



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Appeal 287 of 2010**

DOMINIC AYUKA..... 1ST APPELLANT

ERIC METOBO.....2ND APPELLANT

V E R S U S

FIDELITY COMMERCIAL BANK LIMITED.....RESPONDENT

R U L I N G

Before me is a Chamber Summons dated 23rd July, 2010 filed by M/s Omboga & Company advocates on behalf of the two applicants. The respondent is named as **FIDELITY COMMERCIAL BANK LTD.** The application arises from a ruling delivered by the subordinate court in Milimani Commercial Court Civil Case No. 3237 of 2010 on 16th July, 2010.

The application as filed under Order XXI Rules 22 (1) of the Civil Procedure Rules and section 3 and 3A of the Civil Procedure Act (**Cap. 21**). The prayers in the application are as follows-

1. ***THAT this application be certified urgent and be heard ex- parte in the first place.***

2. ***THAT this Honourable Court be pleased to stay execution of the Ruling/Order dated 16th July, 2010 pending the hearing and determination of this application.***

3. ***THAT a temporary injunction do issue restraining the respondent by itself, its servants, employees and/or agent from selling, alienating or transferring and/or dealing in any manner prejudicial to the proprietary interest of the appellants/applicants over motor vehicle registration number KAS 648Y until this application is heard and determined.***

4. ***THAT this Honourable Court be pleased to issue an***

order compelling the Respondent to immediately and unconditionally release motor vehicle registration number KAS 648Y to the appellants/applicants.

5. ***THAT the Respondent be condemned to pay the costs.***

The application has grounds on the face of the Chamber Summons. It is supported by the affidavit of **DOMINIC AYUKA** the 1st applicant dated 23rd July, 2010, which affidavit was sworn by the deponent also on behalf of **ERIC METOBO** (the 2nd applicant)

The grounds of the application are as follows-

1. ***The applicants/appellants bought motor vehicle KAS 648Y for value from ALFRED MOFFAT MUCHIRA and are the bonafide purchasers for value and so the owners.***
2. ***The respondent took possession of the motor vehicle with a view of auctioning it through its agents on the 31st May, 2010.***
3. ***The appellants/applicants obtained temporary injunctive orders which have since lapsed after the trial court dismissed them on the 16th July, 2010.***
4. ***THAT respondents will now proceed to auction the said motor vehicle to the detriment of the appellants/applicants unless restrained by an order of this Honourable Court.***

The court on 26th July, 2010 certified this application as urgent and ordered that it be heard inter partes. The court also ordered that the status quo in the meantime be maintained.

When the application was served, a replying affidavit sworn by **PHILIP MUOKA** on 2nd August, 2010 was filed. This affidavit was sworn in opposition to the application. The deponent of the affidavit was described as the corporate legal advisor of the defendant/respondent. It was deponed in the said affidavit, inter alia, that the applicants obtained the registration of the motor vehicle fraudulently and that the stay granted should be vacated as the respondents continued to incur costs for repossession and storage of the motor vehicle.

This application came for hearing before me on 16th August, 2010 as the vacation Judge. The applicant was represented in court by Mr. Ombasa while the respondents were represented by Mr. Kanjama. Both counsel for the parties addressed me. I initially fixed the date for ruling as 19th August, 2010. However, I was assigned some other duties by the Chief Justice in Mombasa, and I postponed the ruling to 23rd September, 2010.

Having perused the prayers in the application, in my view prayers 1, 2, and 3 have already been spent. The prayers that still remain for my determination are prayers 4 and 5. Prayer 1 was certification of the application as urgent. Indeed, the application was certified as urgent. Prayer 2 was for stay of execution pending hearing and determination of the application. Indeed, the court ordered maintenance of status quo till determination of the application. Prayer 3 was

for temporary injunction pending the hearing and determination of the application. This prayer was also served by the order of the court directing that the status quo be maintained.

