

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO.641 OF 2006

ANTONY MWINZI KYENGO1ST APPELLANT

BASE AUCTIONEERS 2ND APPELLANT

VERUS

MULAIMU MAVUSYU1ST RESPONDENT

JOSEPH MUTUA KAINDI 2ND RESPONDENT

JUDGMENT

The 1st respondent herein filed a suit against the 1st and 2nd appellants alongside the 2nd respondent. The subject matter was a motor vehicle registration number KAQ 263D where he entered into a sale agreement with the 2nd respondent acting under the authority of the 1st appellant for the purchase of the said motor vehicle. He subsequently remitted the agreed purchase price of Kshs. 450,000/= to the 2nd respondent and the 1st appellant whereby the motor vehicle was subsequently handed over to him.

Thereafter the motor vehicle was attached by the 2nd appellant following a repossession order. He therefore moved the court claiming the release of the said motor having paid valuable consideration and also damages for breach of contract. Alongside the plaint he filed an application by way of chamber summons under Order 39 Rules 1 and 2 of the then Civil Procedure Rules and Sections 3A and 63 (c) and (e) of the Civil Procedure Act seeking the release of the motor vehicle and injunction to restrain the defendants from selling and or disposing of the motor vehicle.

The lower court heard the application and gave orders in favour of the plaintiff, now 1st respondent, and disposed of the suit by way of mandatory injunction. It is that order that led to the present appeal.

By giving a mandatory injunction, the learned trial magistrate finalized the suit by locking out all the other parties at interlocutory stage. It is trite law that interlocutory mandatory injunctions must meet two tests among others. A party must demonstrate special circumstances and only in clear cases should such an order be granted.

If there are any issues to be canvassed at the trial and which must be tested by way of oral evidence and cross examination, such orders should not be given by the court at interlocutory stage. The material presented before me, clearly demonstrates several issues which could not be determined at interlocutory stage without hearing the other parties.

The authority to sell the motor vehicle was not established. The receipt of the funds by the 1st appellant was not established.

Whether or not the transfer documents were handed over was also not established. Whether there was partnership between the 1st appellant and the 2nd respondent was also not established, especially when another property was cited between the two parties.

Clearly therefore, the mandatory injunction was not supported by the facts and the law. This appeal therefore must succeed and the order given by the lower court set aside in its entirety. The lower court

file shall be returned for trial before another magistrate of competent jurisdiction. Each party shall bear their own costs.

Dated and delivered at Nairobi this 2nd Day of December, 2015.

A.MBOGHOLI MSAGHA

JUDGE