



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 388 OF 2018

JOHN MBUKI MWAURAAPPELLANT

VERSUS

NEO SILVER ARROW AUTOMOBILES LTD.....RESPONDENT

(Being an Appeal from the Ruling and Order delivered on 30th July 2018 in Nairobi Chief Magistrate's Court, Milimani Commercial Courts Civil Suit No. 3863 of 2018)

RULING

The Appellant/Applicant has moved this court by way of a Notice of Motion dated the 22nd August, 2018 seeking the following orders:

(1) Spent

(2) That this Honourable court be pleased to issue conservatory order of injunction restraining the Respondents by themselves or through their agents, servants or assignees or representatives from auctioning, advertising for sale, selling, disposing or in any way interfering with the Appellant's title to Motor vehicle registration number KBM 249S Toyota Hilux.

(3) That this Honourable court be pleased to order that the said Appellant's motor vehicle registration number KBM 249S be kept at a safe and neutral place.

(4) That the costs of this application do abide by the outcome of the Appeal.

The application is based on the grounds set out in the face of the same and it's supported by the annexed affidavit sworn by John Mbuki Mwaura on the 22nd August, 2018.

The summary of the facts as captured in the grounds and the supporting affidavit are that; by a ruling delivered on the 30th July, 2018, the lower court dismissed an injunction in Nairobi CMCC No. 3863 (John Mbuki Mwaura Vs. Neo Silver Arrow Automobiles Ltd) in which the applicant had sought the following orders;

(a) A temporary order of injunction restraining the Respondent from auctioning, advertising for sale, selling, disposing or in any way interfering with the Appellant's title to Motor vehicle registration Number KBM 249S Toyota Hilux.

(b) A prayer that this court does issue an order that the Appellant's vehicle registration number KBM 249S Toyota Hilux be immediately released to the Appellant.

(c) That in the alternative this court be pleased to order that the said Appellant's motor vehicle registration number KBM 249S be kept at a safe and neutral place.

The background of the case being that in the year 2014, the applicant delivered his motor vehicle registration number KBN 610Y to the Respondent for specialized work, repair and service which was repaired and released to him on 10th March 2014 and he was given a bill of KShs.26,925 inclusive of V.A.T. He avers that he settled the said bill.

On 2nd October 2015 another of his motor vehicle KBM 295S was involved in an accident with a third party motor vehicle KBJ 315C which caused substantial damage to his motor vehicle aforesaid. That Occidental Insurance Company Limited who were the insurers of the third party vehicle agreed to repair his motor vehicle KBM 294S at a garage of his choice and on 17th December 2015, he talked to Mr. Eston Kairu on behalf of the Respondent who agreed to undertake the repair works which were to be facilitated by Occidental Insurance Co. Ltd.

In his affidavit, the Applicant depones that the Respondent through Mr. Kairu indicated to him that they could not get a new or second hand cargo cabin to replace the damaged one and he asked the applicant to source for the same himself. On consulting Occidental Insurance Co. Ltd. about sourcing the cabin, they asked Mr. Kairu to give them a revised quotation for labour costs for the repair works exclusive of the cabin which they agreed would be sourced by the insurers M/s Occidental Insurance Co. Ltd.

That a representative of Occidental Insurance managed to get a second hand cabin which according to him, was not fitted as the Respondent failed to confirm whether the cabin would fit on the pick up or not, as a result of which, the Applicant asked the Respondent to release his motor vehicle to him or to another garage of his choice for repairs but the Respondents refused to do so but it continued to detain his motor vehicle KBM 249S for alleged outstanding sums for the repair of motor vehicle KBN 610Y which sums he had already paid.

The applicant further depones that he received a notice from the Respondent, threatening to sell motor vehicle KBM 249S under the uncollected Goods Act to recover the alleged repair costs and storage charges.

The applicant alleges that the threatened action by the Respondent is irregular for the reasons that;

- (1) It is the Respondent who has refused to co-operate with Occidental Insurance Co. Ltd. and therefore any claim of unpaid repairs in respect of KBM 249S does not arise.***
- (2) It is the Respondent who has refused to release motor vehicle KBM 249S to the applicant or to another garage for repair.***
- (3) The motor vehicle is not “uncollected” within the meaning of the uncollected Goods Act as it is the Respondent who has refused to release the motor vehicle.***
- (4) The Respondents raised a repair invoice of Kshs.267,925 in respect of repair costs for Motor vehicle KBN 610Y which sums the applicant paid.***

The applicant avers that the vehicle is a family vehicle used by his family for their personal use and for use to run their business and consequently continued detention of the same by the Respondent has put him to great loss. He avers that the threatened sale of the motor vehicle under the Uncollected Goods Act is unlawful and irregular and unless the same is stopped by this Honourable Court, he risks losing the said vehicle and hence the need for the court to issue a conservatory order of injunction as prayed for in the application and also an order for the release of the motor vehicle. The applicant depones that he is ready and willing to provide security for the alleged charges claimed by the Respondent pending the hearing and determination of the Appeal.

The Respondent filed a Replying affidavit on 16th October 2018 sworn by one Eston Kairu, who is its Managing Director in which, he has reiterated the averments contained in the Replying Affidavit dated 4th May 2018 in CMCC No. 3863 of 2018 (the primary suit) a copy of which is annexed to the Replying affidavit. He avers that, section 3(1) of the Disposal of Uncollected Goods Act apply to goods in possession or under the control of custodian under a contract (a) to repair; treat or work, on the goods, the applicant herein being the “Depositor” and the Respondent being the “custodian” of the subject motor vehicle and therefore the circumstances surrounding the repair of the applicant’s motor vehicle falls squarely within the ambit of the said definition.

