IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWILU, AZANGALALA & KANTAI, JJ.A.)

CIVIL APPEAL 169 OF 2010

BETWEEN

JOSEPH D. K. KIMANI T/A

PYRAMID AUCTIONEER .....1ST APPELLANT

DR. LUKE MUSYIMI MUSAU.....2ND APPELLANT

AND

SIMON CHEGE KAMANGU.....RESPONDENT

(An appeal from the Ruling of the High Court of Kenya at Nairobi

(Sitati, J.) dated 3rd May, 2010

in

H.C.C.C. No. 66 of 2010)

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JUDGMENT OF THE COURT

[1] This is an appeal by the two defendants, now appellants, from the decision of the High Court ***(R. N. Sitati, J.),*** given on 3rd May, 2010, whereby the learned Judge, among other orders, issued a mandatory injunction compelling the appellants to *release to the respondent and keep off motor vehicle registration No. KBB 184X, (the said or the suit vehicle).* The respondent was the plaintiff in the suit. The learned Judge further granted an interlocutory prohibitory injunction restraining the appellants from, among other things, interfering with the respondent's operations and possession of, selling, disposing of, vandalizing parting with possession *(except to the respondent)* of the suit vehicle pending the hearing and determination of the said suit. The learned Judge also declined to consolidate ***HCCC Nos. 47*** and ***66*** both of ***2010***.

[2] The facts of this litigation are not much in dispute. The origin is ***Bungoma Chief Magistrate's Court Civil Case No. 54 of 2004*** between ***Moses Wekesa Buyayi -v- Kenya Bus Service Limited & Another, (Bungoma case),*** in which a decree was issued against the defendant, ***Kenya Bus Service Limited***. Pursuant to that decree a warrant of attachment and sale was issued which resulted in purported sale of

the suit vehicle in a disputed public auction. There is some controversy as to whether any public auction indeed took place as asserted by the respondent given the mystery of the *"Kenya Times"* newspaper issues of 13th and 14th October, 2009, which purportedly advertised the auction of 12th October, 2009. It would appear however, that even before the publication of the date of sale, the 2nd appellant knew of the threat to sell the said vehicle. We say so, because he lodged, in the ***Bungoma case***, objection proceedings against the attachment of the suit vehicle. The decree holder in that case lodged a preliminary objection to the objection which preliminary objection was upheld by the learned magistrate ***(J. K. Ngarngar, S.R.M.)***, in a ruling delivered on 9th October, 2008. In the learned Magistrate's view, the objection proceedings were incompetent as no supporting affidavit was filed with the application.

The 2nd appellant challenged that ruling in ***Bungoma High Court Civil Appeal No. 141 of 2009 (HCCA No. 141 of 2009)***, which he later withdrew.

[3] That ruling on the 2nd appellant's objection would appear to have paved way for the sale of the vehicle which then occurred on 12th October, 2009. The 2nd appellant then filed ***Nairobi HCCC No. 481 of 2009,*** against one ***Zacharia W. Barasa t/a Siuma Traders***, the auctioneer who purported to sell the suit vehicle to the respondent. The record shows that that suit was withdrawn by the 2nd appellant on 4th February, 2010.

[4] The 2nd appellant sought, in the said suit, three main reliefs namely; a declaration that the suit vehicle belonged to him and should be released to him; a declaration that the auctioneer was wrongfully interfering with the operation of his business and a permanent injunction restraining the auctioneer from interfering with the business operations.

[5] Even before he withdrew the said suit, the 2nd appellant, on 29th January, 2010, through his advocates, instructed the 1st appellant to take possession of the suit vehicle which possession was achieved on 10th February, 2010, thereby provoking the respondent's suit in the ***High Court: HCCC No. 66 of 2010***.

