



Kuti v Givens (Civil Suit E016 of 2022) [2023] KEHC 2095 (KLR) (13 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2095 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL SUIT E016 OF 2022
FR OLEL, J
MARCH 13, 2023**

BETWEEN

FELIX KILONZO KUTI PLAINTIFF

AND

LATANYA NASHA GIVENS DEFENDANT

RULING

1. Before court is the defendant/appellant notice of motion appellant's dated January 25, 2023. Prayer 1 and 2 are spent and what remains for determination is pray (c) namely;

That pending interparty hearing of determination of the defendants application dated 12th December 2022, this honourable court do issue a temporary order of injunction restraining the interested party herein, Diamond Trust Bank and its agents Phillip Mwaura T/A Gillette Traders Auctioneers and Leakeys Auction yard whether by themselves, agents servants or any person acting on their instructions from offering for sale, selling disposing auctioning dealing or denoting Isuzu bus KDE 282R.

2. The appellant relied on the grounds on the face of the application and the supporting affidavit of the appellant Latanya Nasha Givens dated January 25, 2023 and further affidavit dated February 13, 2023.
3. This application was opposed by the plaintiff vide his replying affidavit dated February 8, 2023, while the interested party filed their replying affidavit sworn by one Faith Ndonga filed in court on February 10, 2023.
4. Pursuant to directions given by this court that the parties advocates did appear before court on 14/2/2023 and made brief oral submissions with regard to prayer (b) which sought for release of the school bus KDE 282R.. After hearing submissions by all parties the court did order and direct that the said school bus be released to the Defendant and that she gives her undertaking to comprehensively insure the bus and undertakes to indemnify the interested party



Brief Facts

5. It was the applicants contention that vide a court order issued on November 9, 2022, motor vehicle Isuzu bus KDE 282R and KBN 643A pick up was to be released to the principal, I can Fly High School as that was in the best interest of the school children and to enable the school operations to continue. As at the time the relevant order was issued the said motor vehicles had been detained at its auctioneers yard and the applicant had to pay Ksh.140,000/= to have them released.
6. On January 24, 2023 in the presence for counsel for the plaintiff and defendant herein a further order was issued which amongst other things restrained the plaintiff, his agents, servants, or any person acting on his instructions/under his directions from interfering with, auctioning, charging pleading, vandalizing, driving, damaging, selling, removing from school or disposing of Isuzu KDE 282R and other motor vehicles mention therein. The court further directed the plaintiff handover to the defendant copies of logbooks and certificate of insurance for the suit motor vehicle. In a strange twist of events on the said 24/1/2023, the very day the injunctive orders were issued. Phillip Mwaura T/A Gillette Traders Auctioneers through his agent Mr. Victor Rono, acting on instructions of the interested party attached the school bus KDE 282R and took it to Leakey's Auction yard along Mombasa road.
7. The appellant question the timing of the entire process and stated that it was designed to circumvent the order issued by their court on November 8, 2022 and January 24, 2023. Further the aim was to frustrate the defendant and the school from continuing with their daily activities and therefore it was in the interest of justice and best interest of the school to have the motor vehicle released unconditionally to the principal, I Can Fly High School as earlier directed by court.
8. The plaintiff opposed this application and stated in his replying affidavit that he did not sent any third party to go attach the school bus and he had no authority to order the auctioneer to attach the Bus. He stated that the bus was attached as he had defaulted in paying monthly instalments due to the interested party for three months, and that the allegation that he consented to Mr victor Rono to go collect the bus was untrue.
9. Further the plaintiff stated that the defendant was the author of her own misfortune as she had placed the bus in a position of it being auctioned as the loan remained unpaid, and that he should be given an opportunity to access the school and use some of the motor vehicles to enable him raise funds to settle the facility. It was not his wish to have the school bus repossessed.
10. The interested party oppose this application by filing a Replying Affidavit filed in court on 10/2/2023. They stated that the plaintiff approached the bank and sought a hire purchase facility to enable him purchase a new school bus. The bank considered his request and he was issued with a facility of Ksh.4,000,000/- to purchase a new Isuzu bus FR590 from Thika Motor Dealers. The hire purchase agreement was no.060HPAR21328000I with respect to motor vehicle Registration number KDE 282R and it outlined the terms and conditions that would apply.
11. It was the interested party contention that the plaintiff routinely defaulted on monthly repayments and other payments were made in a piecemeal manner contrary to the term of agreement and was in arrears of Ksh.3,973,551.69 which amount continued to attract interest. The bank therefore was right to repossess the said motor vehicle. Further the interested party stated that the court order of 24th January 2023 only stopped the bank from disposing off and/or selling off the suit property pending interparty hearing on the application dated January 12, 2022 and the repossession was not in breach of the said orders.



12. The final issue raised by the interested party was that they will be prejudiced if the orders prevailing are not discharge as the outstanding amount will continue to accrue.

Analysis and Determination

13. Order 40 rule 1 of the *Civil Procedure Rules* provide that;

“Where it is proved by affidavit or otherwise;

- a. That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongly sold in execution of a decree, or
- b. The defendant threatens or intends to remove or dispose of his property in circumstance’s affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that maybe passed against the defendant in the suit,

The court may by order grant a temporary injunction to restrain such acts, or make such other order for the purposes of staying and preventing the wasting, damaging, alienation, sale removal, or disposition of the property as the court thinks fit until disposal of the suit or until further orders.

