



**Platinum Credit Limited v Mwashighadi (Civil Appeal E038 of 2021)
[2023] KEHC 3046 (KLR) (31 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 3046 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E038 OF 2021
A. ONG'INJO, J
MARCH 31, 2023**

BETWEEN

PLATINUM CREDIT LIMITED APPELLANT

AND

ONESMUS MWALUGHONGO MWASHIGHADI RESPONDENT

*(Being an appeal from the ruling of F. M. Nyakundi (SRM) in Voi
PMCC Civil Case No. 127 of 2020 delivered on 24th June 2021)*

JUDGMENT

1. The Respondent vide a Notice of Motion application dated January 28, 2021 seeking that the court do issue a preservation order restraining the Respondent, its agents or servants and/or workers and any other 3rd party from dealing with or interfering in any manner with motor vehicle registration number xxxx pending the hearing and determination of the suit and that the said motor vehicle be preserved at the Respondent's yard at Ikanga and the court to do a visit to inspect the same, and finally that the costs of the application be provided for.
2. The application was allowed pursuant to Section 1A, 1B and 3 of the *Civil Procedure Act* pending the hearing and determination of the main suit. It was also ordered that there would be no orders as to costs and each party to take care of their own costs.
3. The Appellant was aggrieved and dissatisfied with the said decision and preferred the appeal herein on the following grounds: -
 1. That the learned trial magistrate erred in law and in fact by allowing the Respondent's (in this appeal) notice of motion application dated January 28, 2021 as filed in Voi CMCC No 127 of 2020 in terms of prayer 3 of the notice of motion yet the application did not meet the requirements for grant of the restraining orders in the circumstances.



2. That the learned trial magistrate erred in law and fact by allowing prayer 3 of the Respondent's application dated January 28, 2021 despite making a finding of fact that the motor vehicle registration number xxxx (hereinafter 'the Motor Vehicle') was already sold to a Third Party and was therefore not in danger of being wasted, damaged or alienated.
 3. That the learned trial magistrate erred in law and fact by allowing prayer 3 of the Respondent's application dated January 28, 2021 can be granted and the third purchaser subsequently enjoined in the suit.
 4. That the learned trial magistrate erred in law and fact by allowing the Respondent's application dated January 28, 2021 which in effect meant that the court stepped into the arena of rewriting the agreement for the parties yet there was already an existing, scrupulously valid and binding agreement between the parties.
 5. That the learned trial magistrate erred in law and in fact by finding that the Respondent was improperly served with the necessary notices prior to the sale of the motor vehicle yet the learned trial magistrate acknowledged in his ruling that the notice of disposition dated July 17, 2020, certificate of posting and the Standard Newspaper advert dated August 3, 2020 were annexed to the Appellant's replying affidavit dated September 16, 2020 and February 3, 2021 filed at the trial court.
 6. The learned trial magistrate erred in law and in fact by finding that the Respondent could only have been effectively served with the necessary notices by a qualified process server engaged by the Appellant who would then file an affidavit of service as evidence of service.
 7. The learned trial magistrate erred in law and fact by finding that the motor vehicle was the Respondent's only source of livelihood when there was no evidence supporting that claim.
 8. That the learned trial magistrate erred in law and fact by allowing the Respondent's application dated January 28, 2021 which act was a desecration of the sacrosanct and age long principle of freedom of contract especially in a case like this where the agreement of the parties was freely, willingly and consciously entered into by the parties.
4. The Appellant submitted that Order 40, Rule 1 upon which the application that was appealed from was hinged conotes the cases in which temporary injunction may be granted. That further, Order 40, Rule 10 (1) makes provision for the detention, preservation and inspection of property. The Appellant stated in respect to the provisions above that the remedies herein are not automatically granted once applied for and the court is clothed with a discretionary function of either allowing or disallowing the remedies which discretion must be exercised judiciously.
 5. The Appellant argued that at paragraph 10 of the Replying Affidavit, dated September 16, 2020, they deponed that the motor vehicle was sold to a 3rd party and they annexed a notice of the disposition of the motor vehicle dated July 17, 2020 addressed to the Respondent together with the certificate of posting registered postal article, the auctioneer's auction advert on the Standard of August 3, 2020 and letter dated August 20, 2020.
 6. The Appellant pointed out that the fact of the sale of that motor vehicle was also acceded to by the Respondent at paragraphs 4, 5 and 6 of his affidavit in support of the notice of motion application dated January 28, 2021. That this therefore means that the application dated January 28, 2021 was overtaken by events and was inconsequential for the reason that under the above cited provisions of the Civil Procedure Rules (CPR), the orders sought therein can only be granted where the disputed