[6] Appurtenant to the plaint, the respondent lodged an application by way of chamber summons dated 11th February, 2010, seeking two main reliefs namely that the appellants be restrained from selling, disposing of, vandalizing, parting with possession - except to the respondent - or in any other way dealing with the suit vehicle, pending the hearing and determination of the suit and a mandatory injunction requiring the appellants to release the suit vehicle pending the hearing and determination of the application. The respondent, among other things, claimed that the said vehicle, which he had bought at a public auction, had been seized by the 1st appellant on the instructions of the 2nd appellant without any court order and that unless the orders he had sought were granted, the appellants would dispose of the said vehicle.

[7] The respondent, through his advocate, on 11th February, 2010, appeared ex-parte before ***Rawal, J.,*** *(as she then was)*, who granted an order that the appellants be restrained from taking any further action in respect of the suit motor vehicle pending hearing of the application interpartes on 18th February, 2010. Before the application was served, the appellants released the said vehicle to the respondent with the result that no hearing took place on 18th February, 2010, which position was maintained on 24th February, 2010, when the application was placed before the court.

[8] On the same day, 24th February, 2010, the respondent filed an amended chamber summons seeking mainly to restrain the appellants from seizing the suit vehicle and a mandatory injunction requiring them to keep off the suit vehicle pending the hearing and determination of the suit. The basis for that application was that on 23rd February, 2010 the respondent had been ordered to take the vehicle to Pangani Police Station on 24th February, 2010, so as to have it released to the appellants.

[9] The appellants opposed the application and both filed replying affidavits. The 1st appellant, in the main, averred that he was instructed by the 2nd appellant to repossess the said vehicle which he did as

already observed but had been coerced to release the same to the respondent by the Flying Squad. The 2nd appellant deponed, *inter alia*, that he was the registered owner of the said vehicle and was not a party in the ***Bungoma case*** which decreed that the said vehicle be attached and sold. The 2nd appellant further contended that the respondent used underhand means to procure possession of the said vehicle and was not candid to the court as he deliberately failed to disclose that ***Rawal, J.,*** had directed that the said vehicle be kept by the 1st appellant.

[10] The two applications gave rise to the ruling being challenged in this appeal. In a considered ruling dated 3rd May, 2010, ***Sitati, J.,*** determined that only one order was in place and that is the order issued on 24th February, 2010. In her view the order of ***Rawal, J.,*** of 11th February, 2010, elapsed when the respondent amended his chamber summons and obtained fresh orders. The learned Judge further declined the application for consolidation of the two suits. In her view, the 2nd appellant should have pursued his remedy in the Bungoma case rather than file ***HCCC No. 47 of 2010***.

[11] With respect to the respondent's application, the learned Judge found that he had demonstrated a *prima facie* case with a probability of success and that damages would not adequately compensate him. On the balance of convenience test, the learned Judge concluded that the same tilted in favour of the respondent. The learned Judge thus granted the prayers sought by the respondent pending the hearing and determination of the suit.

[12] The appellant remained unsatisfied, hence this appeal premised upon some ten (10) grounds. However, ***Mr. Mituga***, learned counsel for the appellants, while canvassing the appeal before us, raised the following issues: Whether the learned Judge should have consolidated ***HCCC No. 47*** and ***66*** both of ***2010***; whether the suit vehicle, registered in the 2nd appellant's name at the material time, could lawfully be sold to the respondent yet its owner, the 2nd appellant was not a party to the proceedings; that the respondents acquisition of the said vehicle was contrary to ***rule 62*** of the ***Civil Procedure Rules*** and that the purported public auction at which the respondent purchased the said vehicle was not public and that the conditions for the grant of a mandatory injunction were not met.

[13] ***Mr. Mituga*** emphasized that the 2nd appellant was the registered proprietor of the suit vehicle and was not a party in the ***Bungoma case***. According to learned counsel, the suit vehicle should not therefore, have been attached in execution of a decree in that case. ***Mr. Mituga*** further submitted that the respondent failed to demonstrate a *prima facie* case with a prohibitory success. Learned counsel made that submission because the evidence on record clearly showed that no public auction was conducted at which the respondent could purchase the said vehicle and further that if the auctioneer had cared to make a search with the Registrar of Motor Vehicles, he would have ascertained that the judgment debtor in the ***Bungoma case*** was not the owner of the said vehicle. It was also ***Mr. Mituga's*** further contention that the respondent was not a *bona fide* purchaser, for value, without notice of the said vehicle as he knew that the same did not belong to the judgment debtor in the ***Bungoma case***.

