



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 225 OF 2017

JOSIAH MWALE.....APPELLANT

VERSUS

ALL CARS LIMITED.....RESPONDENT

(Being an appeal from the Ruling of Hon L.W. Kabaria (Ms) Resident Magistrate (RM) at the Chief Magistrate's Court at Milimani in Civil Case No 4828 of 2016 delivered on 5th May 2016)

JUDGMENT

INTRODUCTION

1. In her ruling of 5th May 2017, the Learned Trial Magistrate Hon. L.W. Kabaria (Ms) Resident Magistrate (R.M) dismissed the Appellant's Notice of Motion application dated and filed on 22nd March 2019.
2. Being dissatisfied with the said Ruling, the Appellant lodged his Memorandum of Appeal dated 11th May 2017 on 12th May 2017. He relied on six (6) Grounds of Appeal. In his Supplementary Record of Appeal dated 19th October 2018 and filed on 18th December 2018 annexing the Ruling delivered on 5th May 2017 he relied on seven (7) different grounds of Appeal.
3. On 13th December 2018 this court directed both the Appellant and the Respondent to file and serve the respective Written Submissions. As the Respondent did not attend court on the said date, it directed the Appellant extract the order for service upon the Respondent for its further action.
4. On 6th February 2019, the Appellant informed the court that he did not manage to serve the Respondent with the court order and Supplementary Record of Appeal because he was chased away from the premises and threatened that police would be called.
5. As the Appellant's Process Server, Jacob Kanyili Joseph Swore an Affidavit of Service on 9th January 2016 and filed on 10th January 2019 evidencing what transpired at the time he was serving the Respondent with the aforesaid documentation, this court reserved its judgment.
6. The Appellants Witness Statements were annexed to his Supplementary Record of Appeal.
7. In his Witness Statement, the Appellant contended that the Learned Trial Magistrate made (sic) Rulings without the Respondent having filed any defence at all and that she used his suit to protect it and it went ahead to use the subject motor vehicle without respective the injunctive order that was issued by Hon Usui preventing the Respondent from using, selling and/or leasing the subject motor vehicle until the suit was heard and determined.
8. He complained about the eight (8) months delay in the Learned Trial Magistrate delivering her Rulings which contravened his rights as the matter was to be heard within thirty (30) days. He also contended that he had been continuously harassed by the Respondent and that his file disappeared for about three (3) months and that it was only made available to him after he wrote to the Hon. CJ seeking his assistance in the matter.
9. He contended that the Learned Trial Magistrate ignored the Sales Agreement which provided that a notice had to be given before the Respondent could confiscate the subject motor vehicle.
10. He relied on the provisions of Order 10 Rule 10 of the Civil Procedure Rules, Article 50(i) and (j) of the Constitution of Kenya, 2010 and

Order 7 Rule 1 of the Civil Procedure Rules in support of his arguments.

11. He sought the following orders:-

- 1. The ruling dated 14th March 2017 and 5th May 2017 and all consequential ruling of the lower court be set aside.**
- 2. That the appellant case be heard and determined by the Honourable court on merits.**
- 3. That the suit motor vehicle be released to the appellant forthwith in the manner and condition it was before it was reposed.**
- 4. That the Honourable court be pleased to order the defendant to pay for damages incurred for the lose of business and income daily of (10,000 daily x 30 days x 32 months) up to date of judgment.**
- 5. That the court be pleased to order the defendant to pay for the cost of the suit from lower court to the appeal in high court.**
- 6. That interest of the court rates from the date the cause of action arose till judgment.**

12. Order 7 Rule 1 of the Civil Procedure Rules states as follows:-

Where the plaintiff is in doubt as to the persons from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties.

13. Order 10 Rule 10 of the Civil Procedure Rules states as follows:-

Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a *bona fide* mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.

