Odongo v Ahmad Motors Limited (Civil Appeal E049 of 2024)
[2024] KEHC 14038 (KLR) (8 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14038 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL APPEAL E049 OF 2024

AC BETT, J

NOVEMBER 8, 2024

BETWEEN

WELLINGTON ODONGO ..... APPELLANT

AND

AHMAD MOTORS LIMITED ..... RESPONDENT

(Being an appeal from the Ruling of Hon. Gladys W. Kiamah (RM), in Kakamega CMCC. No. E091 of 2023 delivered on 22nd February 2022)

JUDGMENT

1. Before me is a Memorandum of Appeal dated 5th March 2024, being an appeal from the ruling of Hon. Gladys. W. Kiama, Resident Magistrate that was delivered on 22nd February 2024 in Kakamega Magistrate's Court Civil Suit Number. E091 of 2023.

2. The appellant, being aggrieved by the ruling mentioned above appealed to this court on the following grounds: -

   (1) That the honourable magistrate erred in law by allowing the application for review on setting aside orders despite the grounds for granting such orders not being met.

   (2) That the trial court erred in law by allowing the respondent to take possession of the motor vehicle despite the appellant having paid more than two-thirds of the hire purchase price.

   (3) That the trial magistrate erred in law and in fact by setting aside orders issued by a magistrate of higher ranking than her.

   (4) That the trial court erred in law and in fact by setting aside orders that had already been overtaken by events.

(5) That the trial court erred in law by failing to hold the respondent liable for his actions of repossessing the motor vehicle without a court order yet two-thirds of the hire purchase price had been paid.

(6) That the trial magistrate erred in law by allowing the respondent to exercise the rights under the hire purchase agreement before the conclusion of the main suit.

(7) That the trial magistrate erred in law and in fact by considering the application before her despite not having jurisdiction to hear the same.

(8) That the trial magistrate erred in law by enforcing a hire purchase agreement which was not registered.

Background

3. The appellant herein instituted a suit in the Chief Magistrate's Court vide a plaint dated 16th May 2023. He claimed to have entered into a sale agreement with the respondent herein for motor vehicle Toyota Hiace Regiusace Reg KDH 206 V at an agreed selling price of Kshs 2,920,000 where he paid a deposit of Kshs 800,000 and he was to pay the arrears in the agreed instalments. The appellant claimed that the respondent was threatening to repossess the suit motor vehicle yet he was paying his instalments until he was unable to do so due to economic restraints streaming from the harsh economic times. He claimed that he was ready to pay the respondent the remaining amount as agreed. The appellant prayed that a permanent injunction be issued restraining the respondent, its servants or agents from repossessing, interfering or selling the suit motor vehicle. The appellant also prayed for extension of the repayment period and for costs of the suit.

4. The appellant also filed a Notice of Motion dated 16th May 2023 seeking an order of temporary injunction restraining the respondent, its servants or agents from repossessing, interfering or selling the suit motor vehicle pending hearing and determination of the suit. The respondent through its submissions dated 20th June 2023 claimed that the appellant did not satisfy the criteria needed for one to be issued with an interim injunction as it was set out in the case of Giella V Cassman Brown [1973] EA 358. The appellant in his submissions in support of the said application stated that he followed due process in purchasing the suit motor vehicle and has been paying the required instalments as agreed and that the respondent had ill intention of breaching their contract and interfering with his peaceful utilization of the suit motor vehicle.

5. By an order dated 3rd August 2023 the trial magistrate ordered that the respondent, its agent or its servants be restrained from repossessing, interfering or selling the suit motor vehicle the condition that the plaintiff pays the arrears of the purchase price within 90 days.

6. After the lapse of the 90 days prescribed in the conditional temporary injunction, the appellant again filed a Notice of Motion dated 23rd November 2023 under a certificate of urgency seeking orders that the suit motor vehicle be released to the appellant unconditionally and temporarily pending the hearing and determination of the suit. He further sought orders to restrain the defendant, his agents/assignees from disposing off the suit motor vehicle pending the hearing and determination of the suit.

7. The court vide an ex parte order dated 23rd November granted the appellant the orders he sought for.

8. Aggrieved by this decision, the respondent filed an application for review under a notice of motion dated 8th January 2024 seeking a stay of execution of the orders issued on 23rd November 2023. The respondent in the Notice of Motion and Supporting affidavit stated that the appellant failed to make material disclosure on the status of his accounts with the respondent thus misleading the court to

issue the said orders. The respondent also stated that a mandatory injunction can only be issued at the interlocutory stage on the existence of special circumstances and/or in the clearest of cases and that these thresholds are impossible to evaluate in the absence of rival facts. The respondent also claimed that the order was res judicata as the court had already pronounced itself vide the order dated 3rd August 2024 where the court issued the same reliefs on the same subject property where there was no demonstration of contempt of the said orders. The respondent further claimed that the order issued by the court turned punitive to the respondent, having curtailed his rights instead of preserving the state of things pending determination of the main suit. The respondent also claimed that through the said court order, the arrears borne by the appellant continue to accrue while the motor vehicle which is to serve as security continues to depreciate in value and this may cause severe financial loss to the company.

