



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. E089 OF 2021

TAHMEED COACH LIMITED.....APPELLANT

VERSUS

MABURUKI MWAGUTA

AND LUVUNO CHIMERA MWACHIDUDU (suing legal representatives of the

Estate Of MWANAKOMBO OMARI, deceased).....1ST RESPONDENT

SEIF HEMEDI MOHAMED.....2ND RESPONDENT

STANBIC BANK KENYA LIMITED.....3RD RESPONDENT

KIRIIYU MERCHANTS AUCTIONEERS.....4TH RESPONDENT

EVALINE NJERI MUTURI.....5TH RESPONDENT

ASAFA LUKO AILA.....6TH RESPONDENT

RULING

[1] This ruling is in respect of two applications. The 1st application is the Notice of Motion dated **5 August 2021**. It was filed by the appellant pursuant to **Order 42 Rule 6(6)** of the **Civil Procedure Rules, 2010** for orders that:

[a] The 6th respondent whether by himself or by his servants or agents or otherwise howsoever be temporarily restrained from selling, transferring and/or hiring to any third party and/or raising finances from an unsuspecting third party or in any other manner whatsoever using or dealing with **Motor Vehicle Registration Number KCV 296R** until the hearing and determination of this appeal.

[b] On the grounds set forth in the annexed affidavit of **Abdulkarim Juma Abdalla** sworn on the **5th day of August 2021** and filed herein, this Court do, in the first instance, dispense with notice of this application to the respondents and make an interim order in terms of Prayer 1 until the *inter-partes* hearing of this application.

[c] Directions be given for the service of the order made herein on the respondents, **National Transport and Safety Authority (NTSA)** and **Master Fabricators Limited** and for all necessary steps herein; and

[d] That the costs of the application be costs in the Appeal.

[2] The application was premised on the grounds that unless temporary injunction is granted the Appeal will be rendered nugatory; and that the Appeal is based on good arguable grounds and is, therefore, not frivolous or otherwise an abuse of the process of the Court. It was supported by the affidavit sworn on **5 August 2021** by the appellant's Operations Manager, **Abdulkarim Juma Abdalla**, as well as the documents annexed thereto all marked as **Exhibit "AJA1"**.

[3] It is manifest from the averments in the Supporting Affidavit, therefore, that the 1st respondent filed an action on **28 September 2016** in the Chief Magistrate's Court at Kwale, being **Civil Suit No. 470 of 2016** seeking general and special damages, interest and costs on behalf of

the estate of **Mwanakombo Omari**, deceased, who died in a road accident on or about **22 May 2016**. The 1st respondent had contended, in that suit, that the deceased's death was attributable to the negligence of **Seif Hemedi Mohamed** (the 2nd respondent herein) and **Tahmeed Coach Ltd** (the appellant).

[4] The appellant further averred that, in a Judgment delivered on **10 July 2019**, the lower court found the 2nd respondent 100% liable for the accident and awarded the 1st respondent **Kshs. 2,150,000/=** as compensation for loss of dependency, pain and suffering and loss of expectation of life, together with interest and costs. Thereafter 1st respondent filed an application for execution of the ensuing Decree; whereupon Warrants of Attachment and Sale of the movable property of the appellant and 2nd respondent were issued authorizing the 4th respondent to attach and sell the property. Accordingly, the 4th respondent served a Proclamation of Attachment over the appellant's **Motor Vehicle Registration No. KCV 296R**.

[5] At paragraphs 12 to 20 of the Supporting Affidavit **Mr. Abdalla** averred that, although the appellant filed objections to the attachment, the same were ultimately dismissed; and that shortly thereafter, the 4th defendant seized the appellant's motor vehicle in execution of the subject decree and sold it to the 5th respondent. He further stated that, while they were awaiting the ruling of the lower court, which had been slated for **10 March 2021**, he got to learn, upon checking the appellant's NTSA-TIMS Account, that ownership of the subject motor vehicle had been transferred to the 5th respondent. The appellant then sought a reversal of that transfer vide an application under Certificate of Urgency filed on **16 February 2021**, but even that last-ditch attempt was thwarted when the application was dismissed on **9 June 2021**. Thereupon, the appellant filed the instant appeal, with the conviction that it has good chances of success.

