

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CIVIL APPEAL NO. E097 OF 2023

JOHN NDUATI KARIUKI

APPELLANT

- VERSUS -

AZAN MOTORS LIMITED

RESPONDENT

***(Being an appeal from the ruling and order of Hon. W.
Onkunya SRM delivered on 29/08/2023 in the Kimilili
SPMCC No. E091 of 2022)***

JUDGMENT

1. The respondent moved the court by the motion dated 12/06/2023, seeking, amongst other things, that the court vacate its orders issued on 6/07/2022, direct the appellant to surrender the suit vehicle to the nearest police station, and grant leave to the respondent to include one Patrick Masinde Nyongesa as a Third Party.
2. The appellant opposed the application vide a replying affidavit sworn on 21/06/2023.
3. In its decision delivered on 29/08/2023, the trial court partially granted the respondent's application, allowed the respondent to enjoin the intended Third Party, and ordered

the appellant to surrender the suit vehicle to the nearest police station.

4. Dissatisfied with the said Judgment/decreed, the appellant lodged this appeal by the Memorandum of Appeal dated 7/09/2023 and raised six (6) grounds of appeal as follows:

a) The learned magistrate erred in fact and in law in failing to appreciate that the orders issued on 29th August 2023 conflict with the orders issued on 8th June 2022.

b) The learned magistrate erred in fact and in law in failing to appreciate that allowing the application dated 29th August 2023 amounted to an embarrassment of judicial process by court issuing two conflicting orders.

c) The learned magistrate erred in fact and in law in failing to appreciate that the orders as issued on 29th August 2023 could only be issued after the court had vacated the orders issued on 8th June 2022 and since the Court did not vacate the orders issued on the 8th June 2022 then it could not allow the application dated 12th June 2023.

d) The learned magistrate erred in law and in fact in considering extraneous factors that were not

pleaded by the parties to make it the reason behind her ruling.

e) The learned magistrate misdirected herself in law and in fact for arriving at a decision that was not supported by evidence of the parties.

f) The learned magistrate erred in fact and in law in failing to appreciate that the surrendering of the vehicle at the police station will result to the vehicle being wasted and stands a risk of being vandalized which goes against the reason for granting the orders.

5. The parties agreed to dispose off the appeal by way of written submissions.
6. The appellant submitted that the trial magistrate erred in fact and in law by failing to appreciate that the orders issued on 29/08/2023 conflicted with those issued on 8/06/2022, and that, as a result of this conflict, the judicial process was likely to be embarrassed, as held in the case of Lydia Kaguna Japheth & 2 Others v Mbesa Investment Limited & 2 Others [2022] KEHC 2310 (KLR). The appellant further submitted that the trial magistrate arrived at her decision after considering extraneous factors not pleaded by the parties, specifically that the suit vehicle was wasting away or being vandalised.

7. The respondent submitted that the orders issued by the trial court were not in conflict. That an interim order may be varied, reviewed, or set aside if there is discovery of new or important evidence or if there has been a material change in circumstances since the original order was made. It was also stated that denying a litigant a chance to be heard should be a last resort for the Court, as held in the cases of *Douglas Wambua Mutula v Kenya Ports Authority* [2020] eKLR, *Sabei District Administration v Gasyali & Others* (1968) E.A. 300, and *Mbaki & Another v Macharia & Another* (2005) EA 2006. The respondent further asserted that the Third Party was an essential part of the suit, making their inclusion crucial for the final determination. It was contended that the appellant has not demonstrated how the court would have been embarrassed, especially since the said orders had already been overtaken by events. Additionally, it was argued that the appellant had infringed upon its proprietary rights and benefited from ex-parte orders which were lawfully overturned.

ANALYSIS AND DETERMINATION

8. As this is a first appeal, the Court is duty-bound to evaluate the evidence before the trial court afresh and reach its own independent findings and conclusions. (See *Selle & Anor vs. Associated Motor Boat Co Ltd & Others* [1968] EA 123).

