



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CIVIL APPEAL 17 OF 2007

RAEL MWONJIA GICHUNGE1ST APPELLANT/APPLICANT

PITU AMAR SINGH.....2ND APPELLANT/APPLICANT

V E R S U S

FAUD MOHAMED ABDULLA.....RESPONDENT

INJUNCTIONS

- **Conditions for grant – Order XXXIX Rule 1 & 2 of the Civil Procedure Rules.**

RULING

This Ruling relates to an application dated and filed on 15th July 2009. It seeks orders of temporary injunction to restrain the Respondent and/or his employees from selling and/or alienating and/or transferring and/or misusing and/or vandalizing and/or in any manner whatsoever from interfering with the 1st Appellant's/Applicant's ownership of Motor Vehicle registration number KAU 009S.

The Applicant also asked for costs of the application. The Application was supported by the Affidavit of Rael Mwonjia Gichunge sworn on 14th July 2009, and the grounds on the face of the application; including one ground that the appeal has overwhelming chances of success.

The application had been filed under a Certificate of Urgency and I directed that it be served upon the Respondent who in turn filed a Replying Affidavit sworn and filed on 20th July 2009 denying that the Applicant should be granted any orders of injunction, particularly as the vehicle, the subject matter of the application had been sold to a third party. There was an agreement for sale attached to the Replying Affidavit.

The application was urged before me on 20.07.2009 by Mr. Mageto for the Applicant, while Mr. Muriuki urged the application on behalf of the Respondent. Mr. Mageto urged the usual conditions for

grant of a temporary injunctive orders set out in the case of **GIELLA VS CASSMAN BROWN & CO. LTD [1973] E.A. 356**, that the applicant had established a prima facie case with a probability of success, that the loss cannot be compensated in costs, and that the balance of convenience lies with the applicant.

Mr. Muriuki counsel for the Respondent argued to the contrary and reiterated the contents of the Respondent's Replying Affidavit, the motor vehicle, the subject of the litigation, had been sold, and any action by the applicant must include the purchaser and consequently urged that the application be dismissed with costs to the Respondent.

I agree, for the reasons set out below, that the application herein should be dismissed with costs to the Respondent.

Firstly, it is common practice in these courts to abuse the process of the court by whatsoever provision of the law available. Abuse of the process of court is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious or oppressive, and the ordinary remedy is to apply to strike out or stay such proceedings.

The application herein is one such instance of such abuse, and the court can exercise its inherent jurisdiction to strike such proceedings.

In a judgment delivered by the lower court on 3rd March 2009 the court found on the evidence before it that the Respondent was entitled to the subject vehicle, and ordered specific performance by delivery of the vehicle to the Respondent. Unhappy with that finding, the applicant sought and was granted a conditional stay of the court's order. The Applicant failed to meet the conditions of the order of stay and the vehicle was released to the Respondent by the auctioneers who had had custody of it.

Secondly, being dissatisfied with the lower court's orders, and failure to meet the conditions laid down by that court, the Applicant came to this court by a Notice of Motion dated 4th March 2009 for a stay of execution under Order XLI rule 4 of the Civil Procedure Rules. That application was dismissed by me in a Ruling delivered on 3rd April 2009 (and not 3rd April 2007 as incorrectly typed in the Ruling.)

Unhappy with that Ruling the applicant filed a Notice of Appeal against the Ruling on 9th April 2009, pursuant to rule 74 of the Court of Appeal Rules.

Under Order XLI Rule 4(1) of the Civil Procedure Rules having been refused an order of stay by this court, the logical step would be for the applicant to seek an order of stay of execution in the Court of Appeal. Instead what does the applicant do? The Applicant moves to another firm of Advocates who ignore the provisions of Order XLI rule 4(1) and go back to Order XXXIX for temporary injunction.

Thirdly and unfortunately for the applicant, Order XXXIX rules 1, 2, 3 and 9 have no application to this matter at all. Rule 1, 2 and 2A of Order XXXIX contemplate the existence of a suit. There is no suit pending between the parties in this matter and there is no basis for invoking the provisions of Order XXXIX, and no order of injunction is due under that order. The application is to that extent incompetent. The remedy for applications which are either incompetent or an abuse of the process of court is to strike them out. A stay having been refused it is mala fide for the applicant to go round that order and purport to substitute it for an injunction. The court has inherent jurisdiction to strike out and dismiss such incompetent applications that are an abuse of the court process.

For those reasons, the applicant's application dated and filed on 15th July 2009 is hereby dismissed with costs to the Respondent, Those are the orders of the court.

Dated delivered and signed at Meru this 31ST day of July 2009

M. J. ANYARA EMUKULE

JUDGE.