



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

MISCELLANEOUS CIVIL NO.68 OF 2015

CADS MOTORS LIMITED.....APPLICANT/PLAINTIFF

VERSUS

MIR MIR TEA LTD.....DEFENDANT

ELLIOT TOLIMO NGENY.....RESPONDENT/INTERESTED PARTY

RULING

1. The proceedings giving rise to the present application are somewhat convoluted. From what the court can gather from the pleadings before it, this matter arises out of proceedings in **CMCC No. 514 of 2014-Cads Motors Ltd. vs Mir Mir Tea Ltd**, and is also connected with **CMCC No. 553 of 2014-Jyoti Girish Shah vs Elliot Tolmo Arap Ngeny**. Jyoti Girish Shah appears to be a Director of the applicant.

2. It appears that in Civil Suit No. 514 of 2014, the plaintiff had sued the defendant, Mir Mir Tea Ltd, and obtained judgment in its favour. A proclamation was issued against the defendant, following which the respondent in this matter filed objection proceedings in respect to three motor vehicles the subject of the proclamation, being motor vehicles KCA 544T, KAE 144W, KAQ 973P and KAM 013H.

3. In a consent order entered into on 23rd September 2015, the parties agreed that the motor vehicles would be excluded from execution until the lifting of the corporate veil in respect of the defendant, Mir Mir Tea Ltd. It appears that while motor vehicle registration number KCA 544T was a subject of the proclamation, it had been in the custody of the applicant for more than a year as it was also the subject of another suit, CMCC No. 553 of 2014 - **Jyoti Girish Shah vs Elliot Tolmo Arap Ngeny**. Judgment in this suit was delivered in favour of the plaintiff, the present applicant, on 15th December 2015.

5. The facts that emerge from this judgment are that the plaintiff /applicant and the respondent had entered into an agreement for sale of the plaintiff's motor vehicle, registration number KAN 409A Toyota Prado, to the defendant, for the price or sum of Kshs 900,000. The agreement was that the respondent would trade in his motor vehicle, a jaguar then bearing the number KX44B17, which was valued at Kshs 850,000, as a deposit and pay an additional Kshs 50,000 to the plaintiff on or before 30th December 2012. The plaintiff released her Toyota Prado to the respondent, while the respondent deposited his Jaguar KX44B17 with the plaintiff. The respondent, however, instead of registering the said motor vehicle in the plaintiff's name as had been agreed, proceeded to register it in his name. It was registered as KCA 544T.

5. It then appears that by an application dated 9th September 2015, the respondent sought an order for the release of motor vehicle registration number KCA 544T to the respondent. After hearing counsel for the applicant in the absence of counsel for the plaintiff and the defendant, the court (Hon. B Limo) issued

orders as follows:

(b) (sic) That the motor vehicle registration number KCA 544T Jaguar Sallon (formerly registration number KX44B17 ceased and be released to its owner, ELLIOT TOLMO NGENY.

(c) THAT the OCS, Kericho Police Station, do ensure the release of the Motor Vehicle registration number KCA 544T to its owner, ELLIOT TOLMO NGENY.

6. The applicant then filed an application dated 2nd December 2015 in which it sought orders for stay of the orders issued on 1st December 2015. The court did not, however, hear the application, ordering, instead, that the motor vehicle registration number KCA 544T be produced in court before the applicant's application could be heard. It is at this point that the applicant filed a Notice of Appeal dated 3rd December 2015, and also filed the present application. Interim orders for the maintenance of the status quo were issued by the High Court sitting in Nakuru. The application was not argued, for various reasons, including, on two occasions, the indisposition of Counsel for the respondent. It was finally canvassed before me on 1st December 2016.

The application

7. In the application dated 3rd December 2016 expressed to be brought under the provisions of Order 51 Rule 1 of the Civil Procedure Rules, section 1A and 3A of the Civil Procedure Act and all enabling provisions of the law, the applicant seeks the following orders:

1. That the application herein is certified urgent and service thereof be dispensed with in the first instance.

2. That pending the hearing and determination of the application interparties this honourable court be pleased to issue interim orders restraining the respondent and or its agents from removing motor vehicle registration mark KCA 544T from the applicant's custody.

3. That there be stay of execution to interim orders issued on 1st December 2015.

4. That costs of this application be in the cause.

8. The application is supported by an affidavit sworn by the applicant's Director, Jyoti Girish Shah, on 3rd December 2016 and is based on a total of 11 grounds which emerge from the summary of the case that I have set out above. Ms Shah averred that in the absence of interim orders, she was apprehensive that she may lose her vehicle before Kericho CMCC No.553 of 2014 was determined.

9. In the affidavit in support of the application, Ms Shah averred that the applicant had sued Mir Mir Tea Ltd and the court had found in its favour and a proclamation had issued against the defendant on 28th August 2015. The respondent in this case had filed an objection contending motor vehicles KCA 544T, KAE 144W, KAQ 973P and KAM 013H belonged to him and not the defendant. On 23rd September 2015, the parties had entered into a consent to the effect that the subject motor vehicles would be excluded from execution until the lifting of the corporate veil.

