



**Radha Motors Limited v Kiplagat & another (Civil Appeal
E077 of 2020) [2023] KEHC 19927 (KLR) (13 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 19927 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E077 OF 2020
HK CHEMITEI, J
JULY 13, 2023**

BETWEEN

RADHA MOTORS LIMITED APPLICANT

AND

VICTOR KIPLAGAT 1ST RESPONDENT

EXPRESS AGENCY AUCTIONEERS 2ND RESPONDENT

RULING

1. The notice of motion dated June 20, 2022 prays for orders that there be stay of execution of the ruling of the trial court dated June 16, 2022 and all consequential orders pending the hearing of the application.
2. The application is supported by the sworn affidavit of Rameez Muhammad the applicant's director sworn on the same date. In the affidavit the applicant seeks stay of execution of the orders granted by the trial court which directed the applicant to release motor vehicle registration number KDD 955S unconditionally to the 1st respondent.
3. From the said affidavit it is evident that the parties entered into a sale agreement wherein the applicant sold the said motor vehicle to the 1st respondent for a sum of kshs 3,010, 000. The said respondent has already paid substantial sum of kshs 1,350000 leaving a balance of kshs922000.
4. As a result of the default according to the applicant it went ahead to repossess the vehicle rendering the respondent to file the suit for it to be returned. The trial court ordered that the applicant does so unconditionally.
5. The applicant being dissatisfied with the said order has appealed to this court seeking stay of execution of the same. It argues that it has good grounds of appeal and that if the application is disallowed it stands to suffer loss and damage.



6. The 1st respondent has filed a replying affidavit sworn on June 29, 2022 in which it accuses the applicant of being in contempt of the court orders. He deponed that the court cannot allow the said application till the applicant surrenders the vehicle to him unconditionally as directed by the court.
7. The respondent has also filed a preliminary objection on a point of law dated June 28, 2022 the substance of which is that the pleadings filed by the applicant have been prepared by unqualified person as set out under section 22(1) (b) of the *Advocates Act* chapter 16 laws of Kenya. The applicant has attached some correspondences from the Law Society of Kenya indicating that one Joanne Waweru Njoki did not have a practicing certificate for the period when she filed the pleadings on behalf of the applicant.
8. For the above reasons therefore the applicant prayed that the pleadings be expunged from the record as they are incompetent ab initio.
9. The court directed the parties to file written submissions which they have done and I have perused the same together with the attached authorities. This court proposes to deal with the two issues, namely the application as well as the preliminary objection simultaneously.
10. In regard to the preliminary objection the same does not qualify the ingredients of a preliminary objection as was laid down by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696 at page 700 paragraphs D-F Law JA as he then was had this to say:

“ a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
11. At page 701 paragraph B-C Sir Charles Newbold, P. added the following:

“ a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”;
12. From the above citation it appears that the court does not need to look elsewhere to establish that the issue raised is a pure point of law. It must be very plain. Respectfully with the matter at hand the applicant has had to produce evidence from the Law Society which in my view is subject to contestation. Already in the applicant’s submissions it has argued that the law was amended to allow the pleadings to stand despite the same having been filed by unqualified person.
13. The applicant cited section 34B of the *Advocates Act*. This immediately rings a bell that the court must look elsewhere to arrive at a decision whether the preliminary objection can stand.
14. Although the objection could be sustained I find that it does not strictly stand out as a pure point of law but a mixture of law and facts.
15. In regard to the application I find that both the applicant and the 1st respondent have come to the court without clean hands. I state so for the following reasons.



16. The applicant without obtaining any court order seems to have unilaterally attached the said vehicle from the 1st respondent who had defaulted in the payment of the instalments. I state so because there is no evidence that he objected to the contention that there was a balance of kshs922000.
17. Since that is the case unless otherwise proved I find that this is a matter which does not need to clog the courts. The parties must honour the contract they signed willingly and not use the courts to sanitize their ills.
18. In the premises it is hereby directed as hereunder;
 - (a) The applicant shall release to the 1st respondent the motor vehicle registration number KDD 955S on condition that the latter pays the pending instalments up to the date of this ruling.
 - (b) Any balance of the instalments shall be paid by the 1st respondent monthly as per the contract effective from August 30, 2023.
 - (c) In default of the instalments stated above the applicant shall issue a 14 days' notice and in default be at liberty to execute in the normal court process for the balance as well as costs.
 - (d) The auctioneer's costs, if any, shall be paid by the applicant for the reason that the attachment was not sanctioned by the court.
 - (e) Costs of this application shall be in the cause.

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 13TH DAY OF JULY 2023.

H K CHEMITEI

JUDGE

