



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA  
CIVIL APPEAL NO. 45 OF 2003**

**ANTONY NJANE KIMANI.....APPELLANT**

**=V E R S U S=**

**JAMES NJARAMBA.....RESPONDENT**

**J U D G M E N T**

There are two appeals here arising from the same suit concerning two different Rulings/Orders. They have been consolidated. Appeal No.45/2003 deals with an ex-parte order of mandatory injunction which was granted on 20/2/2003 in favour of the Respondent. This order was made before the Appellant was served with the summons to enter appearance, or served with the application seeking the orders.

The effect of the order was that the Respondent together with Police from Makupa Police Station pounced on the motor vehicle subject of dispute from the possession of the Appellant. The motor vehicle was alleged to be subject of an agreement entered into in the year 2001. Up to the date of the order the vehicle had been in possession of the Appellant. The copy of the log book exhibited then was in the name of Appellant as the last owner. The name of Respondent does not appear.

This information was before the Trial Magistrate on 20th February, 2003 when she proceeded to issue a mandatory order in favour of the Respondent without seeking to hear the Appellant. The Trial Magistrate ought to have considered that between the year 2001 and 2003 which time had passed, why did the Respondent wait so long before claiming his rights? Is the Respondent not guilty of inordinate delay? Would it not have been just to hear what Appellant had to say before she ordered the vehicle to be taken from him without notice. If the Appellant had taken so long with the vehicle why would he now want to destroy it. Looking at the Plaintiff filed by the Respondent the main prayer is for the handing over the motor vehicle KAM 307W to the Respondent. By making the orders she brought the Plaintiff's claim to an end without hearing the Appellant. The Trial Magistrate acted contrary to rules of natural justice.

When eventually the application was heard inter-partes the Trial Magistrate found that she was entitled to maintain the mandatory injunction despite very able argument in opposition.

I have perused the record and I am of the opinion that the Plaintiff/Respondent had not established grounds to warrant a mandatory order to be granted. There was shown inordinate delay in bringing the action, no irreparable loss that could not be compensated in damages was shown, the value of the vehicle was known and no allegation that the Defendant could not pay such damage if the Respondent was claiming specific performance or damages. Whereas prohibitory injunctions are grounded on the principles set out in Giella Cassman Brown case and are easily granted as the effect is interlocutory, mandatory injunctions are not granted unless the court is definitely sure that the Applicant will win the case at the end. In this case the evidence is not clear. There are the two log books exhibited by Plaintiff. Where is the transfer? The letter from K.R.A. shows particulars as on 27/2/2003. The Defendants/Appellants defence has to be considered. There is the disputed signature of the Appellant. As it is the Trial Magistrate did not consider the issues raised in the Appellant's Affidavits.

I find that the orders made by Trial Magistrate were flawed. I find she acted in error and without appreciation of the legal authorities which were cited before her. The court decisions must be based on the balancing of the two sides of the story and this can always be reached after examination of witnesses and hearing both sides at the trial. That a party has given an undertaking as to damages is not sufficient to grant mandatory injunctions.

I therefore allow the appeals and set aside order made on 4/4/2003 and dismiss the application dated 20/2/2003 both with costs in this appeal and the court below.

Dated this 2nd day of July, 2004.

JOYCE KHAMINWA

J U D G E

2/7/04

Khaminwa, J.

Chege – Court Clerk

Mr. Jengo – for Appellant

Mr. Kilonzo – H/B – for Magolo

Judgment read in their presence in open court.

JOYCE KHAMINWA, J.