



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI
CIVIL APPEAL NO. 2 OF 2018

EXECUTIVE SUPER RIDES LTD. APPELLANT

VERSUS

EQUITY BANK KENYA LIMITED1ST RESPONDENT

GEOFFREY MATI NJOKI2ND RESPONDENT

REGENT AUCTIONEERS (K) LIMITED 3RD RESPONDENT

(Being an Appeal from the Ruling and Order of Hon. E. K. Usui Senior Resident Magistrate delivered on 6th September 2017 in Milimani CMCC No. 26 of 2017)

J U D G M E N T

1. The Appellant, Executive Super Rides Limited, is a Limited Liability Company, incorporated under Companies Act. Cap 486 Laws of Kenya. The Appellant is in the business of selling new and used motor vehicles in Nairobi. The 1st Respondent, Equity Bank Kenya Limited is a Limited Company, incorporated under the Companies Act, CAP 486 and is in banking business in Nairobi and elsewhere. The 2nd Respondent, Geoffrey Mati Njoki is a male adult. The 3rd Respondent, Regent Auctioneers (K) Limited is a Limited Liability Company, incorporated under the Companies Act Cap 486 and it is a firm carrying on auctioneering business.

2. This is an appeal against the Ruling of E.K. Usui Senior Principal Magistrate, dated 6th September 2017, in the case Chief Magistrate's Court Milimani Commercial Court Civil Case Number 26 of 2017. By that Ruling the learned Magistrate dismissed the Appellant's interlocutory injunction application dated 4th January 2017. The appellant being aggrieved by that dismissal filed this appeal. The Appellant has raised seven grounds of appeal as follows:

(i) The Learned Magistrate misdirected herself as to the principles for the grant of injunction and thus improperly exercised her discretion by dismissing the Appellant's Application.

(ii) The Learned Magistrate erred in law and in fact by disregarding the submissions and the evidence adduced by the Appellant.

(iii) The Learned Magistrate erred in law and in fact in holding that the Appellant had parted with possession of the Motor Vehicle Registration Number KBV 623A and thus did not establish a prima facie case against the 1st and 2nd Respondents.

(iv) The Learned Magistrate erred in law and in fact disregarding that the Appellant had tendered the amount owed by the 2nd Respondent to the 1st Respondent pursuant to the terms of the Agreement dated 24th July 2015.

(v) The Learned Magistrate erred in law by holding that the balance of convenience falls on the 1st Respondent who was owed more money than the Appellant.

(vi) That the Learned Magistrate erred in law and in fact in holding that the Appellant did not have a genuine and arguable case.

(vii) The Learned Magistrate erred in law and in fact in otherwise failing to exercise her discretion in the proper manner resulting in injustice to the Appellant.

3. The Appellant prays, by this appeal the said Ruling be set aside but surprisingly the Appellant does not pray for orders to be issued as sought in the application before the Learned Magistrate.

4. The Appellant filed a Complaint before the Magistrate's Court against the three Respondents. It is pleaded in that Complaint that the Appellant entered into an agreement, dated 24th July 2013, with the 2nd Respondent. By that agreement the Appellant agreed to sell and the Respondent agreed to buy a Motor Vehicle registration KBV 623A, hereinafter referred to as the subject vehicle. The purchase price was Kshs. 1,831,000. The 1st Respondent financed, for that purchase, at Kshs. 1,100,000. The balance of the purchase price was to be paid by the 2nd Respondent. The Appellant released the subject vehicle to the 2nd Respondent.

5. The 1st Respondent financed the purchase and as security the subject vehicle was registered in both the names of the 1st and 2nd Respondent.

6. The 2nd Respondent defaulted in his repayment of the facility given by the 1st Respondent. The Appellant also alleges, in the Complaint, that the 2nd Respondent failed to pay the Appellant the unfinanced balance of the purchase price.

7. It is not clear how subsequently the Appellant obtained possession of the subject vehicle, but it did. The 1st Respondent instructed the 3rd Respondent to attach the subject matter, which by then was in the Appellant's possession. That attempt to attach the subject motor vehicle was what prompted the Appellant to file its case before the Magistrate's Court seeking permanent injunction to restrain the Respondents from attaching the subject motor vehicle. That is the only prayer in the Appellant's Complaint, other than costs.

