



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**Civil Appeal 53 of 2006**

**STANLEY CHIRO SONJE ..... APPELLANT**

**V E R S U S**

**GERD KIEFER ..... RESPONDENT**

*(Being an Appeal from the Orders of Honourable Mr. B. N. Olao – Chief Magistrate at Mombasa made on 15<sup>th</sup> day of March, 2006 in Mombasa Chief Magistrate’s Court No. 2790 of 2005)*

**CORAM : Before Hon. Justice L. Njagi**

**Mrima for Appellant**

**Magolo for Respondent**

**Court clerk – Kinyua**

**RULING**

In a nutshell, the appellant / applicant filed Civil Suit No. 2790 of 2005 in the Chief Magistrate’s Court, Mombasa, on 18<sup>th</sup> August, 2005. The suit was commenced by way of a plaint in which the appellant sought against the respondent, inter alia, a mandatory injunction directing the respondent to release to the appellant, unconditionally, motor vehicles Nos. KAT 628M and KAT 824Z.

Contemporaneously with the plaint, the appellant also filed an application by Chamber Summons asking for an order, inter alia, that pending the hearing and determination of the suit, a mandatory injunction be issued directing the respondent to forthwith and unconditionally release motor vehicles registration Nos. KAT 628M and KAT 824Z. A further prayer sought an order that pending the hearing and determination of the suit the respondent be restrained from arresting, taking possession of, holding, retaining and / or interfering with the aforementioned vehicles.

After hearing the application inter partes, the court declined to grant the interlocutory mandatory injunction. Instead, in his ruling dated 15<sup>th</sup> March, 2006, the learned Chief Magistrate dismissed the Chamber Summons application with costs. It is against this order of dismissal that the appellant has preferred this appeal. He proposes to ask this court that the orders made by the learned Chief Magistrate on 15<sup>th</sup> March, 2006, be set aside and instead the prayers sought in the Chamber Summons dated 18<sup>th</sup> August, 2005, be granted as prayed, or on such terms as the appellate court will deem fit and just in the circumstances of this case.

Pending the hearing and determination of the appeal, the appellant has filed this application for a mandatory injunction. The application is made by a Notice of Motion expressed to be brought under O.

XLI rule 4(6) and O. L rule 1 of the Civil Procedure Rules, Sections 3A and 63(e) of the Civil Procedure Act, and all enabling provisions of the law. The appellant seeks an order that pending the hearing and determination of this appeal, this court be pleased to issue a mandatory injunction requiring the respondent or any other person thereof in possession of the motor vehicles registration number KAT 628M and KAT 824Z to forthwith and unconditionally release the said motor vehicles to the appellant / applicant herein. The application is supported by the annexed affidavit of the appellant / applicant, Stanley Chiro Sonje, and is based on the ground that the appeal herein has high chances of success. It is also the applicant's case that unless the orders sought are granted, the appeal will be rendered nugatory and the appellant will suffer irreparably.

On 12<sup>th</sup> July, 2006, the respondent filed his replying affidavit in opposition to the application. At the hearing of the application, Mr. Mrima appeared for the applicant while the respondent was represented by Mr. Magolo. After considering the arguments and submissions of both counsel against the pleadings, I note that the order sought by the appellant is exactly the same one which was sought in the lower court but rejected by the learned Chief Magistrate. The order sought is not one for just an injunction, but a mandatory injunction. There is ample authority in case law that even though such an injunction can be granted at an interlocutory stage, it is only granted very sparingly and only in exceptional circumstances such as where the applicant's case is very strong and straightforward.

The applicant perceives his case to lie in that strong and exceptional species of cases. However, when Mr. Mrima addressed this court, he mostly traversed ground which had already been considered but rejected by the learned Chief Magistrate. Counsel for the appellant also relies strongly on "evidence" from the respondent's girl friend. Unfortunately that "evidence" takes the form of letters none of which is addressed by or to the respondent. The two letters are dated 12<sup>th</sup> June and 28<sup>th</sup> June, 2006. Their questionable authenticity notwithstanding, they were both written long after the lower court had given the decision now appealed from. I don't see how such letters can assist in the appellate process when the learned Chief Magistrate never saw, let alone considered them. At their very best, if only they were admissible, and this is a very big "if", they could assist in an application for review. I am constrained to restrain myself from making any indepth comments as these could easily embarrass the judge who will hear the appeal. However, let it suffice to say that while the intended appeal is not frivolous, in my view, it does not measure up to the standard where one can say with confidence that the appellants' victory is a foregone conclusion and therefore he deserves a mandatory injunction.

In addition to demonstrating that the appeal should not be frivolous, it was held in TANUI & ORS v. BIRECH & ORS, [1991] KLR 510, that when considering an application for an injunction pending appeal, the court should ensure that the appeal, if successful, is not rendered nugatory. By seeking a replica of a mandatory injunction order which has been rejected by the lower court, the appellant is seeking to obtain through the back door what has been denied at the front door. However, to ensure that the parties are at an equal footing, and that the appeal is not rendered nugatory, this court has power in exercise of its appellate jurisdiction under O.XLI rule 4(6), to grant an injunction on such terms as it thinks just. I consider that in the interest of justice, the best that can be done in the circumstances of this case is to maintain the status quo as it was before 15<sup>th</sup> March, 2006, when the ruling now appealed from was delivered.

In summary, whereas a mandatory injunction can be granted on an interlocutory application as well as at the hearing, in the absence of special circumstances it will not normally be granted unless the case is a very clear one. In the instant matter, I don't think that the applicant has established such a clear case as would warrant the grant of a mandatory injunction. Given the hostile coastal environment, keeping those vehicles at the police station at Bamburi will not do anybody any good. The vehicles might just go to waste. The application for a mandatory injunction accordingly fails. The alternate prayer for storing the vehicles at Bamburi Police Station equally fails. In the circumstances, the orders made by this court on 3<sup>rd</sup> July 2006, are accordingly discharged.

In order to ensure, however, that the appeal will not be rendered nugatory, I order that upon receiving the vehicles, the respondent shall not in any way, dispose of them in any manner until the appeal herein is heard and determined. Parties at liberty to apply.

Costs of this application to abide the appeal.

Dated and delivered at Mombasa this 21<sup>st</sup> day of September, 2006.

L. NJAGI

JUDGE