



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO. E21 OF 2020

MEGASHELL TRANSPOTERS LIMITED.....APPELLANT/APPLICANT

-VERSUS-

CO-OPERATIVE BANK LIMITED.....RESPONDENT

RULING

1. This a ruling on an application for temporary injunction taken on by the Appellant/Applicant pursuant to Order 42, Rule 6 of the Civil Procedure Rules and Sections 3 & 3A of the Civil Procedure Act and Article 25(c) and Article 159 (2) (d) of the Constitution of Kenya, 2010. The Application is dated 3/12/2020 and for avoidance of doubt, it seeks the following orders: -

a) Spent;

b) Spent;

c) That pending the hearing and determination of the appeal herein this honourable court be pleased to grant an order of injunction restraining the Respondent by themselves or through its agents, servants and/or assignees from selling and/or disposing of motor vehicle registration number KCM 256G/ZF 6227, on such terms as it deems fit;

d) That this Honourable court do grant such further or other orders as it deems fit in the interest of justice;

e) That the costs of this application be in the cause.

2. The application is premised on grounds (a)-(L) on face of the application and further supported by the supporting affidavit of **Mohamed Ibrahim Musa**; the Plaintiff's director, sworn on 3/12/2020. It is however important to state that this application was initially filed on 13/11/2020 but the Plaintiff withdrew the same on realizing a mistake on face of the application and filed it after rectification.

3. The gist of the Appellant/Applicant's case is that the Respondent had financed the purchase of the suit motor vehicle but has now repossessed it. Consequently, the Appellant/Applicant sought for an injunction to restrain the sale of the motor vehicle before the trial court which was granted on condition that the Applicant pays the Defendant a sum of Kshs. 1,000,000/=. It is averred that the Applicant was unable to pay the sum dictated by the trial court prompting the filing of yet another application before the trial court seeking the amount to be reviewed down to Kshs. 300,000/=. Unfortunately, this prayer was denied by the trial court and now the Appellant/Applicant avers that it is apprehensive that there is likelihood that the subject Motor vehicle which has already been proclaimed, shall be sold. The Appellant further states that it has currently been faced with financial constraints and beseeches this court to review the conditions set by the trial court either by reducing the amount to Kshs. 300,000/= or allowing the Appellant/Applicant to settle the sum of Kshs. 1,000,000/= in a four equal Monthly instalments.

4. The Defendant opposed the application and in doing so filed grounds of opposition dated the 18/11/2020. The grounds are: -

a) The application is supported by a defective affidavit. In the absence of an affidavit in support, there is no evidentiary basis upon which to grant the reliefs sought.

b) Given the depreciating value of the asset and the increasing loan, it would be inequitable and unjust to grant an injunction which would leave the Respondent under-secured.

c) The Appellant has not honoured any of its proposals right from the trial court. It does not deserve the equitable remedy of injunction.

d) In any event, the sale of the financed asset will not render the appeal nugatory.

5. On 15/12/2020, Mr. Maina Counsel for the Appellant/Applicant was directed to file written submissions within 14 days thereof, the Respondent having had their submissions filed on 25/11/2020. Today's ruling date was then fixed in the presence of counsels for both the parties. Meanwhile, Mr. Maina did not file written submissions within 14days as directed.

6. The Respondent on the other hand, singled out only one issue for determination, which is, whether the injunction pending appeal should be granted. The Respondent first faults the Appellant's application for annexing a wrong affidavit in its support. While the application explicitly states that it is supported by an affidavit of Peter Ndungu Kanari, a different affidavit sworn by Mohamed Ibrahim Musa, had been annexed purporting to support the application. However, this anomaly was rectified after the first application had been withdrawn.

7. On the substance of the application, the Respondent heavily relied on the case of **John Mwashigadi Mwakisha –vs- Housing Finance Co. Ltd [2020] eKLR**. First, it is argued that the appeal will not be rendered nugatory if the injunction sought is denied. The reason put behind the argument is that the subject motor vehicle which has been repossessed can be quantified to cents and if sold, the Appellant/Applicant can be compensated if it succeeds in the appeal.

