



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

**Civil Appeal 373 of 2006**

**ISIAYA ABINERI ..... PLAINTIFF**

**VERSUS**

**DR. STANLEY KHANGA ..... 1<sup>ST</sup> RESPONDENT**

**TRENDY CARS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**ZABLON RASHID MUYONGA ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

The Chamber Summons herein, dated 13/6/06, under Order 41 Rule 4 of the Civil Procedure Rules, seeks the following orders: -

- 1.
2. **Already spent**
- 3.
4. **That all proceedings and orders issued by the Lower Court, Milimani, in CMCC No.2019 of 2006 be stayed pending the hearing and determination of this appeal.**
5. **Costs of this application.**

Supported by an Affidavit of Isiaya Abineri, the application is on the grounds that: there is a serious breach of the Rules of the Court; if the 3<sup>rd</sup> party is not properly enjoined in the suit so as to have a chance of being heard, there is a likelihood of injustice being occasioned to an innocent party; the issues of contempt can only be determined fairly if the 3<sup>rd</sup> party is allowed to put a response to the application for contempt; the appeal has high chances of success.

From the Supporting Affidavit the salient points in support of the application are, inter alia, that: prior to the application for joinder, the suit had proceeded on an interlocutory application and orders of injunction issued against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents; pursuant to the orders of 10/4/06, the 1<sup>st</sup> Respondent herein filed an application, dated 17/5/06, seeking orders of committal against the 2<sup>nd</sup> and 3<sup>rd</sup>

Respondents for contempt; that the applicant herein was never brought in the suit before the orders of 10/4/06 were issued and had he been enjoined as a party, the lower Court would not have issued the said orders of injunction as at that time the motor vehicle in issue had passed hands (been sold); the advocate for the 1<sup>st</sup> Respondent did not oppose the applicants application for joinder and therefore the same was allowed; upon the application for joinder being allowed, Counsel for 1<sup>st</sup> Respondent sought to prosecute his application for contempt against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents but applicant's Counsel raised a Preliminary Objection, on a point of law, but the learned Magistrate disregarded the Preliminary Objection application, and ordered that the matter proceed as scheduled; the applicant felt aggrieved by the Ruling and reasoning of the learned Magistrate and filed an appeal against the same.

Finally, that there is danger that in the event of the application for contempt against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents succeeding, the applicant will be reduced to a mere spectator, rather than a participant in the proceedings.

In opposition, the 1<sup>st</sup> Respondent, Dr. Stanley O. Khainga, raised the following preliminary objections, on points of law:

1. **The application is incurably defective and incompetent;**
2. **The application is in breach of mandatory legal provisions;**
3. **The applicant lacks LOCUS STANDI to bring the current application.**

Notice of the above Preliminary Objection had been filed and served, on the applicant, on 14/6/06.

This brief Ruling deals with the above preliminary points.

Mr. Kinoti, learned Counsel for the 1<sup>st</sup> Respondent, submitted that the order sought to be stayed in this application is not annexed to the application before this court.

My perusal of the pleadings reveal otherwise. Referred to in Clause 3 of the Supporting Affidavit of the appellant/applicant, and annexed thereto, is the order issued at Nairobi on 11<sup>th</sup> April, 2006. Accordingly, the submission and the allegation therein, has no basis, legal or factual.

The other Preliminary Objection is that the applicant has no LOCUS STANDI. In support of that, learned Counsel stated that the application at the Subordinate Court for contempt did not involve the applicant herein. The application, continued Mr. Kinoti, sought to commit the then Respondent, to civil jail, and therefore, the party who can complain is the 3<sup>rd</sup> Respondent.

The above objection overlooks very clear pleadings. These are that the applicant had sought to be enjoined in the suit but that was not done until the injunctive orders of 10/4/06 had been issued. That order compelled the Defendants, their agents, officers or servants to unconditionally release Vehicle Registration No. KAU 522S, along with the original Logbook, and number plates, and duly executed transfer form in favour of the Plaintiff/1<sup>st</sup> Respondent. What Mr. Kinoti – Counsel for the 1<sup>st</sup> Respondent - has deliberately overlooked is that by the time that order was made, the applicant/appellant had become the owner of the vehicle in issue. Hence, the order was legally impossible to enforce against those to whom it was directed. The order could not be enforced without interfering with the proprietary rights of the applicant herein, yet despite the efforts by the applicant to be enjoined, that enjoining took place after the order, not before.

Put differently, the only way the order could have been obeyed was by depriving the applicant/appellant of his vehicle, through an order, in a case, where he was not a party at the time it was issued.

The problem, in my view, hinges on the Lower Courts failure to observe the provisions of Order 1

Rule 10 of the Civil Procedure Rules, under which the Court is empowered, either on the Courts own initiative or upon the application by either party, to bring in, at any stage of the proceedings any person who ought to have been joined or whose presence before the court may be necessary for the court to effectually and completely adjudicate the issue or questions involved in the suit.

To argue that the applicant was not involved in the contempt issues is, in my view, to adopt a narrow view of the facts and their overall impact on the order from which the contempt proceedings are underpinned.

The issues of incompetence or lack of locus standi, of the application and or applicant, respectively, do not arise in the circumstances and facts of this application.

Accordingly, the Preliminary Objection is rejected as lacking in substance.

The application, vide Chamber Summons dated and filed in this court on 13/6/06, to proceed on merit.

It is so ruled and ordered.

DATED and delivered in Nairobi, this 29<sup>th</sup> day of November, 2006.

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**O.K. MUTUNGI**

**JUDGE.**