



**Al Husnain Motors v Njoroge (Civil Appeal E183 of 2024)
[2024] KEHC 10673 (KLR) (11 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 10673 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E183 OF 2024
FN MUCHEMI, J
SEPTEMBER 11, 2024**

BETWEEN

AL HUSNAIN MOTORS APPELLANT

AND

SYLVIA WANJIRU NJOROGE RESPONDENT

RULING

Brief Facts

1. The application dated 25th July 2024 seeks for orders of stay of proceedings in Thika CMCC No E258 of 2024 pending the hearing and determination of the instant application and further set aside the ruling dated 23rd July 2024 and reinstate the ruling delivered on 25th June 2024 in Thika CMCC No E258 of 2024.
2. In opposition to the application, the respondent filed a Replying Affidavit dated 1st August 2024.

Applicant's Case

3. The applicant states that the respondent filed a suit Thika Civil Case No E258 of 2024 Sylvia Wanjiru Njoroge v Al Husnain Motors Limited together with an application dated 16th April 2024 seeking orders to have motor vehicle registration number KDL 752S returned to her after it was repossessed by the applicant.
4. The trial court rendered its ruling on 25th June 2024 whereby the learned trial magistrate held that the applicant clears all outstanding arrears within 30 days and parties to agree on auctioneers costs by 15/7/2024 failure to which the auctioneers were at liberty to file their bill of taxation by the court. The learned trial magistrate further issued a temporary injunction barring the respondent from selling by way of auction or private treaty or interfering with motor vehicle registration number KDL 752S pending further orders scheduled for 22/7/2024. The trial court directed the respondent to send the



- applicant a statement of all arrears within 7 days and upon payment of all the amount so demanded failure to which the motor vehicle registration number KDL 752S was to be released unconditionally.
5. The applicant states that they complied with the said orders and shared a statement of arrears with the respondent/plaintiff's advocate. The applicant further states that the respondent did not abide to the court's orders but instead filed another application dated 13th July 2023 seeking review of the orders issued on 25th June 2024. The trial court issued its ruling on 23rd July 2024 and held that the applicant (respondent herein) deposit Kshs 200,000/- in court and execute an affidavit undertaking to avail the subject motor vehicle in court or as directed by the court when so required. Further, upon compliance with the aforesaid, the subject motor vehicle be released to the plaintiff forthwith unconditionally. The trial magistrate further held ordered that the respondent file a statement of the auctioneers and storage fees payable and the applicant to ensure that she continues paying the monthly installments of Kshs 60,000/-.
 6. The applicant states that what the learned trial magistrate read in court did not match what was written particularly the learned trial magistrate quoted that before the release of the subject motor vehicle, a car track was to be installed and monitored by the applicant. Furthermore, the learned trial magistrate stated that Kshs 200,000/- was to serve as a security for storage fees/auctioneers fees and that the respondent should pay all the installments as they fall due failure to which all orders relating to the subject motor vehicle will be vacated and the vehicle will be released to court for onward transmission to the applicant. The applicant further states that the learned trial magistrate read out in open court that the respondent should pay installments as stated in the sale agreement which is an amount of Kshs 105,000/-. However, the applicant alleges in the written ruling he stated that the sum of Kshs 60,000/- should be paid. The applicant further argues that the learned magistrate erred in fact by stating that there was a meeting of minds of payment of Kshs 60,000/- as monthly installments yet there is nowhere in their pleadings where they accepted the said sum. The applicant avers that the correct monthly installment in the agreement is for the sum of Kshs 105,000/- which the respondent ought to have cleared by 17th July 2024.
 7. The applicant argues that the ruling and orders issued on 23rd July 2024 were contradictory, biased and tantamount to an appeal of the trial court's previous ruling. The applicant further argues that the learned trial magistrate misapplied the law on review as per Order 45 of the Civil Procedure Rules as they were no grounds to review the orders issued on 25th June 2024.

The Respondent's Case

8. The respondent states that she filed a suit in the trial court for the irregular repossession of her motor vehicle registration number KDL 752S. The respondent further states that she filed an interlocutory application dated 16/4/2024 which was opposed by the applicant herein and the trial court rendered its ruling on 25th June 2024 which in principle set out conditions for injunction and release of the subject motor vehicle.
9. The respondent avers that parties failed to agree as directed by the trial court in its ruling dated 25th June 2024 and that she proceeded to file an application for review dated 13/7/2024 which the trial court rendered its ruling on 23/7/2024.
10. The respondent argues that the applicant has deposed to competing factual issues through its advocates on record, a practice that is countenanced by courts and advocates' ethical practices. The advocate is not a party to the dispute for her to swear an affidavit for competing and confirmed issues and thus the affidavit can only be expunged for being incompetent.