- property is in danger of being wasted, damaged or alienated and that the suit motor vehicle was already alienated to a 3rd party.
7. Additionally, the Appellant submitted that despite having confirmed that the motor vehicle had been sold to a 3rd party, the Respondent made no effort to join/add the said 3rd party to the suit, before the trial court as it is the party that can comply with the orders sought therein if granted. The Appellant stated that the court made an order which cannot be enforced for reason that they were sought against the wrong party. The Appellant therefore prayed for reversal of the said orders.
 8. The Appellant contends that they demonstrated at paragraph 5 of its replying affidavit dated February 3, 2021 that the surplus amount of the proceeds of Kshs 175,710 from the sale of the motor vehicle was refunded to the Respondent who has equally kept quiet about the fact. The Appellant submits that they have demonstrated that all the pre-requisites to the auction were complied with, and that all the necessary notices and demands were issued as aforesaid. That the said demands and notices were sent via registered post as it has also been demonstrated. The Appellant states that a valuation prior to the sale was also conducted. To add on, they submitted that Order 22 Rule 65 of the Civil Procedure Act is clear as to the effect of an irregular sale and that under the order, the irregularity will not vitiate the sale.
 9. It is submitted by the Appellant that the trial court also made a determination at page 8 of its ruling that the motor vehicle was the Respondent's only source of livelihood. The Appellant argued that the argument and restructures agreement RS-1 and RS-3 were contractual in nature and formed the basis of the relationship between the Appellant and the Respondent and they express their legal intention to be bound by the terms of the agreement and the court cannot rewrite a contract for the parties but rather enforce a clear incontrovertible terms of the contract.
 10. The Appellant submitted that the notices that were referred to by the trial court in which the Respondent through the postal address that they had given and it was not necessary to engage a process server to serve him with notices which were already posted to him.
 11. The Respondent on the other hand submitted that the Appellant sold the motor vehicle secretly and that he learnt later, that is why he sought for preservation orders. He submitted that the trial magistrate was right in finding that the motor vehicle was in danger of being wasted as it had exchanged hands and no one would know what would happen to it next. It was further argued that the Respondent was at liberty to join parties to the suit and that Order 1 Rule 9 provides that no suit shall be defeated by reason of misjoinder or non-joinder of parties and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties before it. It was argued that the order granted was in the interest of justice and fairness and it was meant to bring all the parties concerned while the subject matter is preserved and protected.
 12. It was the Respondent's contention that the court issued the conservatory orders when it found that there was an issue with regard to the agreement in question that was not done properly and that did not amount to a contract written by the court for the parties. The contract was not varied by the court rather the court was protecting one party in the contract against the other. On the issue of service, the Respondent argued that the Appellant was in the process of execution without putting the terms clear to the Respondent without effecting proper service.
 13. In consideration of the application and the ruling in the trial court and in consideration of the grounds of appeal and submission of the respective parties, this court finds that the subject matter of the application and the suit in the lower court was confirmed by both parties through their pleadings to have been disposed off. The said subject matter was not in possession and/or control of the Appellant and issuance of conservatory orders to be executed by the Appellant in those circumstances was an exercise in futility as there was nothing to be preserved or protected.



14. This court therefore finds that the appeal has merit, the same is allowed and the orders issued on June 24, 2021 in application dated January 28, 2021 is set aside. The costs of the appeal and the application in lower court to the appellant.

DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,

THIS 31ST DAY OF MARCH 2023

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Otolo- Court Assistant

Mr. Wafula Advocate for the Appellant - Present

Mr. Mwazighe Advocate for the Respondent – No appearance

Appellant – No appearance

Court: Copy of judgment to be supplied to parties on payment of copying charges

HON. LADY JUSTICE A. ONG'INJO

JUDGE

