



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

(CORAM: CHERERE-J)

CIVIL APPEAL NO. E027 OF 2022

LABAN KAIRIRA T/A KK MOTORS.....APPELLANT/APPLICANT

VERSUS

EZEKIEL MUTUMA MUBUU.....1ST RESPONDENT

TRIDENT INSURANCE CO. LTD.....2ND RESPONDENT

RULING

1) **Maua CMCC No. E024 of 2020 (Ezekiel Mutuma Mubuu -V- Trident Insurance Co. Ltd & Laban Kairira T/A KK Motors** is pending before the trial court.

2) By an order dated 17th February, 2022, the court directed 1st Respondent to release Motor vehicle KCS 876C to the Appellant and the 2nd Respondent to deposit Kshs. 285,708/- within 21 days.

Appeal

3) The Appellant being dissatisfied with the lower court's ruling by filing the Memorandum of Appeal on 24th February, 2022 which raises 4 grounds mainly on the ground that Appellant's repair costs have not been paid.

4) Simultaneously with the appeal Appellant also filed an application dated 24th February 2022, seeking; orders that-

a. Pending the hearing and determination of this appeal, this Honorable Court be pleased to stay execution of the mandatory injunction directing the Appellant to release motor vehicle registration no. KCS 876C Toyota Probox to the 1st Respondent issued by the Honorable T.M Gesora CM Issued on the 17th day of February 2022 in Maua CMCC No. E024 of 2020 (Ezekiel Mutuma Mubuu -V- Trident Insurance Co. Ltd & Laban Kairira T/A KK Motors

b. That costs of this Application be provided for.

5) The motion is premised on the grounds among others that that Appellant's repair costs have not been paid. The summons is supported by an affidavit sworn by the Appellant/Applicant on 24th February, 2022 in which he reiterates the grounds on the face of the application and additionally states that he stands to suffer loss if he releases the vehicle before the 2nd Respondent has settled the repair costs.

6) Vide a Replying Affidavit sworn on 3rd February 2022, 1st Respondent avers that he is the legal and registered owner of motor vehicle registration number KCS 876C Toyota Probox and is not privy to the contract of repair between the Respondents which 2nd Respondent has allegedly breached and ought not to suffer the detention of his motor vehicle.

Submissions

7) Appellant's case is that he is holding Appellant's motor vehicle in exercise of repairer's lien over unpaid charges of Kshs. 285,708, he will suffer substantial loss if he releases the vehicle without being paid his charges. He contended that he filed his application without unreasonable delay and the responsibility for paying for the repair charges rests with the 1st Respondent as owner of the vehicle and not on the

2nd Respondent. He relied on HGE V SM [2020]eKLR, Marshalls East Africa Limited V Wilson Osoro [1993]eKLR.

8) 1st Respondent submitted that there is no justifiable and genuine reason why the Appellant should continue to detain his motor vehicle causing him substantial loss whereas he can seek redress from the insurance company that authorized the repairs. He relied on Antoine Ndiaye V African Virtual University [2015] eKLR, Stephen Wanjohi V Central Glass Industries Ltd 1991, James Wangalwa & Another V Agnes Naliaka Cheseto [2012]eKLR, Leo Sila Mutiso V Rose Hellen Wangari Mwangi, RWW V EKW [2019]eKLR, Gianfranco Manenthi another V Africa Merchant Assurance Company Ltd [2019]eKLR.

Analysis & Determination

9) I have carefully considered the application, the affidavits and the submissions filed by both parties as well as the authorities relied upon.

10) It is clear that what the Applicant seeks in this application is the grant of an order in the nature of mandatory injunction. The principles guiding the grant of mandatory injunctions at an interlocutory stage are now well settled and it is trite that the court can only grant a mandatory injunction under the provisions of section 3A of the *Civil Procedure Act* and not under Order 40 of the *Civil Procedure Rules*. See Belle Maison Ltd. vs. Yaya Towers Ltd. Nairobi HCCC No. 2225 of 1992.

11) In the case of Kenya Breweries Limited & Another vs. Washington O. Okeyo Civil Appeal No. 332 of 2000 [2002] 1 EA 109 the Court of Appeal stated as follows:

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However if the case is clear and one which the Court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff, a mandatory injunction will be granted on an interlocutory application...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 plaintiff. Moreover, before granting a mandatory injunction the Court had to feel a high 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.” [Emphasis provided].

12) In Dickson Mwangi vs. Braeburn Limited T/A Braeside School Civil Appeal No. 12 of 2004 [2004] 2 EA 196, the same Court of Appeal stated that interlocutory mandatory injunctions should only be granted with reluctance and only in very special circumstances.

13) In this case, there is no doubt at all that the subject motor vehicle was handed over to the Applicant for repairs, at the request of the 2nd Respondent. If a chattel is in repair, the repairer acquires a *lien* on the chattel for the cost of repairs. It would appear to this Court that where as in this suit, the repairer does not look to the owner for payment of the charges, the *lien* may not attach to the chattel in the first place.

14) That 1st Respondent motor vehicle is lying idly, not in use, wasting away and is depreciating cannot be overemphasized and further withholding of the vehicle will no doubt continue to occasion the 1st Respondent further loss.

15) Having considered all the material placed before the court, it is my considered view that the trial magistrate’s direction was well founded and that this is a case where a mandatory injunction is unwarranted.

16) In the end, the Applicant’s application dated 24th February 2022 is hereby dismissed. Costs shall abide the outcome of the appeal.

DELIVERED AT MERU THIS 31ST DAY OF MARCH 2022

WAMAE. T. W. CHERERE

JUDGE

Appearances

COURT ASSISTANT - KINOTI

FOR APPELLANT - MS. KIEMA FOR NKUNJA & CO. ADVOCATES

FOR 1ST RESPONDENT - MS. KIRIMI FOR MUTEMBEI KIMATHI ADVOCATES

FOR 2ND RESPONDENT - N/A