

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 342 OF 2019

BENJAMIN WAMBUA NDOLO.....APPELLANT

VERSUS

EXECUTIVE SUPER RIDES LIMITED.....1ST RESPONDENT

THE ALE AUCTIONEERS.....2ND RESPONDENT

(Appeal for Ruling /Order of the Senior Principal Magistrate's Court of Nairobi before

Hon. Mr. Ocharo SPM delivered on 14th June, 2019 in Chief Magistrates Court

Milimani Commercial Courts, Civil Case No. 10957 of 2018)

RULING

By an application dated 20th June, 2019 the appellant moved the court for an order of stay of execution relating to the auction of motor vehicle registration No. KBX 888G seized by the 2nd respondent, at the instance of the 1st respondent. Several grounds have been set out on the face of the application and there is a supporting affidavit sworn by the appellant.

The application is brought under Sections 1A,1B,3A,3,63e,75(h) of the Civil Procedure Act, Order 40 rules 1, 2 and 6 and Order 50 rule 1 of the Civil Procedure Rules.

The application is opposed and there is a replying affidavit sworn by the General Manager of the 1st respondent. The dispute between the parties has its genesis in an agreement of sale dated 20th July,2017, in which the appellant agreed to purchase the said motor vehicle from 1st respondent at an agreed price of Kshs. 3,300,000/=. The terms of payment were set out in the said agreement which were supposed to be finalized by 7th September, 2019.The appellant defaulted and therefore the motor vehicle was seized due to that default.

The parties have filed submissions which I have noted. There is no express denial that the appellant is in breach. I have perused the agreement between the parties with a view to making an informed finding that, where parties have entered into an agreement for the fulfilment of any terms and conditions, the court may not rewrite the said agreement between the parties. That finding affects the grant of the orders sought by the appellant to stay the execution or grant a mandatory injunction. In any case, a mandatory injunction may be granted where the appellant establishes a clear case of entitlement to the right sought, and where if such an order is not granted extreme prejudice shall be visited upon him. See **Tom Onyango v Mimoso Investments Limited (2017) e KLR**

In the present case it has been established that, it was indeed the appellant who was in breach of the terms and conditions set out in the agreement and therefore may not claim the benefit of a mandatory injunction. I have balanced the right of appeal as against the judgment in favour of the respondents herein.

I am not persuaded that the appellant is deserving of the orders sought and therefore, this application is dismissed with costs to the respondents.

Dated, signed and delivered at Nairobi this 27th Day of November, 2019.

A. MBOGHOLI MSAGHA

JUDGE