



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 122 of 2007

NICHOLAS MAHIHU MURIITHI.....APPELLANT

VERSUS

CONSOLIDATED BANK OF KENYA LTD.....1ST RESPONDENT

DIKEMWEA ENTERPRISES LIMITED.....2ND RESPONDENT

RULING

Before me is a Notice of Motion in which the applicant seeks:

- (1) Leave to appeal from the ruling and order of the subordinate court delivered on 27th February 2007 and the Memorandum of Appeal filed herein on 1st March 2007 be deemed to have been properly filed and served; and**
- (2) Pending the hearing and determination of the intended appeal the Respondents be restrained from advertising, offering for sale, auctioning, selling, transferring or otherwise parting with the title and possession of the applicant's motor vehicle registration No. KAU 569G.**

In support of the application Nicholas Mahihu Muriithi has sworn an affidavit giving grounds. The application is opposed by the respondent who has filed grounds of opposition.

The facts which gave rise to this suit briefly may be stated. On 26th October 2005 the 1st Respondent granted the applicant a loan of Sh. 5,000,000/= repayable in 24 months instalment of Sh 243,383/= to enable the applicant to purchase a motor vehicle registration No. KAU 569G.

As security for the advance the 1st Respondent kept the log book of the motor vehicle together with two transfer forms in blank signed by the applicant and drew up a chattel's mortgage for the same. On 15th January 2007 the 1st Respondent wrote a letter to the 2nd Respondent to collect a sum of Sh 3,304,236.60 from the applicant being the outstanding arrears. The letter was copied to the applicant. This figure was disputed by the applicant. The said motor vehicle was repossessed on 15th January 2007 and was advertised to be auctioned.

On 14th February 2007 the applicant filed a suit against the Respondent and the main relief sought in the plaint were:

(a) A declaration that the Defendants' repossession and scheduled auction of the motor vehicle registration No. KAU 569G on 15th February 2007 was unlawful and void.

(b) A permanent mandatory injunction directed to the Defendants whether by themselves agents, servants, or otherwise howsoever to provide the plaintiff with the proper and correct accounts in respect of the sums paid in respect of the servicing of the loan.

(c) A permanent injunction restraining the Defendants whether by themselves, agents servants, or otherwise howsoever from advertising, offering for sale, auctioning, selling transferring or otherwise parting with the title and possession of the Applicants motor vehicle reg. No. KAU 569G on 15th February 2007.

The applicant also sought costs of the suit with interest and any other further relief the court may deem appropriate. The defendant on being served with summons filed a statement of defence on 23rd February 2007 in which they denied the claim and on the same date filed a Notice of a Preliminary Objection on a point of law citing lack of pecuniary jurisdiction.

Mr. Mungata counsel for the Respondents submitted that the court lacked pecuniary jurisdiction to entertain the suit and urged the court to dismiss the entire suit with costs. He submitted that from the pleadings it was clear that the dispute between the applicant and the 1st Respondent was whether the applicant owed the 1st Respondent a sum of Sh. 3,304,236.60 a fact which is denied by the Applicant. While Mr. Havi counsel for the Applicant submitted that the preliminary objection raised by the Respondents touched on issues of facts and not issues of law and urged the court to dismiss the respondent's preliminary objection. In her ruling delivered on 27th February 2007, the learned trial magistrate upheld the Respondent's preliminary objection and dismissed the applicant's suit. The applicant being dissatisfied with the said ruling has appealed against the same being High Court Civil Appeal No. 122 of 2007. In the meantime the applicant filed this application seeking orders that pending the hearing and determination of the appeal the Respondents be restrained from advertising offering for sale, auctioning selling, transferring or otherwise parting with the title and possession of the applicant's motor vehicle reg. No. KAU 569G.

I have considered the applicant's application in light of the pleadings, the affidavit evidence as well as the rival arguments by both counsel and it is clear that the facts as pleaded are disputed and would require the court to carry out an investigation. As was stated in the celebrated case of MUKISA BISCUIT MANUFACTURING CO. LTD V. WEST END DISTRIBUTORS LTD [1969] EA

“A preliminary objection is in the nature of what used to be a demure. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

In the instant case evidence was required to ascertain the amount in dispute and therefore the applicant's appeal is arguable.

Having reached that conclusion and in view of the fact that injunction orders are meant to preserve property and maintain status quo the applicant's notice of motion is allowed in terms of prayer 3 of the Notice of Motion dated 1st March 2007.

Costs will be costs in the appeal.

Delivered and dated at Nairobi this 23rd day of May 2008.

J. L. A. OSIEMO

JUDGE