[14] ***Mr. Nyang'au***, learned counsel for the respondent, in resisting the appeal, submitted that there was no dispute that a warrant of attachment and sale was issued in the ***Bungoma case*** and was executed which execution ended with the sale of the said vehicle to the respondent who was then issued with transfer documents. Learned counsel further submitted that before the sale of the said vehicle to the respondent the 2nd appellant lodged objection proceedings in the ***Bungoma case*** which proceedings were dismissed. The dismissal, according to learned counsel, was challenged by the 2nd appellant in an appeal but which appeal he withdraw.

Mr. Nyang'au further submitted that the 2nd appellant also filed ***HCCC No. 481 of 2010,*** against the auctioneer who sold the vehicle to the respondent which suit he also withdraw. In learned counsel's view, the actions of the 2nd appellant left the orders in the ***Bungoma case*** intact and those orders cannot be the subject of challenge now. With regard to the issue of consolidation of ***HCCC No. 47 of 2010*** with ***66*** of the same year, learned counsel submitted that ***HCCC No. 47 of 2010,*** was an incompetent suit and could not be consolidated with a competent one. Learned counsel further contended that costs in ***HCCC No.***

481 of 2009, had not been paid to the respondent and the suit could still be stayed on that account. With regard to the sale of the said vehicle to the respondent, learned counsel submitted that if there was any irregularity, the same could not vitiate the sale and a party affected by such sale, if the irregularity is proved, may sue for compensation. In learned counsel's view, the respondent was an innocent purchaser for value without notice and was entitled to costs as ordered by the court below.

[15] We have considered the record of appeal and the submissions of counsel. We have also given due consideration to the authorities cited and the applicable law. This is a first appeal from the High Court sitting in exercise of its original jurisdiction. By dint of the provisions of ***rule 31*** of this ***Court's Rules***, this Court has power to confirm, reverse or vary the decision of the High Court appealed against or to remit the proceedings to the High Court with such directions as may be appropriate. In ***Selle and Another -vs- Associated Motor Boat Company Ltd. and Others [1968] EA 123***, the predecessor on this court held:

> ***"(i) an appeal from the High Court to this Court is by way of retrial and the Court of Appeal is not bound to follow the trial Judge's findings of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence generally".***

[16] And by dint of ***rule 29(1)*** of this ***Court's Rules***, our mandate is to reappraise the material availed to the court below and to draw our own conclusions on the facts emerging from the material. A caution was however, sounded in ***Peters -v-Sunday Post Limited [1958] EA 424***, where the predecessor of this Court stated:

> ***"Whilst an appeal court has jurisdiction to review the evidence to determine whether the conclusions of the trial Judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion or if it is shown that the trial Judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide. Watt -v- Thomas [1947] 1 All E.R. 58; [1947] A.C. 984, applied".***

[17] This is however, an appeal from orders of the High Court on interlocutory applications. The appeal does not therefore raise issues of credibility of witnesses. We are also alive to the reality that the suit is pending hearing and determination on merits before the High Court and we should refrain from making any concluded views on the matters in dispute to avoid pre-judging the pending suit. (See ***David Kamau Gakuru -v- Natural Industrial Credit Bank Ltd., [C.A. No. 84 of 2001] (UR))***.

