

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Suit 207 of 2005

JAVED IQBAL SYED PLAINTIFF

- Versus -

RAFAKAT JAMIL

AL-MALIK BROTHERS MOTORS LTD. DEFENDANTS

Coram: Before Hon. Justice Mwera

Mogaka for plaintiff

Adhoch for respondent

Court clerk – Kinyua

R U L I N G

When the court was poised to hear the defendants' application dated 7/12/2005 brought under sections 3A, 63 Civil Procedure Act, Mr. Mogaka for the plaintiff objected.

He told the court that the plaintiff's own application dated 13/10/2005, to bring contempt proceedings against the defendants was due for hearing on 9/2/2006. That these proceedings sprung from the partial disobedience of Khaminwa J's ex parte injunction of 6/10/2005 which required the defendants to restore to the plaintiffs certain two motor vehicles – subject matter in this suit: Reg. No. KAS 127M/ZC 1341 and KAS 404M/2B 1676. That the defendants had returned the former vehicle to the plaintiff but failed to deliver the latter. That accordingly either they purge the contempt or they should comply fully with or that order of 6/10/2005 in order to be heard on the present application.

It was heard that that contempt application had been agreed by consent of 19/10/2005 to be heard on 23/11/2005. Come that day, the application (plus others in this file) could not be reached and it was moved to 9/2/2006.

The court heard that indeed the defendants had filed an application dated 11/10/2005 to discharge the said injunction but had not listed it for hearing. So it shall not be proper to hear their present application of 7/12/2005 before the contempt proceedings which parties agreed to be argued first before any other application. And that in any case the applicants were in contempt.

The present application, so Mr. Adhoch argued, should not be hinged on any other application here and particularly the contempt notice of motion. That by this application the defendants sought orders of this court to have the motor vehicle KAS 127/ZC 1341, released to the plaintiff following the orders of 6/10/2005, taken back and stored in a neutral place because the issue of its ownership is still pending. That about three parties were claiming it and so if it is running around, it could face the risk of damage etc.

After hearing both counsel this court is minded to uphold Mr. Mogaka's objection. First because on 19/10/2005 by consent all parties agreed to argue the contempt application first. That was put on 23/11/2005 and then moved to 9/2/2006. Second, Mr. Adhoch told this court that the defendants were not in contempt because they could not release motor vehicle KAS 404M/ZB 1676 which was said to be in the hands of a 3rd party.

In this court's view that argument should be reserved for the contempt hearing on 9/2/2006 to be determined. Third, considering this application dated 7/12/2005, i.e. to get the motor vehicle KAS 127/ZC 1341 from the plaintiff, would amount to reviewing Khaminwa J's order of 6/10/2005 and in fact it will be as if this court is entertaining the defendants' application to vary those very orders of 6/10/2005. It was not in dispute that the defendants have not listed that application for hearing.

So all in all the defendants' application dated 7/12/2005 is held in abeyance until the other preceding matters are cleared or further orders regarding the sequence of hearing those matters, are given.

It is so ordered.

Delivered on 10/1/2006.

J.W. MWERA

JUDGE