[6] In addition to the application dated **5 August 2021**, the appellant filed an application dated **12 August 2021** seeking that the Officer in Charge of the nearest police station to the location where **Motor Vehicle KCV 296R** was domiciled, be ordered to move the said motor vehicle to Central Police Station, Mombasa, for safe custody. The application was expressed to have been made under **Section 3A** of the **Civil Procedure Act** in the interest of justice. In the Supplementary Affidavit sworn in support of the 2nd application by **Mr. Abdalla**, he indicated that the motor vehicle was on the verge of being rebranded at **Master Fabricators Limited** where it was; and that ownership had changed from the 5th to 6th respondent. He further averred that he received information from the Managing Director of **Master Fabricators Limited** that he was under pressure from the 6th defendant to release the motor vehicle. He was therefore apprehensive that the motor vehicle would be released and taken to a decision unknown to the appellant. This is what informed the filing of the 2nd application by the appellant.

[7] A perusal of the court record shows that interim orders were issued as prayed in the two applications. In respect of the application dated **5 August 2021**, the formal order was issued on **10 August 2021** thus:

[a] that in the interim the Sixth Respondent whether by himself or by his servants or agents or otherwise howsoever be temporarily restrained from selling, transferring and/or hiring to any third party and/or raising finances from an unsuspecting third party and/or in any other manner whatsoever using or dealing with motor vehicle registration number **KCV 296R** until the *inter-partes* hearing and determination of the aforesaid Notice of Motion.

[b] That the Respondents be served with the said Notice of Motion for *inter-partes* hearing on **19th day of August 2021** before the duty judge.

[8] Likewise, interim orders were issued following the filing of the 2nd application thus:

[a] That interim orders that the motor vehicle **Registration Number KCV 296R** be deposited at the Central Police Station, Mombasa under the custody of the OCS at the applicant's cost pending *inter partes* hearing.

[b] That the OCS of the nearest police station to where the motor vehicle **Registration Number KCV 296R** is currently domiciled to provide security in transit to Central Police Station, Mombasa.

[9] The 1st respondent, **Ali Mabruki Mwaguta**, opposed the application. He relied on his own Replying Affidavit, sworn on **1 October 2021**. He respondent to both applications and pointed out that they are both spent as the orders prayed for have already been granted. He nevertheless complained that substantive prayers were given that involved the movement of the subject motor vehicle to Central Police Station, Mombasa, without his involvement. He cited **Article 48** of the **Constitution** and posited that he was, in the circumstances, condemned unheard in contravention of the rules of natural justice. He further averred that it was imperative for the appellant to first prove the allegations of fraud; and that since no such proof was availed, the Court has no basis for granting the prayers sought in the 1st application dated **5 August 2021**. He consequently prayed for the dismissal of that application.

[10] On behalf of the 3rd respondent, a Replying Affidavit was sworn by **Simon Mwangi** on **5 October 2021**, basically supporting the position taken by the appellant in its Supporting Affidavit. **Mr. Mwangi** further averred that, pursuant to the banker-customer relationship, the appellant had approached the 3rd respondent for an asset-financing arrangement, and was accordingly facilitated in connection with the purchase of **Motor Vehicle Registration No. KCV 296R**. He further averred that the said motor vehicle was offered as security for the facility; and therefore that the 3rd respondent was consequently registered as co-owner of the motor vehicle. He was thus of the posturing that the motor vehicle was never available for attachment in the first place.

[11] In addition, it was the assertion of **Mr. Mwangi** that, although the 3rd respondent was a co-owner of the subject motor vehicle, it was neither impleaded in the Kwale suit, **No. 470 of 2016**, nor served with any Proclamation of Attachment. He likewise propounded the view that the attachment and sale of the subject motor vehicle was unlawful and, therefore that the appellant is entitled to an injunction pending the hearing and determination of the appeal. He added that the 3rd respondent stands to suffer irreparable loss should the orders prayed for not be granted.

