



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**MISC. CIVIL APPLICATION NO. 203 OF 2016**

**NGAO CREDIT LIMITED.....1ST APPLICANT**

**WESTMINISTER MERCHANTS.....2ND APPLICANT**

**VERSUS**

**JOEL IRUNGU GITHIRI.....1ST RESPONDENT**

**ALEX OTUKE ONDIMU.....2ND RESPONDENT**

**RULING**

1. This is a notice of motion dated 14/11/2016 seeking *inter alia* for orders that this honourable court be pleased to stay proceedings on Embu CMCC 232 of 2016 pending hearing and determination of this application. The other prayers were dealt with *exparte*.

2. The application is supported by the affidavit of one Teresiah Kimani a risk officer of the 1<sup>st</sup> applicant sworn on 11/11/2016. The grounds in support may be briefly stated:-

(a) That the Resident Magistrate Hon. V.O. Nyakundi issued irregular orders which have adversely affected the 1<sup>st</sup> applicant.

(b) That the said orders were issued in favour of the 1<sup>st</sup> respondent for the 1<sup>st</sup> applicant to return motor vehicle registration No. KBE 052 E which was a security for a loan facility to the 2<sup>nd</sup> respondent.

(c) That the orders were issued without giving the 1<sup>st</sup> applicant an opportunity to be heard.

(d) That the repossession was in accordance with the loan agreement by the parties for default executed of the loan repayment.

(e) That the orders were issued during a public holiday on 20/10/2016.

(f) That the 1<sup>st</sup> applicant is likely to suffer loss if the orders are enforced.

3. The application was opposed by the 1<sup>st</sup> respondent whose response may be summarized thus:-

(i) That the orders by the Resident Magistrate were regular and were obtained on 24/10/2016 and not 20/10/2016 as alleged.

(ii) That the 1<sup>st</sup> applicant has not responded to two applications by the 1<sup>st</sup> respondent.

(iii) That the 1<sup>st</sup> applicant ought to first obey the court orders and challenge them later.

(iv) That the 1<sup>st</sup> respondent was a purchaser and was not aware of the loan agreement between the 1<sup>st</sup> applicant and the 2<sup>nd</sup> respondent.

4. Both parties filed written submissions and filed authorities. The firm of MJD Associates Advocates represented the applicant while that of Momanyi Gichuki & Co. appeared for the 1<sup>st</sup> respondent.

5. I have perused the order in question by Hon. V.O. Nyakundi. I note that the application as shown by the court stamp was filed on 24/10/2016 and orders issued on 26/10/2016. The 1<sup>st</sup> applicant was wrong in his averment that the order was made on 20/10/2016 which day was a public holiday.

6. The 1<sup>st</sup> respondent attacked the procedure followed by the 1<sup>st</sup> applicant in filing this application instead of pursuing the application before the learned magistrate. It is correct that the applicant had the option of approaching the magistrate's court which is possessed of the jurisdiction to grant the orders sought for review of its own orders.

7. From the tone in the supporting affidavit, the 1<sup>st</sup> applicant seems to have been quite incensed by the order of the court, firstly because he believed that it was issued on a public holiday and secondly, because the 1<sup>st</sup> applicant was not given a chance to be heard before the order which heavily impacted on its interests in the subject matter.

8. The 1<sup>st</sup> respondent did not raise a preliminary objection but chose to raise the issues as part of his reasons for opposing the application. Firstly, my take is that this court too has jurisdiction to issue the orders sought should the applicant satisfy the court as to their irregularity.

9. Article 165 of the Constitution confers to this court supervisory powers over subordinate courts and the applicant seeks the exercise of the said powers. Secondly, I take notice that this application was brought under certificate of urgency and if this court was to send it to the Resident Magistrate for disposal, delay will certainly be occasioned.

10. It is not in dispute that the 2<sup>nd</sup> respondent was given a loan facility by the 1<sup>st</sup> applicant and gave his vehicle as the security. All the relevant documents including the loan agreement and personal guarantee were annexed to the application. The log book of the vehicle KBR 052E in the names of the 1<sup>st</sup> applicant and 2<sup>nd</sup> respondent is proof that the vehicle was charged as security for a loan given to the 2<sup>nd</sup> respondent.