Prayer 4 is for orders of a mandatory injunction for release of the motor vehicle. This prayer is for my decision. Prayer 5 is for costs. This prayer is also for my decision.

I will start by saying that though the surrounding facts as well as Order XXI rule 22(1) of the Civil Procedure Rules under which the application brought deal with stay of execution of decrees, the substantive prayer 4, which is for my decision herein is in the form of a request for injunctive orders, which are covered under Order XXXIX of the Civil Procedure Rules. This application having been brought under Order XXI rule 22(1) of the Civil Procedure Rules, I will reproduce the said rule hereunder for the position to become clear. It provides as follows-

“22(1) The court to which a decree has been sent for execution, shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the Judgment – debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.”

It is clear from the above that the provisions of the law under which the application was made relate to stay of execution, not injunctions. Therefore the prayer 4 for injunction is totally misplaced. In addition, this is a matter that arises from a ruling of the subordinate court, which ruling from documents filed herein, is for challenge through an appeal, the memorandum of appeal wherein has been filed. Therefore the proper substantive prayer should have been for stay of execution pending appeal.

Be that as it may, I will treat this as an application for injunction, with regard to prayer 4 which is now for my decision. In that regard, the cases of **ALJI BHIMJI SANGHANI BUILDERS & CONTRACTORS –VS- NAIROBI GOLF HOTELS KENYA LTD** – Nairobi Hccc No. 1900 OF 1995 (*Ringera J*), and **CARTER & SONS LTD –VS- DEPOSIT PROTECTION FUND BOARD & 2 OTHERS (CA)** Civil Appeal No. 291 of 1997, on the principles to be considered by the court in applications for stay of execution, do not apply.

The principles to be applied in application for interlocutory injunctions pending hearing of a case are well stated in the case of **GEILLA –VS- CASSMAN BROWN & COMPANY LTD [1973] E.A.358** where the Court of Appeal for East Africa stated, inter-alia, that-

- (i)
- (ii)
- (iii)
- (iv) ***An applicant must show a prima facie case with a probability of success.***
- (v) ***An injunction might not normally be granted unless the applicant might otherwise suffer irreparable injury.***
- (vi) ***When the court is in doubt, it will determine the case on the balance of convenience.***

On the first consideration above, the applicants have filed a case against the respondent which is still pending. Depending on evidence, the case might be determined either way. That evidence will have to be adduced and tested at the trial court. In my view, with the facts placed before me, I find that the applicant has established a prima facie case because the decision of the case could go either way depending on evidence.

On the second consideration, I am of the view that if the orders prayed are not granted, the applicant will not suffer irreparable loss. The orders sought in prayer 4 are specific and I cannot invent prayers on behalf of the applicants. They have asked this court for unconditional release of the motor vehicle to them. That prayer, if granted, will actually have the effect of determining the whole case. In my view, it is not a prayer that can be practically granted at this interlocutory stage. Therefore, it cannot be said that if it is not granted the applicants will suffer any irreparable loss. Irreparable loss can only be considered in situations where a prayer is grantable in the first place. The prayer is not grantable and therefore applicants have failed to show that they will suffer irreparable loss if the prayer 4 is not granted.

The above two requirements in the **GEILLA** Case have to be both in the affirmative for the application for interlocutory injunction to be successful. In our present case, the second requirement was not satisfied. Therefore the application will not succeed. I will decline to grant prayer 4.

Having stated as above, I do not find it necessary to consider the third consideration for the grant of interlocutory injunctions as I have no doubt that the application is for dismissal. In effect, from my above findings, the application fails.

As the application has failed, costs will be to the respondents.

Consequently, and for the above reasons, I dismiss the application with costs to the respondents. Any Interim orders granted are hereby vacated.

Dated and delivered at Nairobi this 23rd day of September, 2010.

George Dulu
Judge.

In the presence of:-

Mr. Ombasa for the applicants/appellants

Mr. Kanjama for the respondents

Catherine Muendo – Court clerk.