8. The injunction application was opposed by the 1st Respondent on the ground that it lent the 2nd Respondent Kshs. 1,100,000 for the purchase of the subject motor vehicle and that the facility was secured by the subject vehicle. That the 2nd Respondent had defaulted in the repayment of the Loan facility and accordingly the 1st Respondent instructed the 3rd Respondent to repossess the subject vehicle.

9. The 2nd Respondent also opposed the application. The 2nd Respondent deposed that he had paid the Appellant the balance of the purchase price. That the subject vehicle, as security for the finance, had been registered in both his name and that of the 1st Respondent.

10. The 2nd Respondent further deposed that he released the subject vehicle to the Appellant on the understanding that the subject vehicle would be valued to enable the Appellant to sell to the 2nd Respondent, as a trade-in, a superior model vehicle.

11. The Learned Magistrate in her considered Ruling found that the Appellant had failed to show a *prima facie* case, because the 1st Respondent was a joint registered owner of the subject vehicle and because the Appellant had lost possession of the subject vehicle.

12. I have considered the submissions of the parties, the grounds of appeal and the authorities. The issues that fall for consideration in this appeal is:

(a) Was the trial Court correct in dismissing the Appellant's injunction application?

(b) Who shall bear the costs of this appeal?

13. The Court of Appeal in the case **MRAO LTD -V- FIRST AMERICAN BANK OF KENYA LTD AND 2 OTHERS [2003] eKLR** considered how an Appellant Court should deal with an appeal against a decision on an interlocutory injunction. The Court stated this:

“The power of the Court in an application for an interlocutory injunction is discretionary. Such discretion is judicial. And as is always the case judicial discretion has to be exercised on the basis of the law and evidence. And as was stated by this Court in the case of Carl Ronning V Societe Navale Chargeurs Delmas Vieljeux (The Francois Vieljeux) [1984] KLR1 an Appellant Court may only interfere with the exercise of judicial discretion if satisfied either;

(a) The judge misdirected himself on law, or

(b) That he misapprehended the facts, or

(c) That he took account of considerations of which he should not have taken an account, or

(d) That he failed to take account of consideration of which he should have taken account, or

(e) That his decision, albeit discretionary one, was plainly wrong”.

14. In exercising her discretion the Learned Magistrate was required to consider the principles of injunction as enunciated in the case **GIELLA V CASSMAN BROWN & CO 1973 E.A. 356** where the Court held:

“First an Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience”.

15. The Learned trial Magistrate in applying the first principle of injunction set out above found the Appellant had failed to show a *prima facie* case with probability of success.

16. In my view the Learned Magistrate cannot be faulted in finding that the Appellant had not shown *prima facie* case. I make that finding because of two broad reasons.

17. Firstly the Appellant, although it argued that the 2nd Respondent was indebted to it, for the balance of the purchase price, the Appellant did not plead the amount in his Complaint. The issue of indebtedness of the 2nd Respondent was dealt with, in the Complaint, very casually without mentioning a specific amount.

18. The second reason is that without pleading that the Appellant was owed money he could not defeat the Respondent's claim or seek an injunction, when the 1st and 2nd Respondent were registered owners of the subject vehicle.

19. For the above reasons I too find the Appellant failed to prove a *prima facie* case with probability of success.

20. The claim of indebtedness, by the Applicant, can be compensated by an award of monetary compensation. In other words the Appellant failed to prove that if an injunction was not granted, as it sought, it would suffer irreparable injury which could not be compensated by an award of damages. The Appellant, therefore, also failed to satisfy the second principle of granting an injunction.

21. Since in my view there is no doubt in my finding of the first two principles of granting an injunction I shall not proceed to consider the third ground of those principle.

22. I do therefore find the Learned Trial Magistrate cannot be faulted in her Ruling and that she took account of all the principles set out in the case MRAO Ltd (Supra).

23. That being my finding the appeal fails. There no reason why costs should not be awarded to the Respondents. I shall order costs to follow the event.

24. The judgment of this Court is that the appeal be and is hereby dismissed with costs to the 1st and 2nd Respondent, who are the Respondents who participated in this appeal.

DATED, SIGNED and DELIVERED at NAIROBI this 5TH day of MARCH, 2019.

MARY KASANGO

JUDGE

Judgment Read and Delivered in Open Court in the presence of:

Sophie..... **COURT ASSISTANT**

..... **FOR THE APPELLANT**

.....**FOR THE 1ST RESPONDENT**

.....**FOR THE 2ND RESPONDENT**

.....**FOR THE 3RD RESPONDENT**