



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: OUKO, (P), KARANJA & GATEMBU, JJ. A.)**

**CIVIL APPLICATION NO. 12 OF 2019**

**BETWEEN**

- 1. NIC BANK KENYA PLC.....1<sup>ST</sup> APPLICANT**
- 2. GATHOGO t/a VALLEY AUCTIONEERS.....2<sup>ND</sup> APPLICANT**
- 3. CAR MAX (E.A) LIMITED.....3<sup>RD</sup> APPLICANT**

**AND**

- 1. WILLIAM KIPKORIR ARUSEI.....1<sup>ST</sup> RESPONDENT**
- 2. EMPRO ELECTRICAL & MECHANICAL ENGINEERS COMPANY LIMITED.....2<sup>ND</sup> RESPONDENT**

*(Being an application for stay of proceedings and stay of execution of the orders of the*

*High Court of Kenya at Mombasa (Otieno, J.) issued on 8<sup>th</sup> March, 2019*

*and 12<sup>th</sup> March, 2019 in H.C. Misc. Appli. No. 306 of 2018)*

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**RULING OF THE COURT**

This dispute relating to an asset financing facility extended to the 2<sup>nd</sup> respondent by the 1<sup>st</sup> applicant to purchase a motor vehicle has had a long drawn history punctuated by numerous applications by both sides. What is however pertinent to the application under our consideration are two orders of the 8<sup>th</sup> and 12<sup>th</sup> day of March 2019.

In the first instance, the 1<sup>st</sup> applicant was directed to release the motor vehicle in question, which it had repossessed from the 2<sup>nd</sup> respondent after the latter fell in arrears with the repayment. When it was not released, the court denied the 1<sup>st</sup> applicant audience for allegedly being in contempt of the order.

Those two orders aggrieved the applicants who evinced their intention to challenge them on appeal to this Court. In the meantime, they sought orders under **Rule 5(2)(b)** of the Court of Appeal Rules to stay both the execution of those orders and further proceedings before the court below.

Hearing notices were issued to the parties by the court’s registry on 27<sup>th</sup> February, 2021 together with directions requiring them to file and exchange submissions before the date set for the hearing.

When the application came up on 4<sup>th</sup> March, 2021 for our consideration based on the record, replying affidavit and submissions, if any, in accordance with the Covid-19 Practice Note, none of the parties had complied with those directions.

Going by some of the decisions made by the court below, subsequent to the the instant application, one of which was rendered on 11<sup>th</sup>, June 2019, we entertain no doubt that in all likelihood, the horse must have bolted and what was intended to be prevented has either happened or dissipated, hence the lack of interest by the parties. This view is further buttressed by the fact that to date, 3 years since the orders of 8<sup>th</sup> and 12<sup>th</sup> March, 2019 were made, no appeal has been lodged.

Even applying the principles, we are bound by in an application brought under **Rule 5(2)(b)** of the Rules of the Court, we do not think the intended appeal is arguable, neither is it likely to be rendered nugatory. We note, first, that the applicants were heard, subsequent to the orders denying them audience and a ruling delivered on 11<sup>th</sup> June, 2019. In the ruling, the learned Judge wound the clock back to the period before the impugned orders. He ordered that;

**“The upshot is that I do allow the Application dated 23/2/2019 with costs to the applicant. That takes back the matter to the status it stood on the 18/12/2018 after the application that instituted the matter stood withdrawn with costs to the Respondents. Let the status quo maintaining as at 17.12.2018 be restored as far as the possession of the suit motor vehicle is concerned”.**

For these reasons, we find no substance in the application. It is dismissed with no orders as to costs.

**Dated and delivered at Nairobi this 19<sup>th</sup> day of March, 2021.**

**W. OUKO, (P)**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, (FCIArb)**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**