



REPUBLIC OF KENYA



**Birech v Auto Cats International Limited & another (Civil Appeal (Application)
E128 of 2022) [2023] KEHC 1070 (KLR) (21 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1070 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL (APPLICATION) E128 OF 2022
RN NYAKUNDI, J
FEBRUARY 21, 2023**

BETWEEN

JOHN KIMELI BIRECH APPLICANT

AND

AUTO CATS INTERNATIONAL LIMITED 1ST DEFENDANT

AL-HILAM AUCTIONEERS 2ND DEFENDANT

RULING

1. The Applicant approached this court by way of Notice of Motion dated September 16, 2022 seeking the following orders;
 1. Spent
 2. The status quo ante be restored by the release and restoration of Motor Vehicle registration No KDC xxxx Toyota Land Cruiser to the / Applicant John Klmeli Birech with the Assistance of the Police Commanding Muthangari police station or any other police station within the Republic of Kenya, who shall provide security, supervise the repossession and handover the Motor Vehicle.
 3. Spent
 4. Spent
 5. That the OCS Muthangari Police Station or any nearest police station within the vicinity of the subject motor vehicle to ensure compliance of this orders pending hearing and determination of the application.
 6. That costs be provided for by the Respondents.



Applicant's Case

2. The Applicant alleges that he entered into a sale agreement for motor vehicle registration number KDC xxxx Toyota Land Cruiser May 05, 2021 with the 1st Respondent where he deposited to a tune of Kshs, 2,100,000/= and within the period of 9 months from the date of the agreement the had further made another payment to a total of Kshs 5,100,000/= leaving a balance of kshs,3,100,000/= as of February, 2022.
3. The contends that the 1st Respondent then instructed the 2nd Respondent to repossess the said motor vehicle from the on the basis of default in payment. It is upon this act of the Respondent that the moved the Eldoret Chief Magistrate court and filed a Civil Suit No E132 of 2022 and vide an application dated February 10, 2022 and obtained orders to the effect that the subject motor vehicle be released to the respondent. The orders were later vacated by the orders dated August 08, 2022 when the Respondents filed their application dated March 1, 2022 seeking the same.
4. when the application in Civil Case Eldoret No E132 of 2022 was pending for ruling, the Respondents moved to Nairobi Milimani commercial court vide the Misc application no E908 OF 2022 and obtained orders for repossession of the subject motor vehicle. He later moved on to the Nairobi High court vide HCC COMMA E 104 OF 2022 on the ground of sub-judice and through the ruling dated August 22, 2022 the orders in E908/2022 above were vacated. When the matter in Eldoret Civil Suit No E132 of 2022 came up for ruling on September 01, 2022 the 's application was dismissed for lack of merit, thus the Respondents regained powers to again repossess the 's motor vehicle. The Applicant submitted that he has never defaulted in payment of the purchase price of the motor vehicle.
5. The Applicant cited section 15(1) of the *Hire Purchase Act* (Cap 507) and submitted that he purchased the subject motor vehicle from the financier on 5th May 2021 under hire purchase terms at a consideration of Kshs 8,200,000/ =which amount he has so far paid Kshs 5,100/000/=. The payment of Kshs 5,100,000/= constitutes more than 2/3 of the purchase consideration. Therefore the remedy of repossession in law is unavailable to the auctioneer and financier under hire purchase terms as per section 15 of the Hire Purchase Act.
6. The Applicant contended that the 1st Respondent has no legal authority to repossess the said motor vehicle as it does not possess a duly registered Chattels mortgage that would have given him authority to instruct the auctioneer to repossess the said motor vehicle from the Applicant without reference to the court as envisaged by section 6 and 9 of the Chattels Transfer Act (Chapter 28 of the Laws of Kenya) which was repealed by the Moveable Property Security Rights Act, Act No. 13 of 2017. He cited the case of *Co-operative Bank of Kenya Limited v Adhiambo* (Miscellaneous Application El258 of2020) [2022] KEHC 60 (KLR) (Commercial and Tax) in support of his submissions.
7. With regard to the orders issued on September 1, 2022 dismissing the application dated February 10, 2022, the Applicant submitted that this suit has so far not been dealt with by the respective court. The purpose of the plaintiff now instituting the Civil suit in Eldoret Civil Case No E132/2022 was basically to save his right to own property. The plaintiff therefore highlighted including the confirmation of having paid over 2/3 of the purchase price to the 1st defendant. He further proposed to pay Kshs 150,000/= on monthly basis until payment in full. By virtue of the court dealing with the application and dismissing the said application and allowing the defendant to repossess the subject motor vehicle ideally final by its nature. This has since rendered the main suit and the orders sought nugatory thus necessitating this appeal.
8. The Applicant asked that the court finds the application merited.



