



REPUBLIC OF KENYA



Orina v Palmieri (Civil Appeal 138 of 2022) [2023] KEHC 17555 (KLR) (16 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17555 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL 138 OF 2022
SM GITHINJI, J
MAY 16, 2023**

BETWEEN

GEOFFREY ORINA APPLICANT

AND

GIORGIO PALMIERI RESPONDENT

((Being an appeal from whole decision and Ruling and Order made on the 14th day of December, 2022 by Hon James Ongondo – Chief Magistrate in Malindi Cmcc No. E260 of 2022))

RULING

- 1 This Ruling is in respect to a Notice of Motion application dated December 19, 2022 brought under Order 42 Rule 1 of the *Civil Procedure Rules*, section 1A and 3A and 63(e) of the *Civil Procedure Act*, Order 50 Rule 1 seeking the following orders;
 1. Spent.
 2. Spent.
 3. That upon inter - partes hearing, there be a stay of execution of the order issued on December 14, 2022 pending the hearing and determination of the Appeal herein.
 4. That costs be provided for.
- 2 The application is supported by the affidavit sworn by Geoffrey Orina on the same day. He stated that the Respondent filed this matter in the subordinate court and on the 14th day of December, 2022, the Honourable court delivered a Ruling in finality of the matter. He deponed that the order issued seemed to be final as it granted the Respondent everything he wanted in the suit but at the interim stage. He further deponed that if the order is executed, he will suffer loss as he has not been fully paid for the services he offered and that some spare parts were purchased on credit and further that he had been



given 7 days to comply with the order notwithstanding the fact that funds are required to purchase the necessary spare parts.

- 3 In response to the application, the respondent filed a replying affidavit sworn by Giorgio Palmieri on the 7th day of February, 2023. He deposed that the orders of December 20, 2022 were issued based on gross misrepresentation, deceit and without full disclosure of the pertinent facts to this court by the applicant. He asserted that the applicant is forcefully attempting to take possession of his property and that the current application is intended to frustrate him and deny him the use of his motor vehicle. Further that the application for stay calls for the question of security and if indeed the applicant is desirous of being granted stay, they should deposit security in court of the amount due as a price for stay. He further contends that he would be greatly prejudiced and will suffer irreparable loss if stay orders are granted as the applicant intends to continue holding his motor vehicle illegally.

Disposition

- 4 I have considered the present application, the response as well as the submissions by counsels.
- 5 I note that in the application that is the crux of this appeal, the applicant sought mandatory orders as well as temporary injunctive orders restraining the defendant from selling the motor vehicle in question by way of public auction. I have also perused the ruling by the subordinate court. In my view, a mandatory injunction should only be granted in special circumstances and in clearest of cases. The grant or refusal of an injunction involves the exercise of judicial discretion. The circumstances in which this court can interfere with the exercise of judicial discretion by the lower court were articulated in the well-known case of *Mbogo and another v Shab* (1968) EA 93 where the court stated:

“...that this court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted of matters which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

- 6 Bearing that in mind, the main issue in this appeal is whether the subordinate court erred in granting a mandatory injunction in the circumstances of this case and whether doing so constitutes an erroneous exercise of judicial discretion. An applicant for mandatory injunction must, in fact, establish the existence of special circumstances. Further the applicant must prove his case on a standard higher than the standard in prohibitory injunctions.
- 7 In the present case, the respondent in the application dated October 12, 2022 asserted that he is the registered owner of the motor vehicle in question and that sometime in February, 2022, he took the motor vehicle to the applicant who is a mechanic for repair and that after paying the requested amount, the applicant failed to release the motor vehicle. The applicant on the other hand contended that after repairing the motor vehicle, the respondent protested paying the agreed amount alleging that the bill was too high. He further contended that the order as issued by the subordinate court is incapable of being performed since the respondent is yet to pay for parts of the motor vehicle that had been replaced.
- 8 In the case of *Kenya Breweries Ltd & another v Washington O Okeya* [2002] eKLR, the Court of Appeal stated as follows on mandatory injunctions;

“A mandatory injunction ought not to be granted on an interlocutory application in the absence or 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.”

9 The court also reaffirmed its decision in *Sbariff Abdi Hassan v Nadhif Jama Adan* (2006) eKLR where it stated that:

“The courts have been reluctant to grant mandatory injunction at the interlocutory stage. However, where it is prima facie established as per the standards spelt out in law as stated above that the party against whom the mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case.”

10 I am of the considered view that a mandatory injunction bringing a matter to conclusion at an interlocutory application cannot be issued in the absence of special circumstances. I am not convinced that special circumstances existed in this matter that would have warranted the grant of a mandatory injunction in the nature of the orders issued in the ruling dated December 12, 2022. Further, I am also not convinced that this case is so clear that it ought to be decided at once. On perusal of the issues, I am of the view that there are competing claims by both parties and these require further interrogation at full hearing.

11 In the end, I am inclined to allow the application dated December 19, 2022. Application is therefore allowed. Costs be in the cause.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 16TH DAY OF MAY, 2023.

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S.M. GITHINJI

JUDGE

In the Presence of; -

Ms Achieng holding brief for Miss Metto for the Respondent.

Mr Mogaka is for the Appellant (absent)

CORAM: Hon. Justice S. M. Githinji

Mogaka Bwongaki & Co. Advocates for the Applicant.

Njuki & Co. Advocates for the Respondent