9. The appellant filed a Replying Affidavit dated 6th February 2024 in response to the respondent's application where he stated that the application for stay of execution had been overtaken by events. The appellant averred that the respondent never appealed against the said orders only to emerge 2 months later with the application which according to the appellant is misleading to the court. He further stated that if the respondent was dissatisfied with the said orders, it would have appealed rather than seek for stay of orders way out of time.

10. The court delivered a ruling dated 22nd February 2024 where it set aside the orders of 23rd November 2024 stating that the respondent was at liberty to exercise its rights under the hire purchase agreement.

11. Aggrieved by the said ruling, the appellant herein filed the Memorandum of Appeal dated 5th March 2024 on the ruling dated 22nd February 2024 which is now the matter before this court.

Submissions

12. The appellant filed written submissions on the appeal where he submitted that the respondent did not meet the threshold required to set aside the said orders as provided under Rule 45 of the Civil Procedure Rules. The appellant further submitted that the reasons that were advanced by the respondent in his application were leaning towards an appeal rather than an application for review.

13. The respondent in its submissions submitted that the review and orders granted by the court were granted in the rightful manner. The respondent relied on the case of National Bank of Kenya Limited –Vs- Ndungu Njau [1997] e KLR where the Court held as follows on the scope and jurisdiction of review:-

> "A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established."

14. The respondent further submitted that its application for review met the required threshold on the ground that there was an apparent error on the face of the record since the court had issued Mandatory Injunctive Orders which required the establishment of special circumstances for such orders to be granted and the court issued them without giving the respondent a chance to argue his case. The respondent also pointed out that the court granting further injunctive orders to the appellant while the appellant was in blatant breach of the earlier conditional injunctive relief is an error apparent on the face of record thus warranting the review.

Analysis

15. I have carefully examined the materials presented before this court. I have also considered the rival submissions filed by the parties and I find that the relevant issues to be determined are as follows: -

i. Whether the trial magistrate erred in law by allowing the application for review and/or setting aside orders.

ii. Whether the trial magistrate had Jurisdiction to hear and determine the matter.

Whether the trial Magistrate erred in law by allowing the application for review and/or setting aside Orders

16. I will first address the appellant's contention that the court erred in allowing the application when he had paid more than two thirds of the purchase price as well as grounds 5, 6 and 8 of the Appeal. If the court were to find that the agreement was a hire purchase agreement then there would be sufficient grounds to allow the appeal.

17. The appellant's appeal is premised on the ground that he had paid two thirds of the purchase price and so the respondent should not have repossessed the suit motor vehicle without a court order. Section 2 (1) of the Hire Purchase Act, Cap 507 Laws of Kenya defines a hire-purchase agreement as:-

> "...an agreement for the bailment of goods under which the bailee may buy the goods or under which the property in the goods will or may pass to the bailee; and, where by virtue of two or more agreements none of which by itself constitutes a hire-purchase agreement there is a bailment of goods and either the bailee may buy the goods or the property therein will or may pass to the bailee, the agreement shall be treated for the purposes of this Act as a single agreement made at the time when the last of those agreements was made..."

18. I have perused the motor vehicle sales agreement between the appellant and the respondent and find that the same does not fall within the ambit of a hire purchase agreement. None of the terms and conditions set out in the agreement can be interpreted to mean that the sales agreement was a hire purchase agreement. The plain interpretation of the agreement is that it was an agreement to purchase the suit vehicle through payment by instalments of Kshs. 96,364/= (subject to a minimum of Kshs. 87,000/=) per month with a penalty of 40% of the purchase price in case of default.

19. In the case of Eunice Kanugu Kingori -vs- NIC Bank Limited [2018] eKLR the court elucidated the import of a hire purchase agreement and stated thus:-

> "...Hire purchase Agreements are Agreements whereby, an owner of goods allows a person, known as the hirer, to hire goods from him or her for a period of time by paying installments. The hirer has an option to buy the goods at the end of the Agreement if all installments are being paid. However, it is not a contract of sale but contract of bailment as the hirer merely has an option to buy the goods and although the hirer has the right of using the goods, he is not the legal owner during the term of the agreement, the ownership of the goods remain with the owner."

20. I therefore find that the agreement between the appellant and the respondent was not governed by the Hire Purchase Act since it was not a hire purchase Agreement. It was an agreement for outright sale by instalments subject to the conditions set out in the agreement. The provisions of the Hire Purchase Act were therefore not applicable to the parties to the said agreement nor to these proceedings. In arriving

at this decision, I am also guided by the case of Advance Auto Import Ltd -vs- Sewe (Civil Appeal E070 of 2023) [2024] KEHC 409 (KLR) where Aburili J. held:-

> " It is therefore clear that for an agreement to pass as a hire purchase agreement, it must be one for the bailment of goods that does not necessarily require the hirer to purchase the same in the end."