11. The respondent avers that the trial court matter is scheduled for mention on 25/9/2024 but she deposes that she filed an application for amending her plaint which raise factual issues in contest such as interest rates and penalties levied; manner of repossession of the subject vehicle; existence and execution of the hire purchase agreement; whether there were oppressive and capricious terms in the hire purchase agreement contravening the Consumer Protection Act and the amount paid against the purchase price.
12. The respondent argues that the review was necessitated by the fact that the parties did not agree on the amounts due in terms of arrears. The respondent further argues that the learned trial magistrate was allowed to review the impugned ruling for sufficient reasons. Thus the misconstruction by the applicant on the contents of the ruling based on allegations of what counsel heard ought to be cross checked against the ruling delivered.
13. The respondent states that the learned trial magistrate correctly observed that the parties could not agree on the arrears and took into account that she had paid Kshs 2,456,000/- against the applicant's desired purchase price of Kshs 3,450,000/-.
14. The respondent avers that the subject motor vehicle is currently registered in the name of the applicant despite paying a substantial amount for it.
15. The respondent argues that the applicant does not stand to be prejudiced by allowing her to use the subject motor vehicle as she keeps paying Kshs 60,000/-. The respondent further states that the court can issue orders of usage of the subject motor vehicle as the car has a tracking device thus the vehicle can be tracked with ease and traceable and would not be a challenge to ensure it is operating upon release to her.
16. The respondent states that the trial court took into account the parties competing claims and issued a payment of Kshs 200,000/- which was within its discretion to do so.
17. Directions were issued that the application be canvassed by way of written submissions but from the record, it is only the applicant who complied on 15th August 2024.
18. The Applicant's Submissions

The applicant submits that the ruling dated 23rd July 2024 appears to be an appeal of the ruling dated 25th June 2024. The applicant relies on the cases of *Otieno, Ragot & Company Advocates v National Bank of Kenya Limited* [2020] eKLR and *Paul Mwaniki v National Hospital Insurance Fund Board of Management* [2020] eKLR and submits that the trial magistrate misapplied the law on review as per Order 45 of the Civil Procedure Rules as there were no grounds to review the orders issued on 25th June 2024. Thus, the orders were biased and inappropriate in the circumstances.
19. The applicant submits that it has an arguable appeal which shall be rendered nugatory unless the court grants stay of execution of the impugned ruling.
20. The applicant relies on Order 42 Rule 6 of the Civil Procedure Rules and the case of Ena Investment Limited v Bernard Ochau Mose & 2 others [2022] eKLR and submits that the purpose of stay of execution is to preserve the subject matter in dispute while balancing the interests of the parties.
21. Relying on the case of James Wangalwa & another v Agnes Naliaka Cheseto [2012] eKLR, the applicant submits that it shall suffer substantial loss if the subject motor vehicle is released to the respondent as the applicant is in possession of the vehicle which is registered to its name. Thus handing over possession of the subject motor vehicle to the respondent would be a toll order as she may tamper with the same pending appeal. The applicant argues that the respondent has already defaulted in paying her monthly instalments and there is no guarantee that the balance of the purchase price of Kshs



- 1,153,830/- shall be paid if the subject vehicle is released to her. The applicant further argues that its right to repossession will be lost and that the subject vehicle is a depreciating asset which it shall not be able to sell at its market value and may have no recourse to the respondent.
22. The applicant submits that the ruling was delivered on 23rd July 2024 and the application and memorandum of appeal were filed on 25th July 2024. Thus, the application was filed timeously.
 23. On the issue of security, the applicant states that it is ready and willing to abide by the court's direction. The applicant states that it has been in possession of the motor vehicle and has not sold the same.
 24. The applicant states that the respondent has not given any plausible reason why the court should deny issuing the orders sought.

Issues for determination

25. The two main issues for determination herein are:-
 - a. Whether the Supporting Affidavit sworn by the applicant's counsel is incompetent.
 - b. Whether the applicant has met the prerequisite for grant of stay of proceedings.

The Law

Whether the Supporting Affidavit is incompetent and ought to be expunged.

26. The respondent has attacked the validity of the applicant's supporting affidavit on the premise that it has been sworn by the applicant's advocate. It is argued that in matters which entail contentious evidential facts or issues of evidence, it is inappropriate for an advocate of a party to swear and/or depone to such facts.
27. The Court of Appeal in [Hakika Transporters Services Ltd v Albert Chulab Wamimitaire](#) [2016] eKLR expressed the following:-

As regards the appellant's objection regarding the affidavit supporting the application, it is clear that Mr. Munyithya has deponed only to matters within his personal knowledge as counsel acting in this matter both in the High Court and in this court. Ordinarily counsel is obliged to refrain from swearing affidavits on contentious issues, particularly where he may have to be subjected to cross examination. Rule 9 of the [Advocates \(Practice\) Rules](#) however permits an advocate to swear an affidavit on formal or non-contentious matters.

28. Nevertheless, the law does not prohibit or bar advocates completely from swearing affidavits but such an affidavit should relate to issues that are born out of the record of the court, issues which have been pronounced upon, issues that the court is to take judicial notice of, settled issues of law and/or issues that are admitted by the adverse party in the subject proceedings. In the instant case, the instant application is supported by an affidavit sworn by the counsel for the applicant. She has deponed to contested facts particularly the amount of the monthly installments payable and the fact that the ruling as read by the trial magistrate is not similar to the one he wrote. The facts sworn by the advocate raise serious questions of fact and evidence which would require the advocate to be cross examined to determine the truth.
29. The said facts as sworn by counsel cannot be verified for the foregoing reasons. In my considered view, the said affidavit is incompetent and is accordingly struck out. Accordingly, the application dated 25th July 2024 is incurably defective devoid of a supporting affidavit and is hereby struck out with costs to the respondent.



30. It is hereby so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 11TH DAY OF
SEPTEMBER 2024.**

F. MUCHEMI

JUDGE

