



Driver’S Universe Motor Co. Ltd & 2 others v Ugi & another (Commercial Appeal E106 of 2021) [2023] KEHC 18106 (KLR) (Commercial and Tax) (30 May 2023) (Ruling)

Neutral citation: [2023] KEHC 18106 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E106 OF 2021**

DAS MAJANJA, J

MAY 30, 2023

BETWEEN

**DRIVER’S UNIVERSE MOTOR CO. LTD 1ST APPELLANT
EXECUTIVE SUPER RIDES LIMITED 2ND APPELLANT
CARS DIRECT LIMITED 3RD APPELLANT**

AND

**BENEDICTA MWENDWA UGI 1ST RESPONDENT
REGISTRAR OF MOTOR VEHICLES 2ND RESPONDENT**

(Being an appeal from the Ruling and Order of Hon. P. Muboli, PM dated 9th November 2021 at the Nairobi Magistrates Court, Milimani in CMCC No. E1664 of 2021)

RULING

1. This is an appeal against the ruling of the subordinate court dated November 9, 2021 where the trial magistrate allowed the 1st respondent’s application dated March 9, 2021 and granted the following order, “That pending the hearing and determination of this application and the main suit, this honourable court be pleased to issue a mandatory injunction order compelling the 1st, 2nd and 3rd defendants to unconditionally release the attached motor vehicle registration numbers KCW G, Toyota Hilux and KCV F, Mitsubishi Shogun to the plaintiff.”
2. It is not in dispute that before the trial court, the 1st respondent purchased motor vehicles registration numbers KCW G and KCV F (“the subject motor vehicles”) from the 1st appellant on credit terms. Having defaulted on agreed payments, the 1st appellant sent auctioneers to repossess them thus precipitating the suit and the application.



3. The trial magistrate considered the parties' arguments and concluded that as the 1st respondent had paid more than 2/3 of the hire purchase price, the 1st appellant could not proceed to repossess the motor vehicles as this would contravene section 15(ii) of the *Hire Purchase Act* (chapter 507 of the Laws of Kenya) ("the HPA"). The court consequently held that the repossession was unlawful and as such issued the mandatory order.
4. The grounds of appeal are set out in the memorandum of appeal dated November 17, 2021. I also heard brief oral arguments by the respective counsel. The thrust of the appeal is that the trial magistrate erred in issuing a mandatory injunction yet the motor vehicles had already been sold and transferred. The 1st respondent supports the decision of the trial court and urges that there was no evidence that the motor vehicles had been sold and that the mandatory order was warranted in the circumstances.
5. Since this is an appeal attacking the exercise of discretion, this court can only intervene if it is satisfied that the trial court in exercising its discretion misdirected itself on matters of principle and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the trial court was clearly wrong in and that as a result there has been an injustice (see *Mbogo v Shab* [1968] EA 93).
6. It is not in dispute that the court may, in appropriate circumstances, grant a mandatory interlocutory injunction. The applicable principle was stated by the Court of Appeal in *Kenya Breweries Ltd and another v Washington O. Okeyo* [2002] eKLR as follows;

A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the 1st respondent. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.

7. In the ruling, the trial court made specific findings of fact and in that regard concluded as follows:

Both the plaintiff and the defendant agree on several issues. That the plaintiff had paid more than 2/3 of the hire purchase price, being Kshs 6,799,758/= out of the total sum of Kshs 10,240,750/=.

It is not in dispute that the plaintiff defaulted in paying monthly instalments for some time. It is also not in dispute the instructions for the repossession to the 2nd and 3rd defendants and eventual sale were issued without a court order and therefore unlawful.

8. Did the 1st respondent make out a case warranting the grant of the mandatory injunction? I have anxiously considered the entire record of appeal and although the appellants did not raise the issue, I note that the ruling appealed from was grounded on violation of the provisions of the HPA. I have read and re-read the plaint, application, depositions and submissions and there is nowhere the parties have pleaded the case in relation to the HPA. Further, the agreements under which the 1st respondent purchased the subject motor vehicles do not purport to be hire purchase agreements within the meaning of the HPA. They were credit agreements supported by personal guarantees. The trial magistrate appears to have considered a wholly different case other than that pleaded and argued by the parties hence the trial court exercised its discretion wrongly and this court is entitled to intervene.



9. The appellants are correct to note that the trial magistrate, having made a finding of fact that the motor vehicles had been sold, the court could not therefore issue an injunction. A sale implies that the proprietary interest in the goods had passed to third parties and as such the court could not issue a mandatory injunction against the motor vehicle which had already been sold without affording the purchasers an opportunity to be heard. I find and hold that the trial court erred in issuing an mandatory injunction when it had found as a fact that the subject vehicles had been sold.
10. I therefore allow the appeal on the following terms:
- a. The ruling and order dated November 9, 2021 is hereby set aside and substituted with an order dismissing the 1st respondent's application dated March 9, 2021.
 - b. The 1st respondent shall bear the costs of the application before the subordinate court and of this appeal which are assessed at Kshs 30,000.00.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF MAY 2023.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango.

Mr Ochieng instructed by Ogola and Okello and Company Advocates LLP for the Appellants

Mr Amutallah instructed by Amutallah Robert and Company Advocates for the 1st Respondent.

