



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL APPEAL NO 20 OF 2019

JELINE NJERI CHEGE.....APPELLANT

VERSUS

TENGERI OSORO.....1ST RESPONDENT

D.T. DOBIE & COMPANY (K) LIMITED....2ND RESPONDENT

**(Being an Appeal from the Ruling and Order of Honourable D.A Ocharo (Mr) Principal Magistrate in Chief Magistrates Court:
Case No.589 of 2019 Milimani (Commercial and Admiralty Division) Delivered on 11th July 2-019)**

JUDGEMENT

1. By a memorandum of Appeal dated 15th July 2019 and filed in court on the 20th July 2019, the Appellant is seeking for the following orders against the Respondents: -

- a) *That the ruling delivered on the 11th July 2019 and all consequential orders arising therefrom be set aside;*
- b) *That this Honourable court be pleased to allow and grant the orders prayed for the appellant's application dated 31st January 2019; and*
- c) *Costs of the appeal to be awarded to the appellant*

2. The Appeal is based on the following grounds: -

- a) *That the learned Magistrate erred in law and in fact, in failing to take into account the incontrovertible fact that the appellant was, is and remains the registered legal owner of the subject motor vehicle registration number KCK 205F, Volkswagen Polo and as such she is entitled to its use and possession;*
- b) *That, the learned Magistrate erred in law and in fact; in failing to order and direct the 1st Respondent to pay garaging and parking charges despite holding that the subject Motor Vehicle was delivered to the 2nd Respondent by the 1st Respondent and the said 1st Respondent accepted to pay the said costs;*
- c) *That, the learned Magistrate further erred in law and in fact, in failing to consider the unequivocal admission by the 2nd Respondent that, they were willing to release the subject motor vehicle to the Plaintiff and as such should have ordered the 1st Respondent to pay the garaging and parking fees to enable the 2nd Respondent release the motor vehicle to the Plaintiff;*
- d) *That, the learned Magistrate erred in law and in fact and completely misinterpreted the issues before the court in that, he failed to recognise that one of the issues before the court was who was liable to pay the 2nd Respondent's costs ancillary to its possession of the Plaintiff's car which issue the Magistrate ignored and failed to determine;*
- e) *That, the learned Magistrate erred in both law and fact and failed to consider the undisputed essential facts that, the Appellant is the owner of the subject motor vehicle and that the 1st Respondent having caused extensive damage to it, was liable to pay for any garaging and repairs arising from his depositing of the said vehicle with the 2nd Respondent;*

f) That, the learned Magistrate erred in law and fact and failed to take due regard of the fact that, the Plaintiff wrote to the 2nd Respondent vide a letter dated 25th October 2018 and the 2nd Respondent only replied on the 4th February 2019 and that no reason was given for the inordinate delay in responding to the appellant;

g) That, learned Magistrate erred in law and in fact that, as he failed to consider that, the subject motor vehicle was at the risk of being auctioned due to accruing garaging and repair charges or incurred due to the damage caused by the 1st Respondent hence the Appellant would suffer irreparable damage and harm;

h) That, holding that there was no basis for the Appellant seeking for the subject motor vehicle to be released to her, the learned Magistrate erred in law and in fact and miserably failed to consider that, as the registered owner of the motor vehicle she was entitled to uninterrupted possession and use;

i) That, the learned Magistrate erred in both law and fact by failing to consider that there was no authority given by the Plaintiff or at all for the Motor Vehicle to be deposited with the 2nd Respondent;

j) That, the learned Magistrate erred in law and in fact by proceeding on the wrong principles, framing issues which, he did not determine and thereby arriving at a wrong decision;

k) That, the learned trial Magistrate erred in law in failing to scrutinize/evaluate the submission, documents and affidavits filed by the appellant and to correctly relate them to the case thereby failed to find that the appellant had established a prima facie case;

l) That, the learned Magistrate erred both in law and fact in basing his decision on issues not pleaded and proven by the Respondents;

m) That the learned Magistrate failed to exercise his judicial powers and discretion judiciously and failed to consider all the relevant facts.

3. The Appeal was filed alongside a notice of application dated; 15th July 2019; seeking for the following orders: -

a) That the application be certified as urgent and the same be heard ex parte in the first instance;

b) That pending the hearing and final determination of the application; the Honourable court be pleased to issue an order restraining the 2nd Defendant/Respondent, its servants, agents, employees and or anyone else working under its direction, instruction and or employment from; selling, disposing of and or otherwise moving the Motor Vehicle registered as KCK 205F (or any part thereof), from its premises;

c) That pending the hearing and final determination of the Appeal; herein the Honourable court be pleased to issue an order restraining the 2nd Defendant/Respondent, its servants, agents employees and or anyone else working under its direction, instruction and or employment from selling, disposing of and or otherwise moving the Motor Vehicle registered as KCK 205F (or any part thereof), from its premises; and

d) That costs be provided for.