10. Further, according to the applicant, though motor vehicle registration mark KCA 544T had been proclaimed, it had been in her custody for more than a year as it was the subject of another suit. Judgment in this suit was to be delivered on 1st December 2015.

11. The applicant averred that the respondent in this case had been heard ex parte and had been granted substantive orders without hearing the applicant and without its advocates on record being served with a hearing notice. Its application for stay had not been heard by the court as it had been ordered to deliver the motor vehicle to the court premises as a condition to the hearing of the application. The applicant had then filed the present application and obtained orders from the High Court sitting in Nakuru.

12. The applicant filed a further affidavit sworn on 1st December 2016. In the said affidavit, it is averred that motor vehicle registration mark KCA 554T, the subject matter of this application, was previously registered as KX44B17. The deponent states that she had filed Civil Suit No.553 of 2014 against the respondent, Elliot Tolimo Arap Ngeny, for breach of contract and sought orders directing the defendant to release forthwith the logbook for the said motor vehicle together with duly signed transfer forms and new number plates. Judgment in favour of the plaintiff was entered on 16th February 2016, and a decree issued on 11th May 2016. The decree had not been executed due to what the applicant refers to as hostility from the respondent.

13. In submissions made on its behalf by Learned Counsel, Mr. Mbeche, it was argued that the applicant was seeking orders restraining the respondent from removing motor vehicle registration mark KCA 544 T from the applicant's custody. The applicant was also seeking orders to stay execution of interim orders issued on 1st December 2015 in CMCC No.514 of 2014. The applicant states that it obtained judgment against the defendant in that case, but the defendant is not a party to the present application. A decree was issued on 21st April 2015 and the plaintiff retained the services of an auctioneer, who served a proclamation on the defendant on 28th August 2015.

14. The respondent in this application then filed objection proceedings on 9th September 2015, and a consent was entered between the parties before the court in which it was agreed that there would be stay of execution with regard to the motor vehicles which were proclaimed, one of which was motor vehicle KCA 544 T, the subject of this application. The consent was entered into on the basis that there would be stay pending the lifting of the corporate veil. The applicant had not proceeded with execution since the date of the consent.

15. According to the applicant, the respondent thereafter moved to court on 1st December 2015 and obtained substantive orders, which were issued without service having been effected on it or the defendant. Mr. Mbeche submitted that despite the applicant never having seen the application, the court nonetheless issued an order that the applicant should avail the subject motor vehicle to the respondent interested party. Upon receipt of that order, Counsel for the applicant then made an application before that court for stay of the order issued on 1st December 2015 on the grounds that the applicant had not been served and that the subject motor vehicle was the subject of another court case namely **CMCC NO.553 of 2014**. Instead of hearing the application dated 3rd December 2015, the court insisted that the subject motor vehicle be availed. The applicant therefore moved to the High Court with the present application and obtained temporary orders staying the hand over of the motor vehicle to the respondent.

16. The applicant's submissions were that Order 51 (3) of the Civil Procedure Rules provides that no motion shall be made without notice. The exception to the rule is where there is danger that the applicant will suffer irreparable loss or serious mischief will result to the applicant. Its contention is that the orders issued on 1st December 2015 are null and void as no notice was served on the applicant. The applicant contends that the subject motor vehicle was the subject of CMCC No.553 of 2014 in which there is a judgment delivered on 16th February 2016 in favour of the applicant as evidenced in annexure JGS3 in the further supplementary affidavit of the applicant sworn on 1st December 2016.

17. With respect to the averment in the affidavit in response sworn by the respondent that the plaintiff is deceased, the applicant's submission was that the applicant is alive and is the one who swore the replying affidavit. The applicant also denies that it is out to defraud the respondent as alleged in the affidavit in reply. Its contention is that the subject motor vehicle was all along in the custody of the applicant prior to the filing of CMCC No. 514 of 2015 and 553 of 2014; that the auctioneers did not even take part in repossession of the motor vehicle from the respondent, and that it is legally in the custody of the applicant by virtue of a transaction between the applicant and the respondent in CMCC No.553 of 2014.

The Response

18. In his submissions in reply, Mr. Mutai relied on the affidavit of the respondent sworn on 31st October

2016. In the said affidavit, the respondent has deposed that he was served with a proclamation dated 28th August 2015 emanating from Kericho CMCC No.514 of 2014 in which his property was to be attached despite the fact that he was not a party to the said suit. He filed objection proceedings in the suit, and he confirms the consent orders excluding his properties from execution entered into on 23rd September 2015 excluding motor vehicles registration numbers KCA 544T, KAE 144W, KAQ 973P and KAM 013H and any other property belonging to him from execution pending the lifting of the defendant's corporate veil by the plaintiff.

