



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Criminal Application 726 of 2010

LUGARD MOGUSU OBONDI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Ex-parte Applicant's Notice of Motion application is dated 15th February 2008. The application is brought to court pursuant to **Order LIII Rules 1,2,3 and 4** of the **Civil Procedure Rules** (before repealed) and **Section 8 & 9** of the **Law Reform Act**.
2. The application seeks 2 prayers to wit:-
 - (a) **That the honourable court be pleased to permanently stay criminal proceedings in Chief Magistrate's court Nairobi in Criminal Case No. 86 of 2008 or any subordinate court in the Republic of Kenya over the same charge.**
 - (b) **That costs of the application be provided for.**
3. The application is supported by the grounds appearing on the face of the motion and those in the supporting affidavit by the ex-parte applicant.
4. The facts which gave rise to this application are that by a contract entered into on 17th December 2007 between the Applicant and the Motherland Tours and Travel, the former hired motor vehicle registration No. KAP 071 J Mitsubishi Pajero from the latter for use. The period of rental was for an initial 3 days and which the applicant extended from time to time by making direct payments through M-pesa to the agents of Motherland Tours and Travel.
5. That the applicant used the motor vehicle so hired to his rural place in Kisii and this information was relayed to the agents of Motherland Tours and Travel. After the December 2007 general elections post election violence erupted throughout Kenya, and especially Western Kenya including Kisii, rendering the applicant unable to travel from Kisii to return the motor vehicle to the owners.
6. Eventually calm returned and the applicant was able to travel with his family from Kisii on the 10th January 2008 to Embu where he is based. By another agreement between the Applicant and agents of the Motherland Tours and Travel, they agreed to meet in Nairobi for the vehicle to be delivered to Motherland Tours and Travel. Upon reaching Makuyu from Embu the motor vehicle developed mechanical problems at Makuyu. The agents were duly informed.

7. Assistance to repair the car was sought for from mechanics in Thika which mechanics were approved by the agents of the Motherland Tours and Travel. The motor vehicle was not ready till the 24th January 2008. It is this delay in the motor vehicle which culminated in a complaint being lodged at the Central Police Station Nairobi, by agents of Motherland Tours and Travel.

8. There was borne **Criminal Case No. 86 of 2008, Nairobi** against the Applicant for misuse of the motor vehicle which is the reason the applicant has sought these orders. This would therefore appear to be a case arising out of a contract, and where the agents want to be paid, failing which they will proceed with the tendering of evidence against the applicant for illegal misuse of the motor vehicle.

9. The facts as submitted and which are not opposed point to the fact that the parties were engaged in a contract. It was not that the usage of the motor vehicle in question was without any colour of right and devoid of authority from the agents of the company that hired the vehicle to the applicant, but rather that the applicant remained with the motor vehicle for longer than the contract period.

10. I am in agreement with Mr. Nyaberi the learned counsel for the applicant, and with the learned state counsel Mr. Njeru who wisely conceded the application that this is a matter whose proper enclave is in a civil court.

11. For the foregoing reasons, the criminal proceedings in **Cm Cr. Case No. 86 of 2008, Nairobi** or in any other subordinate court pertaining to the same charge are ordered permanently stayed.

12. Nothing in the order of court set out above shall preclude the agents of Motherland Tours and Travel, from claiming from the applicant herein, what is due and owing to them pursuant to the contract that gave rise to this case.

It is so ordered..

SIGNED DATED and DELIVERED in open court this 7th day of *November* 2012.

L. A. ACHODE

JUDGE