



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: WAKI, J.A (IN CHAMBERS))
CIVIL APPLICATION NO. NAI. 59 OF 2011 (UR.39/2011)

BETWEEN

JOSEPH IRUNGU GICHIRI.....APPLICANT

AND

CHRISTOPHER MUSYOKI KIMATHI.....RESPONDENT

(An application for injunction pending the hearing and determination of the intended appeal from the Ruling

and Order of the High Court of Kenya at Nairobi (Sitati, J) dated 17th February, 2011

in

H. C. C.A No. 173 of 2010)

RULING

On the 11th day of March, 2011, I declined to certify as urgent the notice of motion dated 10th March, 2011 and filed on the same day as I was not persuaded that this Court ought to put aside other matters, many of them urgent too, in order to deal with the motion. The applicant now returns to me under **rule 47 (5)** of the rules of this Court seeking to persuade me, in the presence of the respondent, that the matter is indeed urgent.

The record before me is barely sufficient to elicit the entire history of the application before this Court. It is apparent however from the few documents available for perusal that in the year 2009 the Respondent sold his Mercedes Benz prime mover Registration No. KBH 376U to the applicant who made part payment thereof and took possession pending payment of the balance by February 2010 and execution of the transfer. The applicant issued postdated cheques to cover the balance but the cheques were dishonoured. As the vehicle had not been transferred and the property thereof remained with the respondent, he sought to repossess it but the applicant apparently went before the Principal Magistrates Court in Kikuyu and obtained restraining orders on 14th May, 2010. The respondent was dissatisfied with

that order and therefore sought to challenge it before the superior court on appeal. Pending the hearing of the appeal, he sought interim orders for stay of the Principal Magistrate's orders, a prohibitory injunction to restrain the applicant from, *inter alia*, alienating or otherwise dealing with the vehicle, and a mandatory injunction to place it in the custody of the court. Before that application was heard, the superior court, Sitati J, issued an order on 25th May, 2010 that the applicant do return the vehicle to Kikuyu Police Station for safe custody, which order was apparently ignored by the applicant who "*unlawfully took the vehicle to Garissa*" and was apparently towed from Garissa to Kikuyu Court at the respondent's expense. For that reason, Sitati J declined to give the applicant audience in the main application. Upon hearing the application, the learned Judge granted the orders sought subject to the condition that the respondent shall deposit Kshs.100,000/= in court as security for costs. That was on 17th February, 2011. The respondent subsequently made the deposit.

The applicant filed his notice of appeal on 2nd March, 2011 and on 10th March, 2011 he filed the motion now the subject matter of this hearing on certificate of urgency seeking an order granting him custody of the vehicle and a "*temporary injunction to restrain execution*" of the orders of Sitati J. The two orders sought are rather unusual and it is not clear whether they are obtainable under **rule 5 (2)** of this Court's rules which is relied on, but that is not for me to decide. Learned counsel for the applicant Mr. Dola Indidis pleaded with me to consider that the vehicle is wasting away in Kikuyu Police Station yard instead of earning income for the applicant to repay his loans; that the superior court was wrong in refusing to hear the applicant's explanation for his failure to comply with the order for return of the vehicle from Garissa; and that the application stands a high chance of success.

In response to those submissions, learned counsel for the respondent Mr. Jacob Ngwele found no urgency in the matter since there were no adverse orders made against the applicant. The orders made were directed at the lower court and affected the vehicle which is now in the safe hands of the court. He further submitted that the appeal before the superior court was already admitted and could be heard anytime, and therefore the proceedings before this court are an abuse of the court process.

I have considered the material before me and the submissions of counsel and I do not, with respect, find any reason to alter my previous order rejecting the certificate of urgency. The conflicting rights of the parties over the vehicle will be determined on the merits of the appeal before the superior court which I am told, and it is not disputed, is ripe for hearing. In the meantime the vehicle lies in safe custody on the orders of the court and the motion before this Court will take its turn as and when it is reached in the normal calendar of the Court. Hopefully this will not be long. I do not see why it must jump the queue and therefore I decline to certify it urgent. The costs occasioned by this reference shall abide the result of the motion.

Dated and delivered at Nairobi this 1st day of April, 2011.

P. N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR