



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. E112 OF 2020**

**JOSEPH NG'ANG'A MUKUNDI.....APPELLANT/APPLICANT**

**VERSUS**

**MARTIN ANDREW MUGAMBI.....1<sup>ST</sup> RESPONDENT**

**PRESITIGE SAFE MOTORS LTD.....2<sup>ND</sup> RESPONDENT**

**JOHN M. MBIJIWE T/A BEALINE KENYA AUCTIONEERS.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The appellant herein, took out the motion dated 14<sup>th</sup> September 2020 in which he sought for the following orders:

*i. THAT this application be certified as urgent and service be dispensed with in the first instance.*

*ii. THAT this honourable court be pleased to stay the orders of the court issued on 28<sup>th</sup> August 2020 and issue an order directing that the suit motor vehicle of registration number KCU 770M Toyota Prado be preserved under a neutral safe custody either within the secure precincts of this honourable court or any other safe location that the court may deem fit, pending the hearing and determination of the instant application.*

*iii. THAT upon granting of prayer 2, the County Commander Nairobi Area do assist in compliance of the said orders.*

*iv. THAT this honourable court be pleased to set aside or vary orders and all consequential orders issued by the court on 28<sup>th</sup> August, 2020 pending the hearing and determination of this appeal.*

*v. THAT this honourable court be pleased to order that the possession of motor vehicle of registration no. KCU 770M Toyota Prado to remain in possession of the applicant pending the hearing and determination of appeal.*

*vi. THAT this honourable court be pleased to stay proceedings in CMCC 2185 of 2020 pending the hearing and determination of this appeal.*

*vii. THAT this court be pleased to assist to any other orders that may deem fit and just.*

*viii. THAT the cost of this application be provided for.*

2. The appellant filed an affidavit he swore in support of the application. When served with the motion, the 1<sup>st</sup> respondent filed the replying affidavit he swore to oppose the application. The appellant filed a further affidavit in response to the replying affidavit of the 1<sup>st</sup> respondent. Learned counsels appearing in this appeal made oral submissions.

3. I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the motion. I have also considered the oral submissions made by learned counsels.

4. The background of this motion can easily be deduced from the pleadings and affidavits filed in this appeal. Joseph Ng'ang'a Mukundi, the appellant herein approached **Prestige Safe Motor Ltd** the 2<sup>nd</sup> respondent to find him a buyer for his motor vehicle registration no. KCU 770M make Toyota Prado for ksh.4,500,000/=.

5. On 10<sup>th</sup> October 2019, the appellant instructed his driver to take the motor vehicle to the 2<sup>nd</sup> respondent's yard to find a buyer. The appellant left for an official trip outside Kenya from 24<sup>th</sup> November 2019 and returned on 15<sup>th</sup> December 2019.

6. Upon his return the appellant was surprised when he visited the 2<sup>nd</sup> respondent's yard only to find that the same was locked. The appellant's calls to the directors of the 2<sup>nd</sup> respondent went unanswered. The appellant managed to trace the location where his car was using the car tracker he had installed in his prado. He then instructed **John M. Mbijwe T/a as Bealine Kenya Auctioneers**, the 3<sup>rd</sup> respondent to attach and repossess motor registration no. KCU 770M.

7. When the appellant reported the matter to the police it emerged that the 2<sup>nd</sup> respondent had sold the aforesaid motor vehicle to **Martin Andrew Mugambi** the 1<sup>st</sup> respondent using the authority to sell dated 6<sup>th</sup> December 2020.

8. The 1<sup>st</sup> respondent filed an application in Nairobi C.M.C.C no. 2185 of 2020 seeking for possession of the aforesaid motor vehicle.

