



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 638 OF 2012

GITONGA KITHINJI MURIUKI..... APPELLANT

V E R S U S

KINGS CAPITAL LIMITED..... 1ST RESPONDENT

STEPHEN KITHINJI MUNAH 2ND RESPONDENT

ROBERT WAWERU T/A ANTIQUE AUCTIONEERS 3RD RESPONDENT

*(Being an appeal from the ruling and orders of the Chief Magistrate's Court in Nairobi at Milimani
Civil Suit no. 6143 of 2012 delivered on 23rd November 2012)*

JUDGEMENT

1. Gitonga Kithinji Muriuki, the appellant herein, filed an action before the Chief Magistrate's Court, Milimani Commercial Court, against Kings Capital Ltd, Stephen Kithinji Munah and Robert Waweru T/a Antique Auctioneers, the 1st, 2nd and 3rd respondents respectively vide the plaint dated 12th October 2012. In the aforesaid plaint the appellant sought for judgment against the respondents in the following terms:

a) A declaration that the attachment of his motor vehicle herein is illegal, unlawful and contrary to the law governing financial transactions and law of guarantee.

b) An order of this honourable court directing to the 1st and 3rd defendants to release the plaintiff's motor vehicle forthwith.

c) An order directing the 1st and 2nd defendants to give statement of accounts and all other documents relating to the two loans issued to the 2nd defendant.

d) General damages arising from harassments of the plaintiff and the attachment of his motor vehicle.

e) Costs of this suit.

2. The appellant filed the aforesaid plaint together with the motion dated 12.10.2012 whereof he sought for *interalia*:

1. THAT this honourable court be pleased to order that the ruling and the order of Hon. P.

W. Wasike dated and delivered on 23rd November 2012 be stayed pending the hearing and determination of the appellants appeal filed herein.

2. THAT this honourable court be pleased to order the release of the appellant (plaintiff's) motor vehicle registration number KBN 234G being held by the 3rd respondent herein upon such terms and conditions that this honourable court may be pleased to order.

3. The motion was opposed by the respondents. The motion was heard and eventually dismissed by Hon. P. W. Wasike on 23rd November 2012. Being aggrieved by the dismissal order, the appellant preferred this appeal.

4. On appeal, the appellant put forward the following grounds:

1. THAT the learned magistrate erred in both law and fact by refusing to exercise his discretion judiciously to the detriment and prejudice of the plaintiff.

2. THAT the learned magistrate erred in both law and fact by misinterpretation of the facts as presented by the parties before him and more particularly the plaintiff thereof and the appellant herein.

3. THAT the learned magistrate erred in fact by failing to appreciate what was before him was not the dispute between the plaintiff and the 2nd defendant as directors or partners of the company but a dispute as to the payment of 1st and loan given to the 2nd defendant by the 1st defendant.

4. THAT the learned magistrate erred both in law and in fact by failing to appreciate and take into account the plaintiff's genuineness and sincerity in offering to deposit the disputed and contested sum in court in exchange of the release of his motor vehicle registration no. KBN 234G and which motor vehicle had offered as a security.

5. THAT the learned magistrate erred both in law and fact by failing to give a conditional release of the motor vehicle held by the 3rd defendant at the instance of the 1st defendant and on account of the 1st defendant.

6. THAT the learned magistrate erred both in law and fact by considering extraneous issues some of which were not before the court in arriving to a wrong decision regarding whether the plaintiff's motor vehicle should be released or not.

7. THAT the learned magistrate erred both in law and fact by not considering all the facts presented before him relating to the dispute such as the legality, execution and dating of the documents and in relation to the releasing of the funds to the 1st defendant.

8. THAT the learned magistrate erred both in law and fact by not appreciating the material facts on concealment, deceit, fraud, misrepresentation and dishonest and breach of trust on the part of the defendants as against the plaintiff.

9. THAT the learned magistrate erred both in law and fact by ignoring the attachment and the value that the plaintiff had to the vehicle that is and has been illegally and irregularly held by the 3rd defendant.

10. THAT the learned magistrate erred both in law and fact by ignoring the simple fact that the plaintiff had been making payment as at the time of the attachment.

