

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL AND TAX DIVISION**  
**COMM. APPEAL NO. E016 OF 2024**

**BETWEEN**

**MICHAEL  
MUNYI.....1<sup>ST</sup>  
APPELLANT  
SAMUEL MUGENDI.....2<sup>ND</sup>  
APPELLANT**

**AND**

**DIAMOND TRUST BANK KENYA  
LIMITED.....1<sup>ST</sup> RESPONDENT  
JOHNSON MUIGAI FERNANDES.....2<sup>ND</sup>  
RESPONDENT**

**AND**

**NATIONAL TRANSPORT & SAFETY AUTHORITY.....  
INTERESTED PARTY**

**RULING**

**Introduction and Background**

1. On 21<sup>st</sup> November 2024, the Court issued a ruling where the Appellants were ordered to surrender the possession of two subject motor vehicles to a car yard that was to be mutually agreed upon

by the parties and that the said vehicles were to be valued by a registered valuer pending the hearing and determination of the appeal.

2. On 6<sup>th</sup> February 2025 and on application by the 1<sup>st</sup> Respondent (“the Bank”), the Court reviewed this ruling by giving a timeline of 90 days for the subject motor vehicles to be released as previously ordered by the Court. On 14<sup>th</sup> May 2025, the Appellants expressed difficulty in complying with the orders and the Court gave an additional 7 days for the orders to be complied with.
3. The Appellants have now filed the application dated 15<sup>th</sup> May 2025 seeking to halt the implementation of the order to release the vehicles to the Bank, that the orders of 6<sup>th</sup> February 2025 be cancelled and that the previous orders of 21<sup>st</sup> November 2024 where the vehicles would be secured with tracking devices and their value determined, be reinstated instead of the vehicles being released to the Bank while the appeal is heard. The application is opposed by the affidavits of the Appellants sworn on 15<sup>th</sup> May 2025, 16<sup>th</sup> June 2025 and 18<sup>th</sup> June 2025 and it is opposed by the Bank through the replying affidavit of its Debt Recovery Officer, FAITH NDONGA, sworn on 30<sup>th</sup> May 2025. The application has been

canvassed by way of written submissions that I have considered and I will be making relevant references to later on.

4. The Appellants' case is that releasing the vehicles to the Bank would make their entire appeal pointless, as the Bank could sell or otherwise dispose of the assets, rendering a favourable appeal outcome meaningless. They accuse the Bank of refusing to cooperate in identifying a neutral storage yard for the vehicles, as was initially ordered by the Court, and instead proposing a storage yard of an auctioneer with whom they have an interest.
5. They allege the Bank obtained the release order by misleading the Court and not disclosing their refusal to agree on neutral storage and they claim the adverse order was issued because their former advocate failed to attend the Court session. They argue the Bank has already recovered its money, that is, Kshs. 11 million from another defendant and therefore it will not suffer any loss if the vehicles are not released to them. They believe their underlying appeal is strong, citing grounds such as the original judgment being heard by one magistrate and drafted by another who did not hear the case, which they claim is illegal.
6. In response, the Bank depones that the Appellants are solely responsible for the current situation due to their complete failure to

comply with the previous Court order of 21<sup>st</sup> November 2024. The Bank states they proactively sent multiple letters proposing a specific car yard and valuer, but received no response from the Appellants and that due to this inaction, the Bank applied for and was granted a variation of the order on 6<sup>th</sup> February 2025, which now requires the vehicles to be released directly to the Bank within 90 days.

7. The Bank dismisses the Appellants' allegation of proposing a biased storage yard as a baseless afterthought and they state they were always open to a neutral facility but the Appellants never raised any formal objection or provided a counter-proposal.
8. The Bank highlights that the Appellants' former advocate failed to attend Court on 6<sup>th</sup> February 2025, when the variation order was issued and they also note the Appellants ignored a subsequent 7-day warning from the Court to comply, choosing instead to file the present application to set aside the orders. The Bank argues that it suffers real prejudice from the Appellants' continued retention of the vehicles, citing risks of depreciation, the vehicles being sold to third parties, and the inability to realize the security for its judgment. The Bank invokes the legal principle that "**equity aids the vigilant, not those who slumber on their rights**" and they

contend that the Appellants, through their contemptuous and dilatory conduct, have disentitled themselves from the Court's discretionary relief.

9. The Bank urges the Court to dismiss the Appellants' application in its entirety with costs and enforce its prior orders for the release of the vehicles to protect the integrity of the judicial process.

