



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL DIVISION**  
**CIVIL APPEAL NUMBER 123 OF 2015**

**AGNES N. WANYOIKE. .... APPELLANT**

**VERSUS**

**SAFARI DEVELOPMENT CO. LIMITED. ....1<sup>ST</sup> RESPONDENT**

**LEONARD NJOGU. .... 2<sup>ND</sup> RESPONDENT**

**R U L I N G**

The Appellant herein filed a plaint praying for two declaratory orders that she is the lawful owner of motor vehicle Registration Number KAY 643G Toyota Rav 4 Station Wagon and that she was not privy to any dealings, agreements or contracts between the Respondents and herself. She further prays for an injunction to prevent the Respondents or their agents from seizing, transferring, trespassing upon or otherwise dealing with the motor vehicle and a mandatory injunction to compel them to restore the log book of the subject motor vehicle to the custody of the Appellant.

The Appellant on the same limb filed an application dated 3<sup>rd</sup> April, 2004, where she sought orders of injunction against the Respondents from seizing, transferring, trespassing upon or otherwise dealing with the motor vehicle registration number KAY 643G pending the hearing and determination of the application inter partes and determination of the suit. The Magistrate upon hearing the application dismissed it.

Aggrieved by the decision to dismiss the application, the Appellant preferred this appeal and also filed an application praying for orders that: -

- 1) Spent.
- 2) Pending the hearing of this application inter partes, a temporary injunction do issue against the Respondents jointly and severally to prevent them by themselves or agents or servants or by anyone claiming through or under them from seizing, attaching, transferring or otherwise interfering with the Appellant's title in and possession of the motor vehicle registration number KAY 643G Toyota Rav 4 Station Wagon.
- 3) Pending the hearing and determination of this appeal, an injunction do issue against the Respondents jointly and severally to prevent them by themselves or agents or servants or by anyone claiming through or under them from seizing, attaching, transferring with the Appellant's title in and possession of the motor vehicle registration number KAY 643G Toyota Rav 4 Station

Wagon.

4) Costs hereof be provided for.

The first Respondent filed a replying affidavit sworn by Robinson Njoka Chege who swore to oppose the application and stated that a search from the Registrar of Motor vehicles is not conclusive evidence of ownership. He averred that, the 2<sup>nd</sup> Respondent took a loan of Kshs.600,000/- from the 1<sup>st</sup> Defendant and he offered the motor vehicle as security including a duly completed transfer form indicating that the Appellant had transferred the motor vehicle to him and the original log book. He argued that the appellant has not established a prima facie case with probability of success and he will suffer great loss and prejudice if the application is allowed.

The 2<sup>nd</sup> Respondent did not file his response.

The Appellant and the 1<sup>st</sup> Respondent orally submitted in court. The Appellant has submitted that should the orders be denied, the appeal will be rendered nugatory since the motor vehicle will be seized. She further claimed that the ruling in the lower court did not comply with the Traffic Act which provides that unless otherwise proved, the registered owner of motor vehicle will be presumed to be the owner hence the appeal is arguable.

The 1st Respondent submitted that the Appellant has moved the court under the wrong provisions of the law having cited Order 42 Rule 6 that provides for stay of execution pending Appeal instead of Order 40 Rule 1 that provides for injunction. He argued that the Appellant has not shown that he has a prima facie case with a chance of success since she transferred the motor vehicle to the 2<sup>nd</sup> Respondent as per the transfer form that contains the same signature as that in her affidavit. He claimed that the Appellant is not the owner of the motor vehicle and she lacks the locus standi to bring the suit. He further asserted that the Appellant will not suffer any harm that cannot be compensated by way of damages.

I have carefully considered the materials before me and the submissions made by the learned counsels for the respective parties. Firstly, the Respondent claims that the Appellant has not moved this court properly since he has moved the court under the wrong provisions having cited Order 42 Rule 6 instead of order 40 Rule 1. Article 159 (2) (d) of the Constitution of Kenya, 2010 is applicable in a situation like this one.

In my view, that is a mere technicality which does not affect the substance of the matter. I do hereby excuse the Appellant for the oversight which should not be used to defeat substantive justice and in any case, Order 42 Rule 6 (6) bestows on this court the power in exercise of its Appellant 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.

The Appellant has sought injunctive orders, the law on the granting of injunction is fairly well settled. The celebrated case **of Giella Vs Cassman Brown & Co. Limited (1973) E.A. 358** Lays down the conditions for granting of interlocutory injunction as follows: -

- i) Prima facie case with a probability of success.
- ii) The Applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damage;
- iii) If the court is in doubt on the existence or otherwise of a prima facie case, it will decide the application on the balance of convenience.

This court appreciates that, at an interlocutory stage, the court is not required to make any conclusive or definitive findings of fact or the law but the court is not excluded from expressing a prima facie view in the matter.

From the material before the court, it is not clear whether or not the Appellant sold the motor vehicle to the 2<sup>nd</sup> Respondent who did not make an appearance in this case to shed light on the circumstances. That is an issue that will be conclusively decided during the substantive hearing of the matter and I do not wish to delve into it, at this moment as doing so would be trespassing on the jurisdiction of the trial court.

It suffices for now to note that the Appellant herself has denied having sold the vehicle to the 2<sup>nd</sup> Respondent. In her evidence on oath, she alleges that her log book was stolen and there was fraud on the part of the 2<sup>nd</sup> Respondent in dealing with the said log book the way he did. The veracity of this evidence cannot be determined at this stage.

The Appellant has produced a copy of the log book in her name and also a certificate of official search showing that she is the registered owner of the subject motor vehicle. Section 8 of the Traffic Act provides that: -

***“The person in whose name a vehicle is registered, shall unless the contrary is proved be deemed to be the owner of the vehicle.”***

Though the 1<sup>st</sup> Respondent has attached a copy of the transfer form, the appellant has denied having signed the same.

In the circumstances aforesaid, I am satisfied that the Appellant has established a prima facie case. I do, however, note that the ownership of the said motor vehicle is in issue and it's only fair that the same be preserved until the appeal is heard and determined and to attain that, I do order that the original log book be deposited with the court within seven (7) days from today to be released after the determination of the appeal.

Further to ensure that justice is not delayed in this matter, the Appellant should prosecute the appeal within 90 days from today's date failing which, the partial orders in his favour, shall lapse.

Each party shall bear its own cost.

Dated, signed and delivered at Nairobi this 2<sup>nd</sup> day of June, 2016.

.....

**L NJUGUNA**

**JUDGE**

***In the presence of***

..... ***for the Appellant***

..... ***for the Respondents***