



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. 168 OF 2010

MACHARIA WAIGURU.....APPELLANTS

Versus

MURANG'A MUNICIPAL COUNCIL1ST RESPONDENT

MURANG'A MOTOR SPARES.....2ND RESPONDENT

RULING

The application before the court is one dated 17th May 2011. The Respondents having been served with the hearing notices thereon did not appear and therefore the application preceded *exparte*.

The notice of motion herein is brought under order 42 rule 32 order 21 rule 3(3) section 201(A) of Local Government Act and all other enabling acts in which the applicant seeks orders that:

- a. This honourable court order the 1st respondent to produce their parking bye-laws and to confirm that they have complied with section 201A of the Local Government Act.***
- b. The court do order the second respondent to tow motor vehicle registration number KSZ 892 Nissan Datsun back to where they had towed it from on 19th December 2009 in condition it was in by that time plus its content.***
- c. The court be pleased to order the Principle Magistrate court Murang'a to assess damage as to this case.***
- d. Cost of this appeal to be borne by the Respondents.***

The application is supported by the affidavit of Macharia Waiguru the applicant sworn on 17th May 2011.

The respondents responded to the said application by a replying affidavit by Mr. Kimwere Josephat filed on 21st September 2011 grounds of opposition and preliminary objection filed on the same date in which the same states that the application is not based on any law and is not suitable that there is a

pending application and that the application is premature as the appeal has not been served and no direction taken thereon. This is in respect to the first respondent while the second respondent has filed a replying affidavit through its director Mr. SALIM SUMAR sworn on 15th November 2011 in which he alleges that the applicant did not establish any case against the second respondent.

Before going into the merits of the application herein it is necessary to set the brief history of this matter.

The appellant on 30th December 2009 filed an application under certificate of urgency before the Murang'a Principal Magistrate's court being civil case No. 415 of 2009 seeking order to inspect car registration number KSZ 892 Nissan Datsun which then was laying at the 1st respondent's premises in Murang'a town having been taken there by the second respondent and to return Ksh. 300,000/- hidden in the car by the applicant and that the respondent give reason why the car should not be released.

On 31st December 2009 the application was allowed in terms of prayer (a) with the appellant being given the liberty to inspect the said motor vehicle.

On 5th January 2010 the appellant again moved to court under notice of motion to be allowed to enter the 1st Respondents premises and take away car registration number KSZ 892 Nissan Datsun. These applications were withdrawn on 1st March 2010 and on 14th April 2010 the main suit proceeded for hearing after which the plaintiff case was dismissed by the trial court on the basis that the appellant had not pleaded Ksh. 300,000/- neither had he proved the loss thereof. The court further held that the appellant had not proved his loss of user claim.

Being dissatisfied by the said judgment on 30th September 2010 the appellant filed a memorandum of appeal in which he pleaded the following grounds of appeal.

- 1. That the trial magistrate side stepped the main issue in the application dated 30th December 2009 which has the illegality of the defendant's action.**
- 2. In the absence of any evidence from the defendant the court had no alternative but to enter judgment against them.**
- 3. The question of Ksh. 300,000/- did not arise at the hearing as by this time the subordinate court had already issued an inspection order to the plaintiff to enter 1st defendants premises and ascertain whether the Ksh. 300,000/- was still there and having ascertained that it was not the court allowed the plaintiff to amend the plaint to claim for Ksh. 300,000/- as special damage.**
- 4. The court failed to take into account that there being no conditions limiting the inspection as provided to by the law the owner of the money Stephen Mwangi Kimani accompanied the plaintiff during inspection and ascertained that the money was missing. It was therefore unnecessary to call him as a witness as he has stated in his affidavit attached herein.**
- 5. The magistrate completely disregarded the law in that as the defendants did not produce any law or regulation either to back their claim for obstruction or payment of parking fee.**

b. The court is condoning illegalities by shouldering the defendant to avoid being questioned on the disappearance of Ksh. 300,000/- and not give evidence and also to avoid being questioned to how the notice relating to car registration No. KSZ 892 was back dated.

c. The magistrate failed to follow the sequence of events brought about by his own order of inspection and subsequent events.

d. The magistrate failed to follow the sequence of events brought about by his own orders and giving half baked remedies regarding the 2nd defendant.

On 6th October 2010 the appellant filed an application under certificate of urgency a notice of motion under order XLI rule 21 and 27 seeking orders for the release of the appellant's car registration no. KSZ 892 Nissan Datsun having failed to give any reasons for its detention and having failed to defend itself or give any lawful reason for detaining it. That this honourable court be pleased to assess damages for wrongful detention of motor vehicle registration no. KSZ 892, that this honourable court be pleased to order that this case and any other case involving the appellant and or defendant be handled by any other magistrate except the I.K. Orege Resident Magistrate, Murang'a. This honourable court does order that the police make further investigations into the origin of the notice relating to the car registration no. KSZ 892 which was backdated and the disappearance of Ksh. 300,000/- which was in the car and that this honourable court orders the Murang'a court to forward its original file in PMCC No. 415 of 2009 to enable this court pronounce judgment therein and set aside the judgment of Murang'a court.

This application was directed to be served for interpartes hearing and from the records it seems that the same is still pending and the applicant has not given any valid explanation on the status thereof. This position is confirmed by the advocate for the first respondent in paragraph 6 of his replying affidavit.

Though the application was not opposed when it was argued before me, the issue for the court to determine is whether the court while exercising its appellate jurisdiction can grant the orders sought and whether the applicant has met the conditions for the grant of orders sought.

As pointed herein above in the absence of an explanation by the applicant on the status of the application dated 7th November 2011 I am of the considered opinion that the present application before the court is an abuse of the court process as the applicant ought to have prosecuted his application herein or in the alternative withdraw the same before filing the current application.

Order 42 rule 32 under which the application is tendered states as follows:

"The court to which the appeal is preferred shall have powers to pass any decree and make any orders which ought to have been passed or made and to pass or make such further or other decree as the case may require and his power shall be exercised by the court notwithstanding that the appeal is as part only of the decree and any of the respondents although such respondent may not have filed any appeal or cross appeal."

To my mind this power can only be exercised by this court once appeal has been heard and determined in exercise of the powers conferred to this court by section 78(1) of the Civil Procedure Act. I further take the view that the orders sought in prayer 'A' is of the nature of taking additional evidence and the applicant ought to certify the court that the conditions set in respect of the same have been met. Prayer 'B' is in the nature of a mandatory injunction and taking into account the submission before this honourable court I am of the view that orders sought herein can only be granted upon the appeal herein being heard and determined.

I am therefore of the considered opinion that the application herein lacks merit and dismiss the same being an abuse of the court process with no orders as to cost.

Dated and delivered at Nyeri this 10th day of February 2012.

J. WAKIAGA
JUDGE

