



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MUSINGA, GATEMBU & MURGOR, JJA.)

CIVIL APPEAL NO. 199 OF 2012

BETWEEN

CHERANGANI HILLS LIMITED.....APPELLANT

AND

CFC STANBIC BANK LIMITED1ST RESPONDENT

J. M. WAFULA.....2ND RESPONDENT

KENYA REVENUE AUTHORITY3RD RESPONDENT

GILLETTE TRADERS AUCTIONERS.....4TH RESPONDENT

EXCEL ENTERPRENUERS DEVELOPMENT

SCHEME LIMITED..... 5TH RESPONDENT

(An Appeal from a ruling and Orders of the High Court of Kenya at Kitale, (Koome, J.) of 15th December, 2011, read and delivered by (Karanja, J.) dated 3rd February, 2012

in

H.C.C.C. NO. 113 OF 2010

FORMERLY NAIROBI H.C.C. NO. 11 OF 2010)

JUDGMENT OF THE COURT

1. The appellant is aggrieved by, and has appealed against the ruling and order of the High Court at Kitale (M. Koome, J. (as she then was) given on 15th December 2011 restraining the 3rd respondent from transferring and registering motor vehicle registration number KAY 726X to any third party and ordering that vehicle to be stored pending the hearing and determination of the suit.

2. The substantive suit, we were informed from the bar, is yet to be heard and determined by the High

Court. We must therefore refrain from making pronouncements that might prejudice the parties at the trial before the lower court.

3. That said, the grant or refusal of a temporary injunction involves the exercise of judicial discretion within the long-standing principles settled in **Giella vs. Cassman Brown and Company Ltd [1973] EA 358**. The circumstances under which we, as an appellate court, can interfere with the exercise of such discretion are limited. In **Mbogo & Another vs. Shah [1968] E.A. 93** at page 96, Sir Charles Newbold P. stated that:

‘...a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice....’

4. Accordingly, the question we have to answer in this appeal is this: In arriving at the impugned decision, did the learned judge misdirect herself in law? Did she misapprehend the facts or take into account extraneous considerations or fail to take into account relevant considerations? Is her decision plainly wrong?

5. In its plaint before the High Court, the 1st respondent averred that it is a joint owner of motor vehicle registration number KAY 726 X based on a hire purchase agreement entered into with the 5th respondent, Excel Entrepreneurs Development Scheme Limited (the hirer); that the hirer defaulted in making payments under the Hire Purchase agreement whereupon the 1st respondent’s right to repossess and sell the vehicle crystallized; that the 1st respondent purported to attach and sell the vehicle in execution of a decree obtained in Kitale CMCC 432 of 2007; that the intended transfer and registration of the vehicle based on the purported sale was unlawful, null and void.

6. Together with the plaint, the 1st respondent filed a chamber summons under Order XXXIX of the Civil Procedure Rules seeking interlocutory injunctive relief. In the affidavit in support of that application, the 1st respondent exhibited the Hire Purchase Agreement on the basis of which it asserted its claim to the vehicle, maintaining that the purported sale of the vehicle to the appellant in execution of the decree was null and void.

7. In a replying affidavit sworn in opposition to the application, the managing director of the appellant, denied that the 1st respondent is the owner of the vehicle and asserted that the appellant is a bona fide purchaser of the vehicle for value without notice of any defect or irregularity in the sale of the vehicle.

8. We have considered the appeal and the submissions by learned counsel Mr. D. M. Wanyama for the appellant, Mr. P. Wawire for the 1st respondent, and Mr. J. Nyangweso holding brief for Wangui Mwaniki for the 3rd respondent.

9. In our view, there are obviously competing claims asserted by the appellant and the 1st respondent over the vehicle that warranted the preservation of the same pending the final adjudication over those claims at the trial.

10. We are in agreement with the Judge when she stated in her ruling:

“I am of the view that the plaintiff’s suit is properly before this court to determine the weighty issues raised in the plaint on whether the sale of the motor vehicle KAY 726 X in execution of a decree, over a motor vehicle that was registered jointly with the plaintiff and the 4th defendant could be lawfully attached and sold in execution of a decree in another matter, this in my view is a triable issue. Therefore the plaintiff’s suit cannot be struck out.”

11. We think the learned Judge correctly exercised her discretion in preserving the vehicle pending final determination of those claims. It would of course have been wise for the parties, considering the wasting nature of the asset in contest, to have agreed on the disposal of the vehicle and to have the proceeds secured rather than suffer the depreciation of the vehicle whilst in storage. That however, is a matter for the parties.

12. The arguments that the suit on the basis of which the judge granted the injunction was not properly before the court in view of Section 34 of the Civil Procedure Act; or that the 1st respondent participated in Kitale CMCC 432 of 2007 through objection proceedings which was the proper forum for the 1st respondent to have pursued its objection; or that the property in the vehicle had passed within the meaning of Section 58 of the Sale of Goods Act by the time the injunctive relief was granted; or that the only remedy that the 1st respondent would have pursued was for an award in damages; or that the matters the 1st respondent was raising in his suit were res judicata, are all matters that the trial court will address in due course.

13. The appellant has not established any basis for us to interfere with the decision of the Judge.

14. For those reasons, the appeal fails and is hereby dismissed with costs to the respondents.

Orders accordingly.

Dated and delivered at Eldoret this 16th day of February, 2017.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

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DEPUTY REGISTRAR