



Ithiri v Driver's Universe Motor Company Ltd & 2 others (Commercial Appeal E007 of 2022) [2024] KEHC 4520 (KLR) (Commercial and Tax) (1 March 2024) (Judgment)

Neutral citation: [2024] KEHC 4520 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E007 OF 2022
DO CHEPKWONY, J
MARCH 1, 2024**

BETWEEN

MARY KAGWIRIA ITHIRI APPELLANT

AND

DRIVER'S UNIVERSE MOTOR COMPANY LTD 1ST RESPONDENT

CARS DIRECT LIMITED 2ND RESPONDENT

EXECUTIVE SUPER RIDERS LTD 3RD RESPONDENT

(Being an appeal from the ruling of the Chief Magistrate Court (Hon. H.M. Nyaga) dated 21st January, 2022 in Mombasa CMCC No.E12227 of 2021)

JUDGMENT

1. This Appeal arises from a ruling and orders issued on 21st January, 2022 following an application dated 1st November, 2021 in which THE subordinate court declined to grant an injunction on the ground that the Appellant had not established a prima facie case to deserve granting of the said orders.
2. The brief facts as brought out in pleadings filed by parties and the Record of Appeal presented to this court are that the Appellant, the 1st, and the 3rd Respondents entered into two separate sale agreements for the Appellant to purchase two Motor Vehicles Registrations No.KCV 318A Porsche Cayenne for a consideration of Kshs.4,000,000/= and No.KBP 976Q Mercedes Benz for a consideration of Kshs.1,400,000/=. The parties had agreed that part of the consideration for the purchase of Porsche would be a trade-in with the Appellant's Motor Vehicle Registration No.KAC 200H valued at Kshs.300,000/=. It was agreed that thereafter the Appellant would make a first instalment of Kshs.700,000/= upon signing the sale agreement and pay the balance in twenty-four (24) monthly instalments of Kshs.160,000/=.



3. The Appellant averred that she honored her part of bargain by handing over the said trade-in Motor Vehicle Registration No.KAC 200H, and paid the agreed instalments by making the first instalment for Kshs.1,000,000/= on 22nd July, 2019, subsequently, she paid Kshs.700,000/= on 25th May, 2019, Kshs.500,000/= on 2nd December, 2019, Kshs.500,000/= on 12th April, 2020, Kshs.500,000/= in May, 2020 and Kshs.500,000/= on 30th March, 2021. As such, it is the Appellant's case that she has paid the agreed purchase price of the Porsche Cayenne in full but the Respondents have disregarded the terms of the agreement and have failed to hand over to the Plaintiff the original logbooks and transfer documents of the said Porsche Cayenne. And instead, the Respondents did sent unknown people to repossess the said Motor Vehicle Registration Number KCV 318A make Porsche Cayenne from her.
4. Thus, in the application dated 1st November, 2021 filed before the trial court, on the above grounds, the Appellant sought for an order of injunction restraining the Defendants from selling or in any other way disposing the subject motor vehicles and further, a mandatory injunction compelling the Respondents to execute all necessary transfer documents and release the motor vehicles to her.
5. It is however important to point out that in response to the application, the Respondents filed a replying affidavit sworn by one Peter Kamau who presented himself as the 1st and 3rd Plaintiff's General Manager. He averred that although the plaintiff offered her Motor Vehicle Registration No.KAC200H as part of consideration for purchasing Motor Vehicle Registration No.KCV318A the said Motor Vehicle Registration No.KAC 200H was impounded by Equity Bank Kimited through Dalali Auctioneers while in hands of a third party who had purchased it from the Respondents thus leading to embarrassment, exposure to possible litigation and damage to the Respondent's reputation. He annexed written handwritten notes by the Appellant's husband where he had offered to pay the Kshs.300,000/= being the assessed value of Motor Vehicle Registration No.KAC 200H after its repossession.
6. The Respondents added that the Appellant had also requested for insurance and repairs for Motor Vehicle Registration No.KBP 976Q but refused to pay for the same. The insurance fee was Kshs.3,000/= while the cost of repairs totalled to Kshs.323,400/=. Besides that, the Plaintiff failed to deliver the said Motor Vehicle Registration No.KBP 976Q to Kenya Revenue Authority for verification hence the reason a new logbook has never been issued.
7. The deponent has added that with respect to Motor Vehicle Registration No.KCV 318A, the Plaintiff made late payments on the agreed instalments attracting interest which to date continue to accrue. That, therefore, as at the time of swearing the affidavit, the Plaintiff/ Appellant's debt with respect to Motor Vehicle Registration No.KBP 976Q was Kshs.2,331,385/= and Kshs.1,094,227/= for Motor Vehicle Registration No.KCV 318A respectively which the Plaintiff did not disclose the same to court.
8. The above assertions prompted the Appellant's further affidavit which she swore on 25th November, 2021 and deposed that she delivered Motor Vehicle Registration No.KAC 200H with all necessary documents and the allegations leading to its repossession by Equity Bank are strange to her. She denied being in arrears as alleged. But instead, has stated she made lumpsum instalments which covered the agreed Kshs.160,000/= instalments but the Respondents failed to transfer the vehicle to her.
9. Upon considering the facts as presented above, the trial court opined that the Plaintiff had not established that she had paid all the outstanding instalments and or the agreed selling price for an order of injunction to issue.
10. Aggrieved by that decision, the Appellant launched the instant appeal putting forth the main ground as being that the learned trial Magistrate erred in fact and law in failing to appreciate that she



