



REPUBLIC OF KENYA

High Court at Nakuru

Civil Appeal 186 of 2012

**AFRIC PAK MOTORS LTD.....APPLICANT
VERSUS
ELIZABETH WANJIRU NGATIA.....RESPONDENT**

RULING

The Notice of Motion dated 19/2/2013 is brought pursuant to **Sections 1A, 1B** and **3A** of the **Civil Procedure Rules** and **Order 42** of the **Civil Procedure Rules**. It is the applicant's prayer that pending the hearing and determination of the intended appeal, this court be pleased to issue an order of stay of execution of the ruling delivered on 19/10/2012 and any other consequential orders. The applicant also prays for costs of the application.

The application is premised on grounds found on the face of the application and the affidavit of Mohammad Nisar Ahmad, the Director of Afric Pak Motors Ltd, the appellant/applicant herein. The applicant's case is that on the applicant sold to the respondent the motor vehicle KBQ 165B for a sum of Kshs.750,000/-. The respondent paid a deposit of Kshs.350,000/- and the balance of Kshs.400,000/- was to be paid by monthly instalments of Kshs.80,000/- The parties signed a sale agreement dated 18/11/2011 (MNA5). The respondent failed to pay any instalment and all the cheques she issued were dishonoured for insufficiency of funds. As a result the applicant repossessed the vehicle. On 13/7/2012, the respondent filed HCC 799/2012 and sought orders for temporary and mandatory injunctions to issue against the applicant and on 19/10/2012 the trial magistrate issued a mandatory injunction compelling the applicant to release the vehicle to the respondent (MNA1). The applicant was aggrieved by the said ruling and filed a memorandum of appeal on 24/10/2012. The applicant's advocate filed an application for stay and the court delivered its ruling on 15/2/2013, disallowing the application for stay (MNA6). It is the applicant's contention that it will suffer substantial loss since the mandatory injunction was unconditional and it means the vehicle be released to the respondent without any security; that the respondent can dispose of the subject vehicle or deal with it in a manner detrimental to the applicant; that the appeal has high chances of success in that the mandatory injunction was issued at an interlocutory stage contrary to the principles applicable to the grant of such order at an interlocutory stage in that it should be issued in the clearest and uncontroverted cases; that the respondent is not a person of means as captured in the trial court's ruling that the vehicle is the only tool of trade for the respondent; and that if the appeal succeeds the applicant will not be able to recover the outstanding amount.

The application was opposed and a replying affidavit was sworn by Munene Muiyuro, the respondent's advocate. He deponed that the application is an abuse of the court process, meant to delay fair trial of the respondent's case because the applicant has no locus standi in the matter because the seller of the vehicle was one Wasim Iqbal but not the plaintiff; that the respondent will suffer irreparable loss if the stay is granted as the subject vehicle is the applicant's tool of trade; that the sale was a credit sale and property passed when the deposit was paid and repossession could only be done upon the issuance of a court order; that no chattels mortgage was ever registered and therefore the appeal will not have any merit. Counsel also argued that the applicant has not provided any security for costs. Counsel relied on the decision in

Pals Car Ltd. V CMC Motors Group Ltd in which he said the facts were similar to this case in that a vehicle was unlawfully attached and a mandatory injunction was issued and the court said there should have been a court order if there was no Hire Purchase Agreement or Chattels Mortgage. In reply, Mr. Kisila urged that the replying affidavit is sworn by an advocate who cannot depose to whether or not the respondent will suffer loss or how the vehicle is used. He also urged that the issue for determination will be whether the act of repossession was legal and before that is done, the status quo must be maintained. Counsel also distinguished **Pals Car** case from the instant one in that the parties therein were jointly registered owners and the rights of one person would not be taken away while that in this case, the respondent does not have any registered interest in the vehicle. For the court to grant the order of stay under **Order 42 Rule 6** of the **Civil Procedure Rules** sought, the applicant has to demonstrate:-

1. **That the application has been filed without unnecessary delay;**
2. **That if the order of stay is not granted the applicant will suffer substantial loss;**
3. **The applicant should offer security for costs;**
4. **For any other sufficient reason.**

This is the second application for stay. After the trial court issued a mandatory injunction on 19/10/2011, the applicant sought an order of stay of the order but in a ruling dated 15/2/2013, the trial court declined to grant stay. The applicant moved with speed and filed the instant application on 19/2/2013. There was no delay in filing this application.

I have read the decision of the trial court. One of the reasons why it granted a mandatory order of injunction is because the applicant had not demonstrated that it was the seller of the vehicle but that one Wasim Iqbal. I have seen the annexed sale agreement, written on the letter head of Afric Pak Motors Ltd. The applicant also exhibited copies of cheques issued to Afric Pak Motors that were dishonoured by Equity Bank and which were issued to it by the respondent. The question is, why would the respondent issue cheques to the applicant if it had not sold anything to the respondent. It is only at a hearing that it can be determined why Wasim Iqbal is indicated as seller. It is the applicant's case that the respondent only paid a deposit of Kshs.350,000/- and from 18/11/2011, the respondent failed to make any other payment. As the respondent continues to use the vehicle, it continues to depreciate and the vehicle may be put beyond the reach of the applicant and there is no guarantee that the vehicle will still be available at the time the case will be heard. The applicant would therefore suffer substantial loss.

The respondent's counsel has deponed that the vehicle is the respondent's only tool of trade meaning she has no other means. It means that if anything was to happen to the vehicle, the respondent will not be able to pay back the applicant and the applicant may suffer irreparable loss.

At paragraph 10 of the affidavit sworn by Ahmad, the applicant is willing to provide any security as the court may advise. The issues that will be determined on appeal are whether the court properly considered the principles for the grant of mandatory injunctions; ultimately, the court will consider whether the applicant sold that vehicle to the respondent; whether the respondent has paid up for the vehicle and whether the repossession was unlawful, or should there have been a court order before repossession. Meanwhile the subject matter must be preserved. For the above reasons, I am satisfied that the applicant has demonstrated that an order of stay is merited and I hereby grant an order of stay of the order issued on 19/10/2011. I direct that the motor vehicle do remain with the applicants pending hearing and determination of this appeal and the applicant is restrained from selling, disposing of or in any way dealing with the motor vehicle or in any manner detrimental to the rights of the respondent or any other interested person. The costs to abide the appeal.

DATED and DELIVERED this 15th day of May, 2013.

R.P.V. WENDOH
JUDGE

PRESENT:

Ms Mbugua holding brief for Mr. Kisila for the applicant

Mr. Munene for the respondent
Kennedy – Court Clerk