



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 924 OF 2004

DR. GEORGE JOSIAH.....1ST APPELLANT

STEPHEN KIMANI KARUU t/a

KIRIIYU MERCHANTS.....2ND APPELLANT

VS.

AGNES KINYANJUI.....RESPONDENT

(Appeal from the Order of Honourable Principal Magistrate El Kindy at Nairobi

in CMCC No. 8180 of 2004 delivered on 6th September, 2004)

JUDGMENT

The Respondent was the Applicant in the trial Court where, on 26th July, 2004, she filed an application seeking among other orders that;

- (a)** There be an interim injunction stopping the 1st and 2nd Defendants from in any way interfering with, alienating, disposing off, transferring or otherwise affecting the Plaintiff's rights in Motor Vehicle Registration No. KAK 538K pending the hearing and determination of the suit herein.
- (b)** That there be a mandatory injunction directing the 1st and 2nd Defendants to deliver up to the plaintiff motor vehicle registration number KAK 538K to hold in her custody and power pending the determination of the suit herein
- (c)** That there be an order directing the 3rd Defendant not to effect any change of ownership of the motor vehicle registration No. KAK 538K pending the hearing and determination of the suit.

Amongst the grounds in support of the Application are that; the 1st and 2nd Defendants had under the colour of distress for rent against one **CHARLES KAHUTHU** unlawfully seized and converted the Plaintiff's Motor Vehicle No. KAK 538K. The application was supported by the Affidavit of **AGNES KINYANJUI** who deponed that she is the registered owner of Motor Vehicle Registration number KAK 538K and that she had allowed Charles Kahuthu the use of the said vehicle with instructions to him to return the same when so required.

The Appellants filed Grounds of Opposition dated 16th August, 2004 and a Replying Affidavit dated 13th August, 2004 which was sworn by **STEPHEN KIMANI KARUU**, an authorized class B auctioneer

trading as Kiriiyu Merchants. He deponed that he was instructed by the 1st Defendant's Advocates through a letter date 13th February, 2004 to levy distress against the 1st Defendant's tenant one Charles Kahuthu in settlement of rent arrears amounting to Kshs. 100,000/= . That the deponent attached the tenant's goods on 16th April, 2004 and a notification of sale was issued to the tenant on the same day but he refused to acknowledge receipt. That in the said Notification, the tenant had been given a grace period of 7 days within which he could redeem his goods by paying the outstanding rent arrears and auctioneers charges.

The said vehicle was sold via public auction on 30th April, 2004 and the Appellants informed the Defendants of the sale on 7th May, 2004. The Deponent further averred that every time he went to the said tenant's house he could find the subject vehicle and that neither the 1st Defendant nor 2nd defendant were in possession of the motor vehicle and could therefore not be ordered to deliver what they do not possess and as such, orders would be made in vain.

The trial magistrate made a ruling on 6th September, 2004 and ordered that the motor vehicle registration number KAK 538K be returned to the Applicant forthwith pending the hearing and determination of the suit and awarded costs to the Respondent herein.

Aggrieved by the trial magistrate's ruling, the Appellants filed this appeal on the following grounds:

- (i) That the Learned Magistrate erred in law and in fact in holding that the Appellants were liable for illegal distress pursuant to section 20 of the distress for rent Act, Cap 293 of the laws of Kenya.
- (ii) The Learned Magistrate erred in law and in fact in holding that the Appellants do restore motor vehicle registration number KAK 538K to the Respondent.
- (iii) The Learned Magistrate's Order was contrary to law and against the weight of evidence.
- (iv) The Learned Magistrate erred in law and in fact in failing to consider the merits of the Appellants' Replying Affidavit sworn on 13th August, 2004

This being the first appeal, the role of this court is to re-evaluate the evidence before the lower court and determine whether this appeal is to stand or not. In the case of **Ephantus Mwangi and Geoffrey Ngugi Ngatia v. Duncan Mwangi Wambugu [1982]-88 1KLR 278** the principle is that a Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on misapprehension of the evidence or the judge is shown to have acted on wrong principles.

The Appellants submitted that they followed the laid down procedure governing distress for rent under the provisions of the Distress for Rent Act, Cap 293 and that by the time the Respondent filed her claim in the lower court on 26/07/2004, the vehicle had long been sold. They further submitted that the order given by the lower court was a final order and left nothing to be canvassed in the case, they cited the case of **Diamond Trust Bank (K) Ltd Vs. Jaswinder Singh Enterprises (1992) 2 EA**, where the Court of Appeal held that a mandatory injunction cannot be granted if the effect of such an order would mean giving a party judgment without giving the other party a right of be heard. They also relied on the case of **Alex Wainaina t/a John Commercial Agencies Vs. Janson Mwangi Wanjihia (2015) eKLR**.