(The Appellant) had fully paid the agreed purchase price for the Porsche Cayenne or in any event appreciating the amount the Appellant had paid so as to preserve the subject matter.

11. The appeal was canvassed by way of written submissions and as the record reflects, both parties complied with the Appellant filing two sets of submissions dated the 30th August, 2022 and 16th September, 2022 respectively whilst the Respondent's submissions are dated 6th September, 2022. Having read through the said submissions, they replicate the summary given above, and this court would not wish to reproduce the same here save to add that the issues/arguments raised in the submissions will be highlighted in its analysis of the case.

Analysis and Determination

12. This being a first appeal, this court is expected to read through the proceedings of the trial court, analyze and re-evaluate the same so as to arrive at its own independent conclusion, while reminded that it did not have the opportunity to hear the parties in their respective presentation before the court. (See the case of *Selle and Another –vs- Associated Motor Boat Co. Ltd & Others* [1968] EA 123)
13. I have considered the pleadings and submissions on record and the main issue which emerges for determination is whether the trial court erred in law in failing to grant a temporary injunction restraining the Respondents and or their servants from selling or otherwise disposing Motor Vehicle Registration No.KCV 318A, Porsche Cayenne.
14. Having considered the ruling dated 21st January, 2022, which forms the subject of this appeal, this court first appreciates that this is merely an appeal against the failure by the trial court to grant an injunction and therefore cannot go into the issue of whether the Appellant had paid the entire agreed purchase price or whether there is an outstanding amount in the purchase price and or whether either of the parties reneged on their part of bargain. These are issues that lie in the determination of the entire suit that is pending before the trial court and can only be determined after hearing the parties on merit.
15. In any event, whether to grant interim prayer of injunction, the court is to be guided by the widely accepted principles that were laid in the locus classicus case of *Giella –vs- Cassman Brown & Co. Ltd*. Guided by the said principles, the Appellant was bound satisfy the court that she has an arguable case with prospects of success, or that she had a prima facie case that can succeed before the trial court, Secondly, that if the injunction is not granted, the appellant is likely to suffer irreparable loss and lastly, that if the court is in doubt, then it can determine the matter on a balance of a convenience.
16. It is further to be remembered that the grant of an order of injunction or not is dependant upon the discretion of the court which must be exercised judiciously and not whimsically or capriciously. However, the court is alive to the fact that it is now well settled that it cannot interfere with the exercise of the discretion by an inferior court unless it is satisfied that its decision is clearly wrong either because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. That is to say that in this appeal, the court only needs to discern whether the learned magistrate made an error which might have led to the wrong conclusion being reached.
17. In support of her case, the Appellant emphasized that she paid the entire agreed purchase price for Motor Vehicle Registration No.KCV 318A Porsche Cayenne and as such the Respondents had no right at all to repossess the said vehicle. The Appellant indeed illustrated the instalments she made towards the purchase of the said vehicle, which have been reproduced in paragraph three (3) herein-above. As such, the Appellant argues that she established a prima facie case worth of having the said motor vehicle preserved from alienation or disposal by sale or transfer to third parties.



18. In rebutting those assertions, the Respondents argued that the Appellant made late payments on the instalments that had been agreed on leading to accrual of interest. The Respondents further submitted that the Appellant is still indebted to it in respect to the subject Motor Vehicle Registration No.KCV 318A to the tune of Kshs.1,094,227/=. The Respondents maintained that the court would be doing greater hardship if it grants the injunction when the Appellant has not paid the entire consideration for purchase of the subject motor vehicle.
19. On whether the above facts establish a prima facie case which is the first issue or hurdle to be satisfied toward the grant of an injunction, this court has first had to seek the guidance in the case of *Mrao - vs- First American Bank of Kenya Ltd and 2 Others* [2003] KLR 125, which defined a prima facie case as follows: -

“..in Civil cases, it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
20. The Blacks Law Dictionary (8th Edition) defines the word ‘prima facie’ as “sufficient to establish a fact or raise a presumption unless disproved or rebutted”. In this case, the fact that the parties entered into a sale agreement for Motor Vehicle Registration No.KCV 318A at a consideration of Kshs.4,000,000.00 is not denied. It is also not denied that the parties had agreed that the Appellant trades in her Motor Vehicle Registration No.KAC 200H valued at Kshs.300,000.00 as part of the consideration, which she did although the Respondents contend that the said motor vehicle was repossessed by Equity Bank. No annexures were attached to support that claim. In this court’s view, the same then remains a subject for determination on merit since the Appellant on the other hand claims to be a stranger to the alleged repossession. It is also noted that the Respondents did not deny having received the instalments paid by the Appellant totaling to Kshs.4,000,000/= but only allege that the instalments were made late thereby accruing interest. The alleged interest has not per se been admitted by the Appellant and it lies with the trial court to establish that.
21. In this court’s humble opinion, the Appellant having established that she paid the agreed consideration of Kshs.4,000,000/= or a substantial part thereof in respect of Motor Vehicle Registration No.KCV 318A, she laid grounds for her rights to be protected with respect to ownership of the said motor vehicle. In other words, she laid a case that she is entitled to ownership of the subject motor vehicle which may only be defeated upon calling evidence from both parties and the court is persuaded that indeed, interest accrued and it ought to be paid or that part of the agreed purchase price has not paid as the Appellant averred.
22. Consequently, the court is persuaded that the Appellant established a prima facie case for grant of a temporary injunction with respect to the subject motor vehicle.
23. On whether the Appellant will suffer irreparable injury which cannot be compensated by damages unless temporary injunction is granted, this court is persuaded that the ground has been met for the following reasons. Firstly, the Appellant has persuasively shown that she paid a substantial part of the agreed purchase price and the amount in contention is a drop in the ocean. Secondly, substantial loss connotes a real and material loss as opposed to an imaginary one or a loss which is considerable in amount or value or larger in volume or number. In the circumstances of this case, the Appellant stands to lose much as opposed to what the Respondents are claiming to be the due balance of the agreed purchase price.
24. Having found that the Appellant established a prima facie case and the fact that she stands to suffer substantial loss, it aligns on all four that the balance of convenience would be in the court granting an



injunction restraining the transfer of Motor Vehicle Registration No.KCV 318A until the rights of the parties thereto are conclusively addressed.

25. In the upshot, this court finds merit in the present appeal and allows it in the terms of the following orders: -
- a. That the Ruling of the trial court delivered in Nairobi C.M.C.C No.E12227 of 2021 be and is hereby set aside partially with regard to the finding that the Appellant had not established a prima facie case with regard to Motor Vehicle Registration No.KCV 318A Porsche Cayenne.
 - b. That an order of temporary injunction be and is hereby issued restraining the Respondents whether by themselves, agents, servants or otherwise howsoever from in anyway selling, transferring, parting with possession and or wasting Motor Vehicle Registration No.KCV 318A, Porsche Cayenne pending the hearing and determination of Nairobi C.M.C.C/E 12227 of 2021, Mary Kagwiria Ithiri -vs- Drivers Universe Motor Company and Others.
 - c. Each party shall bear its own costs of the appeal.

It is so ordered.

RULING DATED AND SIGNED AT KIAMBU THIS 15TH DAY OF FEBRUARY , 2024.

D. O. CHEPKWONY

JUDGE

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 1ST DAY OF MARCH , 2024.

ALFRED MABEYA

JUDGE