21. Order 45 Rule 1(1) in relation to applications for review states as follows: -

> " 1) Any person considering himself aggrieved—
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> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
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> (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."

22. Section 80 of the *Civil Procedure act*, also on reviews, states as follows: -

> " Any person who considers himself aggrieved—
>
> (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
>
> (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

23. From the above provisions, it is clear that while Section 80 of the *Civil Procedure Act* grants the court the power to make orders for review, Order 45 sets out the jurisdiction and scope of review by hinging the power to review to the discovery of new and important matters or evidence, mistake or error on the face of the record and any other sufficient reason.

24. In the instant case, the respondent claims that there was an error apparent on the face of the record thus warranting the review.

25. In Muyodi vs. Industrial and Commercial Development Corporation & Another [2006] 1 EA 243, the Court of Appeal described an error apparent on the face of the record as follows:

> " In Nyamogo & Nyamogo -vs- Kogo (2001) EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long

drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us."

26. The court in Chandrakhant Joshibhai Patel -v- R [2004] TLR, 218 also directed itself as follows on the issue of an error apparent on the face of the record: -

> "...must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long-drawn process of reading on points on which may be conceivably be two opinions."

27. In the instant case, the court issued the impugned orders ex parte, where the appellant did not disclose all the facts to the court and without the appellant fulfilling the conditions set out in the previous orders issued on 3rd August 2023 that required the appellant to pay the arrears in 90 days.

28. The impugned order dated 23rd November 2023 was a mandatory injunction that had the effect of shielding the respondent from performing his obligations under the agreement between the parties. An order had earlier been issued by the court that handled the matter in which the court had granted an injunction to preserve the suit motor vehicle on condition that the outstanding balance of Kshs. 997,000/= due and owing on account be paid by the appellant within 90 days. The appellant did not make any payment as ordered but upon the lapse of the period given, approached a different court with an application that the suit motor vehicle be released to him. In making his application, the appellant did not make the necessary disclosure and the court proceeded to grant the mandatory injunction.

29. It is trite law that a mandatory injunction should be granted in clear cases where the court is convinced that the matter ought to be decided immediately. It should be done with great restraint and upon careful consideration and determination that there exist exceptional circumstances to warrant the injunction. The trial Magistrate who heard the appellant's application on 23rd November 2023 issued an ex parte mandatory injunction where the appellant was guilty of non-disclosure of material facts and had failed to comply with the order of the court that he makes payment of the outstanding amount. In doing so, the appellant was avoiding his obligations. In the case of Kenya Breweries Limited & Another -vs- Washington O. Okeyo [2002] eKLR, the Court of Appeal set aside a mandatory injunction in respect to a motor vehicle and held as follows:-

> "The respondent did not dispute his obligation to the second appellant and the fact that the loan owed to it is serviced and channeled through the first appellant. The obvious resultant effect, therefore, of the mandatory injunction granted by the superior court is to relieve the respondent of his obligation to pay his just debt. He should not be allowed to steal a match by avoiding his just obligations. Moreover, it would certainly be inequitable. It is trite that a contracting party who fails to perform his part of the contract cannot obtain an injunction to restrain a breach of covenant by the other party. In the circumstances, we think that there was nothing to justify the grant of a mandatory injunction on the interlocutory application that fell for consideration before the learned Judge and in that respect the learned Judge erred in granting it."

30. Having said this, I find that there was indeed an error apparent on the face of the record. Moreover, that the court issued a mandatory injunction ex parte in absence of exceptional circumstances constituted sufficient grounds for review of the order.

Whether the trial Magistrate had jurisdiction to hear and determine the matter

31. The appellant has also faulted the trial court for setting aside orders issued by a Magistrate of a higher rank than her. The first injunction order granted to the appellant was issued by Hon. S. Wayodi Resident Magistrate before the mandatory injunction was issued by Hon. Z. J. Nyakundi Senior Principal Magistrate. Hon. S. Wayodi was the trial court that was handling this matter. There is no indication that she was away on 23rd November 2023 when the Senior Principal Magistrate granted the ex parte Orders. The file was subsequently placed before the right trial court for hearing. Order 45 Rule 1 is clear. Hon. S. Wayodi was possessed of the requisite jurisdiction to handle the matter. The trial Magistrate therefore did not err in proceeding to hear and determine the application for review.

Determination

32. For the reasons stated above, I find that the appeal lacks merit and it is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 8TH DAY OF NOVEMBER 2024.

A. C. BETT

JUDGE

In the presence of:

No appearance for the Appellant

Anangwe for the Respondent

Court Assistant: Polycap