



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 413 OF 2018

NIC BANK KENYA PLC.....APPELLANT

VERSUS

NGAO CREDIT LIMITED.....1ST RESPONDENT

BENJAMIN OYINO MAGE.....2ND RESPONDENT

JOHN NAMU T/A VISION ROOTS AUCTIONEERS.....3RD RESPONDENT

NATIONAL TRANSPORT AND SAFETY AUTHORITY...4TH RESPONDENT

GOLDEN TEA TRADERS LTD.....5TH RESPONDENT

EZEKIEL BESA MAGE.....6TH RESPONDENT

RULING

INTRODUCTION

1. The Appellant's Notice of Motion application dated and filed on 14th September 2018 was brought under the provisions of Article 40, 47, 50 and 159 of the Constitution of Kenya, Section 1A, 1B, 3, 3A, 63(e) of the Civil Procedure Act Cap 21 (Laws of Kenya), Order 40 and 51 of the Civil Procedure Rules 2010 and all enabling provisions of the law. Prayers Nos (1), (2), (3) were spent. On 17th September 2018, Mbogholi Msagha J granted Prayer No (4) of the said application. The said application sought the remaining prayers:-

1. Spent.

2. Spent.

3. Spent.

4. Spent.

5. THAT the court be pleased to issue an order granting possession and/or an order for release of the subject motor vehicle to the Appellant for safe keeping in its yard pending the hearing and determination of this application and the appeal.

6. THAT costs of this application be borne by the Respondents.

2. When the matter came up for the hearing on 11th December 2018, the Appellant informed the court that it had served the 3rd, 5th and 6th Respondents with the said application. The 1st and 4th Respondents were represented by their respective counsel on the said date.

3. The 4th Respondent indicated that it had put a caveat on Motor Vehicle Registration No KCA 457T (hereinafter referred to as "the subject Motor Vehicle") and that it was not objecting to the Appellant's present application. The 1st Respondent sought leave to file a Replying Affidavit.

4. This court directed all the Respondents to file and serve their respective responses to the said application. It also granted the Appellant leave to file and serve a Supplementary Affidavit, if need be and further gave directions on the filing of Written Submissions by all parties. The Appellant was directed to extract the order for service upon the 3rd, 5th and 6th Respondents for their action. The matter was then fixed for mention on 11th December 2018 to confirm compliance and/or for further orders and/or directions.

5. By 11th December 2018, the 1st, 2nd, 3rd & 5th Respondents had not filed their respective documentation. As there were Affidavits of Service on record, this court reserved the Ruling herein which has been delivered based on the Appellant's Written Submissions only. The Appellant had filed its Written Submissions dated 7th November 2018 on 14th November 2018.

THE APPELLANT'S CASE

6. The Appellant contended that it jointly owned the subject Motor Vehicle with the 5th Respondent. It was registered pursuant to a Hire Purchase Agreement (hereinafter referred to as "the Hire Purchase Agreement") between them.

7. It stated that when the 5th Respondent defaulted in payment of the facility advanced to it by the Appellant, the Appellant repossessed the subject Motor Vehicle. However, the 5th Respondent filed **Kakamega CMCC No 108 of 2017 Golden Tea Traders Ltd NIC Bank PLC & Another** and in an application filed therein, it sought orders that the said subject Motor Vehicle be released back to it, which application was allowed.

8. Being aggrieved with the said decision, the Appellant filed **HCCA 84 of 2017 NIC Bank Kenya PLC & Another vs Golden Tea Traders Ltd**. Both **Kakamega CMCC No 108 of 2017 Golden Tea Traders Ltd vs NIC Bank PLC & Another** and **HCCA 84 of 2017 NIC Bank Kenya PLC & Another vs Golden Tea Traders Ltd** were still pending hearing and determination as at the filing of the Appeal herein.

9. It averred that the subject Motor Vehicle was released to the 5th Respondent, its Director informed it that the same had been stolen and that the 5th Respondent had lodged an insurance claim with its Insurance Company. The Appellant traced the subject Motor Vehicle to the 5th Respondent's agent.

10. It stated that it had the said Motor Vehicle parked in its yard until 7th August 2018 when the 3rd Respondent served it with an order for repossession of the said Motor Vehicle on account of an alleged loan facility owed to the 1st Respondent by the 2nd Respondent. It said that it was shocked how the subject motor vehicle had changed hands.

11. It then filed **Nairobi Milimani Chief Magistrate's Case No 7240 of 2018**. In an application filed therein, it sought an injunction, which application, it stated, was summarily dismissed despite it having been unopposed.

12. It asserted that it was the sequence of the said events that led it to file the present Appeal and present application. It averred that its application was geared towards the preservation of the subject Motor Vehicle pending the hearing and determination of the Appeal herein.

