



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI
CIVIL APPEAL NO 18 OF 2016
IN THE MATTER OF AN APPEAL

BETWEEN

ABDULRAZAK HUSSEIN OMAR.....APPELLANT

AND

PATRICK M.NYAMU A/T

GLOBAL WOODS AND AGRO-HARDWARE.....RESPONDENT

(Being Appeal against the entire decision contained in the Rulings and the orders to be extracted therefrom given by Senior Principal Magistrate Wahome and the Principal Magistrate of Kenya at Voi the Principal Magistrate Nyakundi dated 20thDecember 2013, 9th January 2014, 15th January 2014, 24th January 2014 and 30th January 2014 in Voi SPMCC NO 175 OF 2013)

JUDGMENT

INTRODUCTION

1. As can be seen hereinabove, the Appeal herein was in respect of five (5) rulings rendered by two (2) different Judicial Officers. The Appellant attached two (2) of the orders in his Record of Appeal dated 18th April 2017 and filed on 20th April 2017. In his order dated 20th December 2013, Hon S.M. Wahome, Senior Principal Magistrate at Voi Law Courts granted a temporary injunction for fourteen (14) days in respect of the Respondent's Notice of Motion Application of even date. There was an order of 30th January 2014 by Odero J in which she stayed the proceedings in the lower court hearing pending the hearing and determination of the Appellants Notice of Motion Application dated 29th January 2014.

2. The Appellant attached three (3) other orders in his Supplementary Record of Appeal dated and filed on 17th May 2017. In his order of 9th January 2014, the Learned Trial Magistrate Hon Nyakundi directed that the Appellant would not address the court until there was proof that the order issued on 20th December 2013 by Hon S M Wahome had been complied with.

3. In his order of 24th January 2014, Hon Nyakundi directed that the Appellant avail to the Respondent herein Motor Vehicle Registration No KBG 583K (hereinafter referred to as "the subject Motor Vehicle") on 30th January 2014 when the court would issue further orders regarding preservation of the same. He further ordered that in the event the Appellant failed to comply with the said order, he would not have audience in his court.

4. In his order of 30th January 2014, Hon Nyakundi asked the Appellant to show cause why he should not be cited for contempt for failing to comply with a court order that had been issued on 24th January 2014. The said Notice to show cause was to be returned on 6th February 2014.

5. The Appellant's Written Submissions and List of Authorities were dated 19th July 2017 and filed on 2nd July 2017 while the Respondent's Written Submissions were dated 21st September 2017(sic) and filed on 18th September 2017.

6. When the parties appeared before the court on 30th October 2017, they requested for a Judgment date herein having relied entirely on their respective Written Submissions.

LEGAL ANALYSIS

7. This court was of the considered opinion that the format the Appellant had adopted in the hearing of this appeal was completely erroneous. He had appealed against five (5) orders in one (1) Appeal file. Be that as it may, this court found it prudent to look into the merits of this Appeal as opposed to dismissing the same on technicalities.

8. Despite the Appellant having relied on nineteen (19) Grounds of Appeal, it appeared to this court that the issues for determination that had been placed before it were really:-

a) Whether or not the Learned Trial Magistrate could issue a positive order/mandatory injunction in the interlocutory stage.

b) Whether or not the Learned Trial Magistrate had power to cite the Appellant for contempt.

c) Whether the Learned Trial Magistrate had power to extend the orders of 20th December 2013 without consent of the Appellant or hearing the Appellant's Notice of Motion Application dated 20th December 2013.

d) Whether the Appellant was denied audience by the Learned Trial Magistrate.

I. INJUNCTION

9. Issues (a) and (c) herein above were dealt with under this head.

10. The Appellant argued that the Learned Trial Magistrate ought not to have granted a positive order/mandatory injunction. He relied on the case of **Ramadhan Salim vs Evans M Maabi T/A Murhy Auctioneers & Another [2016]eKLR** where the Court of Appeal differentiated a positive and a negative order as regards an injunction. He also referred to the cases of **John Mugo Nguga vs Margaret M Murangi [2014] eKLR**, **Primrose Management Ltd vs Chairman of the Business Premises Rent Tribunal Nairobi & Another [2015]eKLR** and **Diamond Trust Bank Kenya Ltd (Formerly Diamond Trust of Kenya Limited) vs Jaswinder Singh Enterprises [1999]eKLR** which had also dealt with the issue of mandatory orders in a interlocutory stage.

11. His further argument was that even if a subordinate court could issue an *ex parte* positive/mandatory order, which he averred was wrong, it was still wrong for the court to have proceeded that way because there was no proof of ownership of the subject Motor Vehicle by the Appellant.

12. On his part, the Respondent argued that the orders that were initially granted were not positive or mandatory orders and what the Learned Trial Magistrate did was merely to issue orders to safeguard the subject Motor Vehicle in a safe place and not in the custody of either of the parties.

13. A perusal of the order of 20th December 2013 showed that Hon S M Wahome granted the following orders:-

a) The temporary injunction is hereby issued for 14 days restraining the defendant/respondent, his agents and/or servants from selling and/or in any other manner disposing the plaintiff's motor vehicle registration no KBG 583K Isuzu truck.

b) The temporary order is hereby issued for 14 days to the defendant/respondent, his servants and/or agents to return the motor vehicle KBG 583K to a central place at Voi.

c) The Respondent is served with the Application on or before 27th December 2013 for interpartes hearing on 9th January 2014.

