



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

**Civil Appeal 190 of 2008**

**ALEX THAIRU NDUTA.....APPELLANT**

**VERSUS**

**SOCFINAF COMPANY LIMITED.....1<sup>ST</sup> RESPONDENT**

**PETER MWANGI**

**T/A DAYSTAR AUCTIONEERS.....2<sup>ND</sup> RESPONDENT**

**R U L I N G**

By a notice of motion dated 28<sup>th</sup> of April, 2008 Alex Thairu Nduta (hereinafter referred to as the appellant), seeks orders as follows: -

1. that the respondents whether by themselves, their servants and or agents be restrained by way of an injunction from alienating, selling, transferring or interfering with the appellant's interest, right and ownership over motor vehicle Registration Number KAG 268Z pending the hearing and determination of this application and or appeal.
2. That pending the hearing and determination of the appeal herein motor vehicle Registration Number KAG 268Z be released and or returned to the appellant
3. That costs of this application be provided for.

The application is grounded on the fact that the appellant purchased a motor vehicle KAG 268Z (hereinafter referred to as the subject vehicle), at a public auction pursuant to a decree and lawful warrant of attachment and sale in Gatundu RMCC No. 1184 of 2004. The appellant maintains that he is a bona fide purchaser for value of the subject vehicle. He contends that he was in the process of transferring the motor vehicle to himself, when Socfinaf Company Ltd (hereinafter referred to as the 1<sup>st</sup> respondent) with the assistance of the police impounded the subject vehicle purportedly in execution of a court order issued in Gatundu Civil case No.1184 of 2004.

In an effort to protect his interests the appellant filed a suit i.e. CMCC.Nairobi No.932 of 2008 in which he sought an order against the 1<sup>st</sup> respondent and Peter Mwangi T/A Daystar Auctioneers (the 2<sup>nd</sup> respondent) for an injunction restraining them from alienating, selling, transferring or interfering with the plaintiffs interests, rights or ownership of the subject vehicle. The appellant also sought an order of mandatory injunction directed to the respondent to forthwith release and return the subject motor vehicle to the appellant. The suit was filed simultaneously with a chamber summons seeking interim orders of like nature. When the chamber summons came for inter parte hearing, the application for mandatory injunction was dismissed, giving rise to the current appeal.

It is the appellant's contention that unless the orders he is now seeking are granted, he will suffer substantial loss. The appellant maintains that under Order XXI Rule 69 of the Civil Procedure Rules, an irregularity in publishing or conducting a sale of movable property at a public auction cannot vitiate the

sale.

The 1<sup>st</sup> respondent objects to the application through a replying affidavit sworn by its administration manager Lucas Omariba. It is contended that if the subject motor vehicle was sold, it was sold when there was already an order for stay of execution in place. It was contended that no proclamation was ever made before the attachment or sale of the subject vehicle. It was for that reason that the Gatundu court ordered the unconditional release of the subject vehicle to the 1<sup>st</sup> respondent. The respondent maintained that the appeal has no chances of success. The court was urged not to release the subject vehicle to the appellant as that would cause prejudice and irreparable harm to the respondent.

Under Order XLI Rule 4 (6) of the Civil Procedure Rules, the court has powers to grant a temporary injunction pending appeal on such terms as it thinks just, provided the procedure for instituting an appeal from a subordinate court has been complied with. In this case, the appellant is not seeking an order of temporary injunction. He is in fact seeking an order of mandatory injunction for release of the subject vehicle to him. It is evident that the appellant's interest in the subject vehicle is the subject of his suit and indeed the current appeal pending before this court. The principles upon which orders of interlocutory injunction pending appeal can be granted generally remain the same as enshrined in the old celebrated case of *Giella vs Cassman Brown and Co. Ltd.* i.e. the appellant must show that he has a prima facie case with a probability of success and that if the injunction is not granted he will suffer irreparable injury. If the court is in doubt it will decide the matter on a balance of convenience. In this case the appellant has not satisfied this court that he has a prima facie case with a probability of success. It is true that the appellant may lose the motor vehicle of which he claims ownership but that loss can be easily quantified and cannot be said to be irreparable. An order for mandatory injunction can only be given in very special circumstances. The appellant has not satisfied this court that there are any special circumstances nor has he established any justification to grant a mandatory injunction at this stage.

For these reasons, I find no merit in this application and do therefore dismiss it with costs.

Dated and delivered this 3<sup>rd</sup> day of June, 2008

**H. M. OKWENGU**

**JUDGE**