

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Appeal 175 of 2009

ISAAC NDUNDA KITHUKA.....APPELLANT

VERSUS

CATHERINE WAIRIMU MACHARIA.....1ST RESPONDENT

OPTIONS CARS LIMITED.....2ND RESPONDENT

RULING

1. By a Notice of Motion dated 14th May 2009, Isaac Ndunda Kithuka hereinafter referred to as applicant, seeks an order of injunction restraining Catherine Wairimu Macharia and Options Cars Ltd (hereinafter referred to as the 1st and 2nd respondents), their servants or agents from repossession or in any way dealing with motor vehicle Reg. No. KBB 143Z, hereinafter referred to as the subject vehicle, pending the hearing and determination of the appeal.
2. The applicant has sworn a supporting affidavit in which he explained that he bought the subject vehicle at a consideration of Kshs.580,000/= from the 1st respondent through her agent the 2nd respondent. That despite paying the consideration and taking possession of the subject vehicle he has not received the original logbook or the duly completed transfer documents to facilitate the transfer of the vehicle to himself. That on 13th January, 2009 pursuant to a complaint made by the respondent, the applicant was instructed by Police Officers from Pangani Police Station to surrender the subject vehicle.
3. The applicant declined and filed an application in the subordinate Court for an injunction to protect his interests. The application was dismissed on the 3rd April, 2009 which dismissal is the subject of the applicant's appeal before this Court. The applicant contends that unless an order of injunction pending appeal is granted, he will suffer substantial and irreparable loss as the respondent may take possession of the subject vehicle and may even dispose it of thus rendering the applicant's appeal nugatory.
4. The application is opposed through a replying affidavit sworn by the 1st respondent. The 1st respondent denies having entered into any agreement with the applicant for the sale of the subject vehicle. The 1st respondent denies that the 2nd respondent was her agent. She maintains that the applicant took the subject vehicle without her knowledge or consent. She denies having received any money as purchase price for the subject vehicle. She contends that the applicant does not deserve the orders sought, that he should be ordered to hand over the subject vehicle to the 1st respondent who is suffering loss of use of the said vehicle.
5. I have carefully given due consideration to the application, the affidavit in support and in reply, the annexures and all the submissions made by counsel. The application is said to be brought under section 3A of the Civil Procedure Rules and Order XXXIX Rule 1 & 2 of the Civil Procedure Act. Obviously the application as above indicated, has been brought under unknown provisions as there is no section 3A in the Civil Procedure Rules nor is there Order XXXIX Rule 1 and 2 in the Civil Procedure Act.
6. Moreover, even if I was to give the applicant the benefits of doubt, and regard the above as a mere clerical error, and deem the application to have been intended to be brought under section 3A of the Civil Procedure Act and Order XXXIX Rule 1 & 2 of the Civil Procedure Rules, the application would still be under the wrong provisions. Order XXXIX rule 1 and 2 of the Civil Procedure Rules does not give powers to the Court to grant an order of interlocutory injunction pending appeal, while the inherent powers of the Court preserved under section 3A of the Civil Procedure Act cannot be invoked to grant an order of interlocutory injunction pending appeal as the specific provisions provided under the Civil Procedure Act. In that regard the application before me is defective.
7. Further, I note that the subject of the injunction is a motor vehicle, whose price according to the applicant was Kshs.580,000/=. Although the subject vehicle is subject to depreciation, the value is capable of being ascertained, and it cannot therefore be said that the applicant will suffer irreparable loss or substantial loss if the order of the interlocutory injunction pending appeal is not granted.

8. In addition although the applicant has exhibited receipts showing that some payments were made to the 2nd respondent, there is nothing to show any nexus between the 2nd respondent who is alleged to have been given the money and the 1st respondent in whose name the subject vehicle is registered. The applicant has therefore failed to demonstrate any prima facie case against the 1st respondent.

9. For the above reasons I find that the applicant's application must fail. It is accordingly dismissed with costs.

Dated and delivered at Nairobi this 14th day of July, 2009

H.M. OKWENGU

JUDGE

In the presence of:

Majanja for appellant

No appearance for the respondent