14. In the case of *Robert Mugo wa Karanja V Ecobank (kenya) limited & ano* (2019) EKLK where the court was dealing with an injunction application it was held that;

“circumstances for consideration before granting of a temporary injunction under order 40 rule 1 of the *Civil Procedure Rules* requires a proof that any property in dispute in a suit is in danger of being, wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose off the property; the court is in such situation enjoined to grant a temporary injunction to restrain such acts...”

15. In *Dr Spry’s book on equitable remedies* 6th edition LBC page 447, it was stated that granting of interlocutory orders were more concern with;

- a. The maintenance of a position that will more easily enable just to be done when its final order is made and
- b. An interim regulation of the acts of the parties that is the most just and convenient in all the circumstances.

16. Finally in the case of *National commercial Bank ltd V Olint corporation* 2009 iv/r 1405, Privy Council held that

“the purpose of interlocutory injunction is to improve the chances of the court being able to do justice after determination on merits.”

17. In this matter, there exists two undisputed orders dated November 8, 2022 issued by Lady Justice M.W Muigai and the second order dated January 24, 2023 issued by justice R. Limo both orders specifically have limbs which make reference to motor vehicle KDE 282R Isuzu bus.



18. The order dated November 8, 2022 at prayer 2 directed that;
 - a. That in the best interest of the children- article 53 of *the constitution* of Kenya 2010 and Section 4 of the Children’s Act, that Motor vehicle registration no. KDE 282R bus and KBN 643A pickup be and are hereby released to the principal of the school (I can fly High School).
 - b. That the logbooks of 5 motor vehicles to be given to the Deputy Registrar Machakos High court.
19. On January 24, 2022 Justice R. Limo also issued granted two orders relating to the suit motor vehicle pending interparty hearing. The Specific order relating to the suit motor vehicle did direct that;
 - a. In the interim, a temporary injunction order is hereby issued restraining the plaintiff herein, whether by himself, agents servants of any persons acting on his instructions/under his directions from interfering with auctioning charging, pledging, vandalizing, driving, damaging, selling, removing from school or disposing the following motor vehicles Toyota Prado KCV 011M, Nissan X-trail KCQ 626D, Toyota Pick Up truck KBN 643A, Toyota Coaster School bus KBA 850G and Isuzu Bus KDE 282R pending interparty of the application.
 - b. In the interim, the plaintiff/respondent is ordered to hand over to the defendant/applicant herein copies of logbooks and certificate of insurance for the following motor vehicles Toyota Prado KCV 011M, Nissan X-trail KCQ 626D, Toyota Pick-up truck KBN 643A, Toyota Coaster School bus KBA 850G and Isuzu bus KDE 282R pending inter parties hearing of this application.
20. Vide the same order dated 24/1/2022 the interested party were enjoined as a party to this suit and subsequently their advocate and filed a notice of appointment of advocates on February 7, 2023.
21. Both orders in their plain and clear interpretation specifically placed the possession control and use of motor vehicle KDE 282R Isuzu bus under the custody of the defendant. No appeal or review has been filed as against the two orders.
22. Having been enjoined in this suit read through the pleadings and filed document, the interested party is fully aware that there is need for all parties to comply and obey court orders in force and therefore it was not open for their agent to attach the suit motor vehicle even, if the order of 24.1.2023 does not specifically refer to them. The order of 24th January 2023 must be read jointly with the orders dated 9th November 2022, which was specific that the school bus was to remain in the custody of the defendant.
23. The court will also consider where the balance of convenience (considering the earlier orders issued) lie, it would only be just a proper to maintain the status quo before hearing of the application dated 12/12/2022 on merit. As stated in *Paul Gitonga Wanjau versus Gathuthis Tea Factory Co. Ltd and 2 others* (2016)eKLR it was held;

“Where any doubt exists as to the applicants rights or if the right is not disputed, but its violation is denied, the court in determining whether one interlocutory applicant should be granted takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was



granted and he should ultimately turn out to be right and that which injury the applicant, on the other hand might sustain if the injunction is refused and he should ultimately turn out to be right..... Thus the court makes a determination as to which party will suffer greater harm with the outcome of the motion. If the applicant has a stronger case on its merits or there is significant irreparable harm it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies."

24. On the same issue in the case of *Chebil Kipkoech versus Barnabus Tuitoek Bargoria and another* (2019)eKLR it was stated that

“the meaning of balance of convenience in favour of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favour of the plaintiff, the inconvenience cause to ‘them would be greater’ than that caused to the defendants if an injunction is granted and suit is ultimately dismissed”.

25. Since there already exist and order of injunction restraining the plaintiff and indeed any party from interfering with the defendant/applicant possession control and use of the suit motor vehicle it would be just and prudent to maintain this order and have to apply cross board in the interim before the said application is heard on merits.

26. From the facts as pleaded it is not in doubt that motor vehicle Isuzu Bus KDE 282R is in danger of being alienated and be disposed off by the third party and the from the affidavits filed in support of the application circumstances have been shown to warrant the granting of the orders as sought.

27. I do therefore find merit in the defendant/application dated 25/1/2023 and granted the prayers sought in prayer (c) thereof. Cost of the said application shall abide cost as shall be directed at the determination of the application dated December 12, 2022.

28. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 13TH DAY OF MARCH, 2023.

FRANCIS RAYOLA

JUDGE