Respondent's Case

9. The 1st Respondent opposed the application in its entirety. In its replying affidavit it stated that the Applicant bought the motor vehicle Registration number KDC xxxx Toyota Land Cruiser and gave post-dated cheques which 'were returned unpaid save for only one which was for the deposit of Kshs 2,100,000/- and which the motor vehicle was being sold at Kshs. 8,200,000/-. The Applicant kept on promising to make payment after receiving money from the U.S.A which were not coming. The sale agreement is clear in terms of what happens when the purchaser defaults and the Respondent proceeded to repossess the motor vehicle. The Applicant then chose to file the suit in Eldoret while the sale agreement and the parties are in Nairobi which was mischievous.
10. Further, the memorandum of Appeal filed by the Applicant does not raise any arguable appeal since honestly the Applicant does not have any issues to be determined by the court.
11. The Respondent submitted that the /Applicant entered into this agreement willingly and has additionally in his Application admitted that he owes the 1st Respondent and has failed to state how to settle the outstanding balance of Kshs 4,050,000/- and seeks this court to compel the 1st Respondent to release the motor vehicle Registration number KDC xxxx Toyota Land Cruiser pending the determination of this suit whereas the himself is in breach of the sale agreement and seeks to use the Honourable court to rewrite the sale agreement by making proposal that he has never himself honoured.
12. the 1st Respondent stands prejudiced by the actions of /Applicant as when he took up the motor vehicle he was to make payments in instalments but which he has failed to make causing the arrears herein and that the only security the 1st Respondent has is the said motor vehicle and if it loses its repossession rights the 1st Respondent will be at loss. If the /Applicants wants the court to allow his prayers let / Applicant pay the whole amount and get his motor vehicle together with transfer of the log book to settle this outstanding account if he is unable to pay the full amount the court does allow the 1st Respondent to advertise and sell the motor vehicle to recover from the loss incurred.
13. The Respondent's position is that the application should be dismissed.

Analysis & Determination

14. The first and foremost convergence point in relation to this application is strongly in favour of interrogating the exercise of discretion by the trial court. Proper guidance it will be found in the cases of *Evans Bartlam (1937) AC 473* *Jenking vs Bushby (1891) 1Ch 484* in which says:

A discretion necessarily involves a latitude of individual choice according to the particular circumstances and differs from a case where the decision follows *ex debito justitiae* once the facts are ascertained and in matters of discretion authorities are not of much value since no two cases are exactly alike and even if they were, the court cannot be bound by a previous decision to exercise its discretion in a particular way because that would be in effect putting an end to the discretion.
15. It is trite that the Appeals Court does not have an open latitude to interfere with every decision which emanates from tribunals or Lower Court. The illuminating principle is to be found in the case of *African Airlines International Ltd v Eastern & Southern Africa Trade & Development Bank (2003) KLR 140 at 143*. Which states " For a court to interfere with the discretion of a single judge it must be shown that the single judge acted on matters which he should not have acted or he failed to take into



consideration matters which he should have taken into consideration and in doing so he arrived at a wrong conclusion or that he was plainly wrong in his decision”

16. With regard to the substantive issues raised by the mover of the motion dated September 16, 2022 the question is whether the power being challenged was be exercised for a lawful purpose. Following the litigation history of this matter various courts have been approached for one remedy or another for the same subject matter. May be from the affidavit evidence the applicant or in any event any party to the suit was desirous of having the power of the court exercised in a particular way. Otherwise the question is where approach various forums constituted by the constitution under Article 50(1) to determine the same cause of action. From the pleadings, primarily nuanced in the averments by both parties this was a subject matter on the payment of the hirer instalments for the motor vehicle registration No KDC xxxx Toyota Land Cruiser it appears the 1st respondent instructed the 2nd Respondent to repossess the aforesaid motor vehicle without taking into account the repayment modules and the amount due and owing.
17. With reference to this issue the outcome of it in those other forums of adjudication it is still a justiciable claim. The granting of interim orders of injunction or status quo is all within the exercise of discretion by the impugned trial court. For this purpose, our constitution has set up various classes of courts which is informed in the form of a pyramid commonly known as hierarchy of courts. It is trite that jurisdiction is the power of the court to decide a particular matter and grant orders sought for by an Applicant or a litigant. Contextually, I raise the question as whether the Applicant has an arguable case that is properly domiciled before the High Court. To answer this question the facts are rather straight forward. What the applicant is aggrieved with is yet to mature either under revisionary jurisdiction or as an Appeal. It is not open to the court to entertain the cause of action while it is formulated to be heard before the lower court and it is better addressed in that adjudication forum. This is an area of our law that appears simple but difficult to construe and interpret
18. Notwithstanding anything to the contrary contained in this ruling I shall make some brief observations on whether status quo should be restored.

Status quo ante is defined as;

“The state that existed before something else (being discussed) occurred” (See *Blacks’ Law Dictionary*, 11th ed at p 1703)

19. It follows that the applicant seeks a restoration of the status to that of before the orders dated March 8, 2022. This court issued orders on February 23, 2022 essentially preserving the subject matter and providing the appellant with an injunctive relief. The orders, similar in nature to those sought herein were then set aside pending the hearing of the matter *inter partes* vide an order dated March 8, 2022. The matter was set down for hearing inter partes on March 17, 2022. The Applicant now seeks to have the subject motor vehicle released to him once again which essentially would mean a reinstatement of the orders dated March 8, 2022.
20. I am firmly of the view that the Lower Court has and still retains exclusive jurisdiction of the matter arising from the administration and management of the Hire Purchase Agreement.
21. It is trite law that he who comes to equity must come with clean hands, which the Applicant has failed to do by virtue of his conduct. However, the issue on the determination of whether the applicant has made the requisite payment is subject of the matter in the trial court and not this court. Given that the court set aside the orders releasing the vehicle and the applicant has not sought an appeal against said orders, this court cannot interfere with the same. The applicant is better placed to seek such orders



before the trial court or appeal the orders that set aside the initial orders that had served the purpose of preserving the suit vehicle.

22. In the premises, the application is dismissed in its entirety with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 21ST DAY OF FEBRUARY 2023

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R NYAKUNDI

JUDGE

Coram: Before Hon. Justice R. Nyakundi

Osoro Juma & /Co. Advocates

Kesse &Kesse Advocates

