REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO.117 OF 2014

BENJAMIN ODIAR AHINDA ..... APPELLANT

VERSUS

KENYA WOMEN FINANCE TRUST (KWFT)

KAKAMEGA REGIONAL OFFICE ..... RESPONDENT

JUDGMENT

1.] This is an interlocutory appeal by ***Benjamin Odiara Ahinda,*** (the appellant), from the ruling and order of ***(J. O. Ongondo)***, Principal Magistrate delivered on 22nd September, 2014 in ***Kakamega Chief Magistrate's Civil Case No.214 of 2014***. The appellant had applied before that court for mandatory injunction restraining Kenya Women Finance Trust (KWFT) (the respondent) from attaching and/or disposing of by way of public auction ***Motor Vehicle Registration No.KBD 486G Isuzu Lorry*** pending the hearing and determination of the suit. The appellant also sought an order that the respondent furnish him with Financial Statements and accounts on the principal debtor Lorna Mbayi Simiyu's account in respect to ***A/C No.1002394584*** with the respondent.

2.] That application was heard and in its ruling the court ordered the appellant to pay the outstanding arrears amounting to Khs.347,518/24 within 21 days from the date of that ruling after which the Motor Vehicle Registration No. KBD 486B Isuzu Lorry the subject of those proceedings was to be released to the appellant. There was a further order that should the appellant fail to comply with the above condition, the respondent would be at liberty to dispose of the motor vehicle.

3.] Aggrieved by those orders, the appellant moved to this court and lodged the present appeal raising seven grounds of appeal as follows:-

> *1. THAT the learned magistrate erred in law and fact in granting exteaneous orders which were not sought.*
>
> *2.THAT the learned magistrate erred in law and fact in failing to consider that there was no statutory Notices issued prior to wrongful and illegal attachment of the appellant's said Motor vehicle contrary to the law under the Chattel Mortgage Act and Auctioneer's Act.*
>
> *3. THAT the learned magistrate made a ruling that was not proper in law in that no reasons were given in support thereof.*
>
> *4. THAT the learned magistrate erred in law and fact in not considering the issues raised by the appellant while making his ruling.*

5. THAT the learned magistrate erred in law and fact in failing to exercise his discretionary powers judiciously.

6.THAT the learned magistrate erred in law and fact by failing to analyse the issues before him critically wholly or properly and his ruling was evidently pre-determined, biased, flawed and indefensible and was arrived at in cursory and perfunctory (sic). and is devoid of sense and justification and occasioned a serious miscarriage of justice.

The appellant prayed that the motor vehicle the subject of this appeal and the proceedings before the court below be released to him unconditionally, and the lifting of the attachment of the said motor vehicle. In the meantime, the appellant filed an application for stay before this court which was granted on condition that the appellant deposited into court Kshs.347,518/20 within 30 days from the date of that ruling after which the motor vehicle was to be released him.

4.] When this appeal came up for hearing, ***Mr Osango*** appeared for the appellant while ***Mr Obilo*** was for the respondent. Parties had filed written submissions which both counsel agreed to highlight. Mr Osango, learned counsel for the appellant submitted that the learned magistrate erred in granting orders that had not been sought. He submitted that the learned magistrate had no basis to order the appellant to liquidate the outstanding arrears of Kshs.347,518/24 as at 20th August, 2014 since the respondent had not pleaded or prayed for such orders. Counsel further submitted that the respondent illegally impounded Motor Vehicle No. KBD 486G, Isuzu Lorry, belonging to the appellant without giving Notice to the appellant. Counsel argued that there was no proclamation or attachment which violated ***section 9*** of the Auctioneers Act. Counsel took issue with the chattels mortgage instrument saying that it was neither dated nor attested to. He was of the view that the loan was advanced on 28th January 2013 yet the chattels mortgage was registered on 30th June, 2014 and according to counsel the loan could not have been disbursed before registration of the chattels mortgage instrument.

5.] Mr Osango further took issue with an affidavit sworn by one ***Christabel Biwi*** in support of the chattels mortgage instalment, saying it was undated and that it was done in June 2014 long after the loan had been disbursed, and in his view, the instrument is unenforceable. He pleaded with the court to allow the appeal and release of the money deposited in court to the appellant

6.] He distinguished the authorities cited by the respondent saying that demand had been made before attachment. He maintained that in the present case the appellant was unaware of the borrower's default.