[18] We further appreciate that the decision whether to consolidate suits or whether to grant or refuse an injunction, whether prohibitory or mandatory is an exercise of judicial discretion and as a general rule an appellate court will not interfere with the exercise of such discretion by the trial court even if sitting as a trial court, it would itself have come to a different conclusion. This principle is founded on the fact that the discretion involved is the discretion of the trial court and not of the appellate court. The circumstances under which this Court will therefore interfere with the exercise of discretion by the trial court are circumscribed and for a guide what ***Madan, J.A.,*** *(as he then was)*, stated in ***United India Insurance Co. Ltd., -vs- East African Underwriters (Kenya) Ltd., [1985] EA 898***, is relevant. The learned Judge rendered himself as follows:

> ***"The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: First, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account of; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong".***

(See also ***Mrao Ltd., -v- First American Bank of Kenya Ltd. & 2 Others, [2003] KLR 125***.

[19] Turning to the merits or otherwise of this appeal we note, with all due respect to learned counsel, that the appeal was canvassed before us as if it was an appeal from a final determination of the learned Judge on the dispute between the parties when, as we have already observed, it is against interlocutory orders of the High Court.

In our view, this appeal turns on whether the learned Judge properly exercised her judicial discretion in refusing consolidation and in granting the respondent orders of prohibitory and mandatory injunction at the interlocutory stage of the suit. At the time the respondent lodged the application for those orders, our ***Civil Procedure Rules***, had not been amended. Then, prohibitory injunctions could be sought under ***Order XXXIX Rule (1)*** and mandatory injunctions could be sought under ***Section 3A*** of the ***Civil Procedure Act***. The respondent invoked both provisions of the Rules and the court was therefore properly seized of the applications.

[20] With regard to the orders of injunction, the principles to be applied when considering applications for the same are old hat. The applicant ought to make out a *prima facie* case with a probability of success at the trial and if the court is in doubt it will decide the application on a balance of convenience. Further, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. See ***EA Industries Ltd., -v- Trufoods Ltd. [1972] EA 420***. That position was reiterated in ***Giella -v- Cassman Brown and Co. Ltd. [1973] EA 358***. There, ***Spry V. P.,*** in the leading judgment of the Court, delivered himself as follows, at p. 360:

> ***"I will begin by stating briefly the law as I understand it. First, the granting of an interim injunction is an exercise of judicial discretion and an appellate court will not interfere unless it is shown that the discretion has not been exercised judicially (Sergeant -v- Patel [1949] 165 EACA 63).***
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> ***The conditions for the grant of an interlocutory injunction are now, I think well settled in East Africa. First, an Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience".***

[21] With regard to the grant of a mandatory injunction, the test is correctly set out in ***Vol. 24 Halsbury's Laws of England 4th Edition***, Paragraph 98, thus:

> ***"A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff... a mandatory injunction will be granted on an interlocutory application".*** Also in ***Locabail International Finance Ltd -v- Agroexport and Others [1986] 1 All ER 901,*** at page 901,it was stated:
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> ***"A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction".***

[22] Our courts have approved the above principles over time. See for instance ***Belle Maison Limited -v- Yaya Towers Limited [HCCC No. 2225 of 1992] (UR), The Ripples Limited -v- Kamau Mucuha [HCCC No. 4522 of 1992] (UR), Malindi Air Services Ltd. -v- Halima Abdnoor Hassan (C.A. 202 of***

1998), (UR) and Kenya Breweries Limited & Another -v- Washington Okoyo, [NAIROBI C.A. NO. 332 OF 2000] (UR).

[23] In this case, there is no dispute that in the ***Bungoma case*** a decree was granted to the plaintiff therein who then applied for execution. *Prima facie,* an execution would appear to have taken place. We say *prima facie*, because the appellants have discredited the same. But the 2nd appellant learnt of the attachment of the said vehicle and lodged objection against the attachment. There is further no dispute that the objection proceedings did not succeed which again, *prima facie*, paved way for the sale of the said vehicle. The respondent placed material before the learned Judge of the court below which persuaded the learned Judge that he had purchased the said vehicle at an auction. He had transfer documents in his favour. He also had possession of the vehicle. He had, of course, before the order of injunction was granted, briefly lost possession to the 2nd appellant but by the time the order was made, there is no dispute that he was in possession of the vehicle. There is no doubt that the learned Judge was alive to the circumstances under which the respondent briefly lost possession. The 2nd appellant's advocate had, without an order of the court, instructed the 1st appellant to repossess the said vehicle and the 1st appellant had, without more, complied with the advocate's somewhat unorthodox instructions. So, the respondent was armed with evidence of execution pursuant to a court decree and had possession of the vehicle. Of significance, the auctioneer who sold the vehicle to him was not joined in the suit giving rise to this appeal.

