



REPUBLIC OF KENYA

High Court at Bungoma

Civil Appeal 80 of 2011

NAGDA SACHIN.....APPELLANT

~VERSUS~

CASSIM WEKESA1ST RESPONDENT

FRED WEKESA.....2ND RESPONDENT

CHARLES KARIM MITHAMO.....3RD RESPONDENT

(Being appeal from the judgment and decree of the learned Senior Principal Magistrate Honourable M O. Wambani in Bungoma Court in Civil Case No.223 of 2010).

RULING

On 26/3/2010 the Appellant filed a suit against the Respondent over a motor vehicle registration number KBH 855W Toyota Carina which he claimed to have bought from the 2nd Respondent on 5/8/2009 and the same subsequently transferred to him. His complaint was that the 1st Respondent had on 23/3/2010 instructed Kuronya Auctioneers to reposses the vehicle without any apparent reason. The suit was brought for a permanent injunction to restrain the Respondents, their servant and agents from repossessing the vehicle. The suit was filed along with a chamber application under Order 39 rules 1 and 2 of the Civil Procedure Rules for both a temporary and a permanent injunction to restrain the Respondents, and all those acting under them, from accessing or restraining the vehicle. On 29/3/2010 a temporary injunction was issued. On 9/4/2010 the application was heard *ex-parte* and granted.

On 7/12/2010 the 1st Respondent applied under Order 39 rule 4 of the Civil Procedure Rules to have the court discharge, vary or set aside the *ex-parte* injunction granted on 9/4/2010. It was also asked that Kuronya Auctioneers be allowed to repossess the vehicles pending the hearing and determination of the application and that the entire suit be dismissed with costs. The 1st Respondent's case was that he had imported the vehicle from Japan through the 3rd Respondent. Subsequently, he sold the vehicle to the 2nd Respondent for Ksh.800,000/= out of which he was paid Ksh.180,000/= leaving a balance of Ksh.620,000/=. It was agreed that the balance be paid on or before 25/11/2009 failing which he repossesses the vehicle from the 2nd Respondent. When the 2nd Respondent did not pay he instructed the Auctioneers to repossess the vehicle. The Auctioneers were met with an injunction. When he came to court he was surprised to learn that the vehicle had been transferred to the Appellant who had filed the suit. His contention was that the 2nd Respondent did not have a good title to pass to the Appellant.

The Appellant swore two affidavits in response to say that he had earlier than the agreement between the 1st and 2nd Respondents bought the vehicle from the 2nd Respondent and subsequently

become registered as the owner. He stated that there was no time the 1st Respondent was the registered owner of the vehicle; that the first registered owner was the 3rd Respondent.

The trial court heard the application and found that since both the Appellant and the 1st Respondent were claiming the vehicle, and since the issue as to who was the rightful owner could only be determined following hearing, the same should be kept at a neutral place agreeable to the parties pending the hearing and determination of the suit. The court asked that the suit should be heard on priority basis. This is the ruling that aggrieved the Appellant who filed the present appeal. The parties agreed to exchange written submissions on the appeal.

As a result of the orders subject of the appeal, the vehicle is now detained at Mumias Police Station. It is certainly subject to deterioration and that is one other reason the Appellant is complaining.

I have perused the record of the trial court. The 2nd and 3rd Respondents were served with summons but did not enter appearance or file defence. They have not participated in the subsequent proceedings. The Respondents were served with the Appellant's application for injunction dated 26/3/2010 but did not respond to it. It was allowed *ex-parte*. The application sought both a temporary and a permanent injunction. It was allowed. However, a permanent injunction cannot be granted at an interlocutory stage. It can only be granted after the suit has been fully heard.

On the application that led to the ruling subject of the appeal, the court was faced with a situation where both the Appellant and the 1st Respondent claimed ownership. It declined to deal with the dispute at that stage. The court ought to have considered that the Appellant was the registered owner of the vehicle, and that such registration made him the *prima facie* owner of the vehicle. In terms of who between the two had a better claim, the Appellant had that claim. Considering the principles in **Giella v. Cassman Brown & Co. Ltd [1973] EA 358**, the Appellant had demonstrated a *prima facie* case with a probability of success.

It was not shown that the Appellant could not pay for the vehicle if the suit was dismissed. It is also material that the 1st Respondent did not have a counterclaim. It is for these reasons that I find that the lower court was wrong to order the vehicle to be kept at a neutral place instead of it being left with the registered owner.

I allow the appeal with costs and set aside the orders made by the lower court on 29/7/2011. The permanent injunction entered for the Appellant will also be set aside. That leaves in place the temporary injunction entered for the Appellant vide the application dated 26/3/2010. The order shall be in place until the lower court suit is heard and determined, or until any further order by the court.

Dated, signed and delivered at Bungoma this 9th day of October, 2012.

A. O. MUCHELULE
JUDGE