



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 123 OF 2015**

**AGNES N. WANYOIKE.....APPELLANT**

**- V E R S U S -**

**SAFARI DEVELOPMENT CO. LIMITED.....1<sup>ST</sup> RESPONDENT**

**LEONARD NJOGU.....2<sup>ND</sup> RESPONDENT**

***(Being an appeal from the ruling and orders of the Chief Magistrate M.Chesang Mrs. Delivered on 18<sup>th</sup> August 2014 in Milimani Civil Suit no. 1790 of 2014)***

**JUDGEMENT**

1. Agnes N. Wanyoike, the appellant herein, filed a suit in the Chief Magistrate's Court, Milimani Commercial Courts at Nairobi against Safari Development Co. Limited and Leonard Njogu, the 1<sup>st</sup> and 2<sup>nd</sup> respondents herein respectively and asked for inter alia, an order for declaration as the owner of motor vehicle registration no. KAY 643G Toyota station wagon, an order of injunction to prevent the respondents from dealing with the said motor vehicle and a mandatory order of injunction to compel the respondents to restore the log book for the suit motor vehicle to the custody of the appellant.

2. It is stated by the appellant in the plaint dated 5<sup>th</sup> April 2014 that sometimes in the month of February 2014, she was contacted by individuals who claimed to be auctioneers namely Kindset Auctioneers and Auckland auctioneers who told her that they had instructions to seize her motor vehicle registration no. KAY 643G. The auctioneers claiming that their instructing client, the 1<sup>st</sup> respondent was owed ksh.600,000/= by the 2<sup>nd</sup> respondent who defaulted thus necessitating the forceful seizure of the aforesaid motor vehicle which the 2<sup>nd</sup> respondent had pledged as security.

3. The appellant then filed the notice of motion dated 3<sup>rd</sup> April, 2014 in which she sought for an order of injunction to restrain the respondents from seizing the suit motor vehicle pending the hearing and determination of the aforesaid motion.

4. Honourable M. Chesang, learned Senior resident Magistrate, heard and dismissed the motion on 18/8/14 where he held inter alia that:

**“..... it is clear and not in dispute that the applicant signed the transfer form of her motor vehicle in favour of the 2<sup>nd</sup> defendant who proceeded to obtain a loan on said motor vehicle from the 1<sup>st</sup> defendant. The applicant is a maker of her own misfortune and that the report of loss of her motor vehicle as shown on the police abstract marked Aw 2 was an afterthought made after auctioneers sought to re-posses the subject motor vehicle. The said report dated**

29<sup>th</sup> February 2014 was made whilst the applicant knew the whereabouts of her vehicle logbook and the registration number therein is reflected as 642G and not KAY 643G as shown on the face of the application. I see no merit in the applicants application and therefore dismiss the same.....”

5. The appellant being dissatisfied preferred this appeal and put forward the following grounds in its memorandum:

*1. The learned trial magistrate erred in law and in fact in failing to advert to and apply principles applicable to the issuance of injunctions.*

*2. The learned trial magistrate erred in law and in fact in failing to advert to detailed submission filed in court by the appellant.*

*3. The learned trial magistrate erred in law and fact in failing to capture the facts of the dispute, the issues for determination and render a reasoned determination of the issues.*

*4. The learned trial magistrate erred in law and in fact in failing to apply her discretion judiciously.*

6. 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. I have re-evaluated the case that was before the trial court. I have also considered the rival submissions.

7. The appellant had sought for inter alia an order for interlocutory order of injunction. Though the appellant put forward a total of four grounds, the main issue to be determined revolve around the question as to whether or not the application met the requirements for the grant of an interlocutory order of injunction.

8. The principles to be considered in such applications were laid down in the case of **Giella vs Cassman Brown & Co. Ltd (1973) EA 358** as follows:

*i. The applicant must make out a prima facie case with a probability of success;*

*ii. The applicant must show that if he is denied the order for injunction he would suffer irreparable loss which cannot be adequately compensated by an award of damages; and*

*iii. If there is doubt as to either of the above, the court would decide the application on a balance of convenience.*

9. The appellant submits that the trial magistrate’s ruling did not touch on the application before him and cited the case of **Giella –vs- Cassman Brown & Co. (Supra)**

10. The 1<sup>st</sup> respondent submits that the trial magistrate was right in his ruling and asked the court to uphold the same.

I have looked at the ruling of the trial court and upon a evaluation, it is clearly discerned that it did not address the issue of interlocutory injunctions as raised in the notice of motion dated 3<sup>rd</sup> April 2014 but instead the ruling address the issue of the appellant having signed the transfer of her motor vehicle in favour of the 2<sup>nd</sup> Respondent, who then proceeded to obtain a loan on the said motor vehicle. The ruling also states that the appellant only made a police report concerning her lost motor vehicle as an afterthought, this was made after auctioneers sought to re-posses the subject motor vehicle. The ruling did not address the applicants prayers as were set in the notice of motion, that gave rise to it.

In light of the circumstances obtaining in this case, am guided by the Court of Appeal observation in the

case of **Cassam –vs- Sachania 1982 KLR 191** that it was held inter alia that:-

***“.....An issue between the parties to an interlocutory application should not be decided at the application stage unless the material facts are capable of being fully established and the law is capable of being fully argued without the benefit of a trial.”***

11. I find merit in this appeal. The same is allowed. Consequently the order dismissing the motion dated 3.4.2014 is set aside. The motion is remitted back to the trial court to be heard by another magistrate of competent jurisdiction other than Hon.M. Chesang. Each party to bear its own costs of the appeal.

Dated, Signed and Delivered in open court this 8<sup>th</sup> day of December, 2017.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent