No. 018/12

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

Civil Appeal 21 of 2011

1. KISINGU JULIUS & NYERI

2. MOTORS SERVICES LTD………………...……..APPELLANT/APPLICANT

VERSUS

JACKSON KIOKO KATIMU……………………………………...RESPONDENT

RULING

1. By an Amended Notice of Motion dated **08/03/2011** and filed on the same day ("Application"), the Appellants herein, **Kisingu Julius** and **Nyeri Motors Services Limited** ("Appellants") seek the following orders:

a. That the Application be certified urgent and be heard *ex parte* in the first instance;

b. That pending the hearing and determination of the Application *inter partes* a temporary injunction be granted restraining the Respondent from attaching the Appellants' motor vehicle registration number KBL 138D;

c. That pending the hearing and determination of the appeal herein the Respondent be restrained by injunction from attaching the Appellants' motor vehicle registration number KBL 138D;

d. That pending the hearing and determination of the appeal herein there be a stay of execution of the decree passed on 25/03/2009 together with warrants of attachment issued therefrom on 30/09/2010 as against the appellant herein.

2. The uncontested facts giving rise to this dispute can be easily stated. The Respondent herein, **Jackson Kioko Katimu,** is the original Plaintiff in **Civil Case No. 904** at the **Chief Magistrate's Court at Machakos**("Original Suit"). That case was against **Major Musyoka Ngati** ("First Defendant in the Original Suit") and **David Muthama Nthulu.** The Respondent prevailed in that case and with the judgment unsatisfied, sought to execute after obtaining the warrant of execution. In particular, the Respondent's agents sought to attach motor vehicle registration number **KBL 138D** by proclaiming it. Upon the proclamation, the Appellants promptly moved to court to object pursuant to the provisions of Order 21 rules 56 and 57 of Civil Procedure Rules. They sought orders lifting the proclamation against motor vehicle registration number KBL 138D on the ground that the motor vehicle belonged to them (the Appellants) and not the original defendants in the suit (the judgment debtors). They also contended that

they had no obligation legal or otherwise to settle the judgment debtor's indebtedness.

3. The objection application was heard by the **Hon. Chief Magistrate B.T. Jaden** (as she then was) and was objected to vigorously by the Respondent. At the end of the hearing, the *Hon. Jaden* issued a ruling dismissing the application. Completely dissatisfied with the dismissal, the Appellants moved to this Court. They timeously filed a Memorandum of Appeal dated 07/03/2011 and simultaneously filed the present Application.

4. As I see it, there are two issues for determination. The first one is whether this is an apt case for the exercise of the court's jurisdiction under Order 42, Rule 6(6) to issue a temporary injunction pending the hearing of the appeal. The second issue would be if the first one is decided in the affirmative whether such an injunction should be granted in the specific circumstances of the case.

5. The Appellants argue that this is a proper case for invoking Order 42, Rule 6(6). They rely on the cases of *Morris Kinyua Waithaka & Others v Kenya Credit Traders Limited* [2008] eKLR and *Jackson Kathurima Rukaria v Kenya Power & Lightning Co. Ltd* (Civil Appeal No. 60 of 2006)(unreported). In these cases, Justices Okwengu and Njagi, respectively, held that the High Court had discretion to issue injunctions pending the hearing of an appeal.

6. The Respondent is doubtful. His position as expressed in the Written Submissions by his advocates, is that the Appellants should have come to court vide Order 42, Rule 6(1). If they had done so, the Respondent argues, their application would have been dismissed because it does not meet the threshold stipulated in Order 42, Rule 6(2) as explained by numerous authorities including *Standard Assurance Co. Ltd v Alfred Muema Komu* (Machakos HCCC No. 186 of 2007 (unreported)).

7. When is an Appellant entitled to seek an injunction under Order 42, Rule 6(6) as opposed to a stay of execution under Order 42, Rule 6(1) and (2)? I do not propose to respond to that question exhaustively here in part because the parties have not fully addressed the Court on the question, and in part because I have concluded that ultimately, it is unnecessary to answer the jurisprudential question in order to determine the Application before the Court. Suffice it to say this is a proper case for coming under Order 42, Rule 6(6) because there is really nothing to stay to warrant an application under Rule 6(1) and (2). What is being appealed against is a dismissal of Objection proceedings. There is no decree that will be extracted and executed against that dismissal which is capable of being stayed. The decree in place is one for the original suit in which the present Appellants are not privy. As such, the Appellants are justified in seeking an injunction to protect their property rather than a stay of execution which would be inadequate to protect their interests. Whatever the outer limits of Order 42, Rule 6(6), I find that this is a proper case to be brought thereunder.

8. Have the Appellants, then, satisfied the conditions for grant of the injunction they seek? As Justice Njagi stated in the *Jason Kathurima Rukaria Case* (supra), the standard for granting an injunction under Order 42, Rule 6(6) is the same one as for granting temporary injunction pending the hearing and determination of a case at trial. That standard is the familiar one stated in the eternal case of *Giella v Cassman Brown* [1973] EA 358. In order to be entitled to an injunction, a party must demonstrate:

a. That it is likely to prevail on the merits;

b. That it will suffer imminent irreparable harm if the injunction is not granted; and

c. The harm the Applicant is likely to suffer absent the injunction outweighs the harm it would cause to the adverse party.

9. On the first *Giella* factor, the Court cannot do anything more than simply form a provisional view of the case in order to render a tentative judgment on the likelihood of success. It is probably more accurate in appeal cases such as this one to ask if the intended appeal is an arguable one. In this case, the Appellants' main line of attack against the decision of the Learned Magistrate is that she erred in holding that the Appellants had not proved that they owned motor vehicle registration number **KBL 138D** in the

face of the *Chattels Mortgage Instrument* a copy of which they produced. They complain that by relying on the photographs of the vehicle produced by the Respondent showing the names of the First Defendant in the Original Suit inscribed on the side of the vehicle, the Learned Magistrate had torpedoed the hierarchical relationship between the Traffic Act as primary legislation and the Traffic Rules as subsidiary legislation. Consequently, the Appellants have overwhelming chances of success on appeal.

10.It is important to set out the evidence on record and the reasoning of the Learned Magistrate to understand the Appellants' argument. Below, the Appellants attached a copy of Chattels Mortgage and Copy of Records which both showed the Appellants were, jointly, registered as the owners of the vehicle. Their straightforward case before the Learned Magistrate was that as the owners of the vehicle, and as persons without any obligation whatsoever to settle the indebtedness of the First Defendant in the Original Suit, the proclamation over motor vehicle registration number KBL 138D should be lifted and set aside. They relied on section 8 of the Traffic Act which provides that:

A person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner.

11.In the court below, the Respondent opposed the Appellants' application and insisted that motor vehicle registration number **KBL 138D** belonged to the First Defendant in the Original Suit. He put on the record photographs of the motor vehicle with the clearly inscribed names: "Musyoka Ngati # 180 Makueni**."** The pictures also showed the trading name of the motor vehicle as "Kako Joy." The Respondent argued before the Learned Magistrate that these photographs demonstrated that the First Defendant in the Original Suit was the true owner of the motor vehicle and that the application to set aside the proclamation was an attempt to prevent the Respondent from benefiting from the fruits of their judgment.

12.In a ruling dated **02/03/11**, the Learned Magistrate dismissed the Appellants' application. In doing so, the Learned Magistrate started her analysis with section 8 of the Traffic Act cited and reproduced above. She noted that while it is true that the Appellants were registered as the owners of the motor vehicle, there was contrary evidence showing the First Defendant in the Original Suit was, in fact, the real owner. That evidence is, primarily, the photographic evidence referred to above. The Learned Magistrate, in material part of her ruling reasoned:

However, the Decree Holder [Respondent] has given affidavit evidence that the motor vehicle belongs to the 1st Defendant as reflected by the annexed photographs that clearly show the name of the 1st Defendant on the motor vehicle. The counsel for the Decree Holder has contended that the name of the 1st Defendant is reflected in the motor vehicle in accordance with rule 55 of the Traffic Act.