9. The appellant opposed the application. Hon. G. A. Mmasi, learned Senior Principal Magistrate heard the 1<sup>st</sup> respondent's motion dated 4<sup>th</sup> June 2020 and in her ruling delivered on 28/8/2020, she granted the following orders inter alia:

*i. Pending the hearing and determination of this suit, the defendants be restrained from altering, offering for sale, selling, disposing off, transferring and or interfering in any way with the motor vehicle registration number KCU 770M Toyota Prado.*

*ii. Pending the hearing and determination of this suit, the defendants to release motor vehicle registration number KBU 770M Toyota Prado, to the plaintiff's possession;*

*iii. That the 1<sup>st</sup> defendant does deposit in court kshs.2,700,000 being payment received from the plaintiff on account of the suit motor vehicle KBU 770M Toyota Prado within 14 days of this court's ruling.*

*iv. At any point pending the determination of the suit the 2<sup>nd</sup> defendant be at liberty to apply to the court for the utilization of the funds listed in order 3 above,*

*v. The plaintiff shall have the possessory rights of the suit motor vehicle KBU 770M, Toyota Prado pending the hearing and determination of the suit,*

*vi. The plaintiff to fix the suit for hearing at the earliest,*

*vii. The cost of the application to be borne by the 1<sup>st</sup> defendant.*

10. The appellant was aggrieved by the aforesaid orders and was therefore, prompted to file this appeal to challenge the trial magistrate's ruling. The appellant put forward the following grounds:

*i. THAT the learned magistrate erred in law and fact in ordering the appellant to release his motor vehicle registration no. KCU 770M Toyota Prado to the 1<sup>st</sup> respondent despite her knowledge that the 1<sup>st</sup> respondent had purportedly purchased the said motor vehicle under an impugned contract due to fraudulent actions by the 2<sup>nd</sup> respondent.*

*ii. THAT the learned magistrate erred in law and fact by issuing final orders depriving the appellant of his rights to own his property despite her appreciation in her ruling that the appellant to date has not received any consideration out of a purported sale of his motor vehicle registration no. KCU 770M Toyota Prado by the 2<sup>nd</sup> respondent.*

*iii. THAT the learned magistrate erred in law and fact by not appreciating that no good title ever passed to the 1<sup>st</sup> respondent as the 2<sup>nd</sup> respondent being the appellant's agent acted fraudulently for its sole purpose.*

*iv. THAT the learned magistrate totally misapprehended the law and the facts of the case leading to an erroneous decision.*

*v. THAT the learned magistrate erred in law and fact by issuing orders not prayed for in the Notice of Motion dated 4<sup>th</sup> June 2020.*

11. In the motion dated 14<sup>th</sup> September 2020, this court has been beseeched by the appellant to grant the orders sought arguing that he is in danger of losing his motor vehicle registration KCU 770M Toyota Prado if it remains in the hands of the 1<sup>st</sup> respondent.

12. He stated that the 1<sup>st</sup> respondent has since then disabled the car tracking device which he had installed. He also pointed out that the orders issued by the trial magistrate on 28.8.2020 are final orders and there is nothing left to be argued in the main suit hence the need to hear the current motion to preserve the suit motor vehicle.

13. The appellant further pointed out that the 1<sup>st</sup> respondent is still the registered owner of motor vehicle registration no. KCK 709Z Honda CRV which was used as a trade in with the 2<sup>nd</sup> respondent and that the motor vehicle is still in possession of the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

