



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. E109 OF 2021

JOHN MWAURA MBUGUA.....1ST APPELLANT/APPLICANT

JOVIWELL MERCHANTS LTD..... 2ND APPELLANT/APPLICANT

-VERSUS-

STANBIC BANK KENYA LTD.....1ST DEFENDANT/RESPONDENT

STAR TRUCK AUCTIONEERS....2ND DEFENDANT/RESPONDENT

LEAKEYS AUCTIONEERS..... 3RD DEFENDANT/RESPONDENT

RULING

1) The subject matter of this ruling is the motion dated 2nd March 2021 taken out by the appellants/applicants in which they sought for the following orders *inter alia*:

i. THAT this application be certified as urgent and service be dispensed with in the first instance and the application be heard ex parte in view of the urgency and purposes of prayer 2.

ii. THAT this honourable court be pleased to issue interim status quo orders restraining the respondents by themselves, their officers, servants, agents or anyone acting on their behalf from attaching, repossessing, advertising, selling or in any other way interfering with the 1st and 2nd applicants' possession and ownership of motor vehicle registration number KHMA 463N pending the hearing and determination of this application.

iii. THAT in the alternative to prayer 2 herein above, this honourable court be pleased to issue status quo orders in respect to the applicants' possession of motor vehicle registration number KHMA 463N pending the hearing and determination of this application.

iv. THAT this honorable court be pleased to issue orders restraining the respondent by themselves, their officers, servants, agents or anyone acting on their behalf from attaching, repossessing, advertising, selling, or in any other way interfering with the 1st and 2nd applicants' possession and ownership of motor vehicle registration number KHMA 463N pending the hearing and determination of the intended appeal.

v. THAT in the alternative to prayer 4 herein above, this honourable court be pleased to issue status quo orders in respect to the applicants' possession of motor vehicle registration number KHMA 463N pending the hearing and determination of the intended appeal.

vi. THAT the applicant be granted leave to file an appeal out of time against the ruling delivered on 10th February 2021 at Nairobi.

vii. THAT this honourable court do award any other orders it may deem just, fit and expedient to award in the interests of justice.

viii. THAT the costs of this application be provided for.

2) The applicants filed the affidavit sworn by John Mwaura Mbugua in support of the motion. When served with the motion, the respondents filed the replying affidavit sworn by Elisha Nyikuli to oppose the applications. When the motion came up for inter partes hearing, this court with approval of learned counsels gave directions to have the motion disposed of by written submissions.

3) I have considered the grounds stated on the motion dated 2nd March 2021 and the facts deponed in the supporting and opposing affidavits plus the rival written submissions. It is appropriate at this stage to set out the background of the dispute before delving into the substance of the application.

4) The applicants being customers of the 1st respondent were advanced a loan facility of ksh.8,750,000/= to purchase motor vehicle excavator reg. no. KHMA 463N.

5) The parties executed a hire purchase agreement to govern their relationship.

6) The applicants defaulted in repaying the loan thus prompting the 1st respondent to invoke Clause 5 of the agreement to terminate the hiring forthwith and commence immediate repossession of the chattel.

7) The 1st respondent instructed the 2nd and 3rd respondents to carry out the repossession exercise. The applicants were prompted to file an action before the chief magistrate's court whereof they sought for an injunction to restrain the respondents from repossessing the excavator from the applicants.

8) The trial magistrate heard the application for injunction and in the end had it dismissed for lacking in merit. The applicants were dissatisfied hence they were prompted to file this appeal together with the instant motion.

9) The substantive order being sought by the applicant is an order for injunction to restrain the respondents from attaching, repossessing, advertising, selling or interfering in anyway with the applicants' possession and ownership of excavator registration no. KHMA 463N pending the hearing and determination of the appeal.

The applicants have also sought for leave to appeal out of time.

10) It is important to first determine the second prayer. It is not in dispute that the trial court delivered its ruling the subject of this appeal on 10th February 2021. The period allowed to appeal had lapsed by the time the instant application was being filed.

11) It is the averment of the 1st applicant that the applicants failed to file their appeal within the statutory period because the court did not supply them with the typed proceedings and ruling. They availed two letters written to the executive officer of the court requesting to be supplied with typed proceedings.

12) The respondents on the other hand aver that the applicants have not offered any explanation for their failure to file the appeal within time. It is apparent that the respondents have not controverted that averment by the 1st applicant which is to the effect that the applicants have not been supplied with typed proceedings and ruling.

13) I am satisfied that the applicants have given a plausible explanation for the delay to file an appeal within time. Consequently, the applicants are granted leave to file an appeal out of time. The draft memorandum of appeal filed herein is deemed as filed out of time with leave of court save that the applicants should pay the court fees within the next 15 days.

14) Having disposed of the prayer for leave, I now turn my attention to the application for injunction pending appeal. It is the applicant's submission that unless the order for injunction is granted the intended appeal would be rendered nugatory and a mere academic exercise.

15) The respondent on the other hand is of the submission that the applicants do not merit to be granted the orders because the applicants do not deserve since they have breached the terms of the hire purchase agreement prompting the 1st respondent to take steps to repossess the excavator as per the terms of the hire purchase agreement.

16) Before granting an order of injunction the court must inter alia satisfy itself that an applicant has established a prima facie case with a probability of success. In the instant case, I have already set out the background of the dispute. The relationship between the applicants and the 1st respondent is a governed by the hire purchase agreement they both executed.

17) In Clause 2(b) of the agreement, the applicants are inter alia obligated to pay monthly hire rentals and all other sums due. The applicants admitted that they defaulted in repaying the loan for a period of three (3) months before the 1st respondent took steps to have the chattel repossessed.

18) In Clause 5 (i) and (ii) of the agreement the respondent initiated a process to terminate the hire purchase agreement and to repossess the chattel.

19) In view of the affidavit evidence, I do not think the applicants have established a prima facie case with a probability of success. In the end I find no merit in the motion dated 2nd March 2021. The same is dismissed with costs to the 1st respondent.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 20TH DAY OF MAY, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant/Applicant

..... for the Respondent