7.] Mr Obilo, learned counsel for the respondent on his part, opposed the appeal saying that according to the pleadings before the lower court, the appellant had given his motor vehicle as security after which the loan was disbursed to the borrower. According to counsel, the motor vehicle is listed in the schedule to the Chattels mortgage instrument as required. He argued that the appellant did not challenge the validity or otherwise of the chattels mortgage instrument and the lower court properly delt with that issue. He supported the learned magistrate's finding that the appellant had validly executed the chattels mortgage instrument and relied on the decisions in ***Diamond Trust vs Kones, David Kimani vs NIC Bank (Nkr HCCC No.253 of 2007),*** and ***Geofrey Njenga vs Geofrey W. Karuri Nbi HCCC No.795 of 1998*** where the courts held that lack of proper form or non-registration did not affect powers and covenants entered into by the parties. According to counsel non-registration of the chattels mortgage instrument does not affect the enforceability of the contract entered into by the parties.

8.] Counsel went on to argue that ***rule 7*** of the 3rd schedule to the Chattels Transfer Act allows the respondent to take possession without Notice once there is default. He submitted that ***section 24*** of the Chattels Transfer Act relied on by the appellant does not apply to the chattel in dispute in this case saying that the section only applies to stocks.

9.] Counsel finally submitted that the prayer sought in this appeal cannot be granted since the suit

in the lower court requires oral evidence which is yet to be tendered, and according to counsel, it is important that the lower court be given an opportunity to hear and determine the dispute before it. He asked that the appeal be dismissed with costs.

10.] I have considered this appeal, submission by counsel and the authorities cited. I have also perused the record of appeal and the ruling of the learned magistrate; the subject of this appeal. This being an interlocutory appeal, the position in law is that in such an appeal where the suit is yet to be heard, the court should refrain from expressing concluded views on any issue which it thinks may arise in the pending trial thus avoid prejudicing any of the parties (see ***B.P. (Kenya) Ltd. vs Kisumu Market Service Station C.A. No.25 of 1992***, ***David Kamau Gakuru vs Industrial Credit Bank Ltd C.A. No.84 of 2001*** and ***Savings & Loan (K) Ltd vs Kanyenjie Karangata Gakambi & another [2005] eKLR.***

11.] The appellant had sought orders of injunction, account and release of the impounded motor vehicle which called for the exercise of Judicial discretion by the learned Magistrate. The law is that a court sitting on appeal will not interfere with the exercise of discretion of a lower court unless the court misdirected itself by taking into account irrelevant matters or failing to take into account relevant ones and in the end caused injustice. In other words, the court must have exercised its discretion wrongly. The position was more aptly put by *S.R. ChARLES NEWBOLD* in the case of *Shah & Another vs Mbogo [1968] E.A. 93 at page 96* as follows**:-**

> *"A Court of Appeal should not interfere with the exercise of discretion of a judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and that as a result there has been injustice."*

12.] In furtherance of this legal principle, the Court of Appeal in the case of *Milka Nyambura Wanderi & Another vs Principal Magistrate's Court Murang'a & Another [2012] eKLR, said:-*

> *"For us to interfere with the exercise of that discretion, it must be demonstrated that the exercise of that discretion was clearly wrong on account of misdirection on the part of the Judge, or that the Judge acted on extreneous matters or failed to take into account matters that he should have taken into account."*

13.] Enunciating the same position, the Court of Appeal deciding in the case of *Gideon Muriuki & Another vs Cleophas Wekesa & Another [2015] eKLR* held as follows:-

> *"this court can only interfere with the exercise of discretion by a lower court where the court has not exercised its discretion judiciously. Where it has misdirected itself in some matters with the result that it arrives at a wrong decision or where it is manifest that the decision of the lower court is clearly wrong."*

14.] The position emerging from the above decisions is that a court sitting on appeal should resist the temptation to interfere with the lower court's exercise of discretion by substituting that court's direction with its own or interfering with the lower court's discretion unless it is demonstrably shown that the lower court was clearly wrong. And in deciding this appeal I will be guided by those principles and ask myself whether the learned magistrate misdirected himself or exercised his discretion wrongly thereby causing injustice.

