



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO.108 OF 2018

TALIB OMAR SAID.....APPELLANT

-VERSUS-

FIRST COMMUNITY BANK LTD.....RESPONDENT

RULING

1. By an application dated **13th August, 2020** filed under **Section 3A, 1A, 1B of the Civil procedure Act, Order 51 Rule 1 of the Civil Procedure Act, Article 40(3) and 159 of the Constitution**, the Appellant/Applicant seeks orders as follows:-

a. Spent;

b. Spent;

c. That this Honourable Court be pleased to order the Respondent, its agents, servants, employees, assignees or whomsoever to forthwith and within 12 hours of issuance of this order to release Motor Vehicle registration number KBL 803M held at Central Police Station at its instance to the Applicant.

d. That the Officer Commanding Station, Malindi be ordered to ensure compliance of this Order.

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

2. The application is premised on grounds that the Applicant and the Respondent were embroiled in a Civil dispute relating to Motor Vehicle registration numbers **KAZ 080T** and **KBL 803M** vide **Mombasa C.M.C.C No.1368 of 2016**. In the said case, the Respondent had sued the Appellant/Applicant allegedly for default of payment of monthly remittances towards a loan advanced to the Applicant by it and sought to recover an overdue of **Kshs.4,575,302.24**. That the lower court eventually delivered Judgment on **29th May, 2018** and declared the purported exercise of the statutory power of sale and the notification of sale by the Respondent as unlawful. Consequently, the court further held that the sale of Motor Vehicle registration number **KAZ 080T** was unlawful.

3. Pursuant to that Order, the Applicant submits that the Respondent had no justification to repossess the subject Motor Vehicle which was later towed to **Malindi Police Station**. As such the Applicant avers that the Respondent acted in blatant disregard of an unequivocal court order. The Applicant further avers that the Motor Vehicle registration **KBL 803M** is under no investigations and if further detained at the police station, it risks depreciating in value and abrogating the Applicant's right to own property.

4. The application is further supported by an affidavit sworn by **Twalib Omar Said** on **15th August, 2020**. In his affidavit, **Mr. Twalib** explicates the grounds on face of the application as captured in the preceding paragraphs.

5. The application is opposed by the Respondent vide a **Replying Affidavit** sworn on **24th August, 2020** by **Charles Roche**, the Respondent's Financial Manager. He deponed that the application is an effort by the Applicant to prevent the bank from exercising its contractual right so as to recover the overdue loan facility. He reiterates that the Applicant does not dispute having obtained a loan from the respondent and to specify, avers that the applicant was offered two loan facilities vide facility letters dated **25th November, 2011** and **14th May, 2012** respectively and secured by log books for Motor Vehicles registration numbers **KAZ 080T** and **KBL 803M** respectively. Consequently, the two Motor Vehicles were registered in joint names of the Applicant and the bank.

6. Further, that the trial court in its Judgment found that the Respondent had established its case and awarded default damages at contractual rates. According to the Respondent, the notification of dated **5th November, 2014** which was declared unlawful was with respect to Motor

Vehicle registration number **KAZ 080T** and not **KBL 803M**. In any event the extend of unlawfulness declared by the court was with regard to selling the said vehicle at an undervalued price.

7. In addition, the Respondent averred that it repossessed the Motor Vehicle **KBL 803M** pursuant to a court order dated **10th August, 2020** issued in **Misc. Application No.244 of 2020** and the said **Order** was annexed as "**CR-4**". It is therefore not true that the repossession was unlawful. In its view, the Respondent towed the Motor Vehicle to Central Police Station, Malindi for safe custody until the rights of the parties are determined.

8. Under directions of this Court, the application was dispensed by way of written submissions and both parties filed their respective submissions. The Applicant filed two sets of submissions dated **11th November, 2020** and **25th September, 2020** while the Respondent's submissions are dated and filed on **12th October, 2020**. I have thoroughly read through those submissions and they reflect the positions held by the parties as illustrated in their pleadings above.

Analysis and Determination

9. I have carefully read through the pleadings filed by both parties and considered the rival arguments made by Counsel for the Appellant/Applicant and Counsel for the Respondent in support of their respective opposing positions. The nature of prayer sought being an Order to compel the Respondent to release Motor Vehicle registration number **KBL 803M**, reveals that the prayer is in nature of a mandatory injunction and the issue for determination therefore is whether the Appellant/Applicant has established a case to enable this court grant the injunction sought.

10. It is vital to point out that the principles that guide the court when considering an application for an injunction are set out in the case of **Giella .V. Cassman Brown (1973) EA 358**. To the effect that an Applicant must establish a *prima facie* case with a probability of success; that an injunction will not normally be granted unless the applicant might otherwise suffer irreparable loss; and that if the court is in doubt, it will decide the said application on a balance of convenience. Further, it is of note that this being an interlocutory application, care must be exercised to obviate expressing any conclusive views on issues which fall for determination at the main trial in this Appeal.

11. I will begin by considering the first limb on whether the Applicant has established a *prima facie* case. According to the Applicant, the Respondent proceeded to repossess Motor Vehicle Registration number **KBL 803M** in blatant disregard of a court order granted in the Judgment delivered on **29th May, 2018** which declared a notice of sale dated **5th November, 2014** as unlawful.

12. I have considered the said Judgment and to this end, agree with the submissions by the Respondent that it was issued with regard to Motor Vehicle registration number **KAZ 080T** and not Motor Vehicle registration number **KBL 803M**. The Judgment further reflects that the trial court found the sale of Motor Vehicle registration **KAZ 080T** as unlawful, having been sold at an undervalued price and this should not be construed to mean that the Defendant was acting illegally in repossessing the Motor Vehicle prior to the subsequent sale. This should also not be interpreted to mean that the trial court debarred the Respondent from repossessing Motor Vehicle registration number **KBL 803M** which had been offered as security to the loan facilities advanced to the Applicant in the event the Applicant defaulted in payment on terms agreed on by the parties. I say so for the reasons as pointed out earlier in this ruling that the unlawfulness declared by the trial court was limited to the acts of the Respondent in selling Motor Vehicle registration **KAZ 080T** at an undervalued price.

13. It is equally important to point out that the same court which issued the Judgment dated **29th May, 2018**, also granted an Order on **10th August, 2020** to the Respondent to repossess and attach Motor Vehicle registration **KBL 803M**. These facts have not been disclosed at any point in the Applicant's case and this Court refuses to buy the idea that the repossession was unlawful as submitted by the Applicant.

14. The above notwithstanding, and having considered the material placed before the court, it is not disputed that the Appellant/Applicant has not fully repaid the amount that was advanced to him by the Respondent on the terms agreed thereof. In my view, as a financier, the Respondent's right to repossess triggers immediately when the borrower defaults in payment of the loan unless the terms thereon are otherwise revised. It therefore follows that before a court can grant an Order compelling the Respondent to release Motor Vehicle registration number **KBL 803M** which is security for the facilities advanced to the Applicant, the applicant has to first establish that he has fully discharged his obligations under the **Musharaka Financing Agreement** which was executed between the parties. As evidence stands, the Applicant has not stated whether he has cleared the loan facilities he obtained from the Respondent. It is my humble view that the Applicant has not satisfied the first limb of granting an injunction by establishing a *prima facie* case and there is no need to consider the other grounds.

15. I therefore find no merit with the Appellant/Applicant's application. The same is therefore for dismissal and it is hereby dismissed with costs.

It is hereby so ordered.

DELIVERED, DATED AND SIGNED VIRTUALLY AT MOMBASA THIS 10TH DAY OF MARCH, 2021

D. O. CHEPKWONY

JUDGE

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.