



REPUBLIC OF KENYA



My Credit Limited v Kinyanjui t/a Gamu Transporters & another (Civil Appeal E003 of 2024) [2024] KEHC 17260 (KLR) (22 May 2024) (Judgment)

Neutral citation: [2024] KEHC 17260 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E003 OF 2024**

F WANGARI, J

MAY 22, 2024

BETWEEN

MY CREDIT LIMITED APPELLANT

AND

**FRANCIS GACUI KINYANJI T/A GAMU TRANSPORTERS 1ST
RESPONDENT**

CHARLTON AUCTIONEERS 2ND RESPONDENT

*(Being an Appeal from the Ruling of Honourable Nyariki delivered on
5th December 2023 in Mombasa CMCC No. E258 of 2023, Mombasa)*

JUDGMENT

1. The Plaintiff had filed the suit vide the Plaint dated 18/07/2023 seeking for orders inter alia, a declaration that the repossession of the Plaintiff's motor vehicle no. KCH 907E (herein after referred to as the suit motor vehicle), an order of injunction compelling the Defendants to release the suit motor vehicle and further injunction restraining them from attaching, repossessing or in any other way interfering with the suit motor vehicle.
2. The Plaintiff further filed a Notice of Motion Application under certificate of urgency dated 18/07/2023 seeking the same relief as per the Plaint pending hearing and determination of the said application and subsequently the main suit. The grounds for the application was that on 03/09/2022, the Plaintiff had secured a loan facility with the 1st Defendant/ Appellant for Kshs. 1,300,000/= where he offered the suit motor vehicle as security. The loan was repayable in 24 months.
3. The Plaintiff/ Respondent had diligently paid the loan making substantial payments when the Respondent unlawfully instructed the 2nd Respondent Auctioneer to repossess the suit vehicle with



the intention of selling the same by way of public auction. It was stated that unless the Defendants were restrained as prayed, the Plaintiff would suffer irreparable loss.

4. The Defendants filed a Replying Affidavit dated 15/09/2023. It was stated that the Plaintiff had defaulted in the loan instalments repayment despite demand to do so. Notice of repossession had been issued, the suit vehicle repossessed and advertised for sale by way of public auction.
5. The application was canvassed by way of written submissions and both parties complied. The court rendered its ruling dated 05/12/2023 allowing the entire application as prayed with costs to the Plaintiff. Being aggrieved by the said ruling, the 1st Defendant/ Appellant filed this appeal on grounds as stated herein above.
6. The appeal was canvassed by way of written submissions and both parties complied.
7. The appeal was canvassed by way of written submissions. Both parties complied by filing their rival submissions.

Analysis and determination

8. This being a first appeal, this court is under a duty to re-evaluate and re-assess the evidence and make its own conclusions. It must, however, keep in mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand. (*Selle vs Associated Motor Boat Company Ltd* [1968] EA 123 and *Peters vs Sunday Post Limited* [1985] EA 424)
9. I have considered the appeal lodged, the submissions filed both for and against which I have summarized as above, the authorities cited as well as the law and I discern the following issues for determination: -
 - a. Whether the Trial Magistrate erred in granting mandatory injunction on an interlocutory application.
 - b. If the answer to (a) is in the affirmative, what orders should issue?
 - c. Who bears the costs?
10. It is not in dispute that the orders issued by the lower court amount to mandatory injunction. The Appellant was compelled to release the repossessed suit vehicle. The Appellant was further restrained from dealing in any way with the suit vehicle, which included repossession.
11. I have been held that mandatory injunctions can only be issued at interlocutory stage upon demonstration of special circumstances. In *Kenya Breweries Ltd & Another vs Washington O Okeya* [2002] eKLR, the Court of Appeal held as follows;

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”
12. It was the onus of the Plaintiff/ Respondent to show the special circumstances to warrant the issuance of the mandatory injunction orders. I have perused through the Ruling of the court to discern the



reasoning of the court in granting the mandatory injunction. At page 91 and 92 of the Record of Appeal, the trial court analyses the issue of requirement of grant of temporary injunction, and whether the Plaintiff/ Respondent had met the threshold for grant of the said order.

13. The trial court was satisfied that there was enough reason to award interlocutory injunction. Interlocutory injunctions are temporary in nature until final orders are granted upon full trial.
14. I have perused through the Notice of Motion application and the Supporting Affidavit. The Plaintiff stated that he was not in any arrears of the loan facility. He only attached the loan agreement in support of the argument. On the other hand, the Defendant/ Appellant stated that the Plaintiff was in arrears of the loan facility and demand letters were issued to that effect. Repossession notices were also attached in support of their case.
15. I am in disagreement with the finding of the court that the threshold in awarding temporary injunction had been met. The Plaintiff did not tender any evidence that he had paid the loan instalments as alleged. Despite the Defendant filing proof that the Plaintiff was in arrears, nothing stopped the Plaintiff from seeking leave of the court to file a supplementary Affidavit in response to the Replying Affidavit.
16. An order of injunction being an equitable remedy, a party seeking the same must act equitably. There being no evidence that the Plaintiff acted equitably, I find that the Plaintiff failed to meet the threshold of granting of interlocutory injunction.
17. I do concur with the submissions by the Appellant in paragraph 27 and 28 that the court ought not to protect a party from its own wrong doings. I therefore find that the Notice of Motion had no merits and ought to have been dismissed.
18. On the issue of costs, a careful reading of Section 27 of the *Civil Procedure Act* indicates that it is trite law that they follow the cause or event unless the court, for some good reasons, orders otherwise. The matter still pending trial at the lower court, costs should follow the outcome of the suit.
19. Flowing from the above, I proceed to make the following disposition: -
 - a. The appeal has merits and is allowed.
 - b. That the lower court ruling dated 05/12/2023 is hereby set aside and substituted with an order dismissing the Notice of Motion application.
 - c. Costs to follow the outcome of the main suit.
 - d. That file be mentioned before the Chief Magistrate for directions and further orders on 03/06/2025.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA, THIS 22ND DAY OF MAY, 2024.

.....

F. WANGARI

JUDGE

In the presence of:

Kitoo Advocate for the Appellant

Wafula Advocate for the Respondent

M/S Norah, Court Assistant