15.] In his first ground of appeal, the appellant has faulted the learned magistrate for granting extreneous orders that had not been sought. The appellant had sought a permanent injunction restraining the respondent from attaching and disposing of motor vehicle Registration No.KBD 486G – Isuzu Lorry pending the hearing and determination of his suit. The appellant had also prayed that he be supplied with accounts relating to account No.1002394584 held by the *Borrow Lorna Mbayi Simiyu* with the respondent. The other prayer was for the lifting of the attachment to the motor vehicle. After hearing the parties, the learned magistrate made the following orders:-

"1. The impoundment of Motor Vehicle Registration No. KBD 486G shall be lifted upon the applicant liquidating outstanding amount – Kshs.347,578.24/- within 21 days from the date hereunder as of 20th August 2014. .

2. Thereafter the motor vehicle registration KBD 486G shall be restored to the applicant in accordance with the provisions of the chattels mortgage instrument.

3. If condition/order No.1 above is not complied with the respondent is at liberty to dispose of the motor vehicle as per the provisions the chattel mortgage."

16.] These are the orders the appellant has called extreneous and which had not been prayed for. However looking at the appellant's Notice of Motion dated 30th July, 2014, filed in the court below, the appellant had sought an injunction together with an order for release of the motor vehicle. The learned magistrate acceded to that request but ordered the release of the motor vehicle upon payment of the outstanding amount (arrears). He also ordered the lifting of the attachment once the condition for payment was met. If the appellant failed to meet the conditions set for release of the motor vehicle, it would have to be sold.

17.] I do not agree with the appellant that the learned magistrate made extreneous orders. The appellant sought release of his motor vehicle and lifting of the attachment while the learned magistrate ordered him to pay the amount in arrears or the motor vehicle be sold. It is the order requiring payment of the outstanding arrears and in default the disposal of the motor vehicle that has aggrieved the appellant. From the record and documents, the appellant had given his motor vehicle as security and executed a chattels mortgage instrument in favour of the respondent. There were other garantors whose deposits with the respondent Bank were also to be security. The appellant has stated that he was not aware of the borrower's default and wanted to know how much was in default but the respondent was not forthcoming. What happened to the other garantees given by the other three garantors and how much was in arrears is a matter that the appellant ought to have been informed of. He was not the principal borrower and it cannot be assumed that he ought to have known. There was no harm in disclosing the arrears and if the appellant failed to make good, the respondent would still have moved to repossess the chattel if it had the right to do so.

18.] Furthermore, the issues raised in the application before the learned magistrate were both legal and factual. The appellant had raised the issue of the legality and enforceability of the chattels mortgage instrument which had led to the repossession of the motor vehicle, the subject matter in that application as well as this appeal. The transaction therein is governed by The Chattels Transfer Act (Chapter 28) Laws of Kenya Part II of the Act (Registration) provides at *section 4* as follows:-

"All persons shall be deemed to have notice of an instrument and of the contents thereof when that instrument has been registered as provided by this Act..."

19.] Section 5 of the Act further provides:-

"Registration of an instrument shall be effected by filing it and all schedules endorsed thereon, annexed thereto or referred therein, or a true copy of the instrument and the schedules, and an affidavit in form 1 in the first schedule or to the same effect, in the office of the Registrar."

20.] Section 6(1) of the Act is also material and it provides as follows:-

The period within which an instrument may be registered is twenty-one days from the day on which it was executed."

