



**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**

*(An appeal from the Ruling and Order delivered by Honourable A. N. Makau (Senior Resident Magistrate) on 30<sup>th</sup> July, 2018 in Nairobi Chief Magistrate's Court, Milimani Commercial Court Civil suit No. 3863 of 2018*

**RULING**

The Respondent/Applicant has moved this court by way of a Notice of Motion dated the 7<sup>th</sup> March, 2019, under order 42 Rule 6(1) and Order 51 of the Civil Procedure Rules, Article 159(2) (d) of the Constitution and Sections 1A, 1B and 3A of the Civil Procedure Act seeking orders that the Appellant be compelled to furnish security for the sum claimed by the Respondent to date being storage charges amounting to Kshs. 779,061.30cts. That the said security be by way of cash deposit in a joint interest earning account in the names of the parties advocates and that the said security be provided before the subject motor vehicle registration number KBM 249S is removed from the custody of the Respondent. It has also sought the costs of the application.

The application is premised on the grounds set out on its body and it is supported by annexed affidavit sworn by Eston Kairu, on the 7th day of March, 2019. The same is made on the grounds that the Applicant/Respondent's only security/lien is motor vehicle registration number KBM 249S, that by the court ordering removal of the said lien to a neutral place, it exposes the Applicant to irreparable loss in the event the total value of storage outweighs the value of the said vehicle which continues to depreciate on a daily basis.

It is averred that the motor vehicle has been in custody of the Respondent since 17<sup>th</sup> December, 2015 and has continued to attract storage charges at the rate of Kshs. 500 per day which now stands at Kshs. 779,061.30cts. That since the court delivered its ruling on 31<sup>st</sup> January, 2019, in which the court directed the parties to agree on a neutral ground for the storage of the motor vehicle in dispute, the Appellant has not taken any steps towards having the matter listed for directions.

The Appellant/Respondent has opposed the application by way of the replying affidavit sworn by John Mbuki Mwaura on the 21<sup>st</sup> June, 2018 in which, he has deponed that the application is a mischievous attempt by the Applicant/Respondent to avoid compliance with the orders of the court made on the 31<sup>st</sup> January, 2019. That despite the Applicant being aware of the said orders, it has failed to comply with the same and has instead resorted to filing the present application.

The Appellant/respondent has further averred that, the Applicant seeks an order for security for sums alleged to be claimed by it yet, it has never lodged any claim for any sums either in the lower court or in the appeal. He deponed that the order of 31<sup>st</sup> January, 2019 does not require the vehicle to be released to him so as to warrant a claim by the Applicant that it has lost its only lien. That the Applicant has not demonstrated how the removal of the vehicle to a neutral place would expose it to irreparable loss. He has asked the court to dismiss the application with costs.

By way of a supplementary affidavit of Eston Kairu, the Applicant has denied its alleged failure to comply with the court order made on 31<sup>st</sup> January, 2019 and has instead blamed the Appellant/Respondent for making no effort to have the matter listed for directions and has blamed the Appellant/Respondent in trying to canvas the appeal pre-maturely and making false representations to avoid an order for costs being made in favour of the Applicant/Respondent.

Parties filed submissions on the application which this court has considered together with the affidavits in support and in opposition to the same. In its submissions, the Applicant has contended that, it is not in dispute that the Respondent/Applicant is indebted to it and that the only lien the applicant has in securing payment of this debt is the subject motor vehicle, being registration number KBM 249S and by the court ordering the removal of the same to a neutral place, this will expose the Respondent/Applicant to irreparable loss in the event that the total value of storage outweighs the value of the subject motor vehicle.

As rightly submitted by the Respondent/Appellant, it is presumptuous for the Respondent/Applicant to contend that the Appellant is indebted to it yet the matter is still pending in court and the issue is yet to be determined.

Secondly, the sum of Kshs. 779,061.30cts claimed by the Applicant/Respondent as storage charges has not been properly ascertained by this court and cannot therefore form the basis of a purported valuation of security. It is just a figure that was quoted by the Applicant/Respondent.

The test to be applied by the court in deciding whether to order a party to furnish security was considered in the case of *IN FTG HOLLAN VS. AFAPACK ENTERPRISES LIMITED AND ANOTHER (2016) eKLR* where the court of appeal held:

***“..... the court had to be satisfied that the Appellant was about to dispose of its assets or repatriate them from the local limits of the court’s jurisdiction. The Respondent provided no evidence at all to demonstrate that any of the above was about to happen.***

For these reasons, although the learned Judge had complete discretion to order for security, we think he improperly exercised that discretion, and in the result, erred by making a general proposition that a foreign registered company sued in Kenya must provide security even in the absence of evidence that the company intends to dispose or repatriate its property out of the jurisdiction.

Accordingly, we allow the appeal with costs set aside the orders issued on 19<sup>th</sup> March, 2013 and dismiss the motion dated 19<sup>th</sup> July, 2012 with costs.

The court of appeal in the above case was dealing with an appeal arising from an application in which the Applicant had sought for arrest of Directors to show cause why they should not furnish security. The court upon hearing the application, found that a prima facie case had been established for the reason that the Respondent was domiciled abroad and has no attachable assets in Kenya. The court of appeal in allowing the appeal found that the learned Judge did not properly exercise his discretion.

In this court’s ruling delivered on the 31<sup>st</sup> January, 2019, it ordered that the vehicle be kept at a safe and neutral place pending the hearing and determination of the appeal. The applicant has argued that by moving the motor vehicle to another location will be detrimental to it in the event the Applicant/Respondent is unable to pay for the storage charges incurred at the conclusion of the appeal.

In my considered view the Applicant will not suffer any prejudice even if the vehicle is moved to a neutral place because it will still be under control of both parties and neither the Appellant nor the Respondent will have more right over the same.

In the end, I find that the Applicant/Respondent has not met the threshold for granting of the orders sought in the application under consideration. The same is hereby dismissed with no orders as to costs. It is however, in the best interest of the parties to have the appeal heard expeditiously as the subject motor vehicle is deteriorating in value. To that end, the Appellant is hereby ordered to file the record of appeal within 14 days of the date of this ruling and thereafter fix the appeal for directions within 15 days from the date of filing of the record of appeal.

The costs of the application shall abide the outcome of the appeal.

Dated, signed and delivered at **NAIROBI** this **2<sup>ND</sup>** day of **OCTOBER, 2019**.

**L. NJUGUNA**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent