



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 23 OF 2018

TSUSHO CAPITAL KENYA LIMITED 1ST APPELLANT

TRINITY TRANSPORTERS & LOGISTIC LIMITED 2ND APPELLANT

MOSES INDIAZI LUYANI..... 3RD APPELLANT

VERSUS

VNN (Minor suing through her next friend and mother JNM) RESPONDENT

RULING

1. Through an application dated 26th March, 2018 premised on the provisions of Order 42 rule 6 of the Civil Procedure Rules, Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act and all enabling provisions of the law, the 1st appellant seeks the following orders:-

(i) Spent;

(ii) Spent;

(iii) That pending the hearing and determination of the appeal herein the Honourable court be pleased to order a stay of any other proceedings in Mombasa CMCC No. 165 of 2017, VNN (Minor suing through her next friend and mother JNM) vs Tsusho Capital Limited and 2 Others;

(iv) That the costs of this application be borne by the respondent; and

(v) That there be liberty to apply.

2. The application is supported by the affidavit of Marion Chehenza, the 1st applicant's Operations Manager, sworn on 21st March, 2018. The respondent filed a replying affidavit on 9th May, 2018 sworn by JNM to oppose the application.

3. In arguing the application, Mr. Limui, Learned Counsel for the 1st appellant submitted that they filed an application before the lower court seeking orders for the 1st appellant to be struck out of the proceedings as its role was to finance the purchase of the motor vehicle in issue. He stated that the said application was dismissed and the case before the lower court was certified ready for hearing.

4. It was submitted that the 1st appellant will suffer substantial loss by having to defend the case by bringing witnesses to court thereby incurring costs, yet it is a joint owner of the motor vehicle by virtue of the finance agreement. Counsel for the 1st appellant further argued that the mere registration of a motor vehicle cannot be a ground for it to be joined as a party to the suit when its role is that of a financier.

5. Mr. Limui relied on the list of authorities he filed on 8th May, 2018 and stated that in an application for stay of proceedings, the court assesses if an appellant has an arguable appeal and *prima facie*, if the appeal has merit. The court also considers if the application has been brought without delay. Counsel prayed for the application to be allowed.

6. Mr. Mbanda, Learned Counsel for the respondent opposed the application for stay of proceedings. He stated that the 1st appellant is the owner of the motor vehicle which he was selling to 2nd appellant on hire purchase. He further submitted that in the hire purchase agreement it states that should any matter occur that requires litigation, the 2nd appellant will indemnify the 1st appellant. Counsel stated that the lower court held that the issue of ownership will be best canvassed at the hearing of the case. He added that the memorandum of appeal was filed

on 28th February, 2018 but no record of appeal had been filed and directions had not been sought. He prayed for the application to be dismissed.

7. In response to the foregoing Mr. Limui reiterated that the 1st appellant is a financier and the same was indicated in paragraph 3 of the plaint. He further stated that it was not disputed that the 1st appellant is registered as a co-owner of the motor vehicle in issue together with the 2nd appellant.

ANALYSIS AND DETERMINATION

The issue for determination is if proceedings in the lower court should be stayed pending appeal.

8. In its supporting affidavit, the 1st appellant deposes that it sold motor vehicle registration No. KCF 008A to the 2nd appellant pursuant to a Master Installment Sale Agreement dated 12th October, 2015. It further deposes that its registration as a co-owner of the vehicle was done to secure the balance of the purchase price due and owing to it from the 2nd appellant, which was payable on installments. The applicant further deposes that it did not have possession, custody and/or control over motor vehicle registration No. KCF 008A, nor did it exercise control over persons who had the management of the said motor vehicle on the day of the alleged accident or at any time in between. It was further deposed that under the provisions of Section 3 of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405, Laws of Kenya, the 1st appellant could not be deemed to be an owner of the said motor vehicle, thus it is not vicariously liable for the acts of the owner, when the hirer is not in possession of the same.

