



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL  
AT MOMBASA**

**(CORAM: TUNOI, GITHINJI, J.J.A. & ONYANGO OTIENO, AG.  
J.A.)**  
**CIVIL APPEAL NO. 269 OF 2002**

**BETWEEN**

**TRADE AGRAIN LIMITED..... APPELLANT**

**AND**

**AWAL LTD..... RESPONDENT**

**(Appeal from the Ruling of the High Court of Kenya at**

**Mombasa (Khaminwa, Commissioner of Assize) dated 2nd  
May, 2002**

**in**

**H.C.C.C. NO. 121 OF 2002)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

This is an appeal from two interlocutory orders given by the learned Commissioner of Assize, J. Khaminwa (as she then was) on 2nd May, 2002. The first order appealed from is an order of injunction restraining Awal Limited (appellant) from disposing off or selling motor vehicle registration No. KAG 838V pending the hearing and the determination of the suit.

The second order appealed from is in essence an interlocutory mandatory injunction enjoining the appellant to return and hand over the same motor vehicle registration No. KAG 838V to the respondent pending the hearing and finalization of the suit.

The respondent averred in the plaint filed on 23rd May, 2002 that it was the owner of motor vehicle registration No. KAG 838V having bought it on 14th December, 2001 from Nadfay General Traders Limited (Nadfay) for Shs.600,000/=; that the said motor vehicle was bought from the appellant by Nadfay by virtue of a sale Agreement dated 3rd July, 2001; that the appellant had unlawfully claimed ownership of the said motor vehicle had taken it away and was in the process of selling it. The main reliefs sought in the plaint are a permanent injunction; a mandatory injunction and special and general damages. The respondent filed a chamber summons seeking the orders which were eventually granted by the superior court – the subject matter of this appeal. The chamber summons was supported by the affidavit of Mohamed Ali Taib, the manager of the respondent in which he repeated the averment in the plaint and annexed a copy of the agreement dated 14th March, 2001; a copy of the sale agreement dated 3rd July, 2001 and a notification of sale of the motor vehicle.

The appellant filed a replying affidavit sworn by Meryn Melville, the managing director of the appellant company. He deposed in that affidavit that the appellant entered into an agreement with Nadfay as witnessed by the Agreement dated 3rd July, 2001; that purchase price was to be paid by instalments as stipulated by the Agreement; that Nadfay paid only one instalment of Shs.150,000/= leaving unpaid balance of Shs.450,000/=; that the appellant reserved a right to repossess the vehicle in the event of default hence the court order for possession; that no property in the said vehicle was capable of passing to Nadfay until the full payment of the purchase price and that the purported sale to the respondent did not confer any better right or title to the respondent than that possessed by Nadfay.

The sale Agreement between the appellant and Nadfay dated 3rd July, 2001 provided as follows:

***“1. It is hereby agreed that this vehicle, KAG 838V has been sold to Nadfay General Traders Ltd as from 1 st July, 2001.***

***2. The logbook and blank transfer form are hereby attached.***

***3. The sum agreed is Kshs.600,000 payment to be made in equal instalments as under –***

***Kshs.150,000/= on 15 th July, 2001***

***Kshs.150,000/= on 15 th August, 2001***

***Kshs.150,000/= on 15 th September, 2001***

***Kshs.150,000/= on 15 th October, 2001.***

***4. If there is any default in payment, the seller has the right to take back the vehicle without question or any arbitration or should the seller choose to acquire stock ex Nadfays warehouse to cover the value remaining outstanding this will also be in order without problem or question.”***

The superior court considered the Agreement and in particular clause 4 thereof and said:

***“This clause cannot authorise the Defendant to take back the vehicle when the property has already passed to a third party. This agreement also shows that the property in the vehicle passed to the said Nadfay as from 1 st July, 2001 who was given the logbook and blank transfer form. The vehicle is now said to be in possession of the plaintiff by virtue of purchase evidenced by annexure “MATI” and that it is used for transport business. The plaintiff stands to lose the vehicle and its use and I find this to be irreparable loss. On the other hand the defendant is able to recover his loss (sic) which is known from Nadfay as per agreement. Nadfay is not a party to this suit”.***

The superior court was satisfied that the respondent had proved a prima facie case against the appellant and that it was proper to issue a mandatory injunction in the circumstances of the case.

