



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS) Civil Appeal 596 of 2009

AGNES NDINDA MALUNDU.....APPLICANT

VERSUS

FAMILY FINANCE BUILDING SOCIETY.....RESPONDENT

RULING

1. By an amended notice of motion filed on 25th November, 2009, Agnes Ndinda Malundu, (hereinafter referred to as the applicant), has sought several orders. Prayers Nos.(i), (ii) and (iii) are spent and this court is now called upon to determine prayers Nos. (iv), (v),(vi) and (vii), which are as follows:
 - (iv) That upon the *inter partes* hearing, this Honourable Court be pleased to grant an order for injunction to restrain the respondent whether by themselves their servants or agents, or employee or any of them from alienating, transferring, disposing or selling by public auction, or otherwise howsoever dealing with motor vehicle registration number KAQ 494H, Toyota Station Wagon pending the hearing and determination of this appeal.
 - (v) That upon the *inter partes* hearing this Honourable Court be pleased to grant an order for injunction to restrain the respondent from disposing of or in any other manner whatsoever interfering with the plaintiff's title to property known as LR No.111/601 whose title document is currently being held by the respondent pending the hearing and determination of this appeal.
 - (vi) That this Honourable Court be pleased to grant a mandatory order for injunction to compel the respondent to release both the motor vehicle registration number KAQ 494H and title document to LR No.111/601 to the applicant pending the hearing and determination of this appeal.
 - (vii) That the cost of this application be provided for.
2. The applicant who is aggrieved by a judgment which was delivered in the Chief Magistrate's Court at Nairobi in Civil Suit No.7962 of 2006, has lodged an appeal against the said judgment. The subject of the suit and appeal is motor vehicle KAQ 494H (hereinafter referred to as the said vehicle). The applicant contends that the respondent has repossessed the said vehicle and now intends to sell the vehicle at a public auction which was scheduled for 4th November, 2009. The applicant fears that should the said vehicle be sold, the applicant's appeal which has a high probability of success will be rendered nugatory. The applicant maintains that should that happen he will suffer substantial loss.
3. The applicant further complains that the respondent is illegally holding the applicants title documents to the applicant's property known as LR.No.111/601, and the applicant is apprehensive that the respondent may dispose of the said property illegally. The applicant maintains that he has cleared off all the loans that he was holding with the respondent, except for a car loan which is in dispute, and therefore there is no justification for the respondent continuing to hold the applicant's documents of title to the said property.
4. Family Finance Building Society Ltd, (hereinafter referred to as the respondent), has opposed this application through a replying affidavit dated 13th November, 2009, sworn by its debt recovery manager, Harun Ngethe Njuguna. Njuguna depones that the respondent has lawfully taken possession of the said vehicle, as it was entitled to do so in recovery of monies owed to it by the applicant. Njuguna swears that the applicant owes the respondent a sum of Kshs.518,385.20, which continues to attract interest at the rate of 18% per annum. He therefore maintains that if the orders sought are granted, the amount outstanding will accumulate

and the applicant may be unable to pay the same by the time the appeal is concluded.

5. In support of the application, Miss Nungo argued that the applicant has an arguable appeal as there is contradiction in the judgment regarding the application of the Human Resource Manual. She urged the court to issue the orders sought in order to preserve the subject of the appeal.
6. Mr. Mbigi who appeared for the respondent submitted that the Human Resource Manual was not part of the applicant's contract of employment. He further submitted that the property known as LR.No.111/601, was security for other loans, and was not subject of the proceedings in the lower court. Mr. Mbigi maintained that the prayer for mandatory injunction was misconceived as the respondent is the co-owner of the subject vehicle, and by granting the orders sought prejudice would be caused to it.
7. I have carefully considered the application, the affidavit in support and in reply and the annexures thereto. It is evident that the subject of the suit in the lower court was motor vehicle KAQ 494H, which the respondent had repossessed. Neither the applicant nor the respondent appeared to have made any reference or sought any orders in the lower court with regard to property known as LR.No.111/601.
8. The application being one for an order for interlocutory injunction pending the hearing of an appeal it is incumbent that the appellant satisfies the court that he has a bona fide case in the form of an arguable appeal with regard to the orders sought. Property Known as LR No.111/601 not having been the subject of the suit in the lower court it cannot be subject of orders of stay pending appeal as no arguable appeal can arise in respect of that property. In the circumstances, the applicant's prayer for interlocutory and mandatory injunction in respect of property known as LR.No.111/601 is misconceived.
9. With regard to the subject motor vehicle, it is evident that the dispute between the applicant and the respondent which was subject of the judgment in the lower court revolves around it. It is not disputed that the applicant purchased the subject vehicle through a car loan facility from the respondent. The applicant however maintains that any loan outstanding in respect of the car loan, was offset from the terminal dues due to her from the respondent.
10. On its part, the respondent maintains that the applicant's terminal dues were not sufficient to offset the loan. There is therefore an issue as to whether the applicant owes the respondent any money, and whether the respondent has the right to repossess and sell the subject motor vehicle. These are issues to be determined during the hearing of the appeal. Suffice to state that the appeal is arguable and unless the orders sought are granted, the subject vehicle may be sold and the substratum of the appeal may be lost.
11. In addition to the order of interlocutory injunction, the applicant has sought an order of mandatory injunction for the release of the subject vehicle to him. However the applicant has not demonstrated any compelling or special circumstances to justify the release of the motor vehicle to him before the dispute surrounding the subject vehicle is finally determined.
12. The respondent's position is that it is entitled to repossess and sell the motor vehicle to recover its money. Should the respondent be right, an order for interlocutory or mandatory injunction, in respect of the subject vehicle would prejudice the respondent. It is therefore necessary for this court to protect the interest of both parties. Accordingly I make the following orders:
13. That an order for interlocutory injunction in terms of prayer (iv) shall issue on the following grounds:
 - (i) The applicant shall deposit a sum of Kshs.500,000/= into an interest earning account with a reputable financial institution in the joint names of the parties' advocates within 21 days from the date hereof.
 - (ii) The applicant shall file and serve a record of appeal within 90 days from the date hereof.
 - (iii) The applicant shall take all necessary action to facilitate the speedy disposal of this appeal. In the event that the appeal is not disposed off within 12 months from the date hereof, the order for interlocutory injunction pending appeal shall stand discharged unless otherwise extended by the court.
 - (iv) Costs of this application shall be costs in the appeal.

To this extent only does the application succeed.

Dated and delivered this 2nd day of February, 2010

H. M. OKWENGU
JUDGE

In the presence of: -

Ligunya H/B for Maleche for the applicant

Kinga H/B for Mbigi for the respondent

Eric - Court clerk