



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Appeal 525 of 2008

ABI DOTKOM COMMUNICATION LTD.....APPELLANT/APPLICANT

VERSUS

EQUITY BANK LIMITED.....1ST RESPONDENT

ANTIQUA AUCTIONEERS LTD.....2ND RESPONDENT

R U L I N G

The application before me is one brought by the applicant Abi Dotcom Communications Ltd under Order XLI Rule 4(6) of the Civil Procedure Rules, Section 63 (e) and 3A of the Civil Procedure Act and Section 14 of the Chattels Transfer Act seeking *inter alia* orders of :-

(i) interlocutory injunction prohibiting the Respondents i.e. Equity Bank Ltd (1st respondent) and Antiques Auctioneers Ltd (2nd respondent) from advertising for sale, sale by private treaty or auction, transferring, leasing dismantling or any manner committing acts of waste over motor vehicle registration No. KAJ 555W pending the hearing and determination of the appeal herein.

(ii) Mandatory injunction against the 2nd “appellant” directing it forthwith to release motor vehicle registration number KAJ 555W to the appellant unconditionally.

The circumstances leading to the application as set out in the affidavit of Kendi Florence Marangu, sworn on 2nd October 2008 in support of the application, are as follows:

The applicant is the registered owner of motor vehicle KAJ 555W (hereinafter referred to as the subject vehicle). On the 7th August, 2008 the 2nd respondent under instructions from the 1st respondent, attached and carried away the subject vehicle. The applicant maintained that the attachment was illegal as the applicant has had no dealings with the 1st respondent over the subject vehicle.

The applicant further maintained that the 1st respondent’s instruction to the 2nd respondent to repossess the subject vehicle on the basis of a loan agreement between a 3rd party Terra Craft Ltd and the 1st respondent was illegal as there is no valid chattels mortgage registered over the motor vehicle.

Consequently the applicant filed a suit in the Chief Magistrate’s court at Nairobi against the respondents in which he sought an interlocutory injunction against the respondents. However, the application for injunction was dismissed. The applicant has now appealed to this court against the order of dismissal and

fears that unless this court grants interlocutory orders of injunction, pending the hearing of the appeal, the subject vehicle will be disposed of thereby rendering the appeal nugatory.

It was submitted on behalf of the applicant, that the applicant is suffering loss as the subject vehicle is currently in the physical possession of the 2nd respondent. The applicant urged the court to accept a bank guarantee as sufficient security.

The respondents object to the application through a replying affidavit sworn by Ambrose Ngari the Branch Manager of the 1st respondent's Fourways Branch, Corporate Department. It is contended that pursuant to an agreement entered into between the 1st respondent and Terra Craft (K) Ltd, the 1st respondent granted credit facility to Terra Craft (K) Ltd on the security of several vehicles including the subject vehicle. Terra Craft (K) Ltd repaid the loan leaving a sum of Ksh.1,174,433.02 due and owing. The 1st respondent therefore maintained that it was entitled to repossess or attach each of the motor vehicles offered as security including the subject vehicle.

The 1st respondent contends that Henry N. Kinuthia a director of Terra Craft (K) Ltd, who was the registered owner of the subject vehicle, and who offered it to the 1st respondent as collateral Security under a chattels mortgage, could not pass a good title to the applicant. The purported transfer of the subject vehicle to the applicant was therefore fraudulent, illegal and against public policy.

The respondents urged the court to find that the applicant had not established a *prima facie* case nor has the applicant shown that it will suffer substantial loss if the orders sought are not granted. The respondents further contended that the motor vehicle has been in the custody of the 2nd respondent and that the applicant can be adequately compensated by an award of damages.

In reply to the respondent's submission, it was pointed out to the court that there was no registered chattels mortgage to bring section 14 of the chattels mortgage Transfer Act into effect. It was maintained that in accordance with Section 8 of the Traffic Act, the records of the Registrar of Motor Vehicle were conclusive evidence of ownership.

The applicant is seeking orders of mandatory injunction and interlocutory injunction pending appeal. The conditions upon which such an application can be granted remain the same as set out in *E.A. Industries vs Trufoods (1972) EA 420* and restated in the old celebrated case of *Giella vs Casman Brown & Co Ltd (1973) EA 354*. These are, first, that the applicant must establish a *prima facie* case with a probability of success, secondly, that unless the orders sought are granted the applicant will suffer irreparable injury which cannot be adequately compensated by an award of damages, and thirdly, if the court is in doubt it will decide the application on the balance of convenience. In the case of a mandatory injunction the applicant must further satisfy the court that there are special and compelling circumstances justifying the granting of the mandatory orders. I do appreciate that the application in the lower court which is subject of the appeal before this court was essentially for the same orders as now sought. This court as an appellate court will be required in determining the appeal to consider the merits of that application at the hearing of the appeal. At this stage, it is necessary without preempting the issues to be determined at the hearing of the appeal, to consider whether the applicant has demonstrated *prima facie* that he has an arguable appeal with probability of success, upon which the interlocutory orders which are sought can be anchored.

The applicant has filed an appeal which raises ten grounds of appeal. The issues raised include privity of contract, ownership of the subject vehicle, and validity of the chattels mortgage involving the subject vehicle. It cannot therefore be said that the appeal is frivolous. Nevertheless, each party has laid a claim to the subject vehicle and the appeal may be resolved in favour of either party.

The subject of the appeal being a motor vehicle which is subject to depreciation there is a possibility that the applicant may suffer substantial loss if the orders of interlocutory injunction is not granted. However, the loss is not irreparable as the value of the subject vehicle can be easily ascertained. As regards the mandatory injunction the applicant has not shown any exceptional or compelling circumstances that

would justify the granting of an order for release of the motor vehicle to the applicant at this stage. Indeed, such a mandatory order would render the determination of the appeal futile and a mere academic exercise.

Further, the applicant was granted a conditional order for a temporary injunction on the 2nd October, 2008 but failed to deposit the required security of Kshs.1 million. The applicant contends that the required security is not commensurate with the value of the subject matter. Instead the applicant has offered to provide a bank guarantee as security. It is not however for the applicant to decide on the security it considers adequate. Under Order XLI rule 4(2)(b) of the Civil Procedure Rules the applicant has to provide security as ordered by the court. In this case, the applicant has failed to provide the security ordered, and has also failed to demonstrate its willingness to provide security by exhibiting any bank guarantee.

I find that the applicant has failed to satisfy the conditions upon which orders of interlocutory injunction or mandatory injunction can be granted. In the light of the above, I find no merit in the notice of motion dated 2nd October, 2008 and therefore dismiss it with costs.

Those shall be the orders of this court.

Dated and delivered this 20th day of November, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Wambugu for the appellant/applicant

Ms Waiteri for the respondent