



Mwananchi Credit Limited v Cheruiyot & another (Civil Appeal E002 of 2023) [2023] KEHC 2895 (KLR) (22 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2895 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E002 OF 2023
DKN MAGARE, J
MARCH 22, 2023**

BETWEEN

MWANANCHI CREDIT LIMITED APPELLANT

AND

STANLEY KIPYEGON CHERUIYOT 1ST RESPONDENT

DANIEL KARISA KARABU 2ND RESPONDENT

RULING

1. No one was giving me a full picture in this matter. The Applicant knew nothing prior orders while the respondents did not seem to know things when called upon. I therefore decided to call for and perused the original court file to understand the genesis of this dispute.
2. The dispute is described by one of the parties quite well. It arose from a verbal sale agreement between the Respondent. At the time of agreement, involving the suit motor vehicle, was reportedly charged to Equity Bank (K) Ltd. Effectively the said bank held a say and needed to give consent to the transaction, of sale.
3. The said motor vehicle was later used as collateral to the Appellant by the Registered owner The 2nd Respondent. The agreement was reportedly reduced into writing on 30/9/2016 for Ksh 4,241,090. Copy of log book shows as at 25/9/2014, it was registered the motor vehicle was jointly in the names of 2nd Respondent and Equity Bank Ltd.
4. The lower Court appears to have issued an interim order to release a log book for KCA xxxx to the plaintiff pending interpartes hearing. This order was issued exparte. The extension of the order continued, till the impugned order was issued necessitating the appeal.



5. The order in force was for Release of a log book. Notwithstanding from complaining the court was told that there was repossession that was ongoing. The applicant was thus compelled to release the motor vehicle is the genesis of this application.
6. All the orders issued were mandatory in nature. Given the disputes between parties there is an arguable point whether the orders could issue, ex parte, before service on the Appellant.
7. This is more so, when the applicant is not the registered owner but a purchaser through a parole agreement.
8. The Appellant entered appearance on 1/7/2023. They do not appear to have participated in the suit prior thereto. I have perused an affidavit of service and rule that: -
 - a. The first affidavit of service the one filed on 30/8/2022. I need not say more for now. After having satisfied myself that the applicant has met all the requisite criteria for grant of the order of stay in that:-
 - a. The application was made without undue delay.
 - b. There is an arguable appeal. This is a matter a mandatory order can issue ex parte or at the time it was filed on 6/7/2022 for service on 28/6/2022 where the application and affidavit dated 26/6/2022 and order dated 27/6/22 were served.
 - c. The 2nd Affidavit of service was filed on 3/6/2022. It purports to have served a mention notice which the 2nd defendants stamped. It is not stamped. It is filed later.
9. It is therefore safe to categorically state that there is a high likelihood of success of the appeal.
10. The decisions of the superior regarding issue of mandatory orders at interlocutory stage is now well settled. In *INN V NIC 2020 eKLR*, the Court, Hon. Justice J.K. Seron had this to say:-

“...the court will not grant a mandatory injunction if the damage feared by the plaintiff is trivial, or where the detriment that the mandatory injunction would inflict is disproportionate to the benefit it would confer. We would also add that, save in the clearest of cases, the right of the parties to a fair and proper hearing of their dispute, entailing calling and cross-examination of witnesses must not be sacrificed or substituted by a summary hearing.

Persuasive judicial pronouncements by Indian courts have also affirmed that great circumspection is called for before awarding a mandatory injunction at interlocutory stage. In *Bharat Petroleum Corp Ltd V. Haro Chand Sachdeva*, Air 2003, Gupta, J. of the Delhi High Court observed as follows:

“While Courts power to grant temporary mandatory injunction on interlocutory application cannot be disputed, but such temporary mandatory injunctions have to be issued only in rare cases where there are compelling circumstances and where the injury complained of is immediate and pressing and is likely to cause extreme hardship. If a mandatory injunction has to be granted at all on interlocutory application, it is granted only to restore status quo and not to establish a new state of things.”
11. This is a matter we shall deal with in the fullness of time. the less I say the better.
12. The Applicant has shown that the Respondent were stealing a march on them. I therefore issue the following orders: -



- a. All the orders issued in Mombasa CMCC E499 of 2020 are hereby stayed pending Appeal.
- b. Motor vehicle Registration No. KCA xxxx be placed in safe custody of the Appellant or Auctioneers appointed by the Appellant pending hearing and determination of this appeal.
- c. The Appellant should not part with possession of motor vehicle Registration KCA xxxx.
- d. The OCS Changamwe police station to effect this order.
- e. Parties to proceed further with the main appeal, directions of which I shall issue immediately upon reading this Ruling.
- f. The Applicant to have costs of 15,000/= of the application payable by the 1st Respondent, Stanley Kipyegon Cheruiyot, within 15 days, in default execution to issue.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 22ND DAY OF MARCH, 2023.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

HON. MR. JUSTICE DENNIS KIZITO MAGARE

JUDGE OF THE HIGH COURT, MOMBASA

In the presence of:

Miss Yusto for the Appellant/Applicant

Derick Odhiambo for 1st Respondent

No appearance for the 2nd Respondent

Court Assistant – Oliver Musundi

