



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 413 OF 2018

NIC BANK KENYA PLC.....APPELLANT

-VERSUS-

NGAO CREDIT LIMITED.....1ST RESPONDENT

BENJAMIN OYINO MAGE.....2ND RESPONDENT

JOHN NAMU T/A VISION ROOTS

AUCTIONEERS.....3RD RESPONDENT

NATIONAL TRANSPORT AND SAFETY

AUTHORITY.....4TH RESPONDENT

GOLDEN TEA TRADERS LIMITED.....5TH RESPONDENT

EZEKIEL BESA MAGE.....6TH RESPONDENT

(Being an appeal from the ruling and order delivered by Honourable D.A. Ocharo

(Mr.) (Senior Resident Magistrate) on 24th August, 2018 in CMCC NO. 7240 OF 2018)

JUDGEMENT

1. The appellant founded a suit vide the plaint dated 9th August, 2018 and sought for *inter alia*, a permanent injunction against the respondents restraining them from dealing with, advertising, selling or in any other manner interfering with motor vehicle registration number KCA 457T (“the subject motor vehicle”) as well as costs of the suit.
2. The suit was filed together with the Notice of Motion bearing like date in which the appellant sought for *inter alia*, injunctive orders against the respondents pending hearing and determination of the suit.
3. The Motion was unopposed.
4. Upon hearing the Motion, the trial court dismissed it with costs vide its ruling delivered on 24th August, 2018.
5. Being dissatisfied with the above decision, the appellant has now lodged an appeal against the same by filing the memorandum of appeal dated 5th September, 2018 featuring the grounds hereunder:

i. THAT the learned trial magistrate erred in law and fact in summarily dismissing the application dated 10th August, 2018 without according the appellant an opportunity to be heard.

ii. *THAT the learned trial magistrate erred in law and fact in dismissing the application dated 10th August, 2018 'suo motu' without taking into consideration that the application was duly served upon all the parties as ordered by the Honourable Court was unopposed.*

iii. *THAT the learned trial magistrate erred in law and fact by failing to take into consideration the totality of all the facts raised therein while making a determination on the application dated 10th August, 2018.*

iv. *THAT the learned trial magistrate erred in law and fact in holding that the filing of the application dated 10th August, 2018 was an abuse of the court process without affording the applicant an opportunity to be heard in line with the principles enshrined in the Constitution of Kenya.*

v. *THAT the learned trial magistrate erred in law and fact in holding that the appellant should introduce new parties in the existing matter at Kakamega Chief Magistrate's Court without taking into consideration that:*

a) *The cause(s) of action are different.*

b) *The Chief Magistrate's Court at Kakamega has already dispensed with the application for injunction in respect to motor vehicle registration number KCA 457T between the appellant and the 5th respondent.*

c) *The parties in the Kakamega case and the parties in the Nairobi case are totally different.*

vi. *THAT the learned trial magistrate erred in law and fact in failing to grant an injunction whereas the appellant had met the threshold for grant of the orders sought in line with the provisions of Order 40 of the Civil Procedure Rules, 2010.*

vii. *THAT the learned trial magistrate erred in law and fact in arriving at a completely erroneous decision in view of the facts and issues raised in the application dated 10th August, 2018.*

viii. *THAT the learned trial magistrate erred in law and fact in arriving at a decision in the application dated 10th August, 2018 without addressing the weighty legal issues raised by the appellant in the said application.*

6. This court gave directions that the appeal be canvassed by written submissions. From the record, it is apparent that the respondents did not participate in the appeal.

7. The appellant submits that in making the ruling, the trial court did not consider the issues raised before it, including the fact that the subject motor vehicle had mysteriously changed hands and that the said vehicle had been the subject of other court proceedings without the involvement of the appellant, thereby prejudicing the interest of the appellant.

8. The appellant further submits that the trial court did not address its mind to the prayer for injunction yet the appellant had satisfied the prerequisite conditions for granting of the order for injunction sought.

9. It is the argument of the appellant that the trial court erred in using the issue of jurisdiction to summarily dismiss the application without looking into the circumstances and background of the case, and without considering that the application was unopposed.