11. Several cheques were issued by the 2<sup>nd</sup> respondent which bounced and led to seriously default on the loan payment. The amount owed plus interest escalated to Kshs.2,500,000/= by the time this application was filed. The 1<sup>st</sup> applicant authorized repossession of the vehicle which could not be traced for several months. The 2<sup>nd</sup> respondent is said to have gone out of communication with the 1<sup>st</sup> applicant. This was around the same time he was selling the vehicle to the 1<sup>st</sup> respondent. It is also stated which was not disputed that the 2<sup>nd</sup> respondent disabled the car track system to keep the applicant from tracing the vehicle.

12. It was admitted by the 1<sup>st</sup> respondent that he conducted a search before buying the said vehicle. He states that he bought the vehicle from the 2<sup>nd</sup> respondent on 11/11/2016. At that time, the vehicle was in the joint names of the 1<sup>st</sup> applicant and the 2<sup>nd</sup> respondent having been so registered since 29/09/2015 when the loan agreement was signed. The 1<sup>st</sup> respondent became aware of the joint ownership upon conducting the search and he cannot claim to be unaware. The copy of records must have shown that the

vehicle was jointly owned by the 1<sup>st</sup> applicant and 2<sup>nd</sup> respondent. It raises questions on how the 1<sup>st</sup> respondent still decided to buy the vehicle from one person without the participation of the co-owner.

13. The 1<sup>st</sup> respondent ought to have placed all the material to proof he was the owner of the vehicle before the court. Apart from the sale agreement, there was no proof of payment of the alleged purchase price. If it was a genuine sale agreement, it ought to have been signed by the two joint owners.

14. It was held in the case of **MRAO LTD VS FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS [2003] eKLR** that:-

*A prima facie case in a civil application includes but is not confined to a “genuine and arguable case”. It is a case 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.....*

*I would say that in civil cases, it (a prima facie case) is a case in which on the material presented to 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.*

15. In the application before the honourable magistrate, the 1<sup>st</sup> respondent did not present enough material to prove a “genuine and arguable case” for the magistrate to issue the exparte orders. The 1<sup>st</sup> respondent had not established that he was a bona fide purchaser of the vehicle. The issue of the orders was rushed and not supported by sufficient evidence.

16. At the time the orders were issued, the court was not aware of the loan agreement which bound the 2<sup>nd</sup> respondent to honour it by keeping the loan security safe and available for the 1<sup>st</sup> applicant to repossess in case of default. The court was also not aware of the default of payment on the loan and the interest of the 1<sup>st</sup> applicant in the vehicle. The copy of the log book presented to the court for issue of the orders if any require to be investigated if it bore the name of the 2<sup>nd</sup> respondent alone. Had the magistrate been made aware of all this information, and had he exercised caution in the matter would not have granted the exparte orders.

17. The orders for temporary injunction restraining the applicant and others from repossessing, holding and continuing to hold, selling or alienating the vehicle had a big impact and should not have been issued without hearing the applicant and the other parties. The 1<sup>st</sup> applicant was not given a chance to be heard contrary to the rules of natural justice.

18. As for the contempt of court application, the 1<sup>st</sup> respondent is yet to prosecute it against the 1<sup>st</sup> applicant for the court to determine it on merits. It is not clear why the application was not served prosecuted against the applicant and the other parties. The 1<sup>st</sup> applicant ought to have filed his papers in the magistrate's court to defend the suit and to respond to any other pleadings served on him.

19. The 1<sup>st</sup> respondents response and submissions extensively dealt with the issue of contempt. The authorities cited are distinguishable in that the orders sought to have been disobeyed resulted from cases or application heard inter parties unlike in this case where the 1<sup>st</sup> respondent was not heard. Such authorities would be more applicable in prosecuting an application for contempt. I did not find the authorities relevant to this application.

20. I have considered all the issues raised in this application. I am of the view that the orders issued by the magistrate were not based on the laid down principles for a *prima facie* case in civil cases. The rules of natural justice were not followed in that the other parties affected by the order were not heard. It is my considered opinion that the orders issued do not serve the interests of justice.

21. The 1<sup>st</sup> respondent says he has already obtained interlocutory judgment in the magistrate's court. In view of the development following the issue of th irregular exparte orders, it is in the interests of justice that both parties are given a chance to be heard in the suit. The 1<sup>st</sup> applicant should move the court appropriately.

22. I therefore allow the application as prayed. The exparte orders made by V.O. Nyakundi on 24/10/2016 are hereby vacated. Consequently, the contempt proceedings based on the said orders are hereby nullified.

23. Each party to meet their own costs of this application.

24. It is hereby so ordered.

**DATED, DELIVERED AND SIGNED THIS 22ND DAY OF FEBRUARY, 2017.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Ms. Maina for Mulani for Applicants**