21.] If however, an instrument is not registered within the specified period, the Act at *section 9,*

gives the High Court power to extend the period for registration by providing thus:-

> *"The High Court on being satisfied that the omission to register an instrument or an affidavit of renewal thereof within the time prescribed by this Act, or according to the form or effect required by this Act, or that the omission or misstatement in the register or in any affidavit of the name, residence, or occupation of any person or of any other matter, was accidental or due to inadvertence, may order the omission or misstatement to be rectified by extending the time for registration, or by the filing of a supplementary affidavit, or by the insertion in the register of the true name, residence or occupation, on such terms and conditions it thinks fit."*

22.] And finally there is need to refer to *section 17* of the Act which is in the following words:-

> "*An instrument shall contain or shall have endorsed thereto a schedule of the chattels comprised therein, and, save as otherwise expressly provided by this Act, shall give a good title only to the chattels described in that schedule, and shall be void as against the persons mentioned in sections 13 and 14 in respect of any chattels not so described."*

23.] I have deliberately referred to and reproduced the above provisions of the Act as I think they were relevant to the application before the learned magistrate and the issues raised before him. A cursory look at those provisions, *vis-à-vis* the issues raised, one cannot say that they are frivolous. They are pertinent to the issues that were raised in the application and eventually the suit before the lower court.

24.] The appellant raised the issue of enforceability of the chattels mortgage instrument while arguing the application and the learned magistrate stated in his ruling at page 2:-

> *"There is no contention though that the applicant guaranteed the principal borrower and at paragraph 15 of the further affidavit and at paragraph 10 of the plaint. Although the applicant has disputed the chattels mortgage document, he did not show the court the one he signed and therefore the court will interpret the one filed in court as the genuine document the applicant signed."*

25.] With due respect to the learned magistrate, the issue raised by the appellant regarding the chattels mortgage instrument was not one that could be dismissed off hand bearing in mind that the suit was yet to be heard. The learned magistrate was not making a decision on the main suit but a ruling on an application and the issue of which document was executed by the appellant could only be determined once evidence had been taken during the hearing of the main suit. The provisions of the Act I have reproduced above would come into play when the main suit is finally heard, and had the learned magistrate given due consideration to those provisions, and the fact that the motor vehicle is neither mentioned in the instrument nor described in the schedule to the chattel mortgage instrument, would probably have come to a different conclusion.

26.] By ordering the appellant to pay the outstanding arrears or the motor vehicle be sold in default, the learned magistrate summarily determined the suit without giving parties an opportunity to tender evidence during the hearing of the main suit and canverse the issues the suit presented for determination.

27.] The appellant had demonstrated that he had good grounds and the learned magistrate was therefore wrong in ordering the appellant to pay the outstanding arrears without the respondent having disclosed to him the information he needed. He was by virtue of having garanteed the loan, entitled to information on the accounts. I am aware that the main suit is yet to be heard and I must be clear that I am not making a finding at this stage that a Notice before attachment should be served. That is an issue that is still pending and the lower court will pronounce itself on it once the suit is heard.

28.] The learned magistrate was considering an application for mandatory injunction and he was required to consider whether the appellant had satisfied the conditions for granting such a relief. The position in law is that mandatory injunctions should only be granted in the clearest of cases. In the case of *Locabail International Finance Ltd vs Agro Expert and Another (1986) 1 ALLER 90,* it was stated as follows:-

> *"A mandatory injunction ought not be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a match on the plaintiff. Moreover before granting a mandatory injunction the court had to feel a high sense of assurance that at the trial it would appear that the injunction had rightly been granted. That being a different and high standard than was required for a temporary injunction – (see also Reliable Electrical Engineering (K) Ltd vs Mantrac Kenya Ltd (2006) eKLR.*

29.] I agree with submissions by counsel for the appellant that the learned magistrate failed to direct his mind to the legal and factual issues raised in the application before him. Those issues could not be determined in an interlocutory application without the benefit of hearing evidence from the parties and such evidence tested in cross-examination.

30.] The motor vehicle had been attached under a disputed chattels mortgage instrument, and in my view, the order to pay the outstanding arrears or sale of the motor vehicle in default, was, to say the list, capricious and amounted to wrong exercise of discretion which would cause injustice. Selling the motor vehicle at that stage would have rendered that suit for all practical purposes, useless.

31.] I am satisfied that there are good reasons to interfere with the learned magistrate's exercise of discretion. The appellant's appeal is allowed and the order made on 22nd September, 2014 requiring the appellant to pay the outstanding arrears of Kshs.347,518/24 is hereby set aside. The money deposited in court be released to the appellant. Costs to the appellant.

Dated and delivered at Kakamega this 8th day of October, 2015.

E. C. MWITA

J U D G E