



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL DIVISION

CIVIL APPEAL NO. E 227 OF 2020

GEORGE OUMA MIYARE.....APPELLANT/RESPONDENT

VERSUS

PLANET MOTORS COMPANY LIMITED.....RESPONDENT/APPLICANT

RULING

1. The application dated 22nd October, 2020 seeks the following orders:

1. Spent

2. Spent

3. That the honourable court be pleased to set aside the ex-parte orders issued to the Appellant on the 8th October 2020 by Honourable Lady Justice Njuguna pending the hearing and determination of the Appeal.

4. That this honourable court be pleased to grant an order for Motor Vehicle Registration Number KCK 999F (Toyota Prado Chasis No. TJR150-00113310) to be attached and be placed in the officer in charge of Kileleshwa Police Station for safe custody pending the hearing and determination of this Appeal.

5. That upon the grant of prayers above, the honourable court be pleased issue orders to the OCS (Officer Commanding Police Station) Kileleshwa Police Station to assist in enforcement of the court orders.

6. That the costs of this application be provided for.

2. The application is premised on the grounds set out in the application and the supporting affidavit sworn by Muhammed Asim. The Applicant is aggrieved by the *ex parte* orders issued herein on 8th October, 2020 in respect of the application dated 2nd October, 2020. The Applicant's contention is that it was not served with the pleadings and the hearing Notice.

3. The bone of contention is motor vehicle registration No. KCK 999F (Toyota Prado) which was attached and placed under the custody of the police station pending the hearing of the application filed before the lower court. The Applicant alleges non-payment by the Respondent of the full purchase price for the subject motor vehicle. According to the Applicant, the Respondent has defaulted in the payment of Ksh.3,300,000/= after paying Ksh.2,000,000/= out of the total purchase price of Ksh.5,300,000/=. The Applicant is apprehensive that the motor vehicle is at risk of wastage as it might get dilapidated while in the hands of the Appellant/Respondent.

4. The application is opposed. It is stated in the replying affidavit that the Applicant's suit before the lower court is founded on a non-existent and fraudulent agreement for the sale of the motor vehicle the subject of these proceedings. That the application dated 2nd October, 2020 sought orders for stay of the lower court proceedings and for the release of the motor vehicle from the custody of the police station to the Respondent herein pending the hearing of the Appeal which application was heard *ex parte* and allowed after the Applicant herein failed to file a response to the application and failed to attend court though served.

5. It is further stated that the aforesaid *ex parte* orders have already been executed and the motor vehicle released to the Respondent's custody for preservation pending the hearing and determination of the Appeal herein. It is contended that police stations are not storage facilities but open yards for keeping motor vehicles involved in criminal activities or the subject of criminal proceedings. That the motor

vehicle would be exposed to weather elements and vandalism whereas the motor vehicle is not going to waste while under the Respondent's custody as the owner thereof who has acquired the same and given the requisite consideration. The court was urged not to set aside the orders herein as the Respondent stands to suffer irreparable loss.

6. The Applicant filed a supplementary affidavit and exhibited the sale agreement which is stated to have a repossession clause. It is stated that the Respondent is indebted to the Applicant in the sum of Ksh.3,300,000/= and has on several occasions issued cheques that bounced due to insufficient funds. It is reiterated that the Applicant was not served with the application dated 2nd October, 2020 nor the Hearing Notice for the 8th October, 2020. It is further stated that the motor vehicle belongs to the Applicant and that the Log book is still in the Applicant's name. That the Police Station is the most secure and neutral place to keep the motor vehicle as the parties litigate. The court was urged not to re-write the terms of the agreement between the parties and allow the application as the Applicant stands to suffer irreparable harm.

7. I have considered the application, the response to the same and the written submissions filed by the respective counsel for the parties.

8. The principles applicable in determining whether to set aside an *ex parte* judgment were laid out by the Court of Appeal in the case of **Pithon Waweru Maina v Thuka Mugiria [1983]eKLR** as follows:

“a) Firstly, there are no limits or restrictions on the judge’s discretion except that if he does vary the judgment he does so on such terms as may be just...The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. *Patel v EA Cargo Handling Services Ltd [1974] EA 75 at 76C and E b*). Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. *Shah v Mbogo [1967]EA 116at 123B, Shabir Din v Ram Parkash Anand (1955) 22 EACA 48.c*).

9. The application dated 2nd October, 2020 proceeded herein *ex parte* on 8th October, 2020 and was allowed after the court was satisfied that the Applicant was duly served. The Applicant claims not to have been served with the pleadings and the Hearing Notice for 8th October, 2020. I have perused the affidavit of service sworn on 7th October, 2020. The same reflects service through Applicant Advocate's email address. The hearing date was also reflected in the email. The said email address has not been disputed. Based on the material before court, I am satisfied the Applicant was served with the application dated 2nd October, 2020.

10. The lower court made orders for the motor vehicle to be kept in the custody of the Police Station pending the hearing of the application before it. The Appeal on the said orders is still pending herein. Given, there are pros and cons whether the motor vehicle is stored at the Police Station or is released to either of the parties herein. At this stage of the case, there are allegations and counter-allegations regarding the question of the payment of the purchase price.

11. The Applicant's claim is for Ksh.3,300,000/=. The motor vehicle has been released to the Respondent. This court has to balance the competing interests of both parties. I retain the orders issued herein on 8th October, 2020 upon a further condition that the Respondent do deposit security in the sum of Ksh.3,300,000/= in a joint interest earning bank account of the Advocates for the parties herein or in court or in the alternative to deposit sufficient security in court for the sum of Ksh.5,000,000/= within 30 days from the date hereof. In default the instant application to stand as allowed. Costs in cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4TH DAY OF MARCH, 2021

B. THURANIRA JADEN

JUDGE