10. It is also the argument of the appellant that the trial court fell into error by holding that the application is an abuse of the court process yet the issues raised therein differ from those raised in the suit filed before the Kakamega Law Courts, and that the two (2) cases involve different parties.

11. The appellant contends that following issuance of an order for injunction in Kakamega CMCC NO. 108 OF 2017, the appellant released the subject motor vehicle to the 5th respondent but that the subject motor vehicle has, unbeknown to it, now changed hands and is now the subject to another facility purported to have been issued by the 1st respondent and the appellant is now raising issues of fraud which the trial court ought to have taken into consideration.

12. It is the contention of the appellant that it has satisfied the conditions laid out in the renowned case of **Giella v Cassman Brown & Co. Ltd (1973) EA** by establishing a prima facie case with high chances of success and showing the loss it stands to suffer if the injunctive orders sought are not granted since it may lose its interest in the subject motor vehicle through fraudulence of the respondents.

13. In conclusion, the appellant urged that upon granting of an order for injunction, the suit be placed before a different magistrate for disposition.

14. I have considered the appellant's submissions on appeal. I note that the issues raised on appeal are three (3)-fold in nature.

15. The first limb which is portrayed in grounds (i) and (iv) of the appeal touches on whether the learned trial magistrate granted the appellant an opportunity to be heard.

16. The trial court proceedings show that when the appellant's advocate appeared before the learned trial magistrate for hearing of the application dated 10th August, 2018, he indicated that service of the application had been effected and urged the learned trial magistrate to allow the application. The learned trial magistrate indicated that upon considering the application, he found it fit to dismiss it.

17. From my study of the record, I find nothing to indicate that the learned trial magistrate denied the appellant the right to be heard on its application. I therefore see no need to dwell on this issue.

18. Under the second limb constituted in grounds (ii), (iii), (v) and

(viii) of the appeal, it is upon this court to determine whether the learned trial magistrate considered all relevant factors and issues placed before him before arriving at his decision.

19. In the Motion dated 10th August, 2018 the appellant sought for the following orders from the trial court:

(i) Spent.

(ii) THAT the court be pleased to issue an order restraining the defendants/respondents and/or their agents or any other persons acting on their instructions from interfering with, dealing, advertising for sale, selling, handling, transferring and/or in any other manner interfering with the subject motor vehicle pending hearing and determination of the suit.

(iii) THAT the court be pleased to issue an order directing the 3rd defendant/respondent to forthwith surrender the subject motor vehicle to the plaintiff/applicant (appellant) for safe keeping in its yard pending the hearing and determination of the application and suit.

(iv) Spent.

(v) Spent.

(vi) THAT cost of the application be borne by the defendants/ respondents.

20. The Motion was supported by the grounds set out on its face and the facts stated in the affidavit of Kezia Mwanza.

21. In her affidavit, the deponent stated that the appellant is the registered owner of the subject motor vehicle jointly registered in its name and that of the 5th respondent pursuant to the Hire Purchase agreement No. 1002297058 and dated 27th October, 2010 entered into between the two (2) parties where the appellant advanced a loan to the 5th respondent and the subject motor vehicle acted as security thereof.

22. The deponent stated that upon default of payment of the loan facility advanced to the 5th respondent, the appellant repossessed the subject motor vehicle, resulting in the filing of Kakamega CMCC No. 108 of 2017 (Golden Tea Traders Limited v NIC Bank Kenya PLC & Vintage Auctioneers) by the 5th respondent simultaneously with an application in which it sought for and was granted *inter alia*, an injunction against the appellant pending hearing and determination of the suit.

23. It was the deponent's averment that being aggrieved by the order for injunction, the appellant lodged an appeal against the same vide Kakamega High Court Civil Appeal No. 84 of 2017 which at the time was still pending but the appellant has since clarified was dismissed.

24. According to the deponent, the subject motor vehicle was handed over to the 5th respondent before being reported as stolen soon thereafter. The deponent stated that upon being traced by the appellant, the subject motor

vehicle was kept at its yard in Mombasa until 7th August, 2018 when the 3rd respondent took it away on account of an unpaid loan facility by the 2nd respondent to the 1st respondent.

25. It was averred by the deponent that documents delivered to the appellant by the 3rd respondent revealed that the subject motor vehicle had mysteriously changed hands and was registered in the joint names of the 1st and 2nd respondents, which the appellant suspects to be a fraudulent transaction.