[24] It was also evident to the learned Judge of the High Court that the 2nd appellant's previous efforts to assert his ownership of the said vehicle had been without success. Besides losing the objection proceedings in the ***Bungoma case***, his challenge of that order in an appeal had come to naught. He had further instituted ***HCCC No. 481 of 2009*** which he had withdrawn.

[25] In the case of ***Shariff Abdi Hassan -v- Nadhif Jama Adan [CA 121/2005 (2006) eKLR***, this Court observed:

> ***"The courts have been reluctant to grant mandatory injunction at interlocutory stage. However, where it is prima facie established as per the standard spelt out in law as stated above that a party against whom a mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for the full hearing of the entire case. That position could be taken by the courts in such cases as those of alleged trespass to property".***

[26] Given the material which was placed before the learned Judge, as summarized above, it did appear that the 2nd appellant was in the wrong. The grant of a mandatory injunction therefore, had basis.

[27] The appellants placed reliance upon several authorities all of which we have read. The case of ***Arthi Highway Developers Ltd. -v- West End Butchery Limited and Others, [CA No. Nairobi 246 of 2013] (UR),*** was an appeal from a final judgment of the Environment and Land Court. The case of ***Naftali Onchwari Nyangwachi -v- Meshack Osiemo Nyagwachi & Others, [Kisumu C.A. No. 170 of 1991] (UR),*** was an appeal against a ruling dismissing objection to attachment and ***Atogo -v- Agricultural Finance Corporation, [1991] KLR,*** was an appeal against dismissal of a claim for damages for wrongful attachment of property which claim was fully heard. The dismissal was set aside on appeal.

[28] In the matter before us, as we have already observed, the suit is yet to be heard and these authorities may become relevant when the suit is heard. But at the interlocutory stage at which the matter was, we are unable to find any improper exercise of discretion.

With regard to the refusal to order consolidation of the aforesaid suits, nothing much turns on the same. The 2nd appellant's suit is intact and orders made by ***Sitati, J.,*** at the interlocutory stage of the proceedings are not conclusive notwithstanding the language used. The learned Judge in refusing to consolidate the two suits was excersing her judicial discretion and we have not been persuaded that the exercise was improper.

[29] We cannot however resist the observation that the learned Judge, with all due respect to her, in her ruling, made an unfortunate statement which gave the impression that she had made a conclusive opinion on matters which could suitably be canvassed in the trial. She was of the view that the 2nd appellant should not have filed Nairobi ***HCCC No. 47 of 2010,*** and should instead have made his claim in the ***Bungoma case***. With all due respect to the learned Judge, there was no application before her to declare ***HCCC No. 47 of 2010***, a nullity or for otherwise striking it out, yet she would appear to have shut out the 2nd appellant from canvassing that suit.

[30] The appellant however, need not be unduly apprehensive that he has lost his case even before opening his mouth. We say so, because what was before the learned Judge were not applications to determine the competence of ***HCCC No. 47 of 2010*** but applications for interpretation of certain orders of the court, consolidation and injunction. The 2nd appellant's suit is still intact and unaffected by the statement of the learned Judge made at the interlocutory stage of the proceedings.

[31] The other issues raised by the appellant to wit: Whether the suit vehicle could lawfully be sold; whether the purported sale was indeed by public auction and whether the respondent lawfully acquired the suit vehicle, do not really belong to this appeal which is against interlocutory orders of the High Court. We are afraid if we express our opinion thereon, we may very well put the trial Judge in a bind.

[32] The upshot of our consideration is that we find no merit in this appeal and we order that it be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 30th day of September, 2016.

P. M. MWILU

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR