REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

(MILIMANI LAW COURTS)

CIVIL APPEAL 715 OF 2005

LUCY NJAGI T/A CILUCNAN ENTERPRISES …...APPELLANT

VERSUS

MARGARET RUTO …….…….....
RESPONDENT

J U D G M E N T

1. This appeal arises from a ruling which was delivered by Hon. (Mrs.) Ongeri Ag. Principal Magistrate on 15th September 2005, in which she granted an order in favour of Margaret Ruto (herein after referred to as the Respondent) that the appellant Lucy Njagi t/a Cilucnan Enterprises, her servants or agents do release the respondent's motor vehicle registration No. KAD 163L forthwith.

2. The respondent had filed a suit against the appellant in which she claimed to be the owner of motor vehicle KAD 163L. The respondent claimed that the appellant's agents, unlawfully and without any colour of right towed away the respondent's aforementioned vehicle in purported repossession for a claim for Kshs.146,000/=. The respondent sought judgment in her favour and the unconditional release of motor vehicle KAD 163L to her.

3. Filed contemporaneously with the plaint was a Chamber Summons brought under order XXXIX Rule 1 and 2 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. In the application the respondent sought orders restraining the appellants from selling the aforementioned vehicle, and also a mandatory order directing the appellants to release the aforementioned vehicle unconditionally to the respondent. It is this application which was heard by the trial magistrate and the order appealed against issued.

4. In her Memorandum of Appeal which was filed on 16th September 2005, the appellant raised 4 grounds as follows:

(i) That the Honourable Magistrate erred in law and in fact by allowing the respondent's application dated 1st April 2005 and in effect determining the suit in it's entirely whereas the court was yet to issue summons to enter appearance to enable the appellant file her defence.

(ii) That the Honourable Magistrate erred in law and in fact by being biased against the appellant herein and thereby ignored the appellant's replying affidavit sworn on 8th April 2005 together with the annextures thereto that prima facie showed that the appellant was the registered owner of motor vehicle KAD 163L Hyundai Saloon.

(iii) That the Honourbale Magistrate erred in law and in fact by her ordering for the release of motor vehicle KAD 163L Hyundai Saloon to the respondent whereas it belongs to the appellant.

(iv) That the Honourable Magistrate erred in law and in fact in her not deciding the application on merits as envisaged in the law, the uncontroverted facts/evidence/ documents adduced by the appellant and further in not deciding the application on any known principles of law.

5. At the hearing of the application, the respondent did not attend court despite having been duly served. Hearing of the appeal therefore proceeded ex-parte. Mr. Onyango who appeared for the appellant submitted that the ruling of the trial Magistrate prematurely terminated the suit. It was submitted that no summons to enter appearance were served on the appellant and therefore, the appellant did not have any opportunity to file a defence to the respondent's claim. Mr. Onyango further submitted that the magistrate failed to take into account the log-book exhibited by the appellant, which showed that she was the registered owner of the motor vehicle. He therefore urged the court to set aside the ruling of the lower court and substituted it with an order dismissing the respondent's application.

6. I have reconsidered and evaluated the affidavit evidence which was before the trial magistrate as well as the submissions which were made by counsel. First it is evident that the respondent was seeking a mandatory order of injunction. Such an order can only be issued where an applicant has satisfied the court that he/she has a clear case and that he/she will suffer extreme hardship unless the order sought is granted. The court must also bear in mind that the order is an interlocutory order and therefore should not have the effect of prematurely terminating the main suit.

7. In this case, the respondent maintained that she was the lawful owner of the motor vehicle and that the same was unlawfully and illegally repossessed by the appellant's agents. The appellant on the other hand contended that the respondent sold the motor vehicle to the appellant on 5.8.02. She maintained that she had given the respondent a friendly loan which was to be repaid by 5th August 2002 but the respondent was unable to repay the loan and therefore decided to sell the motor vehicle to the appellant. The respondent nevertheless retained possession of the motor vehicle. The appellant maintained that the total amount she had lent the respondent which was due and owing was Kshs.146,000/= and therefore she had the right to repossess the motor-vehicle.

8. It is clear that the motor vehicle initially belonged to the respondent and that the appellant took possession of the motor vehicle in purported rights of a repossession. It is further evident that the motor vehicle has subsequently been registered in the name of the appellant. There are issues which will arise out of the hearing of the main suit as to who is the lawful owner of the motor-vehicle, and whether the repossession of the motor vehicle by the appellant was legal. In her ruling the trial magistrate made a finding that the purported repossession of the motor vehicle was illegal and unlawful. That was a finding which was made prematurely, as that would be a critical issue for determination at the main trial.

9. The above notwithstanding, it was clear from the evidence that the motor vehicle initially belonged to the respondent and was in her possession until it was repossessed by the appellant's agents on 23rd March 2005. Although the appellant's agents purported to use a court order as authority to repossess the motor vehicle, there was no suit which was heard and any order that may have been issued was suspect. In the circumstance, given that a motor vehicle is an article subject to quick depreciation, it was only fair that the court return the parties to the position they were in before the disputed repossession as they await the determination of the suit. Nevertheless, the court did not take note of the fact that the main trial was yet to be finalized and therefore gave orders which ostensibly are final orders.

10. I therefore set aside the orders of the trial magistrate and substitute thereof the following orders:

(i) That motor vehicle registration No. KAD 163L shall be released to the respondent by the appellant's agents, and that the respondent shall retain possession of the motor vehicle and not sell the motor vehicle or in any way part with possession pending the hearing of the suit.

(ii) That the respondent shall take appropriate action to prosecute her suit to facilitate its speedy disposal.

(iii) That in the event that the suit is not finalized within 12 months from today, the appellant will be at liberty to apply in the lower court for the setting aside of the order of interlocutory injunction.

(iv) That costs of this appeal shall be costs in the suit.

Orders accordingly.

Dated and delivered this 4th day of May, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Advocate for the appellant absent

Ruto for the respondent

Erick – Court clerk