The Respondent avers that the failure by the Applicant in taking delivery of his goods despite being given a notice by the Respondent grants the Respondent a lien over the goods i.e. motor vehicle KBM 249S with regard to the debt owed by its customer (the Depositor), as provided in Section 4, 5 (1) (2) (4), Section 6 and 7 of the Disposal of Uncollected Goods Act. The Respondent stated that it is entitled to settlement of its debt and has absolutely no interest in the applicant’s motor vehicle save only as a lien over what is rightfully owed and therefore, the trial court in ruling against the Applicant in the primary suit, did so judiciously upon being satisfied that the application had merits.

The respondent averred that the applicant did abandon his motor vehicle KBM 249S at its premises and is trying to use the court to deny the Respondent of his lawful dues and the Appeal herein, is another attempt to derail the Respondent from disposing off the motor vehicle to recover what is owed to it by the applicant and which keeps accruing on a daily basis.

In further response to the Applicant’s replying affidavit, the Respondent deposes that in the year 2014 the Applicant delivered to it, his motor vehicle KBN 610Y for service and maintenance which was duly done to his satisfaction and an invoice of Ksh.267,925/- inclusive of V.A.T. was given to the applicant at the time of collecting the said motor vehicle which invoice he only settled four (4) years later, long after the release of the vehicle, in total disregard to the Respondent’s hospitality and constant accommodation. That there is no nexus between the debt paid for motor vehicle KBN 610Y, the application herein and the Appeal, which both relate to motor vehicle KBM 249S and therefore the Respondent has a valid claim against the Applicant. The Respondent contends that the Appeal is mischievous and aimed at misleading the court and merely meant to frustrate the Respondent.

Both parties filed their submissions in support of their respective cases which this court has duly considered together with the application and the affidavits as filed.

As rightly observed by the Appellant/Applicant, the court is not dealing with the Appeal at this point but with an interlocutory application. The merits or otherwise of the Lower court’s ruling will be the subject of the substantive appeal at the appropriate time.

The Applicant has sought injunctive orders against the Respondent with respect to motor vehicle registration number KBM 249S which is under the custody of the Respondent and which the Respondent has threatened to sell purportedly under the Uncollected Good Act, to recover the repair costs and alleged storage charges owing to the Respondent. The application is made under Order 42 Rule 6(6) which gives this court the powers to grant a temporary injunction in the exercise of its appellate jurisdiction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or Tribunal has been complied with.

In dealing with the application, this court shall have to determine whether the Applicant has met the principles applicable for granting an injunction and whether he has an arguable Appeal.

In his submissions, the Respondent has submitted that the Appellant delivered the subject motor vehicle to it, in December, 2015 and he only surfaced in the year 2017 after learning that the Respondent intended to dispose off the same under the Disposal of Uncollected Goods Act. The Respondent further alleges that the Applicant abandoned the aforesaid motor vehicle at its premises and that he owes the Respondent and thus he is trying to use this court to deny the Respondent its dues.

The Applicant on the other hand avers that he does not owe the Respondent as it did not repair the subject motor vehicle and that the Respondent is to blame for the delay in carrying out the repairs. The applicant further submits that any debt that was owing to the Respondent was in respect of a different motor vehicle KBJ 315C which debt was fully paid up and it's not in any way related to motor vehicle KBM 249S that is being held by the Respondent.

At this juncture the court cannot make a conclusive finding as to whether the Applicant owes the Respondent any monies on account of repair charges for motor vehicle KBM 249S as in doing so, it will compromise the hearing of the main Appeal. All what the court can say for now is that the Appeal is arguable and it's only fair that the Applicant be given a chance to prosecute the same on merits.

The Applicant has also invoked the provisions of the Disposal of Uncollected Goods Act and one of the issues that the Appellate Court will have to determine is whether the motor vehicle "KBM 249S" can be referred as "goods" under the said Act and if so, whether the Respondent has a right of lien over the goods.

Under Section 3 of the said Act; it provides that it shall apply (inter alia) to goods in possession or under the control of a custodian under a contract.

(a) To repair, treat or work on the grounds. Provided that the application of the Act may be expressly modified or excluded by the terms of the contract.

Section 5(2) provides that:

“Where a custodian has accepted goods for repair, treatment or work on the terms, expressed or implied, that they will be re-delivered to the depositor when the repair, other treatment or work has been completed, notice to take delivery may be given at any time after the repair, treatment or work has been completed.”

A clear reading of the Act will show that under Section 6 a notice of intention to sell cannot issue if, because of a dispute in respect of the goods, the custodian has notice that the depositor disputes all or any part of the sum claimed by the custodian in respect of the goods.

In view of the above provisions which can only be determined at the full hearing, this court forms the view that the Applicant has established a *prima facie* case as required and as set out in the case of **Giella Vs. Cassman Brown** and it's only fair that an injunction be issued pending the hearing and determination of the Appeal.

In the premises foregoing, the application dated 22nd August, 2018 is hereby granted in terms of prayers 2,4 and 5. The parties herein to agree on a neutral place where the subject motor vehicle shall be kept.

It is so ordered.

Dated, Signed and Delivered at Nairobi this 31st day of **January, 2019**

.....

L. NJUGUNA

JUDGE

In the presence of:-

.....**For the Appellant**

.....**For the Respondent**