



**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**CORAM: D. S. MAJANJA J.**

**MISC. APPLICATION NO. E674 OF 2020**

**BETWEEN**

**GLOBAL MOTORS CENTER LIMITED.....APPLICANT**

**AND**

**CLYDE MUNUI MUNGUI..... RESPONDENT**

**RULING**

1. The applicant has moved the court by a Notice of Motion dated 31<sup>st</sup> March 2020 seeking the following orders under **Articles 22, 23, 25(c), 50, 165(6) and 159** of the Constitution, **sections 1A, 1B and 3A** of the **Civil Procedure Act, Order 40 rule 7 and Order 51 rule 1** of the **Civil Procedure Rules** and enabling provisions of the law:

*[1] Spent*

*[2] THAT interim orders do issue staying orders granted by Hon. Mmasi on 19<sup>th</sup> March 2020 and Hon. Ofisi (MRS) on 27<sup>th</sup> March 2020 pending the hearing and determination of this application.*

*[3] THAT the orders issued by Hon. Mmasi on 19<sup>th</sup> March 2020 and Hon. Ofisi (MRS) on 27<sup>th</sup> March 2020 be vacated, lifted or varied.*

*[4] THAT the proceedings in Magistrates Court in CIVIL SUIT NO. 1665 OF 2020 be stayed pending hearing and determination of this application.*

*[5] THAT the Applicant be allowed to sell the Motor vehicle registration No. KCU 607N to recover the full purchase price and the balance if any be paid to the Respondent.*

*[6] THAT (the) application be placed before the Duty Judge today and the same proceed via video conferencing, auction hearing, email or other acceptable technology during the Coronavirus Pandemic where it is not possible to have open court proceedings.*

*[7] THAT cost(s) of this Application be in the cause. [Emphasis mine]*

2. The application is supported by the affidavit of Michael Mumbah Kadenge, the applicant's Finance and Administration Manager, sworn on 31<sup>st</sup> March 2020. The respondent filed a replying affidavit sworn on 17<sup>th</sup> April 2020. Both parties filed written submissions in support of their respective positions.

3. As the prayers in the application show, the applicant's complaint is against two orders made in favour of the respondent in **Milimani Chief Magistrates Court Civil Suit No. 1659 of 2020**. On 19<sup>th</sup> March 2020, the court issued an ex-parte order directing the applicant to release motor vehicle registration number KCU 607N ("the motor vehicle"), which was in its possession, to the respondent. Being dissatisfied with the order, the applicant moved the court to discharge the orders on the ground that the orders were obtained by non-disclosure of material facts.

4. While the applicant's application to discharge the orders was pending, the respondent moved the court for an order directing the Commanding Officer of Embakasi Police Station or the nearest police station to enforce the order granted on 19<sup>th</sup> March 2020. The court once again granted the order ex-parte on 27<sup>th</sup> March 2020. It is the two orders that precipitated these proceedings.

5. The applicant has challenged the orders issued by the subordinate court on the ground that they were issued without hearing the applicant contrary to the right to a fair hearing guaranteed by **Article 50** of the Constitution and that the orders were obtained without disclosing material facts. According to the applicant, the respondent did not disclose that the motor vehicle was registered in the joint names of the parties and that he had issued cheques that were dishonoured.

6. When the matter came up for mention for directions, I asked whether this court had jurisdiction to grant prayers 3 and 5. Neither party addressed the matter in their written submissions. The reason I raised the issue of jurisdiction is that prayer 3 requests the court to exercise original jurisdiction to set aside orders of the subordinate court. Prayer 5 calls on this court to make a substantive determination of the rights of the parties in relation to the motor vehicle. Since I have to satisfy myself that I have jurisdiction, I will now address the matter.

7. Under **Order 40 rule 4** of the **Civil Procedure Rules**, a magistrate has the jurisdiction to issue an *ex-parte* order. A party who is dissatisfied has the right to either apply to set aside the order under **Order 40 rule 7** of the **Civil Procedure Rules** or the right to exercise its undoubted right of appeal under **section 65** of the **Civil Procedure Act** as read with **Order 43 rule 1(1)(u)** of the **Civil Procedure Rules**. This is not what the applicant has done in this case.

8. In respect of prayer 5, this court cannot determine the substantive rights of the parties as there is in existence a suit before the subordinate court to determine the matter. Such a claim is *res sub-judice* under **section 7** of the **Civil Procedure Rules** since this court is being asked to adjudicate a similar claim between the same parties which is already before a court of competent jurisdiction. Further, the rules of procedure do not allow such claims to be litigated by means of a Miscellaneous Notice of Motion such as the one filed in this case.

9. The applicant has invoked provisions of the Constitution to complain that its right to a fair hearing has been violated. While I accept that the High Court has unlimited original jurisdiction in civil and criminal matters and supervisory jurisdiction under **Articles 165 (3) (a) and 165(6)** of the **Constitution respectively**, **these provisions are residuary in the sense that where** the legislature has specifically and expressly prescribed procedures for dealing with specific matters such as those raised by the applicant, those procedures must be utilized to seek relief. This principle has been affirmed by our courts in many cases since the decision of the Court of Appeal in **Speaker of National Assembly v Njenga Karume [2008] 1 KLR 425** where it held that, "*In our view there is considerable merit ... that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.*" As I have shown there are sufficient provisions in law that provide relief in the circumstances set out by the applicant.

10. Likewise, **Article 159(2)(d)** of the Constitution is not a panacea for the applicant's procedural missteps and pitfalls. In the **Law Society of Kenya v The Centre for Human Rights and Democracy and 12 Others SCK Petition No. 14 of 2013**, the Supreme Court reiterated that, "**[T]his Court has had occasion to remind litigants that Article 159(2) (d) of the Constitution is not a panacea for all procedural shortfalls. All that the Courts are obliged to do is to be guided by the principle that "justice shall be administered without undue regard to technicalities."**

11. I have said enough to show that the Notice of Motion dated 31<sup>st</sup> March 2020 is incompetent. It is struck out. Since the parties did not address the issue of jurisdiction, they shall bear their own costs.

**DATED and DELIVERED at NAIROBI this 30<sup>th</sup> day of JUNE 2020.**

**D. S. MAJANJA**

**JUDGE**

Mr Ibrahim instructed by Kibet Rop and Associates Advocates for the applicant.

Mr Chelongo instructed by Mwae and Associates Advocates for the respondent.