9. It is therefore appropriate to consider the history of litigation leading up to the impugned ruling dated 29/08/2023.
10. The appellant filed a suit against the respondent by a plaint dated 25/05/2022, seeking a declaration that the respondent unlawfully repossessed the motor vehicle registered under number KCZ 806V, compensation for loss of use at the rate of Kshs. 6,000/= per day from 13th May 2022, exemplary and punitive damages with interest, and costs of the suit.
11. Simultaneously with the aforementioned plaint, the appellant also filed an application on the same date seeking injunctive relief against the respondent from repossessing the suit vehicle and an order compelling the respondent to surrender the suit vehicle to him.
12. Despite being served with the respondent, the respondent neither appeared nor responded to the aforementioned application, and on 8/06/2022, the trial court granted the orders sought by the appellant.
13. The matter then came up for confirmation of compliance on 6/07/2022, when it emerged that the respondent had been served with the orders of 8/06/2022 but had failed to comply. The appellant subsequently secured orders compelling the OCS to assist the appellant in enforcing the orders issued on 8/06/2022.

14. The respondent on 12/06/2023 filed a motion in court on the same date, requesting the orders initially outlined at the beginning of this judgment, the ruling on which is the subject of this appeal. The trial court arrived at its impugned decision on the basis of the aforementioned facts.
15. With the above background, the only issue to determine is whether the trial court erred in considering extraneous factors not pleaded by either party, thereby issuing orders that conflicted with the orders of 8th June 2022.
16. I have carefully reviewed the pleadings, the evidence before the trial court, the grounds of appeal, and the submissions. The main issue of the appellant's appeal seems to be the order requiring him to surrender the suit vehicle to the nearest police station pending the hearing and determination of the case.
17. The appellant argues that the order in the impugned ruling conflicts with the order dated 8/06/2022, which directed the respondent to surrender the suit vehicle to him. The appellant further asserts that this conflict creates confusion for the judicial process and undermines public confidence in it.
18. The respondent's argument is that there is no conflict between the orders dated 8/06/2022 and 29/08/2023, and that an interim order can be varied, reviewed, or set aside

upon the discovery of new or important evidence or a material change in circumstances since the original order was made.

19. The respondent's motion dated 12/06/2023 was said to be brought under Article 156(2)(d) of the Constitution, Section 80 of the Civil Procedure Act, and Order 51 of the Civil Procedure Rules 2010.
20. Section 80 of the Civil Procedure Act authorizes a court to revisit its own judgment, decree, or order if a party feels aggrieved and no appeal has been lodged, or if no appeal is permissible. It allows for the correction of errors visible on the record or the submission of new evidence.
21. My understanding of the respondent's motion was that it sought a review of the decision made on 8/06/2022 regarding possession of the suit vehicle. In the supporting affidavit, the respondent presented new evidence that the appellant had acquired the suit vehicle from someone who could not pass title to him. This evidence was not available to the trial court when it made its initial ruling on 8/06/2022.
22. Therefore, in my view, there was no conflict between the orders issued on 8/06/2022 and those issued on 29/08/2023. The trial court reviewed its initial orders upon receipt of new evidence. No evidence was presented to show that the trial court considered extraneous factors in reaching its decision.

In any case, the appellant has not demonstrated what prejudice he will suffer if the suit vehicle is surrendered to the nearest police station.

23. In the circumstances, I see no reason to interfere with the trial court's decision dated 29/08/2023. I uphold the decision.
24. In conclusion, I find that this appeal has no merit and dismiss it. Each party will bear their own costs of this appeal.

**Dated, signed and delivered at Bungoma this 3rd Day of
March 2026.**

**R. OUGO
JUDGE**

In the presence of:

Mr. Anwar -For the Appellant

Miss Atika h/b for Mr. Osoro -For the Respondent

Wilkister - C/A