



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 3 OF 2013

(An appeal from a ruling and order of the Senior Principal Magistrate's Court at Mombasa by the Honourable R. Odenyo (SPM) on the 20th December, 2013 in Mombasa RMCC 2307 of 2009)

SALIM MUSA ALI APPELLANT

V E R S U S

1. THOMAS M. MUTWIWA

2. FARJAWALA SHADAU AHMED

3. SALROB (E.A) LIMITED RESPONDENTS

RULING

1. **THOMAS M. MUTWIWA** (1st Respondent) the Plaintiff in **Mbsa RMCC No. 2307 of 2009** in execution of the decree he obtained against the Defendants in that case attached motor vehicle Registration No. KBM 800Z. An objection to that attachment was filed by Salim Musa Ali the Appellant herein. The Magistrate Court by its Ruling of 20th September 2012 dismissed Appellant's objection application. This appeal is against that dismissal.
2. Appellant has filed a Notice of Motion dated 21st January 2012 seeking injunction restraining 1st Respondent from selling, alienating, auctioning or advertising for sale motor vehicle Registration No. KBM 800Z pending the hearing and determination of this appeal.
3. Parties in error, in my view in submitting in respect of that application addressed the requirements of Order 42 Rule 6(2) where a party is required to show it would suffer substantial loss and where the Court can order security be provided. The application before Court however seeks injunction pending appeal as per Order 42 Rule 6(6). In deciding on that application I am of the view that the Court should be satisfied that the Applicant has met the set down principles of granting an injunction. Those are the principles that were laid down in **GEILLA -VS- CASSMAN BROWN CO. LTD (1973)EA 358**. Those principles would require the Appellant to show to the Court that it has an appeal with probability of success; that damages would not compensate loss that he would suffer if injunction was not granted. If the Court entertained any doubt on the first two principles it would decide the application by considering where the balance of convenience lies.
4. Appellant relied on the cases **JOSEPH MUNENE NDUACHO -VS- BILLY ATIENO OTIENO & 2 OTHERS [2011]eKLR** and **SECURICOR KENYA LTD -VS- KYUMBA**

HOLDINGS LTD [2005]eKLR. The decisions of the Court in those cases were to the effect that registration of the motor vehicle into a persons name was prima facie evidence of ownership of that motor vehicle. In other words that proof of ownership of motor vehicle can be otherwise than by registration with the Registrar of motor vehicles.

5. I have considered the application and the record of appeal before Court. In my view I entertain doubt on whether Appellant has shown that he has an appeal with probability of success. I do not wish to delve very much on why I hold that view because I do not wish to influence the Judge who will eventually hear this appeal. I also find that the Appellant would not suffer loss that cannot be compensated if an injunction is not granted. This is because the value of the car in question is quantifiable.
6. Having found that Appellant has failed to satisfy the first two principles of granting an injunction I shall proceed to consider where the balance of convenience lies. Appellant has stated that the vehicle in question is used as a family car. Although that vehicle was proclaimed by an auctioneer, it has not been sold. Even its value is quantifiable. I find the balance of convenience favour Appellant. It is for that reason that I will grant an injunction for a limited period.

7. I grant the following orders-

a. An injunction is granted restraining the 1st Respondent

his servants or agents from selling or alienating motor vehicle Registration No. KBM 800Z pending the hearing of this appeal OR for 6 months whichever occurs first.

b. The costs of Notice of Motion dated 21st March 2013

shall abide with the outcome of this appeal.

Ruling by:

MARY KASANGO

JUDGE

DATED and DELIVERED at MOMBASA this 27TH day of FEBRUARY, 2014.

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JUDGE