



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL 712 OF 2005

INDUSTRIAL AND COMMERCIAL

DEVELOPMENT CORPORATION.....
PLAINTIFF

VERSUS

AUTOSPRING MANUFACTURERS LTD & ANOTHER.....
RESPONDENT

R U L I N G

On 16/10/05, the applicant/appellant herein, by way of a Notice of Motion, under Order 41 rule 4 of the Civil procedure Rules and Section 3A of Cap. 21, Laws of Kenya, moved to this court, seeking various orders, **interalia**.

1. An order stopping the auction, by sale by private treaty or otherwise transfer/or disposal of vehicle No. KAP 336W pending the hearing and determination of this application.
2. An order for unconditional release of the vehicle above to the appellant for storage at the KENATCO go-down yard, in Industrial area, Nairobi pending the hearing and determination of this appeal to prevent the present appeal from being rendered nugatory.
3. An order similar to (2) above directed to the Registrar of Motor vehicles not to register any transfer of the said motor vehicle pending the hearing and determination of the present appeal.
4. In the alternative to the above, an order that the 1st Respondent and/or Whitestone Auctioneers deposit all of the proceeds from the sale of the said vehicle with the court until further orders of this court.
5. A stay of any further proceedings and execution in CMCC No. 713 of 2005, Milimani Commercial Court, pending the outcome of this appeal.
6. Costs of this application.

The application is supported by an Affidavit deponed by Isaac B. Mogaka, dated and filed on 16/9/05.

In opposition the Respondent through their Advocate Migui Macharia Mungai, filed a Replying Affidavit dated 19/10/05, which was served and filed on the appellant/applicant on the day the hearing was in progress, on 19/10/05.

At the commencement of the hearing of the present application – 19/10/05 – Counsel for the applicant, Mr. Mulwa object to the Replying Affidavit on the grounds that it violated the provisions of Order 50 rule 16, and Order 18 rule 3(1) of the Civil Procedure Rules; and it should be struck out and expunged from the Record. In the first place he had had no time to even peruse the document as it was served on him, right here in the court, and further the same was incompetent for being sworn by the Advocate on record touching on matters which such an advocate is not competent to depone upon, nor had the source of such information been disclosed.

Having considered the submissions by the two learned counsels, Mr. Mungai and Mr. Mulwa, I agree with the learned counsel for the appellant/applicant. Order 50 rule 16 is quite specific that the Respondent must give the applicant three clear days prior to the date of the hearing. Here, there wasn't even an hour, much less a day before the hearing date.

Counsel for the Respondent made a very interesting submission, which I dismiss as lacking in merit. He submitted that unless there was any prejudice to the applicant, Order 50 rule 16 is no basis for such a prayer. In other words, if no prejudice is established, the applicant cannot object to the Replying Affidavit simply because there are no three clear days prior to the hearing date.

I reject the learned counsel's submission; firstly because if the intention of the law maker and the Rules Committee was the applicant must show prejudice occasioned by non-compliance with Order 50 rule 16, they would specifically have provided so. They did not do. I must also state that such a submission is not only novel but a fruitless effort to coin a meaning from a clear provision which was recently amended, vide Legal Notice No. 128/2001, after adequate debate and considerations.

Secondly, even if the wild submission had any merits, the Learned Counsel by the applicant/appellant submitted, in his objection to the admission of the Replying Affidavit that he was surprised by the document, given that the application had been served upon the Respondent on 4/10/05.

Further, even if the Replying Affidavit were in compliance with Order 50 rule 16, it would still be incompetent and struck out of the record for violating Order 18 rule 3 (1) of the Civil Procedure Rules.

I have perused paragraphs 2; 3; 4; 5, of the Replying Affidavit and I have no doubt that those paragraphs are not only hearsay but an affront to order 18 rule 3(1) above. The only persons who can competently depone on the matters therein, are either the auctioneers who sold the vehicle; and/or an officer of the Respondent Company, with respect to financial standing of the 1st Respondent company. The deponent of the Replying Affidavit has no capacity or competence to depone on such factual matters as are contained in the above four paragraphs.

In brief, the Replying Affidavit is hereby struck out of the record, and accordingly the application is unopposed.

The upshot of all the foregoing is that the application herein succeeds and I grant the following orders:-

1. The orders prayed for in prayer Nos.2; 4; 6; Notice of Motion herein, dated 16/9/05 and filed in this court on the same date.

2. Costs of this application to be in the cause.

DATED and delivered in Nairobi, this 21st Day of October, 2005.

O.K. MUTUNGI

JUDGE