14. Article 50 (i) and (j) of the Laws of Kenya stipulates that:-

Every accused person has the right to a fair trial, which includes the right—to be presumed innocent until the contrary is proved;

(i) to remain silent, and not to testify during the proceedings;

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

15. A perusal of the Appellants' Complaint dated and filed on 25th July 2016 had sought the following reliefs against the Respondent:-

- a. An order that the defendant should not dispose off the motor vehicle.**
- b. An order that the defendant do release the motor vehicle to the plaintiff with the correct particulars and entries on the logbook**
- c. Costs of this suit plus interest thereon at court rates**
- d. Any other relief as this Honourable Court may deem just to grant.**

16. This court did not understand the relevance of the reliance by the Appellant of Order 10 Rule 10 of Civil Procedure Rules and Order 7 Rule 1. Suffice it to state that it noted that there was no indication in the proceedings if the Respondent entered appearance and/or filed a defence therein.

LEGAL ANALYSIS

17. Although an interim order had been issued on 25th July 2016 restraining the Respondent whether by employees, servants, agents or auctioneers from attaching, advertising for sale whether by public auction or private treaty, leasing, letting, charging or otherwise interfering with the Appellant's ownership, quiet use, custody, control and/or possession of Motor Vehicle Registration No KCF 430Y hereinafter referred to as ("the subject motor vehicle") pending *inter-partes* hearing, in her Ruling of 14th March 2017, the Learned Trial magistrate dismissed the Appellant's Notice of Motion application dated 15th August 2016 seeking a mandatory injunction. She,, however, observed

that the Respondent remained enjoined from disposing the subject motor vehicle until the matter was heard and determined.

18. In the Notice of Motion application dated 22nd March 2019 the Appellant had sought the following orders:-

1. THAT the application be certified as extremely urgent.

2. THAT this Honourable court be pleased to compel orders stopping the defendant from using and storing the motor vehicle to unknown place at all until the matters were heard and determined by court.

3. THAT to mitigate on the loses this Honourable court be pleased to compel orders to the Defendant to release the suit motor vehicle with immediate effect to the Plaintiff as the matters (sic) still heard and determined by the Honourable court.

4. THAT this Honourable court be pleased to compel orders to the defendant for suit motor vehicle to be towed and kept at neutral storage or be detained at a police station or has the court may wish to order until the matter is heard and Determined by court.

5. THAT the OCS Central Police Station Mombasa do enforce the court order.

6. THAT the cost of this application be paid by the defendant.

7. THAT the application be certified as extremely urgent.

19. In her ruling of 5th May 2017, the Learned Trial magistrate noted that there was an order that was issued on 25th July 2016 restraining the Respondent from advertising for sale or selling, leasing, letting, charging or otherwise interfering with the Appellant's ownership of the subject motor vehicle amongst other actions.

20. She further averred that in the event the Respondent had proceeded in any manner that was in contravention of the order issued, then the Appellant could file an appropriate application for consideration by the court as it did not take lightly, contempt of its orders.

21. It was this Court's view that the Appellant may not have understood the purport of the decision of the Learned Trial Magistrate delivered on 5th May, 2017. There did not appear to this court to have a contradiction between her Ruling on 14th March 2017 which dismissed his application seeking a mandatory injunction and her Ruling on 5th May 2017 in which he appeared to have been seeking a review of her orders of 14th March 2017.

22. The Learned Trial Magistrate was correct in observing that if there had been contempt, then the Appellant could only approach the court appropriately for appropriate orders. This court could not fault her for the conclusion that she arrived at.

23. Indeed, it was not necessary for the Learned Trial Magistrate to review the injunctive orders that had been issued because if there was disobedience, the Appellant could still seek appropriate remedies in court.

24. This Court noted that the Appellant was representing himself and being a layman, he was obviously not well versed with the court procedures. He is well advised to seek legal representation to enable him prosecute his case in the proper manner.

DISPOSITION

25. For the foregoing reasons, the upshot of this court's decision was that the Appeal that was dated 11th May 2017 and lodged in court on 12th May 2017 was not merited and is hereby dismissed but with no order as to costs as the Respondent did not defend the same and/or attend court.

26. It is so ordered.

DATED and DELIVERED at NAIROBI this 25th day of June 2019

J.KAMAU

JUDGE