REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 388 OF 2018

JOHN MBUKI MWAURA.....APPELLANT

-VERSUS-

NEO SILVER ARROW AUTOMOBILES LTD....RESPONDENT

(Being an appeal from the ruling and order of Hon. A.N. Makau (Ms.) (Senior Resident Magistrate) delivered on 30th July, 2018 in MILIMANI CMCC NO. 3863 OF 2018)

JUDGEMENT

1. John Mbuki Mwaura who is the appellant herein, instituted a suit against the respondent vide the plaint dated 20th April, 2018 in which he sought for various reliefs including injunctive orders, an order for release of motor vehicle registration number KBM 249S ("the subject motor vehicle") plus costs of the suit.

2. The appellant filed the plaint together with the Notice of Motion dated 20th April, 2018 in which he sought for various interim orders and an alternative order that the subject motor vehicle be kept in a safe and neutral place.

3. Upon service, the respondent's advocate filed a Notice of Appointment of Advocates and put in a replying affidavit to resist the Motion.

4. The Motion was disposed of through written submissions. Eventually, the trial court vide its ruling delivered on 30th July, 2018 dismissed the appellant's Motion with costs to the respondent.

5. The appellant has now challenged the ruling on appeal and has brought forth the following grounds of appeal in his memorandum of appeal dated 22nd August, 2018:

> **(i) THAT the learned trial magistrate erred in law and in fact in misunderstanding the import and application of the principles of injunction set out in Giella v Cassman Brown and erred in finding that the appellant did not meet the requisite threshold for granting of an order of injunction.**
>
> **(ii)THAT the learned trial magistrate erred in law in framing issues for determination contrary to the pleadings before her and basing her decision to decline to grant an order for injunction on extraneous factors.**
>
> **(iii) THAT the learned trial magistrate erred in law and selectively and narrowly picked out aspects of the case before her and failed to appreciate the full circumstances of the case as presented before her.**
>
> **(iv) THAT the learned trial magistrate erred in law and in fact in failing to appreciate that it is the respondent who refused to cooperate with Occidental Insurance Co. Limited and have refused to repair the appellant's motor vehicle registration number KBM 249S Toyota Hilux and therefore any claims for unpaid repair costs in respect to the motor vehicle could not arise.**
>
> **(v) THAT the learned trial magistrate erred in law and in fact in failing to appreciate that it is the respondent who has refused to release the motor vehicle registration number KBM 249S Toyota Hilux to the appellant or to any other garage for repairs as directed by Occidental Insurance Co. Limited and therefore the claims for storage charges by the respondent who has continued to unlawfully hold onto the appellant's vehicle were unwarranted.**
>
> **(vi) THAT the learned trial magistrate erred in law and in fact in failing to appreciate that the said vehicle was not**

'uncollected' within the meaning of the Uncollected Goods Act and it is the respondent who has refused to release the same to the appellant or to another garage for repairs.

(vii) THAT the learned trial magistrate erred in law and in fact in failing to appreciate that the respondent raised a repair invoice of Kshs.267,925/ in respect of repair costs for another motor vehicle registration number KBN 610Y which sum has been paid to the respondent.

(viii) THAT the learned trial magistrate erred in law and in fact in holding and finding that the appellant had not demonstrated a prima facie case against the respondent when the facts of the case clearly showed serious and valid irregular attempts by the respondent to sell the appellant's vehicle.

(ix) THAT the learned trial magistrate erred in law and in fact in failing to find that one of the cardinal principles in Giella v Cassman Brown is the preservation of the subject matter of the suit and that by failing to grant the injunction, the learned trial magistrate effectively allowed acts by the respondent which would have the effect of illegally and irregularly dispossessing the appellant of his vehicle.

(x) THAT the learned trial magistrate erred in dismissing the appellant's prayer for an injunction.

6. This court gave directions for the parties to file written submissions on the appeal. The appellant on his part submitted that despite having received payments towards repair costs for the subject motor vehicle, the respondent continues to hold the subject vehicle and has threatened to sell it so as to settle the outstanding repair costs, yet the trial court found that the respondent's action of holding the subject vehicle to be justified.

7. The appellant also submitted that the trial court's finding contradicted its analysis of the facts and evidence placed before it, hence the need for setting aside of the said finding.

8. On its part, the respondent while supporting the decision of the trial court contended that the appellant did not adduce any evidence to show payments made towards repair costs for the subject motor vehicle and further contended that the averments made in its replying affidavit were uncontroverted.

9. More specifically, the respondent argued that the appellant did not satisfy the conditions for granting an interlocutory injunction. On whether the appellant established a prima facie case, it was the respondent's submission that the appellant did not dispute the existence of a business relationship between the parties upon which the respondent was entitled to hold a lien over the subject motor vehicle.

10. The respondent contended that the appellant did not demonstrate the irreparable harm he stands to suffer for which compensation through an award of damages would not be sufficient.

11. On the condition of a balance of convenience, it was the respondent's argument that it stands to lose more since the storage charges for the subject motor vehicle continue to accrue whereas the value of the vehicle continues to depreciate.

12. According to the respondent, the appellant abandoned the subject motor vehicle at the respondent's premises sometime in 2015 only to later resurface at the time the respondent expressed its intention to sell it. In this way, the respondent submitted that the trial court was correct in concluding that the subject motor vehicle was an 'uncollected good' within the meaning of the Disposal of Uncollected Goods Act.

13. Furthermore, the respondent submitted that the cheque issued by the appellant in an attempt to settle the outstanding amount was received on a without prejudice basis as partial settlement of the amount. The respondent also argued that it is not privy to any existing arrangements between the appellant and Occidental Insurance Co. Limited and quickly mentioned that it is ready and willing to release the subject motor vehicle as soon as the outstanding debt of Kshs.615,707.40 is paid.

14. I have carefully considered the rival submissions on appeal and the authorities cited by the parties. The parties were right to remind this court that this being an appeal in the first instance, this court's sole duty is to re-evaluate the evidence which was tendered before the trial court and consequently determine whether the trial court arrived at a proper finding. However, I noted that most if not all the authorities relied upon by the parties concerned themselves with appeals from the High Court to the Court of Appeal. That notwithstanding, the principles on first appeals remain constant.

15. On the one part, the appellant cited before me the case of **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123** where the Court of Appeal enunciated the principle of appeal in the following manner:

> **"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."**

16. On the other part, the respondent did cite the case of **Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR** equally decided by the Court of Appeal and in which it held thus:

> **"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are**

to stand or not and give reasons either way.”

17. From my study of the ten (10) grounds of appeal raised in the memorandum of appeal, I noted that the same essentially revolve around the twin issues to do with whether the trial court's analysis of the principles for granting an interlocutory injunction were proper, and whether the trial court arrived at a proper finding that the subject motor vehicle constituted 'uncollected goods.' As such, I will address the appeal under the two (2) limbs.

18. On the limb of interlocutory injunctions, the appellant in his Motion dated 20th April, 2018 sought for the substantive prayer that the subject motor vehicle be kept at a safe and neutral place. The appellant also sought for costs of the application. In his affidavit in support thereof, the appellant stated that sometime in 2014 he delivered his motor vehicle registration number KBN 610Y to the respondent for specialized work, repair and service.

19. The appellant stated that on 10th March, 2014 Mr. Eston Kairu who is the managing director of the respondent released the abovementioned motor vehicle to the appellant together with a bill of Kshs.267,925/ which the appellant later paid and a payment cheque was annexed to the affidavit.

20. The appellant then stated that sometime on or about the 2nd day of October, 2015 the subject motor vehicle which also belongs to him was involved in an accident with a third party vehicle registration number KBJ 315C thereby resulting in extensive damage.

21. The appellant asserted that the insurers of the third party vehicle, namely Occidental Insurance Co. Limited, admitted blame and agreed to repair the subject motor vehicle at a garage of the appellant's choice. That it is on this basis that the appellant delivered the subject motor vehicle to the respondent for repair works to be done.

22. According to the appellant, Mr. Kairu later contacted him to inform him that he could not get a new or second hand cargo cabin to replace the damaged one and asked him to outsource one himself. That upon consulting Occidental Insurance Co. Limited, the appellant stated that the insurer managed to get a second hand cargo and sought to contact Mr. Kairu for confirmation on whether the cargo could fit on the subject motor vehicle.

23. The appellant asserted that Mr. Kairu refused to co-operate and it is at this point that the appellant requested for the release of the subject motor vehicle from the respondent's custody and that the respondent declined to comply.

24. It was the appellant's averment that the respondent has since failed to cooperate with Occidental Insurance Co. Limited and has frustrated the repair of the subject motor vehicle as well as its release to him by purporting to detain the vehicle over unpaid sums in respect to motor vehicle registration number KBN 610Y, adding that the respondent did threaten to sell the subject motor vehicle under the Uncollected Goods Act in a bid to recover the repair costs and alleged storage charges.

25. The appellant contended that in the meantime, he has suffered and continues to suffer loss since the subject motor vehicle is used both as a family car and for business purposes, and that the appellant has been forced to hire a different vehicle at a daily rate of Kshs.5,000/.

26. In reply, Eston Kairu faulted the appellant for not enjoining Occidental Insurance Co. Limited to the suit and stated that in any event, the dispute between the parties has nothing to do with the purported accident but is grounded on a business relationship between them.

27. The deponent asserted that sometime in 2014 the appellant delivered motor vehicle registration number KBN 610Y to the respondent for purposes of servicing and maintenance, which were done and an invoice raised for the sum of Kshs.267,925/.

28. The deponent stated that the appellant gave assurances that he would settle the invoice, hence the release of motor vehicle registration number KBN 610Y. That at the time of delivering the subject motor vehicle to the respondent for repairs on 17th December, 2015 the appellant had not settled the invoice.

29. It was the deponent's contention that subsequently, the appellant did not return for the subject motor vehicle or pay the outstanding sum, and that he only resurfaced in 2017 upon learning of the respondent's intention of disposing of the subject motor vehicle under the Disposal of Uncollected Goods Act.

30. According to the deponent, the respondent had severally accommodated the appellant and yet he did not honour his word and that it is only upon failed negotiations that the appellant purported to issue a cheque dated 24th January, 2018 through his advocate and which cheque was received by the respondent on a without prejudice basis and as partial settlement of the outstanding sums.

31. The deponent conveyed the respondent's willingness to release the subject motor vehicle to the appellant upon the relevant payments being made.

32. Upon hearing the parties, the learned trial magistrate reasoned that a business relationship subsisted between the parties at all material times and that it is evident that there are outstanding charges owing to the respondent. The learned trial magistrate further reasoned that the respondent's intention to dispose of the subject motor vehicle as uncollected goods is justified. Finally, the learned trial magistrate found that it would not be necessary for the orders sought to be granted since the subject motor vehicle was safest at the respondent's garage and that in any event, the appellant would be required to pay the outstanding sums to the respondent for the subject motor vehicle to be released to him.

33. From the prayers sought in the Motion, I took note that the only substantive prayer was prayer ((iv) which had to do with an order for storage of the subject motor vehicle in a safe and neutral place. It is therefore clear that the prayer for interlocutory injunction was only

sought in the interim stage which would explain why the learned trial magistrate did not delve into the principles relating thereto. The same applies to the prayer for release of the subject motor vehicle which was also sought in the interim. In this sense and upon re-evaluating the facts and evidence, I see no reason to doubt the learned trial magistrate's approach since she was not duty bound to address any prayer which was not substantively sought. Consequently, grounds (i), (ii), (viii), (ix) and (x) of the appeal cannot stand.

34. I am now left to reconsider the limb to do with whether the subject motor vehicle constituted uncollected goods.

35. Going by the facts and evidence placed before the trial court, I established that the appellant was of the view that the subject motor vehicle did not fall in the category of 'uncollected goods,' while the respondent was of a different view altogether. In the end, the learned trial magistrate agreed with the respondent that there was justification in its act of failing to release the subject motor vehicle and instead intending to sell it on the basis that it has been in the respondent's garage since 2015. As earlier noted, the learned trial magistrate also held that the only way for the appellant to recover the subject motor vehicle was to pay the outstanding debt to the respondent.

36. Upon my re-examination of the facts set out hereinabove and the evidence adduced before the trial court, I gathered that whether or not the subject motor vehicle constitutes uncollected goods may constitute one of the key issues to be determined at the trial since it would require the court to examine the facts and circumstances of the dispute. It therefore follows that this is a question that can only be sufficiently ascertained when the parties give evidence which is at the hearing phase. In that case, by pre-emptively and conclusively determining this issue at the preliminary stage, the learned trial magistrate in my view essentially determined the suit without even granting the parties an opportunity to properly present their respective cases. This was not only improper but also prejudicial to the parties. My finding is guided by the Court of Appeal's analysis in the case of **John Mwangi Muhia & 2 others v Director of Public Prosecutions & 5 others [2019] eKLR** that:

> **"…in Agip (K) Ltd v Highlands Tyres Ltd [2001] KLR 630. Visram J (as he then was) stated:**
>
> **"It is clear that the process of the judicial system requires that all parties before the court should be given an opportunity to present their cases before a decision is given."**

37. The above legal principle was restated by the Court of Appeal in the earlier case of **Agip (K) Ltd v Vora [2000] 2 EA 285** as follows:

> **"In our view, the Commissioner was not entitled to delve into substantive issues and make finally concluded views of the dispute.**
>
> **He was not at that interlocutory stage of the matter, to condemn one of the parties before hearing oral evidence that party being condemned had in opposition to the claims in the suit."**

38. In the circumstances, while I disagree with the appellant to the extent that he urged this court to revisit the issues on whether the subject motor vehicle was uncollected goods and whether the outstanding repair and other costs had been paid in full, I am convinced that the learned trial magistrate fell into error by conclusively determining the suit through an application at the preliminary stage and by finding that the appellant was obligated to pay the respondent any outstanding sums to secure the release of the subject motor vehicle.

39. Suffice it to say that I have re-examined the facts and evidence produced before the trial court without necessarily delving into the merits of the dispute. It is apparent that the subject motor vehicle is the subject matter of the dispute. As per my earlier observation, the only substantive order sought by the appellant is that the subject motor vehicle be kept in a safe and neutral place. In the interest of justice and in a bid to preserve the subject matter, I find that the circumstances of the matter at hand call for a granting of the order sought since in any event, the respondent did not demonstrate to the trial court that it stands to be prejudiced if the order is granted.

40. The upshot is that the appeal succeeds. Consequently, the ruling and order of the learned trial magistrate delivered on 30th July, 2018 is hereby set aside and substituted with an order allowing prayer (iv) of the Motion that motor vehicle registration number KBM 249S be kept at a safe and neutral place to be agreed upon by the parties within 45 days from the date of this judgement.

41. In the circumstances of the appeal, a fair order on costs is that each party bears its own costs of the appeal. Costs of the Motion to abide the outcome of the suit.

Dated, signed and delivered at NAIROBI this 7TH day of MAY, 2020.

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L. NJUGUNA

JUDGE

In the presence of:

……. for the Appellant

……. for the Respondent