8. Secondly, the Respondent submits that the injunction if granted will bring hardship to both parties by increasing the Appellant/Applicant's obligations to service the loan and at the same time diminish the Respondent's security. Thirdly, it is submitted that by its conduct, the Applicant does not deserve an injunction for the reasons that although the trial court found that convenience was tilting in favour of the Respondent, the Applicant was granted an injunction but coupled with some conditions. Nonetheless the Applicant has not made an effort to fulfill any of the conditions set by the trial court and since this is a court of equity, then the Applicant must first do equity before coming to this court.

Analysis and Determination

9. After a scrupulous probe of the contenting parties' respective positions and having taken into account submissions by the Respondent and the authority cited therein, I am of the considered view that the only substantive issue for determination in the instant application is whether the Plaintiff is entitled to an order of a temporary injunction pending the determination of the Appeal.

10. I am also mindful that the –appeal before me arose from an interlocutory ruling and the finding I make herein should not be definitive so as to place the trial court in a situation wherein its discretion would be hampered.

11. An application for injunction pending appeal as correctly put by the counsel for the Respondent, serves to preserve the rights of the parties in the suit to avoid the endeavour by either party being an academic exercise. Nonetheless, an Applicant needs to satisfy the court that he/she has a *prima facie* case, that he/she will suffer irreparable harm which cannot be compensated for in damages and lastly, where the court is in doubt shall determine the case on a balance of convenience.

12. In this case, the arguments by the Appellant/Applicant as I understand is that it has been unable to meet the conditions set by the trial court and there is probability of the motor vehicle being sold to the Respondent. Do these sentiments establish a *prima facie* case? In my view, a *prima facie* case is more than say, an arguable case and it is not sufficient to only raise issues. The Appellant/Applicant must show an infringement of a right, and the probability of its case succeeding upon trial.

13. It is a common ground that the Respondent financed the Appellant to purchase the subject motor vehicle and an agreement was executed between the parties stipulating the terms thereof. Until, and unless the Appellant/Applicant persuades the court that the express terms and conditions of the contract which it freely executed were unconscionable, the fact remains that the parties should, in the meantime comply with the said terms and conditions.

14. It has not been shown that the Respondent was not entitled to repossess the subject motor vehicle in event of default by the Appellant. If this court grants an injunction as sought, then it will have the effect of widening the outstanding amount and at the same time diminishing the Respondents security. To that extend, I agree with the finding of my brother Hon. P.J Otieno in the case of **John Mwashigandi** (supra) that an injunction of this nature will be injurious to both the parties and not just at all.

15. Be that as it may, Justice demands that the court strikes a delicate balance between the 2 parties. If the subject motor vehicle was to be released to the Appellant, then the suit between the parties would end up being no more than an academic exercise. On the other hand, if the vehicles are kept by the Respondent pending the hearing and determination of the primary suit or even the appeal herein, the Appellant could suffer irreparable loss, in the event that the suit ultimately succeeded.

16. In my view, the trial court in an effort to balance the competing rights of the parties ordered the Appellant pay Kshs.1000,000/= as a precondition of the release of the subject Motor Vehicle. That the trial court erred in holding as such has not been shown and I anticipate that it will be an issue for determination at the hearing of the appeal. What the Applicant is saying now is that the amount was so high and it can only afford to pay Kshs. 300,000/=. The Appellant has however not shown any effort to abide with the directions of the trial court. Although it avers that it can only afford Kshs. 300,000/=:, there is yet no evidence showing any effort by the Appellant that he has attempted to pay that amount to the Respondent. The Appellant was in clear understanding that default on its part would attract repossession of the vehicle, and eventually a sale. In event the sale is effected and the Appellant succeeds in its claim against the Respondent, then the loss it might suffer can be quantifiable in monetary terms and be considered. I am therefore not persuaded that the failure of granting injunction at this stage will occasion irreparable loss to the Appellant.

17. Consequently, I find no merit on the Application dated 3/12/2020 and the same is hereby dismissed with costs to the Respondent.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA this 3rd day of February, 2021.

D. O. CHEPKWONY

JUDGE

Order

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open Court.

JUSTICE D.O CHEPKWONY