9. The 1st appellant relied on the case of **Timmeh Ibrahim vs Tipapa Ole Kirookoh and Another** [2014] eKLR, where the court set down the factors to be borne in mind when determining an application of this nature. Counsel for the 1st appellant also relied on the case of **Christopher Ndolo and Another** [2015] eKLR where the court stated that the decision of whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice.

10. The respondent in her affidavit deposes that the title in motor vehicle registration No. KCF 008A Hino Bus/coach was to pass to the 2nd appellant upon full payment of the purchase price and interest, thus the 1st appellant was the legal and beneficial owner of the said vehicle until the day such payment was made in full. It was further deposed that the hire purchase agreement was never registered as required under Section 5 of the Hire Purchase Act.

11. The respondent maintains in her affidavit that the best avenue to address the issue of ownership is through the main trial as per the holding by the Hon. Magistrate in the application filed in the said court. In the respondent's view, this application is an abuse of the court process.

12. This court has gone through the annexures attached to the 1st appellant's affidavit and is of the view that the present application is not an abuse of the court process. The Hon. Magistrate in his ruling dated 10th February, 2018 noted that although the authorities that were cited by Counsel for the 1st appellant were binding on him, some part of the executed agreement between the 1st and 2nd defendants (1st and 2nd appellants) was missing from the copy that was supplied to the court, a matter which was pointed out to the said court by the plaintiff (respondent). Secondly, the Hon. Magistrate noted that it was not evident on the material on record that the sale agreement was registered, and if that was the position, the non-registration would be of no legal effect in advancing the 1st appellant's case. The said Magistrate was of the view that the factual and legal position can only be determined during trial.

13. In paragraph 13(a) of its affidavit filed in this court, the 1st appellant deposes to having furnished a full copy of the Master Installment Sale Agreement through a further affidavit filed in the lower court on 3rd November, 2018 (sic).

14. He further deposes that the sale agreement dated 12th October, 2015 was not subject to registration under the Hire Purchase Act as the value of the motor vehicle in issue stands at Kshs. 6,496,000/= thus the requirement for registration was not applicable.

15. It is not for this court to determine the issues in paragraphs 8-10 as they form the subject of the appeal filed herein. This court has been called upon to exercise judicial discretion in deciding the present application. The 4th Chief Justice of the United States, John Marshall had the following to say on the issue of judicial discretion in the case of **Osborn vs Bank of the United states**, 22 U.S 738 [1824]:-

“Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the Judge, always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law.”

16. Bearing in mind the above decision and that cited by Counsel for the applicant in **Timmeh Ibrahim vs Tipapa Ole Kirookoh and Another** (supra), and further noting that judicial discretion must be exercised judiciously and not capriciously or whimsically, it is my finding that the 1st appellant has an arguable appeal. I also note that the application herein was filed timeously. The 1st appellant is therefore entitled to the orders sought.

17. This court is however of the view that the appeal filed on 28th February, 2018 should be heard expeditiously as the victim of the accident the subject of the lower court case, suffered serious injuries which led to amputation of her left arm at the level of deltoid region which has resulted in 100% incapacity of the said arm. This is as per the medical report contained in the pleadings filed in the lower court.

18. The result is that the application dated 26th March, 2018 is hereby allowed on the following terms:-

- (i) That the proceedings in Mombasa Chief Magistrate's Court Civil Case No. 165 of 2017, VNN (Minor suing through her Next Friend and mother JNM) vs Tsusho Capital Limited and 2 Others are hereby stayed pending the hearing and determination of the appeal herein;
- (ii) That the 1st appellant is given 60 days from the date of this ruling to file and serve its Record of Appeal;
- (iii) That within 15 days of filing of the Record of Appeal, the 1st appellant will take a date on priority basis at the relevant registry for directions as to the hearing of the appeal;
- (iv) Costs of this application shall abide by the outcome of the appeal.

It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 31st day of October, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

No appearance for the appellants

No appearance for the respondent

Mr. Oliver Musundi - Court Assistant