The Respondent also filed her written submissions and has argued that the Appellants did not comply with the procedure for distress for rent and that the respondent had served the Appellants with a statutory declaration which they ignored and instructed the Registrar of motor Vehicles to transfer the title in the said vehicle to a 3rd Party. The Respondent submitted that the mandatory injunction issued was in accordance with the law and cited the case of **Kenya Breweries Limited and Another Vs. Washington O. Okeyo Civil Appeal No. 332 of (2000) EA 109** where the Court of appeal stated that

“a mandatory injunction can be granted on an interlocutory application as well as at the hearing but in the presence of special circumstances ...”

I have read through the grounds of Appeal, the submissions and the evidence on record. The order being appealed against was issued following an interlocutory application filed by the Applicant/ the Respondent herein following which the court ordered that motor vehicle registration number KAK 538K be returned back to the applicant forthwith pending the hearing and determination of the suit. The Appellants contends that the learned Magistrate misapprehended the provisions of the distress for Rent Act (Cap 293) where he concluded that the distress was illegal and as a consequence he gave final orders at an interlocutory stage.

The Appellants have also argued that the tenant owed rent to the first Appellant at the time of distress and that the motor vehicle that was attached was in actual possession and use of the tenant and was lying in the demised premises. That, if the Respondent was aggrieved by the attachment, he ought to have followed the procedure prescribed under Section 19 of the distress for rent Act Cap 293.

The aforesaid Section requires the under-tenant or lodger or other person to serve the superior landlord or the licensed auctioneer or the agent employed by him to levy distress, with a declaration in writing by the under-tenant, lodger or other person, stating that the immediate tenant has no right to property or beneficial interest in the furniture, goods or chattels so distrained or threatened to be distrained upon.....

The Appellants submitted that after the said motor vehicle was attached, the tenant did not raise any objection to the attachment or distress and did not inform the Appellants that the vehicle did not belong to him.

Section 19(4) of the Distress for Rent Act Cap, 293 required the Respondent to apply to the court for determination as to whether the attached motor vehicle belonged to her.

The Respondent on her part contends that motor vehicle KAK 538K belongs to her and that it was unlawfully seized by the 2nd Appellant acting on the instructions of the 1st Appellant and was illegally transferred to a 3rd party one George Ndicho Mburu. That the Respondent's aforesaid motor vehicle was not supposed to be distrained as the tenant did not have ownership rights over the same.

The Respondent further contends that she issued a statutory declaration under section 19(l) (c) of the Distress for Rent Act dated 23rd April, 2004 and the same was served upon the Appellants.

The Respondent herein had sought a mandatory injunction. It is trite law that a mandatory injunction is a drastic remedy which ought to be granted with a lot of caution due to the finality of its nature. See the case of **Alex Wainaina T/a John Commercial Agencies Vs Janson Mwangi Wanjihia (2015) eKLR. (Supra)**

It is also trite that a mandatory injunction cannot be granted if the effect of such an order would be to give a party a final judgment without giving the other party a right to be heard. **See Diamond Trust Bank (k) Limited Vs Jaswinder singh Enterprises (1992) 2 EA.**

From the evidence on record, it is apparent that by the time the case was filed, the sale of the subject motor vehicle had already taken place via a public auction and the Respondent was well aware of that fact. It therefore means that at the time, the vehicle was not in possession of the Appellants but was in possession of a 3rd party who is not a party to the case.

I note that the orders by the trial Magistrate though addressed to the Appellants affected a third party notwithstanding that he is not a party to the suit. The Respondent averred that she issued a declaration and the Appellants went ahead and auctioned the vehicle in total disregard of the same. The Appellants have in response argued that the declaration was served on them long after the vehicle had been sold.

In my considered view, the issues raised in the suit before the lower court could only be determined upon hearing the parties and not at an interlocutory stage. As pointed out hereinabove, a mandatory injunction can only be granted in very clear cases and this is not one of such cases. As the Appellants have rightly

argued, the possession of the vehicle is in the hands of a third party who is not aware of the proceedings before the court. It also bothers me why the Respondent did not approach the court in good time to prevent the auction from taking place. She only did so after the vehicle had been sold. The court has also noted that it is over 13 years since the orders were issued and a lot could have happened to the vehicle the subject matter of the Appeal. It is also not lost on this court that at the conclusion of the matter, damages can also be an adequate remedy to any aggrieved party.

In the circumstances, the order that commends itself to this court is that the orders issued on the 6th September, 2014 are hereby set aside.

Each party shall bear its own costs of the Appeal

Dated, Signed and Delivered at Nairobi this 13th day of **October, 2017**

.....

L. NJUGUNA

JUDGE

In the presence of

.....*for the 1st Appellant*

.....*for the 2nd Appellant*

.....*for the Respondent*