26. Upon hearing the Motion, the learned trial magistrate reasoned that the present suit relates to that filed before the Kakamega Law Courts (CMCC no. 108 of 2017) and that the appellant ought to have introduced the new parties to the already existing suit in Kakamega. The learned trial magistrate also reasoned that the Motion is an abuse of the court process in view of the appeal which was filed to challenge an order made by the court in CMCC no. 108 of 2017.

27. From my study of the trial court proceedings, I established that the learned trial magistrate studied the Motion and supporting affidavit.

28. In my view, there is nothing to indicate that the learned trial magistrate ignored the background facts or circumstances of the case as it is apparent that they were summarized in the Motion.

29. Further to the foregoing, in my view the mere fact that the Motion was unopposed did not automatically entitle the appellant to be granted the orders sought. The learned trial magistrate would still need to consider the Motion on merit, which I am satisfied he did.

30. On the subject of the relationship between the present case and Kakamega CMCC no. 108 of 2017, upon my perusal of the proceedings in both instances, I note that the subject motor vehicle forms the crux of both suits. I also note that whereas the reliefs sought in the respective instances are not a replica of each other, some of them are interlinked, for instance, the prayer for injunction. It is also apparent that the reliefs arise out of the same transaction or a series of the same transactions relating to the subject motor vehicle.

31. Also, save for the respondents who were added to the suit to which this appeal relates, the appellant and the 5th respondent are also parties in the Kakamega suit.

32. Further to the foregoing, it is not in dispute that the 5th respondent has in place an injunction against the appellant in respect to the subject motor vehicle until determination of the suit.

33. In the premises, I am of the view that in order to avoid multiplicity of suits, it would have been prudent to have the two (2) related suits, that is: Nairobi CMCC no. 7240 of 2018 and Kakamega CMCC no. 108 of 2017 consolidated. It is at this point that I depart from the reasoning of the learned trial magistrate, who was of the view that the appellant ought to have instead pursued joinder of the new parties in the Kakamega suit.

34. It is apparent that the transactions that gave rise to the two claims herein arose from the same circumstances in the sense that issues of fraud raised in CMCC no. 7240 of 2018 arose out of circumstances surrounding the mysterious changing of hands of the subject motor vehicle which is also being claimed by the 5th respondent. Based on the above circumstances and the fact that the appellant in both instances is represented by the same advocate hence there is no indication that it stands to be prejudiced, a consolidation of the two (2) claims would be more appropriate to ensure efficiency and expediency in determination of the two (2) cases.

35. In the case of **Selecta Kenya Gmbh & Co. KG v Chase Bank Kenya Limited & 2 others [2018] eKLR** that:

“Similarly, the case law on consolidation of suits...is now settled and the principles that arise there from are that;

i. that the suits should have common questions of law and facts;

ii. the reliefs sought in both cases in respect of or arise from the same transactions or a series of transactions; and

iii. any other reason desirable to make the order.

It is therefore clear that the purpose of consolidation of suits is to save costs, time, speed up trial, eliminate duplicative trials involving the same parties, issues and evidence, for efficient and proper administration of justice, and expeditious disposal of matters, consequently promote judicial economy, so long as it is not to prejudice any of the Parties...”

36. This brings me to the third and final limb of this appeal which essentially is in respect of the question as whether the learned trial magistrate arrived at a proper decision.

37. I have already established that the appellant sought for an injunction pending the hearing and determination of the suit which was denied by the learned trial magistrate on the basis that there is an already existing injunction in place against the appellant over the subject motor vehicle.

38. Having determined that the multiplicity of suits over the subject motor vehicle is neither proper nor necessary and upon considering the injunctive order in place over the subject motor vehicle, I support the decision of the learned trial magistrate in not granting the injunction order sought at this point as this will prevent an overlap of the orders issued by various courts.

39. The orders and reliefs sought by the appellant can adequately be canvassed in Kakamega CMCC no. 108 of 2017.

40. In the end, I find no merit in this appeal. The same is dismissed with no order as to costs.

Dated, signed and delivered online via Microsoft Teams at Nairobi this 18th day of September, 2020.

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J.K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondents