



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**(CORAM: CHERERE-J)**

**CIVIL CASE NO. 35 OF 2019**

**BETWEEN**

**NILAM ENTERPRISES LIMITED.....APPELLANT**

**AND**

**BOARD OF MANAGEMENT**

**MISIKHU FRIENDS SECONDARY SCHOOL.....RESPONDENT**

**JUDGMENT**

**Background**

1. By a plaint filed on 14<sup>th</sup> March, 2019, **BOARD OF MANAGEMENT MISIKHU FRIENDS SECONDARY SCHOOL (Respondent)** sued **NILAM ENTERPRISES LIMITED (Appellant)** seeking orders for:

1. A declaration that the attachment of M/V KAR 333 L ISUZU BUS (*subject motor vehicle*) was illegal and to order conditional release of the subject motor vehicle
2. An order of permanent injunction restraining the attachment, repossession, selling or in any other way interfering with the subject motor vehicle pending the hearing and determination of the suit
3. General damages for loss of user
4. Costs and interest

2. Simultaneously with the plaint, the Respondent filed an application seeking injunctive orders among them a mandatory injunction for unconditional release of the subject motor vehicle.

3. The Appellant opposed the application by way of a replying affidavit sworn on 14.03.19 and filed on 15.03.19 by its director NILESH SHAH.

4. The court record demonstrates that when the matter came up for *interpartes* hearing on 15.03.19, the Respondent's prayer for adjournment to respond to the replying affidavit and for release of the subject motor vehicle was allowed and the application was adjourned for hearing on 14.04.19.

5. The Appellant being dissatisfied with the order of release of the subject motor vehicle to the Respondent on 20.03.19 filed the memorandum of appeal dated 19.03.19 which set out 5 grounds of appeal which I have summarized into one (1) ground that the court gave an order that compromised the Application without hearing both parties

**Analysis and Determination**

6. This being the first appellate court, its duty is to reevaluate the evidence and come up with its own conclusions but also bear in mind that it should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings. See **Sumaria & Another –Vs- Allied Industrial Ltd (2007)2KLR** and **Abok James Odera T/A A.J. Odera & Associates Vs John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR**.

7. I have considered the appeal in the light of the trial court's record, written submissions and authorities cited by the parties.

8. Appellant holds the view that the trial court did not exercise its discretion properly whereas the Respondent is of a contrary view.

9. In the case of **Mbogo & Another – v- Shah [1968] EA 93**, the predecessor to the Court of Appeal held that:

**“a court on appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been injustice.”**

10. From the affidavit evidence on record, it is apparent that the Respondent moved the court on 14.03.19 which was a day after the subject motor vehicle was repossessed by the Appellant.

11. As a result of the urgency disclosed in the matter, the court fixed the application for hearing on 15.03.19 which was two (2) days after the subject motor vehicle was repossessed.

12. The discretion of the court is perfectly free, and the only question is whether upon the facts of any particular case it should be exercised. The record demonstrates that it was pleaded on behalf of the Respondent that the repossession of the subject motor vehicle had left the students of the Respondent school stranded in Kisumu without means of returning back to the school and that they had to be accommodated at Kisumu Boys High School without personal belongings, change of clothes and personal necessities.

13. From the foregoing, I find that the trial magistrate correctly addressed her kind to the foregoing uncontroverted facts. Consequently, the court's discretion directing that the subject motor vehicle be released to the Respondent was in my considered view judiciously exercised and I decline to interfere with that discretion.

14. Consequently, this appeal is found to have no merit and it is dismissed with costs to the Respondent.

**DATED AND DELIVERED AT KISUMU THIS 13TH DAY OF FEBRUARY 2020**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

Court Assistant - Amondi/Okodoi

For the Appellant - N/A

For the Respondent - Mr. Otieno hb for Mr. Onsongo