14. The 1<sup>st</sup> respondent opposed the motion and urged this court to dismiss the same. He argued that he only has possessory rights of the motor vehicle pursuant to a motor vehicle sale agreement dated 6<sup>th</sup> December 2019 which rights were fortified by the orders issued by the trial court on 28.8.2020.
15. The 1<sup>st</sup> respondent pointed out that he traded in and surrendered to the 2<sup>nd</sup> respondent motor vehicle registration no. KCK 709Z Honda CRV valued at kshs.1,800,000/= and subsequently paid ksh.2,700,000/= in cash. The 1<sup>st</sup> respondent further argued that the 2<sup>nd</sup> respondent was by all measure the appellant's agent.
16. The 1<sup>st</sup> respondent stated that an order sought for staying the proceedings in C.M.C.C no. 2185 of 2020 will cause injustice to the parties to this suit therefore all parties should fast track the hearing and determination of the aforesaid suit. The 1<sup>st</sup> respondent also opposed the prayer to have the motor vehicle kept in a neutral place stating that the motor vehicle may waste away thus depreciating in value.
17. It was stated that the orders issued by the trial court were not final orders in nature as alleged by the appellant.
18. Finally, the 1<sup>st</sup> respondent argued that the appellant appears to be reluctant to pursue the 2<sup>nd</sup> respondent his agent to shed light on whole saga.
19. Having considered the rival oral submissions, it is evident that the appellant is seeking to reverse and or vary some of the orders issued by the trial court. One of the orders sought is an order for stay of proceedings in C.M.C.C no. 2185 of 2020. The trial court had made an order directing the 1<sup>st</sup> respondent to fix the suit for hearing at the earliest. This court is now being urged to stay further proceedings pending appeal.
20. The effect of an order for stay of proceedings is to interrupt the right of a party to conduct litigation on the substantive merits of an action. In the suit pending before the trial court the subject matter of the suit is motor vehicle registration no. KCU 770M make Toyota Prado.
21. The appellant avers he never gave authority to the 2<sup>nd</sup> respondent to sell the same to the 1<sup>st</sup> respondent. He has alleged that the 2<sup>nd</sup> respondent forged his signature on the alleged authority used to execute the agreement for sale. That is a serious issue which has to go to trial.
22. A motor vehicle is an asset which depreciates every day that passes. Therefore, any suit that involves such assets should be heard and determined expeditiously.
23. The applicant has not demonstrated what prejudice he would suffer if the order is not granted. It is in the interest of the parties to this appeal and the suit pending before the court below to have the suit heard and determined expeditiously. On the basis of the above reasons I decline to issue the order staying proceedings.
24. The other order sought by the appellant is an order directing that motor vehicle registration no. KCU 770M to be kept in a neutral place instead of being held by the 1<sup>st</sup> respondent.
25. I have already taken into account arguments of the parties. It is not in dispute that the learned Senior Principal Magistrate ordered for the aforesaid motor vehicle to be released to the 1<sup>st</sup> respondent pending the hearing and determination of the suit. The trial magistrate also ordered the 2<sup>nd</sup> respondent to deposit in court the sum of ksh.2,700,000/= with a rider that the appellant is at liberty to apply for utilization.
26. On appeal the appellant is seeking to challenge the trial court's order on the basis that it was never prayed for. One issue which was raised by the appellant is that he fears the motor vehicle may not be safe to be in the possession of the 1<sup>st</sup> respondent because the car tracking device has been disabled. The 1<sup>st</sup> respondent did not respond to the appellant's assertion.
27. If the order is issued, it will mean that the order of the trial magistrate will have to be or varied but not set aside. Basically the appellant is seeking to have the motor vehicle kept by a natural party other than the parties to this appeal. The appellant is challenging the same in ground 1 of the memorandum of appeal.
28. I am convinced that the appellant's fears are valid. It is only reasonable to keep motor vehicle registration no. KCU 770M out of reach of the parties to this dispute.
29. The final order sought is for an order to restrain the 1<sup>st</sup> respondent from altering, selling, transferring mortgaging and interfering in any way with motor vehicle pending the hearing and determination of the motion. It is clear from the way the prayer is framed that the order if granted will lapse at the date of delivery of this ruling.
30. There is no dispute that the appellant is still the registered owner of the aforesaid motor vehicle. It is therefore not possible for the 1<sup>st</sup> respondent to interfere with the ownership of the motor vehicle because he has not been registered as the owner. The appellant has therefore not shown a prima facie case to deserve the order for injunction.
31. In the end, the motion dated 18<sup>th</sup> September 2020 partially succeeds. Consequently, the following orders are issued:

**i. The order directing the defendants (now appellant, 2<sup>nd</sup> and 3<sup>rd</sup> respondents) to release motor vehicle registration no. KCU**

770M Toyota Prado to the 1<sup>st</sup> respondent is set aside and substituted with an order directing the 1<sup>st</sup> respondent to hand over motor vehicle registration to a reputable motor vehicle yard proposed by either the Appellant or the 1<sup>st</sup> respondent or both for safe keeping pending appeal

ii. The appellant, the 1<sup>st</sup> and respondents to jointly meet the storage expenses.

iii. Costs of the motion to abide the outcome of this appeal.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 17<sup>th</sup> day of December, 2020.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent