



ORIGINAL

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 66 OF 2013

EUNICE AKELLO OGOLLA.....APPELLANT

VERSUS

NGAO CREDIT LTD.....1ST RESPONDENT

PAMBO INVESTMENTS.....2ND RESPONDENT

RULING

1). The applicant's notice of motion dated 8-8-2013 prays for stay of the ruling delivered by the learned trial magistrate dated 24-7-2013 in which he ordered motor vehicle Reg. No. KBK 679K do remain within the jurisdiction of the court pending the determination of the suit.

2). The application is supported by the applicant's sworn affidavit dated 8-8-2013. The gist of the applicant's application is that the trial court failed to determine the validity of the Chattels Mortgage the subject in dispute. According to her the said instrument was forged and used to secure the loan.

3). What is interesting further is that the applicant despite this went ahead to pay a total sum of Kshs. 135,000/= which she has admitted.

The respondent has opposed the application. Mr. Kirenga counsel for the respondent argued that there was nothing executable as the magistrate ordered a preservation of the motor vehicle pending the determination of the suit which he ordered the same to be fixed for hearing.

4). This court at this juncture is not seized of the matter in terms of full appeal but its basically to analyse the issues as provided and guided by the provisions of order 42 of the Civil Procedure Rules.

Does the applicant stand to suffer any irreparable harm and loss and will the appeal be rendered nugatory, should the application be denied?

5). The question of whether the Chattels Mortgage is valid or not or whether it was registered per the provision of the Chattels Mortgage Act Chapter 28 is a subject of full hearing. What I note is though is that one Glenn Makindu whom the applicant guaranteed is not a subject of this appeal.

6). The lower court's ruling was meant to preserve the suit motor vehicle. Counsel for the respondent argued that the same was in safe hands and that the matter should be allowed to full trial.

7). I do not think that the trial court erred in anyway. Given the circumstances obtaining the best thing

was to preserve the available security. As noted above the applicant has made on admitted payments of Kshs.135,000/=. Mr. Makindu, the applicant's brother-in-law was to pay the balance.

8). Putting all the issues into perspective from the respondents argument there is an outstanding balance of Kshs.497,625/= which I take it that the same includes accrued interest.

In the interest of justice and in allowing the application, I do make the following orders:-

- a. **The motor vehicle Reg. No. KBK 679K Toyota station wagon be and is hereby released on a running attachment on condition that the applicant do deposit in court the sum of Kshs.400,000/= within the next 30 days from the dated herein.**
- b. **The applicant shall pay the auctioneer's charges to be agreed upon or taxed.**
- c. **In default the original lower court order shall revert.**
- d. **Costs of this application to the respondent.**

Dated, signed and delivered at Kisumu this 24th day of September, 2013.

**H.K.
JUDGE**

CHEMITEI

HKC/va