14. It was very clear that the first orders that Hon S M Wahome granted was not positive/mandatory orders. It was a negative order in the sense that he was restraining the Appellant from disposing of the subject Motor Vehicle in any manner pending the hearing and determination of the Respondent's Notice of Motion application dated and filed on 20th December 2013.

15. Although the second order he granted was positive order in nature, its purpose was merely to conserve and preserve the subject Motor Vehicle in a neutral place pending the hearing and determination of the said application. As was rightly pointed out by the Respondent, the subject Motor Vehicle was to be returned at a central place at Voi and was not to go to the custody of either the Appellant or the Respondent. In that regard, this court found that the said Magistrate did not err when he issued the said order on *anex parte* basis.

16. Notably, Order 40 Rule 4(1) of the Civil Procedure Rules 2010, provides that a court may issue injunction on an *ex parte* basis if it is satisfied that sufficient reasons had been advance for issuance of such orders.

17. It was true as the Appellant stated that such an *ex parte* order could not be issued for more than fourteen (14) days and the same shall not be extended thereafter except by consent of the parties or by an order of the court for a period not exceeding fourteen (14) days. From the proceedings, it was evident that the order was granted for fourteen (14) days and the *inter parties* hearing fixed for 9th January 2014.

18. However, on that date counsel for the Appellant could not confirm whether or not the vehicle had been brought to court on the ground that the orders had been given on an *ex parte* basis. He stated that the facts before the court showed that the Appellant was the owner of the subject Motor Vehicle.

19. On his part, counsel for the Respondent was categorical that the Appellant had not complied with the court orders of Hon S M Wahome that were issued on 20th December 2013 and urged Hon Nyakundi to deny the Appellant audience.

20. Notably, Hon Nyakundi ordered the Appellant to first comply with the order on several other dates thereafter culminating in him being granted leave to file a Supplementary Affidavit. The Notice of Motion application dated 20th December 2013 was then listed for hearing on 24th January 2014. As at that date, the Appellant had still not complied or demonstrated that he had complied with the said order and could therefore not be given audience by the said court.

21. Going further, the Appellant did not also demonstrate what amendments had been made to the order by Hon Nyakundi, if at all, to have caused him to suffer prejudice. In any event, the parties agreed by consent to extend the *ex parte* orders to enable the parties file Supplementary Affidavits.

22. It was therefore the view of this court that the extension of the *ex parte* injunction to the 24th January 2014 was not in contravention of the law as an extra fourteen (14) days extension of *ex parte* injunction with the consent of the parties was envisaged in Order 40 Rule 4 (2) of the Civil Procedure Rules 2010.

The Appellant's Ground of Appeal No 1, 5,9, 12, 13 and 14 were not merited and the same are hereby dismissed.

II. CONTEMPT OF COURT AND LACK OF AUDIENCE

23. Issues No (b) and (d) herein above were dealt with under this heading as they were both related.

24. The Appellant submitted that the Learned Trial Magistrate lacked jurisdiction to cite him for contempt. He contended that only the High Court had power to punish to contempt as provided in Section 5 of the Judicature Act and that in addition, Section 63 (c) of the Civil Procedure Act Cap 21 (Laws of Kenya) provided that where there was disobedience of an order for temporary injunction the punishment would be imprisonment or attachment and sale or contemnor's property.

25. He relied on the cases of **Kyoga Hauliers Limited vs Long Distance Truck drivers and Allied Workers Union [2015]eKLR** in this regard. He argued that by virtue of the Magistrates Court Act 2015 which came into force on 2nd January 2016, the magistrate can only punish for contempt in the face of the court.

26. On his part the Respondent argued that the Learned Trial Magistrate never dealt with any contempt proceedings and merely denied the Appellant audience of the court until he obeyed the order that was in force. He pointed out that the Learned Trial Magistrate actually gave the Appellant an opportunity to comply with the said orders by directing that the application be heard on another date.

27. Upon perusing the court proceedings and the orders of 24th January 2014 and 30th January 2014, this court did not find any evidence of Hon Nyakundi having dealt with any contempt of court proceedings. In his order of 30th January 2014, he merely stated that a Notice to show cause was to be issued to the Appellant to show cause why he could not be cited for contempt of court but did not cite him for contempt of court. If the said Magistrate had punished him for contempt for failing to comply with a court order, that would have been a different issue for determination, which in this case was not the position.

28. This court did not see any evidence pointing to the fact that the Appellant sought adjournment of the matter because his counsel was in another court and Hon Nyakundi declined to grant him the adjournment on that ground. What this court noted was that the Appellant did not advance any reason to explain why he had not or was not complying with the order that had been issued by Hon S M Wahome on 20th December 2013. It appeared that the crux of his argument was that the facts before the court proved that he was the owner of the subject Motor Vehicle.

29. In the absence of any explanation of why the Appellant was not complying the said order of 20th December 2013, this court took the firm view that Hon Nyakundi acted correctly when he denied him audience in his court until such time he would comply with the same.

30. In the premises foregoing, this court found and held that Ground of Appeal No 2, 3, 4, 6, 7, 10, 11, 15, 16, 17, 18 and 19 were not merited and the same are hereby dismissed.

DISPOSITION

For the reasons foregoing, the upshot of this court's judgment was that the Appellant's Appeal that was dated 6th February 2014 and filed on 7th February 2014 was not merited and the same is hereby dismissed with costs to the Respondent.

32. It is so ordered.

DATED and DELIVERED at VOI this 18th day of January 2018

J. KAMAU

JUDGE