



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISC.APP.446 OF 2017

NGAO CREDIT LTD.....APPLICANT

-VERSUS

JOSEPH GACHAU MEJA & ANOTHER.....RESPONDENT

RULING

1. The applicant filed the present Notice of Motion dated 31/10/2017 seeking orders that:-

(i) - Spent

(ii) THAT this honourable court be pleased to review, vary and/set aside the order dated 15th September 2017 and issued on the same date by the Resident Magistrate's Court at Nakuru.

(iii) THAT this Honourable Court be pleased to stay the execution of the Order dated 15th September 2017 and issued on the same date by the Resident Magistrate's Court at Nakuru pending hearing and determination of this application inter-partes;

(iv) THAT this Honourable Court be pleased to stay proceedings pending hearing and determination of the Application inter-partes.

(v) Cost of this Application be provided for.

2. The background to the application as contained in the grounds and supporting affidavits is as follows:

Ngao Credit Limited (the present applicant) advanced a loan to Patrick Kagoya (the 2nd Respondent) and secured using motor vehicle registration number KBW 128K (the suit vehicle). There are on-going proceedings in **Nakuru CMCC No. 920 of 2017 Joseph Gichau Mejah –versus – Ngao Credit Limited and Patrick Kagoya** in which the 1st Respondent has sued the applicant herein and the 2nd Respondent. By Notice of Motion dated 15/9/2017 the 1st respondent sought orders inter alia compelling the applicant (Ngao credit Limited) to release suit order vehicle which the applicant had repossessed as a result of failure by the 2nd respondent to service the loan.

3. The trial court (**Hon. Kitur**) granted the order in terms that “pending hearing and determination of this application inter-partes this Honourable court be and is hereby pleased to order the defendant to release Motor vehicle registration No. KBW 128K Nissan Wingroad to the applicant.” It is this order that the present applicant (Ngao Credit Ltd) seeks to impugn in this application.

4. The applicant's case is set out in the Notice of Motion the lengthy supporting affidavit sworn by Faith Owino who is their legal officer, and the submissions dated 25/1/2018 filed by MJD Associates Advocates. Its case is that the 1st and 2nd respondents have frustrated the applicant from recovering the loan advanced to the 2nd respondent and guaranteed by the 1st respondent.

The applicant is aggrieved by the order requiring them to release the suit motor vehicle. They argue that the order was granted *ex-parte* and that the said order is mandatory in nature.

5. The 1st respondent filed a replying affidavit sworn by Joseph Gichau Mejah on 10/11/2017. The affidavit reiterates the proceedings in the trial court and further states that the applicant shall not suffer any prejudice if the orders of the trial court were not varied or discharged. The 1st Respondent also filed submissions dated 23/1/2018. The 1st respondent submits that the application for review or setting aside of the trial court's orders was misplaced as the matter was *res judicata*. The submissions also emphasize the point that there was no sufficient cause advanced by the applicant to justify a review of the orders of the trial court.

6. The 2nd respondent filed a Replying Affidavit sworn by Patrick Kagoya. His averments largely relate to the substantive suit in **Nakuru CMCC No. 920 of 2017 Joseph Gichau Meja vs Ngao Credit Ltd and Patrick Kagoya**. His position is that the application is an attempt by the applicant to avoid complying with the orders of the trial court and should be struck out.

7. The 2nd respondent also filed submissions dated 13/12/2017. He submits that the 2nd respondent would be denied an opportunity to be heard if the orders of the trial court which sought to protect the subject matter of the dispute were vacated.

8. I have considered the application together with the affidavits and submissions of the parties. The application is two pronged. Firstly, it seeks an order to review, vary or set aside orders issued on 15/9/2017 in **Nakuru CMCC No. 920 of 2017**. Secondly, it seeks a stay of execution on the same order pending hearing and determination of this application.

9. I shall address the 2nd limb of the application first. The applicant sought stay pending hearing and determination of the present application. My understanding of the prayer is that the stay sought was for the limited period for the hearing and determination of the application. If that be the case then it follows that the said order would determine upon the delivery of this ruling as would any interim orders. It is clear therefore that the prayer for stay is already spent.

10. The first limb of the application is in respect of review. The order sought to be reviewed, varied or set aside is one in which the trial court ordered the release of the suit motor vehicle to the 1st respondent.

Order 45 1. Provides circumstances for review as follows;-

(1) any person considering himself aggrieved:

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed,

And who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain in a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

11. In the present case, the applicant was aggrieved by the order of the trial court which required him to release the suit motor vehicle to the 1st respondent. He sought a review of the order before the court that issued the order but the court declined to vacate or vary the order prompting the present application. The applicant's grievance is that the said order was not only granted *ex parte* but that the order itself was mandatory in nature which has the impact of determining the matter before the trial court.

12. It is trite law that mandatory orders ought not to be granted at an inter-locutory stage unless there were exceptional and clear circumstance (see **Diamond Trust Bank (K) Ltd vs Jaswinder Singh Enterprises 1999**).The applicant argues that there were no clear circumstances brought before the court to warrant grant of the orders and further that the release of the subject motor vehicle would determine the suit without the application having been heard.

13. I have perused the hand written proceedings relating to the application and the orders as granted by the court. It is clear from the order that the release ordered was "pending the inter-partes hearing of the application." None of the parties have attached the plaint to the present application. The plaint would have assisted the court in considering whether or not the release of the suit motor vehicle would have the effect of determining the suit as submitted by the applicant. From the affidavits and submissions filed however, it is clear to me that the subject motor vehicle was attached by the applicant on account of default on loan by the 2nd respondent and that the dispute before the trial court revolves around the 1st respondent's obligations and role as guarantor. It cannot therefore be said that the temporary release of the vehicle pending inter- partes hearing of the application before the trial court would determine the suit. The court being seized of the matter would have occasion to determine the rights of the parties and would also in the interim issue any conservatory orders merited by any party.

14. In the premises I am not persuaded that I should interfere with the orders of the trial court. The matter is referred back to the trial court to hear the application before it expeditiously.

Costs shall be in the cause

Orders accordingly

Ruling signed at Garsen on.....day of.....2018.

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R. LAGAT KORIR

JUDGE

Ruling delivered dated and counter signed at Nakuru this 21st day of June, 2018.

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JANET MULWA

JUDGE

In the presence of

.....CA

.....for applicant

.....for respondent