### **Analysis and Determination**

10. As submitted by the parties, the primary issue for the Court's determination is whether the orders of the Court issued on 6<sup>th</sup> February 2025 should be reviewed and set aside and the previous orders of 21<sup>st</sup> November 2024 be reinstated. The parties also agree that the principles governing the exercise of discretion to review a decree or order are now settled. Under **section 80** of the **Civil Procedure Act** and **Order 45** of the **Rules**, an applicant is required to show either that there was an error apparent on the face of record or that there has been discovery of new and important matter which was not available despite the exercise of due diligence or for any other sufficient reason for the Court to review. The Appellants submit that their application is anchored on all the above grounds and more specifically, that their advocates were not present in Court when the orders were reviewed on 6<sup>th</sup>

February 2025 and that the vehicles are stored in the remote town on Embu.

11. As stated in the introductory part, on 21<sup>st</sup> November 2024, this Court delivered a Ruling on the Appellants' application for stay of execution pending appeal. The Court, in its wisdom, found that the Appellants had satisfied the conditions for a stay, however, this was not an unconditional grant and the stay was expressly granted on the following terms:

*“The Appellants do surrender possession of the Motor Vehicles Registration Numbers KBX \*\*2K and KBX \*\*5K which are currently in their possession, to a car yard mutually agreed upon by the parties and to be valued by a registered valuer pending the hearing and determination of the Appeal.”*

12. This order imposed a positive obligation on both parties, but particularly on the Appellants who were in possession of the vehicles, to cooperate in identifying a neutral car yard. The record demonstrates that the Bank acted with diligence to comply with this order. Through its advocates, it sent letters dated 17<sup>th</sup> December 2024 and 15<sup>th</sup> January 2025 to the Appellants' then-advocates, proposing a specific car yard and valuer, and requesting a response within seven (7) days to facilitate compliance. As

deponed by the Bank and evidenced by affidavits of service, these communications elicited no response whatsoever from the Appellants.

13. The Appellants' total non-compliance and failure to engage in the process rendered the conditional stay order of 21<sup>st</sup> November 2024 nugatory and unworkable. This inaction necessitated the mention before the Court on 6<sup>th</sup> February 2025. It is noted from the record that this mention date was scheduled in the presence of both parties' counsel. On that date, the Appellants' advocates were absent. Pursuant to an oral application by the Bank's advocates and in light of the Appellants' indolence, the Court varied its orders to break the impasse. The new order, issued on 6<sup>th</sup> February 2025, required the subject motor vehicles to be released as previously ordered, but now within a strict timeline of 90 days.

14. The Appellants now seek a review of these subsequent orders, claiming they were disadvantaged; however, I find their grounds unpersuasive for a number of reasons. First, a party who has willingly and without justification failed to comply with a clear and specific Court order cannot approach the same Court with unclean hands to seek equitable discretionary relief. I am in agreement with

the Bank's position that the Appellants slumbered on their rights and obligations under the order of 21<sup>st</sup> November 2024.

15. Second, the Appellants argue that releasing the vehicles to the Bank would prejudice their appeal. This Court finds that any such prejudice is entirely of the Appellants' own making. They were offered a secure mechanism to preserve the vehicles in a neutral yard, but they frustrated its implementation through their silence. They cannot now be heard to complain about the consequences of their own default.

16. Third, the allegation that the Bank proposed a "biased" storage yard is a bald assertion, raised as an afterthought and without any evidentiary support. Crucially, the Appellants never raised this alleged bias formally with the Bank or the Court before the variation order was issued. Their failure to even respond to the Bank's proposals or to make a counter-proposal fundamentally undermines their credibility on this point.

17. Fourth, the explanation that their former advocate failed to attend Court or communicate is unfortunate. However, it is a well-established principle that the act or omission of an advocate is generally binding on the client. A party cannot be allowed to benefit from the negligence of their chosen counsel to the detriment of an

innocent litigant who has followed the process. The Appellants' remedy, if any, lies in a different forum against their former advocate.

18. In contrast, the Bank has demonstrated that it has been a vigilant litigant, seeking to comply with Court orders and to move the matter forward. The Bank's right to the fruits of its judgment, which it obtained in the lower Court, has been unduly delayed.

### **Conclusion and Disposition**

19. For the foregoing reasons, I find that the Appellants' application dated 15<sup>th</sup> May 2025 is wholly without merit. It constitutes an abuse of the Court process and a calculated attempt to delay the finality of this litigation. The application is hereby dismissed in its entirety with costs being awarded to the 1<sup>st</sup> Respondent. For the avoidance of doubt, the orders issued by this Court on 6<sup>th</sup> February 2025 remain in full force and effect. The Appellants are directed to comply with the same within the stipulated timeline, failure of which will attract appropriate consequences for contempt of Court.

**DATED SIGNED and DELIVERED virtually at NAIROBI this  
18<sup>TH</sup> DAY of NOVEMBER 2025**

.....  
**J.W.W. MONGARE**

**JUDGE**

**IN THE PRESENCE OF**

1. N/A for the Applicants.
2. Ms. Kavata for the Respondents.
3. Amos- Court Assistant

ORIGINAL