

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 57 OF 2016

BIASHARA SACCO SOCIETY LTD.....APPELLANT/APPLICANT

VERSUS

PETER MWANGI WANJIRU.....RESPONDENT

RULING

By a motion dated 1st December, 2016, the applicant sought for an order of stay against the orders of the Co-operative Tribunal sitting at Nairobi in Tribunal Case No 567 of 2016 in which the respondent is named as the claimant while the applicant is the respondent. According to the motion, those orders were issued on 25th of November 2016. It is not clear on which application those orders were made but there is on the tribunal record a chamber summons dated 29th September, 2016 by the respondent seeking primarily for an injunction to restrain the applicant herein from selling, advertising or in any other way alienating or disposing the respondent's motor vehicle registration number KAX 978U and its trailer registered as ZD 0401 pending the hearing and the determination of the application.

According to the affidavit sworn in support of the motion herein by Joseph Kamau Njamuku, the applicant's chairman, the respondent obtained interlocutory orders, apparently in terms of the primary prayer for an injunction, when he appeared before the tribunal ex parte on 29th September, 2016. When the application came up for hearing on 18th October, 2016 neither the respondent nor his counsel appeared before the tribunal and so the interlocutory orders were vacated at the instance of the appellant/applicant's counsel. However, those orders were reinstated on 19th October, 2016; unfortunately, by the time the orders were reinstated, so the applicant's representative has sworn, the subject motor vehicle had been sold and therefore, as I understand him, the reinstatement of those orders was futile and of no consequence.

The respondent swore a replying affidavit stating that the motor vehicle in issue is in the custody of Ruiru police station and that what the applicant is seeking in this court is to perpetuate an illegality of disposing it in breach of lawful orders. In any event, so he swore the tribunal case is still pending and the proper forum where the applicant should have ventilated his grievances is at the tribunal.

I must say at the outset that I have found the applicant's application a bit perplexing. The motion together with the memorandum of appeal filed in court appear to impugn a ruling and an order of the tribunal dated or made on 25th November, 2016. Neither the ruling nor the alleged order was exhibited to the applicant's application. The omission of either of these two documents means that this court is unable to appreciate the gist of the ruling or the order impugned if at all they exist.

The only order I can see on record, which I thought may have aggrieved the applicant, is the order given on 19th October, 2016 reinstating the order that had been granted ex parte on 29th September, 2016. As a matter of fact, I found the affidavit in support of the summons and the applicant's learned counsel's submissions to have been directed against this particular order.

As far as I can gather from the applicant's affidavit, the only order that may have been made on 25th November, 2016 was the dismissal of the respondent's application dated 1st November, 2016. If the application was dismissed as alleged, I am left wondering whether the tribunal could have in the same breath made any orders that are prejudicial to the appellant. I wouldn't of course be in such a state of

uncertainty if the applicant had exhibited the ruling or the order given by the tribunal on the material date; suffice it to say, this omission does not help its cause.

Be that as it may, it appears to me, as far as I understand the applicant's application, the order by which it is aggrieved, irrespective of whether it is the one made on 18th October, 2016 reinstating an earlier order that had been discharged or whether it is the one made on 25th November, 2016, was made ex parte. This obviously, is a legitimate concern particularly if the tribunal made the order without regard of the state of the subject matter at the time it was made and if it is prejudicial to the applicant. But even then, I cannot understand why the applicant could not proceed to the same tribunal and move it for appropriate orders on the grounds, for instance, that it was condemned unheard or that the respondent suppressed material facts which, if they had been brought to its attention, the tribunal would have not made the order it made.

From what I can see the respondent's initial application for an injunction has not even been determined and the main suit is still pending. There would be nothing wrong, in my view, if the applicant raised the issues it has raised in this application in that suit including the issue whether the tribunal should entertain the respondent's suit when it was instituted when there was in existence a suit between the same parties contending over the same subject matter in the magistrates' court. I am of the humble opinion that the tribunal should be allowed to deliberate and determine these issues before they can be escalated to this court.

I would, in the circumstances agree with counsel for the respondent that the appellant's application is premature and thus misconceived. I hereby dismiss it with costs.

Dated, signed and delivered in open court this 28th April, 2017

Ngaah Jairus

JUDGE