It seems to me that the issue of the name reflected on the motor vehicle ought to have been explained by way of affidavit evidence. I have also noted that the chattel instrument (annexture KJ2) is dated 01/04/10. Judgment herein was delivered on 25/03/09. No logbook has been exhibited. One wonders who the owner of the motor vehicle was before 01/04/10.

13.The Learned Magistrate proceeded to dismiss the Appellants' application on the ground that they had not proved on a balance of probabilities that they had legal or equitable rights over the motor vehicle.

14. I have set out at length the reasoning of the Learned Magistrate because I am required to form a provisional view if the Appellants' appeal has a likelihood of succeeding on the merits. I have concluded that it does not. In my view, the Learned Magistrate was entitled on the strength of the evidence on record to conclude that, on balance, the Appellants had not proved equitable or legal ownership of the motor vehicle. The Learned Magistrate was correct in reasoning that section 8 of the Traffic Act only creates a presumption that the person registered is the owner of the motor vehicle but that presumption can, and was in this particular case, rebutted by other evidence. In her view, that presumption was rebutted by the affidavit evident of the Respondent, which, among other things, annexed the photographic evidence referred to above. By holding that the name inscribed on the body of the motor vehicle pursuant to rule 55 of the Traffic Rules was a factor in demonstrating that the First Defendant was the owner of the vehicle in the absence of an explanation by the Appellants, the Learned Magistrate did not, as the

Appellant claims, elevate the Traffic Rules above the Traffic Act. On the contrary, she read rule 55 of the Traffic rules together with section 8 of the Traffic Act.

15.I note that both below and here, the Appellants have not offered any explanation at all for the curious inscription of the First Defendant’s name on the motor vehicle. It is also noteworthy that the Appellants have not denied knowing the First Defendant. Indeed, while denying they do not answer for his debts, they have not disclosed at all what their relationship with the First Defendant is. For all these reasons, I am not persuaded that the Appellants have a likelihood of succeeding on merit in their appeal.

16.I am entitled to end my analysis here since the law is that the conditions for granting an interlocutory injunction are sequential so that the second *Giella* factor can only be addressed if the first one has been satisfied, and when the Court is in doubt, the third *Giella* factor can be addressed. (See *Kenya Commercial Finance Co. Ltd v. Afraha Education Society* [2001] 1 E.A. 86. Even if I was less sure on that score, the Appellants would fail on the other two *Giella* factors for the following reasons. The subject matter of the Application is a motor vehicle. This is a chattel whose value can be easily ascertained. If it turns out that the proclamation and any subsequent attachment and execution is wrongful, the Appellant should be able to recover all their losses. Although the Appellants claim the differing value of the motor vehicle quoted in the chattels’ mortgage documents and the Proclamation shows the loss to the Appellants will be unquantifiable, I am not persuaded that proves that the motor vehicle’s value cannot be ascertained with reasonable precision. Further, by the Appellants’ own admissions, all losses they would suffer if the Application is not granted are financial in nature and will flow from the non-payment as per the repayment schedule. By definition, a repayment schedule is quantifiable: it is a set amount. Any penalties or interests triggered by the non-payment can also be similarly calculated.

17.I am also not persuaded that the balance of convenience tilts in favor of the Appellants here. The Respondent is entitled to the fruits of his judgment in the Original Suit. Prima facie evidence shows the proclaimed motor vehicle belongs to the First Defendant and should therefore be attached and executed to pay the judgment debt which remains unpaid. The fact that the attachment will affect the Appellants’ economic fortunes does not warrant the Court’s weighing the Appellants’ economic interests above the Respondent’s fundamental right to realize the fruits of his judgment.

18.In the end, therefore, I find the Application to be without merit, dismiss it accordingly, and discharge all the subsisting interim orders herein. The Appellants shall also pay the costs of this Application

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this day **23RD** day of **JANUARY 2012**.

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J.M. NGUGI
JUDGE