[12] On her part, the 5th respondent, **Evaline Njeri**, contended that she bought the subject motor vehicle at a public auction conducted on **7 October 2020** for **Kshs. 3,500,000/=**; and that she, in turn, sold the motor vehicle to the 6th respondent herein. She therefore asserted that

the 6th respondent is a *bona fide* purchaser for value and therefore has a right to ownership and quiet possession of the asset. She pointed out that attempts by the appellant to challenge the sale were all dismissed and her ownership confirmed. She accordingly took the view that the instant application and the appeal itself are all part of the appellant's futile design at staying a negative order; which is impermissible.

[13] In response to the applications application, the 6th respondent filed his own Replying Affidavit sworn on **18 August 2021**. He averred therein that he has a right under **Article 40** of the **Constitution of Kenya** to legally acquire and own property; and therefore as he was not a party to the lower court suit, his possession of the motor vehicle, as a purchaser for value, is impeccable. According to him, the application for temporary injunction is untenable in his case. He further impugned his joinder contending that it was not only unprocedural, but was also done in abuse of the process of the Court in that no leave was applied for or obtained before his joinder.

[14] The two applications were canvassed by way of written submissions, pursuant to the directions given on **29 September 2021**. On behalf of the appellant, written submissions were filed herein on **29 September 2021**. In a bid to demonstrate that the appeal is arguable, counsel for the appellant went into great detail on the merits of the appeal. For instance, at paragraphs 9 to 13, counsel for the appellant urged that the entire process of sale of the subject motor vehicle was flawed; and therefore that the lower court ought not to have sanctified the same by disallowing the objections raised by the appellant. He further argued that, having demonstrated that the motor vehicle had been repainted and renamed, sufficient justification had been made for the issuance of temporary injunction as the 6th defendant's financial ability is unknown to the appellant. Hence, counsel urged the Court to find that the appellant stands to suffer irreparable loss should the 6th respondent's intention to remove the motor vehicle from **Master Fabricators Ltd.**

[15] In response to the averment that the 6th respondent has been wrongly enjoined to this appeal, counsel for the appellant took the view that, since the 6th respondent stands to be affected by the ultimate orders of the Court on appeal, it is only fair and just that he participates in the appeal. The appellant proceeded to take advantage of the provisions of **Order 42 Rule 3** of the **Civil Procedure Rules**, by amending its Memorandum of Appeal to include the 6th respondent as a necessary party. Counsel further proposed and prayed that leave be granted vide this ruling, should the Court find that leave is necessary. Counsel relied on several authorities, as set out at paragraphs 18 of his written submissions.

[16] With regard to the contention by the 5th and 6th respondents that they acquired good title to the motor vehicle, **Mr. Wangila** took the stance that whether or not the 6th respondent was a *bona fide* purchaser for value is irrelevant; and that the question to pose was whether the 5th respondent had a valid title to pass to him. Counsel relied on **Rajendra Sanghani & Another (suing as administrators of the Estate of Ratilal Gordhandas Sanghani) vs. Fairmile Investments Limited & Another** [2021] eKLR in which it was held that the principle of innocent purchaser for value does not give validity to an invalid title.

[17] In the premises, **Mr. Wangila** urged the Court to find that the appeal is arguable and is therefore not at all frivolous; and that unless the injunctive orders sought are granted, the appeal will not only be rendered nugatory, but the appellant will also suffer irreparable loss and damage. He thus prayed that the interim orders granted to the appellant on **9th and 12th August 2021** be confirmed pending the hearing and determination of the appeal.

[18] On his part, **Mr. Ogutu** for the 6th proposed two issues for determination, in his written submissions filed on **28 September 2021**, namely, whether the 6th respondent was procedurally enjoined in the appeal and the present applications; and whether the 6th respondent is an innocent purchaser for value whose right to property is protected under **Article 40** of the **Constitution of Kenya**. Counsel made reference to **Order 1 Rule 10(2)** of the **Civil Procedure Rules** which the appellant relied on and submitted that the said provision, by employing words like "plaintiff" and "defendant" is explicit that its drafters intended such joinder at the early stages of a suit and not on appeal. He also urged the position that a formal application for leave is a prerequisite before joinder; and therefore that it is unprocedural for a party to be joined for the first time on appeal and without leave. Counsel relied on **Francis Kariuki Muruatetu & Another vs. Republic & 5 Others** [2016] eKLR to buttress his arguments.