11. THAT the learned magistrate in fact by failing to consider documents filed by the plaintiff in support of his claim such as the witness statement which had the full disclosure and instead

wrongly and unfairly condemned the plaintiff as an advocate.

12. THAT the learned magistrate erred both in law and fact by holding that the 1st defendant was justified in giving loan and charging interest contrary to the Banking Act and the other related laws.

5. When the appeal came up for hearing, learned counsels appearing in this matter recorded a consent order to have the appeal disposed of by written submissions.

6. I have re-evaluated the arguments presented before the learned Resident Magistrate. I have further considered the rival written submissions. It is appropriate at this juncture to set out in brief the history of this dispute. The parties do not dispute that on 16th July 2012 Stephen Kithinji Muna, the 2nd respondent borrowed a business loan in the sum of ksh.400,000 from kings Capital Ltd, the 1st respondent. The appellant pledged his motor registration no. KBN 234G as security by signing a chattels mortgage with the 1st respondent. It would appear from the pleadings and the submissions that the 2nd respondent defaulted in repaying the loan due to the 1st respondent thus prompting the 1st respondent to instruct Robert Waweru T/A Antique Auctioneers to repossess the appellant's motor vehicle pursuant to the chattels mortgage. The 1st respondent's action prompted the appellant to file the suit before the trial court contemporaneously with motion dated 12.10.2012, which application was dismissed thus giving rise to this appeal.

7. Though the appellant put forward a total of twelve grounds in his memorandum, what is clear in my mind is that the appellant is simply arguing that the trial magistrate did not properly exercise her discretion when she dismissed the motion. The record shows that the appellant had put forward before the trial court the following grounds *inter alia*:

First, that the 1st respondent through the 3rd respondent took possession of the motor vehicle without any proclamation or notice to the appellant. In other words the appellant argued that he never received any demand notice.

9. Secondly, the appellant further argued before the trial court that the 1st respondent was not authorised to do any banking services therefore its operations were illegal.

10. The respondents denied the appellants allegations. They accused the appellant of material non-disclosure. The above issues were considered and the trial magistrate came to the conclusion that the appellant had concealed material facts. This appeal has brought up many issues which may go to the merits of the suit before the trial court. Therefore care must be taken so that this court does not prejudice the mind of magistrate who will eventually try the suit. The main issue to be determined is whether or not the trial magistrate properly exercised her discretion in dismissing the application for injunction. What is apparent from the ruling of the learned Resident Magistrate is that it would appear he misapprehended the issues in contention. The issue raised by the appellant is in respect of a loan of ksh.400,00/= advanced to the 2nd respondent by the 1st respondent and guaranteed by the appellant. The appellant has presented evidence of payments of kshs.150,000 to settle the debt. This issue appears to have been totally ignored by the trial magistrate. The trial magistrate appears to have considered issues relating to Ground Water Consultant Services Ltd yet there was no dispute over the aforesaid company between the appellant and the 2nd respondent. It would also appear that the learned Resident Magistrate completely ignored the question of the existence of two loans guaranteed by two different people to the 2nd respondent. There was an allegation that there was lumping up of payment the 1st and 2nd respondents' loan thereby making a demand to the appellant and thereby making the outstanding balance at ksh.718,000/= and 418,480 as shown in the replying affidavit. It is also argued that the trial magistrate erred when he failed to appreciate that the 1st respondent authorised recovery against the guarantor when he was making payments. It is also pointed out that the trial magistrate failed to appreciate that no notice was given to the appellant and what was given was meant to be a cover-up. With respect I agree with the appellant's submission that the 3rd respondent's failure to issue a proclamation notice and the failure by the 1st respondent to issue a

notice of default to the appellant made the entire recovery process not justifiable.

11. From the above analysis, it is clear in my mind that the appellant had satisfied the principles for granting an order of injunction.

12. In the end, the appeal is allowed. The order dismissing the motion dated 12.10.2012 and issued on 23.11.2012 is set aside and is substituted with an order allowing prayer 4 of the motion.

13. Costs of the appeal is given to the appellant

Dated, Signed and Delivered in open court this 31st day of March, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent