

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 95 OF 2019

SPM CAPITAL LIMITED.....APPELLANT

VERSUS

JULIUS MOGAKA GEKONDE.....RESPONDENT

RULING

1. On the 15th August 2019 the appellant **SMP Capital limited** hereinafter referred to as the appellant filed a Memorandum of Appeal dated the 8th of August 2019. On the 19th February 2020 the appellant filed its Record of Appeal dated the 17th February 2020.

2. As the matter awaited directions on the hearing of the appeal the Respondent **Julius Mogaka Gekonde** hereinafter referred to as the respondent filed an application dated the 12th November 2020 seeking the following orders:

i. That pending the hearing and final disposal of this application, this Honourable court be pleased to grant to the Respondent/Applicant an order of temporary injunction restraining the Appellant/Respondent by itself, its agents, servants, assignees, employees or any other person acting under its instructions directly or indirectly from repossessing motor vehicle Registration Number KCA 538Y and/or in any way or manner whatsoever interfering with the peaceful and quit possession and user of the said motor vehicle by the Respondent/Applicant.

ii. That pending the hearing and final determination of the appeal this Honourable court be pleased to grant to the Respondent/Applicant an order of temporary injunction restraining/stopping the Appellant/Respondent by itself, its agents, servants, assignees, employees or any other person or persons whatsoever acting under its direct or indirect instructions or any other persons claiming ownership of motor vehicle registration number KCA 538Y from repossessing and/or interfering with the possession and peaceful ownership and user of the said motor vehicle registration number KCA 538Y by the respondent/applicant.

iii. That the cost of the application be provided.

3. The application is supported by the grounds on the face of the application and the affidavit of the applicant which details what happened in the lower court. The application was opposed. The respondent filed a replying affidavit sworn by the Ehsan Zahid the manager of the respondent/appellant.

4. I have read both affidavits and also the written submission filed by the applicant. It is clear that the applicant/respondent has not filed a cross appeal in this matter on the orders issued by the lower court. The applicant/respondent admits that the lower court in its judgment ordered him to pay a sum of Kshs. 964,134/-. It is apparent that some amount of monies is still owing which he has not paid and that an application for execution was filed and that the process is ongoing. Execution is ongoing because the applicant/respondent has not paid the amount due. The appellant/respondent had a right to execute. The applicant failed to disclose to this court that the lower court dismissed an application filed by him seeking to have the execution stayed to stopped.

5. As already stated the respondent has not filed a cross appeal, in my view he is not entitled to the orders sought. Further he has failed to show that he has a prima facie case that warrants the orders being sought. He has also failed to show that he will suffer irreparable loss that cannot be compensated by way of an award. I find no merit in the application. I set aside the temporary orders issued on the 17/12/2020 and dismiss the application dated the 12/11/2020 with costs to the respondent.

DATED, SIGNED AND DELIVERED AT KISII THIS 26TH DAY OF MARCH, 2021.

R.E. OUGO

JUDGE

In the presence of:

Mr. Momanyi For the Applicant/Respondent

Appellant/ Respondent Absent

Ms Rael Court Clerk