

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 615 OF 2015

NAPOLEON MURENDE.....APPELLANT

- V E R S U S -

AL HUSNAIN MOTORS LIMITED.....1ST RESPONDENT

TANGO AUCTIONEERS2ND RESPONDENT

RULING

1) Napoleon Murende, the appellant/applicant, took out the motion dated 15.12.2015 in which he sought for an order of injunction to restraining Al Hussein Motors Ltd and Tango Auctioneers, the respondents herein, from wasting, disposing transferring or dismantling motor vehicles registration no. KBZ 708Q, KBZ 066X and KBM 692M pending appeal. The motion is supported by two affidavits of the applicant. When served, the respondents filed a replying and a further affidavits of Mohammed Afzaal to oppose the motion. When the motion came up for interpartes hearing, learned counsels appearing in this appeal recorded a consent order to have the motion disposed of by written submissions.

2) I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the application. I have also considered the rival submissions. The background of this dispute can be discerned for the material placed before this court. The record shows that the appellant/applicant had filed an application similar to the current motion before the Chief Magistrate's Court. The aforesaid application was heard and dismissed. Being aggrieved, the appellant preferred an appeal before this court to challenge the dismissal order. The appellant has now applied before his court vide the motion dated 15.12.2015 for an interim order of injunction pending the hearing, and determination of this appeal.

3) It is the appellant's submission that the appeal raised strong grounds with high chances of success. It is further argued that unless the order for injunction is granted the aforementioned motor vehicles may be disposed of thus rendering the appeal as an academic exercise. The appellant said that he is willing to offer security this court deems fit. In response to the motion, the respondents were of the opinion that the appellant and the 1st respondent entered into an agreement where the appellant would purchase the aforesaid motor vehicles subject to him fulfilling the conditions set out in the agreement. Pursuant to the agreement, the appellant took possession of motor vehicles registration no. KBZ 708Q, KBM 692M and KBZ 066X upon paying a deposit of ksh.1,000,000/= and the balance to be liquidated in agreed instalments of ksh.922,000/= per month. The respondents also averred that the appellant breached the terms of the agreement by forwarding cheques which were dishonoured presentation to the bank. The respondents pointed out that the 1st respondent in the circumstances was entitled to repossess the motor vehicles under Clause 5 of the agreement.

4) After a careful consideration of the material placed before this court plus the rival submissions, there is no dispute that the appellant and the 1st respondent entered into a sale agreement over the aforesaid motor vehicles. It is also not in dispute that the appellant issued cheques which were dishonoured upon presentation to the bank. Under Clause 5 of the sale agreement, the 1st respondent was entitled to repossess the motor vehicles in case of default in payments. The question which this court must grapple with is whether the appellant's motion meets the requirements for issuance of a temporary order of

injunction. First, an applicant must show that he has a prima facie case with a probability of success. In this case the applicant avers that his appeal has triable issues with high chances of success. It is clear in my mind that the appellant breached one of the important clauses of the contract he entered with the 1st respondent who in turn has exercised its right to repossess the motor vehicles. In my view, it is extremely difficult in the circumstances to say that the appellant has a prima facie case with high chances of success.

5) The second principle to be considered is whether the applicant will suffer irreparable loss if the order for injunction is denied. It is apparent that the transaction between the parties herein is ascertainable in monetary terms. It cannot therefore be said that the appellant will suffer irreparable damage.

6) The third principle is that when the court is in doubt, it should apply the balance of convenience to determine the application. From the outset, this court is not in doubt. I will not therefore belabour taking into account this principle.

7) In the end, I find the appellant's motion dated 15.12.2015 to be without merit. It is dismissed with costs to the respondents.

Dated, Signed and Delivered in open court this 25th day of November, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent