



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 55 OF 2019**

**CITIZEN CREDIT LIMITED .....APPELLANT**

**VERSUS**

**JOSEPH NDUNGU NJOROGE .....1<sup>ST</sup> RESPONDENT**

**PROTUS WANGA T/A TIMELESS DOLPHIN AUCTIONEERS.....2<sup>ND</sup> RESPONDENT**

**NATIONAL TRANSPORT AND SAFETY AUTHORITY.....3<sup>RD</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**RULING**

The dispute herein relates to a motor vehicle registration no. KBX 261T allegedly given to the appellant as security for some loan advanced to the 1<sup>st</sup> respondent. It is the appellant's case that the 1<sup>st</sup> respondent defaulted in the repayment of the loan whereupon the motor vehicle was repossessed and sold.

The 1<sup>st</sup> respondent sued the appellant and the auctioneers in the lower court relating to the same motor vehicle, and pleaded for an order that the motor vehicle was illegally and fraudulently seized without adhering with and or to the auctioneers rules, hence the same be returned to the 1<sup>st</sup> respondent unconditionally.

Alongside the plaint, he filed an application for orders that, pending the hearing of his case the appellant herein and the auctioneer be compelled to produce the said motor vehicle for purposes of verifying its condition, and also disclose where the motor vehicle is being stored to allow the 1<sup>st</sup> respondent to view it occasionally.

That application was heard and the lower court delivered its decision on 30<sup>th</sup> January, 2019 by ordering that the appellant and the 2<sup>nd</sup> respondent should produce the motor vehicle within 7 days from the date of that ruling, or in the alternative deposit a sum of Kshs. 890,000/= within 14 days, being the known value of the motor vehicle pending the determination of the suit.

There was another order directed to the National Transport and Safety Authority prohibiting the transfer of the said motor vehicle to any 3<sup>rd</sup> party, pending the conclusion of the suit. The appellant was aggrieved by that decision and filed a Memorandum Of Appeal on 6<sup>th</sup> February, 2019.

Before me is an application by way of Notice of Motion dated and filed on 6<sup>th</sup> February, 2019 seeking stay of the orders given by the lower court, pending the hearing and determination of the appeal and also that, the proceedings before the magistrate's court be stayed until the appeal is heard and determined.

The application is opposed and there is a replying affidavit sworn by the 1<sup>st</sup> respondent and grounds of opposition filed by and on behalf of the 3<sup>rd</sup> and 4<sup>th</sup> respondents.

Parties have made their respective submissions and highlighted the same. It is not in dispute that the motor vehicle is still in the name of the 1<sup>st</sup> respondent and the appellant. The records held by the NTSA confirm this. What this means is that the motor vehicle has not been transferred to any 3<sup>rd</sup> party as alleged by the appellant.

Some of the issues raised in this application have a direct impact on the suit pending before the magistrate's court. To delve any deeper into those issues may be prejudicial to the parties, in the event I were to find the proceedings should go on. I have therefore elected to address the issue of whether or not there should be a stay of execution of the orders of the magistrate made on 30 January, 2019.

Order 42 Rule 6 of the Civil Procedure rules requires that the application be made timeously. After the ruling of the magistrate on 30<sup>th</sup> January, 2019 the appellant filed the Memorandum of Appeal alongside the present application on 6<sup>th</sup> February, 2019. The appellant therefore moved the court timeously. I have to consider whether any substantial loss may result if the order of stay of both the execution and the proceedings before the lower court is not made.

The court is bound to look at the interests of both parties in addressing that issue. As matters stand now, the motor vehicle is registered in both the names of appellant and 1<sup>st</sup> respondent. There is no evidence that the same has been transferred to a 3<sup>rd</sup> party. If the order of stay is given as sought by the appellant only the appellant stands to benefit for two reasons; the first is that if it is true the motor vehicle has changed hands, the new owner is bound to pay the appellant if that has not been done. The second is that, if there is any balance payable, the same shall be paid to the appellant.

It is the 1<sup>st</sup> respondent who stands to lose more than any other party to these proceedings. This loss may be visited upon the 1<sup>st</sup> respondent yet his suit in the lower court is yet to be heard. This court cannot countenance such a situation.

Access to justice is guaranteed by the Constitution and it will not be in the interest to justice to stay the proceedings. Several shortcomings have been pointed out by the 1<sup>st</sup> respondent relating to the seizure, advertisement and alleged sale of the motor vehicle. That I leave to the lower court.

For now I am not persuaded that the appellant deserves the orders sought in the application dated 6th February, 2019. The application is hereby dismissed. I order that the appellant shall comply with the orders given by the lower court and therefore the interim orders given by the court on 7<sup>th</sup> February, 2019 are hereby vacated. The proceedings in the lower court shall continue.

As the appellant's application stands dismissed, the costs of this application shall be paid to the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents.

**Dated, signed and delivered at Nairobi this 18<sup>th</sup> Day of July, 2019.**

**A. MBOGHOLI MSAGHA**

**JUDGE**