13. It thus urged this court to allow its prayer for an injunction.

LEGAL ANALYSIS

14. The Appellant relied on the cases of **Giella vs Cassman Brown [1973] E.A 358** and **Nguruman Ltd vs Jan Bonde Nielson & 2 others Court of Appeal No 77 of 2012** where the holdings of the courts were generally that for an applicant to be granted an order for injunction, he must:-

1. **Establish a *prima facie* case;**
2. **Demonstrate that he will suffer irreparable injury if a temporary injunction is not granted; and**
3. **If the court is in doubt, then it ought to grant an injunction on a balance of convenience.**

It also placed reliance on the case of **Kenlab Cons Ltd vs New Gatitu Service Station Ltd & Another** (citation not given) where it was held that to succeed in an application of injunction, an applicant had to show that he had a right, legal or equitable which required protection by injunction, a fact it stated that it had demonstrated because it had a legal right of the subject Motor Vehicle by virtue of the Hire Purchase Agreement.

15. This court made several observations in this matter. The first was that the 2nd Respondent did not appear to have been served with the court order of 11th December 2018 directing all Respondents to file and serve their documentation as had been intimated by the Appellant's Counsel when she appeared in court on 1st April 2019. If the 2nd Respondent was served, then there was no proof of service of the said court order.

16. Having said so, this court noted that on 11th December 2018, the Appellant did not refer to the 2nd Respondent as being part of the Respondents who were served which the court inadvertently followed and directed that the order be served upon the 3rd, 5th and 6th Respondents. There was therefore an error apparent on the face of the court record.

17. This court mulled over whether or not to defer the Ruling herein until such time that the 2nd Respondent was given an opportunity to respond to the Appellant's Notice of Motion application and noted that the issue was really between the Appellant, 1st and 3rd Respondents as the said subject Motor Vehicle was no longer in possession of the 2nd Respondent, having been repossessed by the 3rd Respondent on instructions by the 1st Respondent.

18. This court thus determined that the 2nd Respondent would not suffer prejudice if the present application proceeded in his absence because in any event the application was seeking to restrain the Respondents, presumably the 1st and 3rd Respondents who had repossessed the subject Motor Vehicle from disposing of, interfering, dealing, advertising for sale, selling, handling and/or in any way interfering with the said subject Motor Vehicle pending the hearing and determination of the Appeal herein.

19. Further, the present application was seeking an order for release of the subject Motor Vehicle to the Appellant for safe keeping pending the hearing and determination of the Appeal. This was not an order that would prejudice his rights as it was a preservative order.

20. The second observation that this court made was that on 17th September 2018, Mbogholi Msagha J granted Prayer No (4). The said Prayer stated as follows:-

“THAT the court be pleased to issue an order restraining the Respondents/their agents servants or any other person acting on their instructions from interfering, dealing, advertising for sale, selling, handling and/or in any other manner interfering with the subject Motor Vehicle Registration Number KCA 457T pending the hearing and determination of this Appeal”

21. This therefore meant that the issue of granting an order for injunction pending the hearing and determination of the Appeal had long been granted and the Appellant's submissions though noted by this court, had long been overtaken by events. As the order had long been granted, there would be nothing for the 2nd Respondent to have responded to.

22. The third observation that this court made was that Prayer No 5 of the application, which was the only prayer that was awaiting determination, was not opposed by the 1st, 3rd, 5th and 6th who were most likely to be affected by the granting of the said order. They were given an opportunity to respond and submit on the same but failed to do so.

23. The fourth observation was that there was another Appeal involving the Appellant and the 5th Respondent herein relating to the same subject Motor Vehicle that was pending at Kakamega High Court. There was a danger of two (2) courts of equal and competent jurisdiction issuing two(2) different and conflicting decisions. It would have been prudent that the proceedings herein be stayed.

24. However, the 5th Respondent did not file its papers in respect of the present application. This court thus deemed this to have been a waiver to object to the proceedings herein. Going further, this court noted that the parties to the suit herein were different from the parties in **HCCA No 84 of 2017** that was pending at High Court Kakamega. It would be unjust and unfair not to allow the Appellant to prosecute its case to its logical conclusion. In any event, preservative orders could only be issued in a suit and not in an appeal case.

25. Accordingly, having considered the Appellant's Written Submissions and the facts that were deponed to by Kezia Mwanzia on 14th September 2018, this court found the same not to have been rebutted and/or controverted by the Respondents. In view of the weighty issues surrounding the ownership of the subject Motor Vehicle, following the sequence of events, it was in the best of interests that the subject matter be preserved pending the hearing and determination of the Appeal herein.

DISPOSITION

26. For the foregoing reasons, the upshot of this court's Ruling was that the Appellant's Notice of Motion application dated and filed on 14th September 2018 was merited and the same is hereby granted in the following terms:-

1. THAT Motor Vehicle Registration No KCA 457T be and is hereby released to the Appellant for safe keeping in its yard pending the hearing and determination of the Appeal herein.

2. THAT costs of the application be in the cause.

27. It is ordered.

DATED and DELIVERED at NAIROBI this 16th day of July 2019

J. KAMAU

JUDGE