



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL DIVISION

HIGH COURT CIVIL APPEAL CASE NO. 47 OF 2017

CO-OPERATIVE BANK OF KENYA LTD.....APPELLANT

VERSUS

JOHN KURIA KIMANI.....RESPONDENT

(Being an appeal from the Ruling delivered on 4th April, 2017

by Hon. K. M. Njalale (Senior Resident Magistrate)

Senior Principal Magistrate's Court at Limuru

in SPMC No. 343 of 2015).

JUDGMENT

1. The Respondent filed suit in the Lower Court against the Appellant seeking a permanent order of injunction to restrain the Appellant from re-auctioning motor vehicle registration No KBS 642D.
2. Secondly, the Respondent sought orders for the release of the transfer documents of the said motor vehicle to Family Bank to facilitate the payment of the balance of the purchase price.
3. Simultaneously with the filing of the plaint on 9th December, 2015 the Respondent filed a Notice of motion application seeking orders restraining the Defendant/Respondent, their agents, servants and/or employees or any other person working under them from reselling motor vehicle registration number KBS 642D pending the hearing and determination of the application.
4. The Respondent's case was that on 11th September, 2015, he participated in the auction of the motor vehicle the subject of the suit. That the Respondent was declared the highest bidder of the motor vehicle at the price of Ksh.2,300,000/=. That at the fall of the hammer the Respondent paid Ksh.575,000/= being 25% of the purchase price. That the balance of the purchase price of Ksh.1,725,000/= was to be paid within 14 days. That later on the parties agreed that the sum of Ksh.1,725,000/= would be paid through a loan facility to be obtained from Family Bank. That Family Bank requested the Appellant for the release of the transfer documents. That the Appellant requested for a professional undertaking from Family Bank to enable them release the transfer documents. That the said professional undertaking was given but the Appellant failed to release the transfer documents and informed the Respondent of the nullification of the auction and forfeiture of the 25% deposit. The Respondent was apprehensive that the Appellant would sell the motor vehicle to a 3rd Party, hence the suit filed herein. The Respondent blamed the delay in the completion of the sale transaction on the internal dealings between the two banks.
5. The application was opposed. It was stated in the replying affidavit that the balance of the purchase price was to be paid within 14 days. That in default the deposit paid would be forfeited without notice to the purchaser and the motor vehicle resold. The Appellant blamed Family Bank for the delay in giving the professional undertaking which was issued on 16th November, 2015, by which time the Appellant had notified the Respondent of the revocation of sale and forfeiture of the deposit. It is further averred that the motor vehicle has since been sold to a third party.
6. On 29th March, 2016, the Respondent filed an application seeking orders that the motor vehicle which was at Purple Royal yard do continue to be detained at the same premises pending the hearing and determination of the application. This application which became spent upon the determination of the same was based on the fact that interim orders had already been issued and the motor vehicle had not been sold

as alleged by the Appellant but had simply been moved to Purple Royal storage yard.

7. No response was filed in opposition to this application.

8. The trial magistrate ruled in favour of the Respondent. The applications dated 8th December, 2015 and 29th March, 2016 were allowed with costs in cause.

9. The Appellant was dissatisfied with the said ruling and appealed to this court on the following grounds:

(a) That the trial magistrate erred in allowing the applications and finding that the Respondent had met the conditions for the grant of a temporary injunction.

(b) That the ruling was against the weight of the evidence.

(c) That the Appellants submissions were not considered.

10. The appeal was canvassed by way of written submissions which I have considered.

11. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:-

“An appeal to this Court from a trial by the High 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. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed sholan (1955), 22 E.A.C.A. 270)”

12. On whether to issue the restraining injunctive orders sought, the principles applicable were well settled in the case of **GIELLA –VS- CASSMAN BROWN & CO. (1973) EA**. To succeed, the applicant must establish a *prima facie* case with a probability of success, that irreparable loss which cannot be adequately compensated by award of damages would be suffered and if in doubt, the court will decide on a balance of convenience.