The memorandum of appeal contains five grounds of appeal. The first four grounds, with respect, deal with the merits of the dispute between the parties and more specifically with the merits of the pending suit. In our view, it would be premature and prejudicial to the rights of the parties to consider the matters raised in those grounds of appeal, while the suit is pending.

For the same reasons we refrain from attempting to finally interpret clause 4 of the sale Agreement dated 3rd July, 2001 between the appellant and Nadfay.

The remaining ground, that is the fifth ground states:

***“The learned Commissioner of Assize erred in law and fact in granting a mandatory injunction”.***

This is indeed the ground argued before us by Mr. Kiarie Kariuki, the learned counsel for the appellant. Mr. Kiarie Kariuki submitted that a mandatory injunction should not have been granted as damages would be an adequate remedy to the respondent since the value of the motor vehicle is known and specific loss of user is claimed in the plaint. Mr. Noor Mohamed for the respondent on the other had submitted that the motor vehicle had been transferred to Nadfay when the respondent bought it and that the attachment is questionable.

A mandatory injunction is an equitable and discretionary remedy. In the case of **THE DESPINA PONTIKOS** [1975] EA 38 the predecessor of this court said at page 57 paragraphs G, H:

***“We should begin by remarking that this court has held more than once that interlocutory mandatory injunction should only be granted with reluctance and only in very special circumstances. On the other hand, the issue of an injunction is an exercise of discretion and it is well established that this court will only interfere with the exercise of his discretion by a trial judge in exceptional circumstances though it will not hesitate to do so if the exercise of discretion has been based on any wrong principles”.***

The learned Commissioner of Assize appreciated that interlocutory mandatory injunctions are granted only in the clearest of cases but was nevertheless convinced that it was proper to grant it in the circumstances of the case. The factors that she took into account appear in the passage of her ruling quoted above. The appellant sold the motor vehicle to Nadfay as from 1st July, 2001. Although the appellant claimed that Nadfay only paid the first instalment and failed to pay the second instalment due on 15th August, 2001 and the subsequent instalment, the appellant did not repossess the motor vehicle before it was sold to the respondent on 14th December, 2001. The appellant took the vehicle from the respondent at the end of February, 2001. The vehicle was not repossessed from Nadfay. Prima facie there was no privity of contract between appellant and respondent. The document dated 27th December, 2002 purporting to be issued by the Magistrate’s Court, Milimani, Nairobi, does not indicate that there was any decree in existence in favour of the appellant against either the respondent or Nadfay. The learned Commissioner of Assize found that the appellant was able to recover its loss which is known from Nadfay. The appellant did not claim in the superior court that recovery of damages from Nadfay would be illusory. The fact that the appellant advertised the vehicle for sale upon taking it from the respondent apparently to recover the balance of the purchase price indicates that the appellant would be adequately compensated by damages. The respondent was in possession of the vehicle and was using it for business before it was taken by the appellant. The mandatory injunction restored the status quo which existed before the appellant took the vehicle. We think that it was just in the circumstances to restore that status quo.

On our own evaluation of the evidence which was before the superior court, we are not satisfied that the learned Commissioner of Assize either misdirected herself or reached a wrong or unjust decision.

The result is that the appeal has no merit and it is dismissed with costs to the respondent.

**Dated and delivered at Mombasa this 23rd day of July, 2004.**

**P. K. TUNOI**

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**JUDGE OF APPEAL**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**J. W. ONYANGO OTIENO**

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**AG. JUDGE OF APPEAL**

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

DEPUTY REGISTRAR