



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 98 OF 2002

JOHN MUTHEE NGUNJIRI

T/A TANGO AUCTIONEERS & GENERAL MERCHANTS.....1ST APPELLANT

RICHARD CHEROGONY MUGE.....2ND APPELLANT

VERSUS

JULIUS CHESARO1ST RESPONDENT

ROSEMARY NYAMBURA2ND RESPONDENT

RULING

This is an application under Order XLI Rules 4(1) and (6) and 5(1), Order L Rule 1 and Order XXI Rule 22(2) of the Civil Procedure Rules (hereinafter referred to as “the Rules”). In it, the Appellants seek, in the main, the following order:

“(c) THAT pending the hearing and determination of the appeal ... (the) Honourable Court be pleased to order motor vehicle registration number KZQ 106 be restituted, restored and handed over to the 2 nd ... (Appellant) and the R espondents herein be restrained by way of a permanent injunction from interfering with the said motor vehicle.”

At the outset, I would like to state that the use of the word “*permanent injunction*” is erroneous as it is plain from the nature of the application and the course of submissions that what was in fact sought was a temporary injunction. This was not raised before me and save for that comment, I will proceed to deal with the application as follows.

The application was supported by the affidavits of John Muthee Ngunjiri and Richard Cherogony Muge both sworn on June 19, 2002. There was no Replying Affidavit filed on behalf of the Respondents whose Advocates filed Grounds of Opposition as follows:

“1. THAT the application is fatally incompetent, ill-thought and scandalous.

2. THAT the application is premature insofar as (sic) it asks this Honourable Court to sit on appeal in a matter that is yet to be concluded.

3. THAT the application and indeed the entire appeal has miserably failed to meet the laid d own requirements of the law.

4. *THAT the application should in any event, be dismissed with costs.*”

From the affidavits in support of the application, the following are the facts leading thereto. On March 2, 2002, the 2nd Appellant attended a public auction of the motor vehicle in dispute at which he was declared the highest bidder. The public auction emanated from NAKURU CMCC NO. 871 OF 1995 (Danny G. Kinyeru v. Julius Chesaro & Rosemary Nyambura). The 2nd Appellant paid the purchase price of Kshs. 500,000/= on March 5, 2003 and was given possession of the said motor vehicle by the auctioneer. The Respondents with the help of the police “*violently*” took possession of the said motor vehicle and detained it at the Nakuru Central Police station. The Respondents made an application in the suit in the lower court referred to earlier which application was struck out on April 17, 2002.

On April 18, 2002 the Respondents filed NAKURU CMCC NO. 669 OF 2002 against the Appellants and obtained orders for the maintenance of status quo.

On June 13, 2002 the Respondents obtained the following orders in NAKURU CMCC NO. 669 OF 2002:

“1. THAT the motor vehicle registration number KZQ 106 currently being held at Central Police Station, Nakuru be released to the Plaintiffs (Respondents) pending the hearing and determination of the main suit herein.

2. THAT the Plaintiffs (Respondents) are restrained from disposing of the motor vehicle.

3. THAT this order be served upon the OCS Nakuru Central Station.”

The Appellants were aggrieved by those orders and appealed to this Court on June 17, 2002. They filed the application set out at the beginning of this Ruling seeking the order already set out.

Mr. Karanja for the Appellants stated that since the Respondents obtained the orders the subject of this appeal, they had not bothered to fix the suit for hearing and that was hurting the Appellants. This is not a sufficient ground to grant the orders sought. I agree with Mr. Njoroge for the Respondents that if the Appellants are aggrieved by the Respondents inaction in the suit pending in the lower court they may apply for its dismissal. On this conclusion alone, I do not see the need to go into the other matters canvassed before me.

I, therefore, dismiss the Appellants’ application dated June 24, 2002 with costs to the Respondents.

Dated and Delivered at Nakuru this 9th day of July, 2003.

ALNASHIR VISRAM

JUDGE