13. As stated by the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR**:

“.....a prima facie case” I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

14. Order 42 rule 6(6) Civil Procedure Rules provides as follows in respect of the granting of a temporary injunction pending appeal:

“Notwithstanding anything contained in sub rule (1) of this rule, the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

15. This court can therefore in appropriate cases grant orders of temporary injunction pending the hearing of the appeal.

16. The facts of the case are largely not in dispute. The documents exhibited by the Respondent reflect that the public auction was held on 11th September, 2015. The highest bidder was the Respondent at the price of Ksh.2,300,000/=. The Respondent paid 575,000/= 25% of the purchase price at the fall of the hammer. The certificate of sale was issued on the same day on 11th September, 2019 and the Appellant’s stamp reflects they received the same on 12th September, 2015. From there on the rest of the communication is between the Appellant and Family Bank which was extending a loan facility of the balance of 1,725,000/= to the Respondent vide letter dated 22nd September, 2015. Family Bank was asking for the release of the original log Book, signed transfer forms and the copy of the sellers PIN.

17. The Respondent vide a letter dated 25th September, 2012 requested for a professional undertaking before the release of the said documents. The next communication from Family Bank was the letter dated 16th November, 2015 requesting for the original Log Book, Discharge letter, signed Transfer Forms, PIN and the Appellants certificate of incorporation. The terms and conditions given in the said letter included payment of the Kshs.1,725,000/= within the 14 days of successful Registration of the transfer of ownership of the motor vehicle, creation of securities in favour of Family Bank and a 60 days Redemption clause.

18. The Appellant on the other had exhibited a copy of the certificate of sale and the conditions of sale upon the payment of the balance of the purchase price. The condition was that:

“The balance of the purchase price shall be paid to the chargees Co-operative bank of Kenya of P. O. Box 48231 -00100 Nairobi within 14 days from the date of sale (as to which time shall be of the essence of the contract)”

19. The sale having taken place on 11th September, 2015, the 14 days had long lapsed by the time Family Bank wrote their letter dated 16th November, 2015 giving their terms and conditions for the release of the purchase price. What was the import of failure to pay in time?

20. The default clause in the condition was as follows:

“If the purchaser fails to pay the balance of the purchased price within 14 days from the date of sale the deposit paid by the purchaser shall, be forfeited to the chargee absolutely and the chargee may without notice to the purchaser re-sell the motor vehicle as such time, in such time in such manner and subject to such condition as he shall think fit. Any deficiency in price which may result and all expenses attending a re-sell or attempt re-sell shall be made good and paid by the defaulting purchaser and recoverable by the chargee as vendor as liquidated damages, the purchaser receiving credit for the deposit any increase of the price on re-sell shall belong to the chargee.”

21. The Respondent failed to meet the timelines for the payment of the purchase price. The contract of sale was between the Appellant and the Respondent. The Respondent can therefore not shift the blame in the delay to the bank. The Co-operative bank (Appellant) had no contract with the Family Bank and the undertaking came rather late in the day.

22. The parties are bound by their own contract and the court cannot rewrite the same (See for example **National Bank of Kenya Ltd v PipePlastic Samkolit (K) Ltd & another (2002) EA 503**). The first condition for a grant of injunctive orders was not met.

23. The subject of the suit is a motor vehicle that was in the process of being purchased by the Respondent. The purchase price of the motor vehicle is known. The deposit paid is also known. Thus the Respondent can be compensated by way of damages.

24. With the foregoing, I hold that the balance of convenience did not favour the continued storage of the motor vehicle as it will be exposed to depreciation. In any event, the application for the storage of the motor vehicle at Purple Royal storage yard lapsed upon the determination of the application dated 29th March, 2016 which sought orders that the motor vehicle be stored pending the hearing and determination of the application.

25. In the upshot, I find merits in the appeal and it is hereby allowed. Consequently, the ruling of the trial magistrate dated 4th April, 2017 is hereby set aside and substituted with an order dismissing the applications filed on 8th December, 2015 and 29th March 2016. Costs to the Appellant.

B. THURANIRA JADEN

JUDGE

Dated, signed and delivered at Kiambu this 18th day of July, 2018

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