[19] In support of the submission that the 6th respondent is an innocent purchaser for value whose right is protected under **Article 40** of the Constitution, counsel made reference to **Lawrence Mukiri vs. Attorney General & 4 Others** [2013] eKLR to back up his assertion that the appellant is not entitled to the orders sought; and therefore that the application ought to be dismissed with costs.

[20] Having given due consideration to the applications, the averments in the various affidavits filed by the parties as well as the written submissions put in by their counsel, it is plain that most of the facts are not in contest. A perusal of the court record confirms that the appellant has indeed appealed the decision of **Hon. Wambugu, SRM, in Kwale Civil Suit No. 470 of 2016** dated **9 June 2021**. A copy of the said decision is annexed at pages 265 to 270 of the appellant's **Exhibit 1** to the Supporting Affidavit. It is also not in dispute that the 1st respondent sued the appellant and the 2nd respondent in the Kwale matter; and that Judgment was entered in the 1st respondent's favour in the sum of **Kshs. 2,150,000/=**.

[21] It is likewise not disputed that in execution of the decree issued in the Kwale matter, the 4th respondent attached motor vehicle **Registration No. KCV 296R**. The appellant and the 3rd respondent have all along been of the view, and still contend, that the said motor was not available for attachment and/or sale; granted that it was purchased through an asset financing arrangement; and was therefore registered in the joint names of the appellant, as the purchaser, and the 3rd respondent, as the financier. Nevertheless, the motor vehicle was sold to the 5th respondent who later sold it to the 6th respondent. Thus, the current registered owner of the subject motor vehicle is the 6th respondent; and it was on this account that he was enjoined to this appeal as the 6th respondent. Needless to repeat that the 6th respondent has strenuously objected to his joinder herein.

[22] It is a fact that the appellant has challenged the decision of the lower court vide this appeal and in its Memorandum of Appeal, it has faulted the lower court for, *inter alia*, holding that the transfer of the motor vehicle to the 6th respondent was above board. The appellant therefore seeks interim intervention by way of an injunction pending the hearing and determination of the appeal. As was noted by the 1st respondent, the appellant's 2nd application is spent in that both prayers were granted on **12 August 2021**. The subject motor vehicle has since been moved to Central Police Station, Mombasa, for safe custody.

[23] Accordingly, in respect of the 1st application, the issues that arise for determination are:

[a] Whether the appellant has made out a good case for the issuance of temporary injunction pending the hearing and determination of the appeal;

[b] Whether the 6th respondent is a proper party to this appeal.

[24] In respect of the first issue, **Order 42 Rule 6(6) of the Civil Procedure Rules** provides that:

“Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

[25] Generally speaking, the grant of a temporary injunction has been guided by the principles laid down in **Giella vs. Cassman Brown & Co. Ltd** [1973] EA 358, in which it was held that:

“The conditions for the grant of an interlocutory injunction are...well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

[26] As to what amounts to a prima facie case, the Court of Appeal, in **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others** [2003] KLR 123 held that:

“A prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

[27] It is now trite that, in determining whether or not the appellant has an arguable appeal, the Court need not examine the merits of the appeal too closely; but it must, nevertheless, be satisfied that there is an arguable appeal. The Court of Appeal made this point in **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others**, Civil Appeal No. 77 of 2012, when it held that:

“We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right, which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right, which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant’s case is more likely than not to ultimately succeed.”