4. The Appellant avers that, on the 5th February 2019, she filed a notice of motion application dated 31st January 2019, in the Chief Magistrates' court; seeking for the following orders: -

a) That the application be certified as urgent and the same be heard ex parte in the first instance;

b) That pending the hearing and final determination of the application herein, the Honourable court be pleased to issue an order restraining the 2nd Defendant/Respondent, its servants, agents, employees and or anyone else working under its direction, instruction and or employment from selling, disposing of and or otherwise moving the Motor Vehicle registered as KCK 205F (or any part thereof), from its premises;

c) That, pending the hearing and final determination of the application, the Honourable court be pleased to issue an order compelling the 2nd Defendant/Respondent to produce and deliver to the Plaintiff/Applicant:

i) The assessment report on the damage to the Motor Vehicle Registered as KCK 205 F; and

ii) A quotation for a similar motor vehicle with identical specifications to the Motor Vehicle Registered as KCK 205F;

d) That the Honourable court be pleased to issue an order compelling the 2nd Defendant/Respondent to immediately release the Motor Vehicle Registered as KCK 205F the Plaintiff/Applicant unconditionally;

e) That, the Honourable court be pleased to issue an order to the effect that; any costs chargeable by the 2nd Defendant/Respondent over its retention of the Motor Vehicle registered as KCK 205F, be paid by the 1st Defendant/Respondent and which payment shall not be a condition for the release of the Motor Vehicle to the Plaintiff/Respondent;

f) That, the Defendant/Respondents be condemned to pay the costs of the application.

5. However, by the time the application before the subordinate court was heard, prayers; (a), (b) and (c), were spent, thus the court only dealt with prayers (d) (e) and (f), only and upon considering the same, dismissed them with costs to the Defendants/Respondents. That has informed the Appeal herein.

6. Upon hearing the parties and considering the issue in dispute in this matter, the court directed the parties to try and resolve the interim issues amicably and proceed to the main appeal. It suffices to note that the appeal herein is not founded on the final decision in the matter before the subordinate court.

7. Furthermore, it noteworthy that, the prayers in the application herein are a duplicate and mirror of the prayers in the application before the Chief Magistrates' Court from which the appeal herein lies. From the outset therefore, this court exercising appellat jurisdiction cannot be expected to hear and determine the same prayers that were a subject of the matter in the subordinate court and on that ground alone, the application herein cannot be entertained. Even then the same was compromised by the parties and the parties agreed that the court determine the appeal.

8. Be that as it were, I have considered the arguments advanced by the parties on the appeal and the submissions filed alongside the authorities cited and I find that, the parties have delved into factual and/or evidential matters relating to; ownership rights in the subject motor vehicle and whether a prima facie case was established, before the trial court. First and foremost, as the matter before the trial court is still pending, therefore, this court cannot pronounce itself on those issues, as that may prejudice the outcome thereof.

9. Secondly, as much as the learned trial Magistrate did not observe the same, I note that, prayers (4) and (5) in the application before the subordinate court, which the court dealt with are final in nature. Thirdly, those prayers are a duplicate of prayers (3) and (4) in the plaint and therefore, the grant thereof, would have determined the substantive issues in the plaint at an interlocutory stage and/or determining the suit at that stage. Therefore, on that ground alone those prayers could not have been granted and if they had been granted, this court on appeal would be inclined to set them aside.

10. In the same vein, having considered the orders sought for in the appeal that the court do grant those prayers cannot be granted by this court while exercising appellat jurisdiction and on the basis of the aforesaid.

11. Even the evidence herein reveals that, the subject motor vehicle has been released to OCS Kilimani Police station though a court order issued in Miscellaneous Application number 370 of 2019; to assist in the investigations of an offence of; attempted theft of motor vehicle. Therefore, most of the prayers sought for in the subject applications and by extension the Appeal.

12. In fact, following the aforesaid, the Appellant should have considered whether the appeal was still available for determination and more so in view of costs associated with litigation.

13. In conclusion I find that, the appeal has no merit and I dismiss it with costs to the Respondents.

14. It is so ordered.

Dated, signed and delivered virtually on this 23 day of June 2020

GRACE L NZIOKA

JUDGE

In the presence;

No appearance for the Appellant

Mr. Wakhisi holding brief for Wetangula for the 1st

1st Respondent

Mr. Ondieki for the 2nd Respondent

Robert -----Court Assistant