19. He asserts that he is the legal registered owner of the said motor vehicle registration No. KAE 144W, KAQ 973P and KAM 013H, as well as Motor Vehicle Registration No. KCA 544T which he alleges is in the unlawful custody of the applicant. He further contends that the applicant has unlawfully retained the said motor vehicle, KCA 544T, without his consent, and has failed to obey the court order dated 1st December 2015 which ordered the applicant to release the motor vehicle to him, and for the Officer Commanding Station, Kericho Police Station, to ensure that the vehicle is released to him.

20. He further avers that due to the disobedience of the court orders by the applicant, he filed yet another application dated 3rd December 2015 seeking full compliance with the orders of 1st December 2015 and further seeking the production of the motor vehicle in court. He states that it is as a result of this latter application that the court ordered that the subject motor vehicle be brought to the court premises and the DCIO, Kericho police station to ferry the same to court. He argues that the applicant once again failed to obey the order, instead filing the present application.

21. With respect to Kericho CM CC No.553 of 2014, his deposition is that it was filed by one Jyoti Girish Shah who is deceased and has not been substituted, and that he is not a party to that suit.

22. Mr. Mutai conceded in his submissions that there was a suit, CMCC No. 514 of 2014 filed by Cards Motors Limited against Mir Mir Tea Ltd. The suit was determined in favour of the applicant and gave rise to the proclamation dated 28th August 2015 in which six properties, all belonging to the respondent, were listed. An objection was filed on behalf of the respondent and a consent entered on 23rd September 2015 under which the properties of the respondent would be excluded from execution pending the lifting of the corporate veil by the respondent. This has not yet been done, and according to Mr. Mutai, Mir Mir Tea Ltd does not seem to exist.

23. Mr. Mutai further submitted that the respondent then filed an application dated 1st December 2015 seeking the release of motor vehicle KCA 544 T to the respondent. The respondent obtained the orders which he served on Counsel for the applicant, though Mr. Mutai conceded that they did not serve the application before they got the orders that were mandatory and final in nature. His submission was that the orders were justified as it had been determined by consent of both counsel that the properties of the respondent, including the subject matter, were to be excluded from execution.

24. According to Mr. Mutai, the applicant then filed the application dated 2nd December 2015 which came up on 3rd December 2015 before the court that had issued the orders of 1st December 2015. The court then issued supplementary orders, after noting that there was objection to the release of the motor vehicle to the owner, directing that the motor vehicle be brought to the court premises until the hearing and determination of both applications. His submission was that said motor vehicle has never been brought to court, and they insisted on its being brought to court as they could be litigating over a subject matter that no longer exists.

25. While submitting that the applicant was seeking justice without obeying the court orders, Mr. Mutai confirmed that the subject motor vehicle was in the custody of the applicant as it carries on the business of mechanics. He alleged that the respondent had taken the motor vehicle there for repair, and asserted that the respondent is not aware of CMCC No.553 of 2014 as he was not a party, and that he became aware of CMCC 514 of 2014 during execution.

Determination

26. I have read the pleadings of the parties and considered the submissions made before me by Counsel for the parties in this matter. I have also considered the pleadings and judgment in CMCC No. 553 of 2014.

27. What emerges from the pleadings is that the applicant, or a director of the applicant, Jyoti Girish Shah and the respondent had entered into an agreement for sale of a motor vehicle belonging to the respondent, consideration for which was to be a trade in of the respondent's motor vehicle, now registered as KCA 544T.

28. While the applicant denies being a party to the suit involving the said motor vehicle, CMCC No. 553 of 2014, he does not address himself to the annexures to the affidavit of the applicant in this matter, which include, *inter alia*, the agreement for sale between the said Jyoti Girish Shah and the respondent dated 16th November 2012.

29. I have considered the judgment in CMCC No. 553 of 2014. The matter proceeded without participation of the respondent as he did not enter appearance and judgment was entered in default of defence, and formal proof of the claim proceeded before the trial court on 22nd June 2015.

30. The respondent filed an application dated 1st December 2015 in which he sought, and was granted, ex parte mandatory orders for the release of the motor vehicle on the basis that the vehicle belonged to him and was registered in his name. A further order was issued on 3rd December 2015 that the motor vehicle be produced at the court precincts before the applicant's application for stay orders could be heard.

31. The applicant has filed a notice of appeal, and though no grounds of appeal are annexed, it would appear that the applicant is aggrieved by the orders issued by the lower court, ex parte, which are mandatory in nature and which, as conceded by Mr. Mutai, are final in nature.

32. On the face of it, the orders of the court issued on 1st December 2015 were unfair, having been issued without hearing the applicant, and being by their very nature dispositive of the matter. The impression that one gets is that the respondent, aware of the pending judgment in civil suit No 553 of 2014, was seeking to pull a fast one on the applicant. The grant of ex parte mandatory orders would have the effect of assisting him in this endeavour.

33. In the circumstances, I am constrained to find that the application dated 3rd December 2015 is merited. It is hereby allowed, with costs to the applicant.

Dated Delivered and Signed at Kericho this 29th day of March 2017.

MUMBI NGUGI

JUDGE