[28] A perusal of the Memorandum of Appeal does reveal several arguable points, including the all-important question of whether the 5th respondent had a valid title to convey to the 6th respondent. The appeal is therefore not an idle appeal. It is also manifest, from the affidavits filed in respect of the 2nd application that the subject motor vehicle was in the process of being rebranded and that, whereas it was allegedly sold for **Kshs. 3,600,000/=** the appellant bought it in July 2019 as a new unit from **Scania East Africa Limited** at **USD 207,094.27**. **It is manifest therefore that, should the motor vehicle be disposed of as proposed by the respondents, the appellant will forever lose not only his right to the motor vehicle, but will also be left to shoulder the obligation of paying off the facility it obtained from the 3rd respondent to purchase the motor vehicle. Clearly therefore the appellant stands to suffer irreparable harm.**

[29] As to the balance of convenience, it was shown that the motor vehicle has already been transferred, at the instance and expense of the appellant, to **Central Police Station** at Mombasa. Thus, the balance of convenience as it stands is in favour of the appellant; while at the same time ensuring that the respondents will not be unduly prejudiced.

[30] As for the joinder of the 6th respondent, the Court’s attention was drawn to the provisions of **Order 1 Rule 10(2)** of the **Civil Procedure Rules** which permits the joinder of any party whose presence is necessary for the effectual adjudication of the dispute. I agree therefore with the argument advanced by counsel for the 6th defendant that the joinder envisaged under **Order 1 Rule 10(2)** of the **Civil Procedure Rules** is the joinder for purposes of primary proceedings at the commencement of a civil dispute. Nevertheless, joinder of interested parties now has constitutional underpinning from the standpoint of **Article 50(1)** of the **Constitution**. To that end, **Rule 5(d)(ii)** of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**, recognizes that:

“The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just ...order that the name of any party person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be added.”

[31] It is manifest therefore that there is no impediment to joinder, even on appeal, of any party who is likely to be affected by the outcome of the decision of the Court, such as the 6th respondent in this case. Hence, the argument by counsel for the 6th respondent, that a formal application is a prerequisite, is untenable. In any event, the appellant has shown that it effected the joinder by way of amendment of the Memorandum of Appeal pursuant to **Order 42 Rule 3** of the **Civil Procedure Rules**, which provides that:

“The appellant may amend his memorandum of appeal without leave at any time before the court gives directions under rule 13.”

[32] In Hamisi Yawa & Others vs. Tsanga Ngala Chome & Others [2018] eKLR the Court of Appeal underscored the rationale for joinder thus:

“The rationale behind the joinder of any party to proceedings is to have on board a necessary party for purposes of determining the real issues in dispute. Perhaps, this is reason behind the general guiding principle that joinder of a party like amendment of pleadings, should be freely allowed and at any stage of the proceedings, provided that it will not result in prejudice or injustice to the other party which cannot properly be compensated in costs...we find that the applicants have made out a case to warrant their joinder in the appeal against the impugned judgment. We say so, because as we set out in the opening paragraph of this ruling, at the heart of the dispute between the parties is the determination of the ownership and entitlement of the suit parcel. Accordingly, the participation of the applicants who claim to be in occupation and entitled to the suit parcel is integral in the conclusive determining the aforementioned issue.

[33] To emphasize the centrality of the right to be heard, the Court of Appeal relied on Mbaki & Others vs. Macharia & Another [2005] 2 EA 206, in which it was held thus:

“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”

[34] It is in the light of the foregoing that I find the joinder of the 6th respondent proper. The protestations of the 6th respondent as to his joinder to this appeal are therefore baseless; particularly considering his admission at paragraph 7 of his Replying Affidavit that he relied on the ruling of the lower court to satisfy himself that the 5th respondent had a good title to the motor vehicle.

[35] In the result, the appellant’s 1st application dated **5 August 2021** is hereby allowed and orders granted as hereunder:

[a] That the 6th respondent whether by himself or by his servants or agents or otherwise howsoever be temporarily restrained from selling, transferring and/or hiring to any third party and/or raising finances from an unsuspecting third party or in any other manner whatsoever using or dealing with **Motor Vehicle Registration Number KCV 296R** until the hearing and determination of this appeal.

[b] That this Order be served forthwith on all the respondents as well as the **National Transport and Safety Authority (NTSA)** and the **Officer in Charge, Central Police Station, Mombasa** in whose custody the subject motor vehicle is presently.

[c] The cost of the application be costs in the Appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 24TH DAY OF NOVEMBER 2021.

OLGA SEWE

JUDGE