



REPUBLIC OF KENYA



**Onepay Credit Limited v Macharia & another (Civil Appeal
E644 of 2022) [2024] KEHC 6124 (KLR) (Civ) (30 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6124 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E644 OF 2022

HI ONG'UDI, J

MAY 30, 2024

BETWEEN

ONEPAY CREDIT LIMITED APPELLANT

AND

EDWARD MWANGI MACHARIA 1ST RESPONDENT

STANLEY MACHARIA MWANGI 2ND RESPONDENT

*(Being an appeal from the orders of the Chief Magistrate's Court, Nairobi in CM COMMSU
No. E056 of 2022 issued on 15th August, 2022 by Hon. E. M. Kongoni Principal Magistrate)*

JUDGMENT

1. The Appellant “Onepay Credit Limited” is the defendant in the lower court. The 1st and 2nd respondents are the 1st and 2nd plaintiffs in the said case. Challenging the orders issued by the learned trial Magistrate on 15th August 2022, the appellant filed the following grounds of appeal.
 - i. The learned Magistrate erred in law and in fact in issuing mandatory injunctive orders despite the fact that the Appellants advocates had been served with the application dated 8th August, 2022 on the same day in the morning contrary to the express Civil Procedure Rules of service of Three (3) clear days.
 - ii. The learned Magistrate erred in law and in fact in failing to give the appellant’s advocate time to respond to that application dated 8th August 2022 as demanded by counsel thereby denying the appellant an opportunity to be heard.
 - iii. The learned Magistrate erred in law and in fact in failing to appreciate that the interlocutory orders of mandatory injunction ought to be determined on substantial justice to all the parties.



- iv. The learned Magistrate erred in law and in fact in failing to appreciate that parties had on 4th August 2022 agreed that the subject motor vehicle should not be transferred to third parties awaiting determination of the Notice of Motion application dated 27th July, 2022 hence no prejudice would be suffered by the respondents.
 - v. The learned Magistrate erred in law and in fact in relying on extraneous matters other than evidence adduced in court.
2. A perusal of the record shows that several applications have been filed in the lower court in this matter. However, the one related to the orders being challenged is dated 25th July 2022 and was filed by the respondents herein.
 3. In the said application the respondents sought the following order:
 - i. This application be certified urgent and dispensed with ex-parte in the first instance.
 - ii. Pending the inter-partes hearing and determination of this application, an interim order be and is hereby issued restraining the respondent by themselves, their agents, auctioneers, employees or proxies from attaching, advertising for sale, selling, alienating, transferring or in any other way interfering with the 2nd claimant's legal ownership of the motor vehicle known as KCN 795N.
 - iii. Pending the hearing and determination of the main suit, an order be and is hereby issued directing the Respondent and all other persons acting on their behalf and at their behalf and at their behest, to immediately and unconditionally release motor vehicle known as KCN 795N to the 2nd Applicant.
 - iv. Pending the hearing and determination of the main suit, an interim order be and is hereby issued restraining the Respondent by themselves, their agents, auctioneers, employees or proxies from attaching advertising for sale, selling alienating, transferring or in any other way interfering with the 2nd Claimant's legal ownership of the motor vehicle known as KCN 795N.
 - v. The OCPD Kasarani to ensure compliance of the Court's Orders
 - vi. The cost of this application to be borne by the respondents.
 4. Before the said application dated 25th July, 2022 could be heard the respondents filed another Notice of Motion dated 8th August 2022 was filed seeking the following orders:
 - i. This application be certified urgent and dispensed with ex-parte in the first instance.
 - ii. Pending the inter-partes hearing and determination of the application dated 25th July 2022 an order be and is hereby issued directing the respondent and all other persons acting on their behalf and at their behest, to immediately and unconditionally release motor vehicle known as KCN 795N to the 2nd applicant.
 - iii. The OCPD Kasarani to ensure compliance of the Court's Orders
 - iv. The cost of this application to be borne by the respondents.



5. The record shows that on 15th August, 2022 the learned trial Magistrate issued the following orders:

“Court: Motor vehicle be released upon payment of auctioneers charges by the applicant.
Applicants not to do any act which will alter the registration status of the motor vehicle.
Submissions on 29/8/2022”

These are the orders that led to the filing of this appeal.

6. The appeal was canvassed by way of written submissions

Appellant’s submissions

7. These were filed by S.N. Thuku & Associates and are dated 19th March, 2024. Counsel submitted that after the court Ruling on 24/6/2022 setting aside the orders of 16/3/2022 the appellant repossessed the motor vehicle KCN 795N. The respondents then filed an application dated 25/7/2022 to which the appellant filed grounds of opposition dated 4/8/2022. On 5/8/2022 the court issued orders to the effect that the status quo be maintained. Another application dated 8/8/2022 by the respondent was again filed seeking unconditional release of the motor vehicle. The same was scheduled for hearing on 15/8/2022 at 9.00am. He states that the appellant’s counsel was only served with the application on 15/8/2022 at 7.45 am

8. Despite the late service the appellant was not given an opportunity to respond to the application. Further more the subject motor vehicle had already been sold to a 3rd party on 3/8/2022. He decries the issuance of exparte mandatory orders for release of the motor vehicle. Counsel heavily relied on the Supreme court case of *John Florence Maritime Services Ltd & another V Cabinet Secretary Transport & Infrastructure & others* Supreme Court Petition No. 17 of 2015 where the court referred to the established general principles to all legal proceedings applicable by Member States Kenya being one of them. The said principles relate to Fair and Public Hearing, adequate opportunity to prepare a case, present arguments and evidence; Legal representation, determination of people’s rights and determination and entitlement to a right of appeal.

9. He thus contends that the appellant was never given a chance to file his papers prior to the court issuing the exparte orders.

Respondents’ submissions

10. These were filed by Owuocha & associates and are dated 8th April, 2024. Counsel submits that the appellant never informed the court that the vehicle had allegedly been sold on 3rd August 2022. He submits that the orders sought were never contested by the appellant’s counsel. Further more this court had also directed the appellant not to dispose of the motor vehicle.

11. Counsel further contends that there is no evidence of late service of the application. Referring to the case of *Union Insurance Co of Kenya Ltd Vs Ramzan Abdul Dhanji* Civil Application No. Nairobi 179 of 1998 he submitted that the appellant was given an opportunity to be heard. Since it did not utilize it, the remedy is for it to explain why.

12. Further that the dispute between the parties is still pending before the trial court, and this appeal can’t resolve it. He did not see anything unprocedural about the orders issued.



Analysis and determination

13. Having considered the appeal, record of appeal and the submissions by both parties, the issue I find falling for determination is whether the appellant was given a hearing before the trial court issued the impugned orders.
14. Being a first appeal this court has a duty to re-evaluate and reconsider the evidence. See *Kenya Ports Authority v Kuston Kenya Ltd* (2009)2 E.A 212
15. The record is very clear and it shows that on 5/8/2022 the court first issued a direction in respect of the application dated 25/7/2022 it stated:

“ Status quo obtaining as at 26/7/2022 be maintained pending the hearing and determination of the application”
16. My understanding of this is that the status quo maintaining as at 26/7/2022 was very well known to both parties (whose advocates were before the court) plus the court. I say this because none of the counsel raised any issue about it.
17. Secondly, the directions/orders issued on 15/8/2022 were issued in the presence of both counsel for the parties. It is nowhere recorded that Mr. Thuku for the appellant raised any issue about late service. All he asked for was 4 days to file the response. What was so difficult for him to inform the court of what he is now claiming before this court? Furthermore, if indeed that was the position counsel should have applied for review of those orders citing:
 - i. The late service of the application and
 - ii. The issue of the motor vehicle having been sold on 3/8/2022. These are things which if true were within the knowledge of the appellant and his counsel and not the court in respect of the orders it issued on 15/8/2022
18. Finally, the order issued by the trial court was not open ended. It had a condition for purposes of preserving the status of the vehicle pending the hearing of the application on 29/8/2022. It is true that every party has a right to be heard, and the opportunity for such hearing must not be abused.
19. In the instant case I find that this appeal has cost the parties a lot of wasted time, since the complaint would have well been addressed by the trial court and the matter heard to its final conclusion.
20. The upshot is that the Appeal lacks merit and is dismissed with costs.
21. Orders accordingly

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 30TH DAY OF MAY, 2024 IN OPEN COURT AT NAKURU

H. I. ONG’UDI

JUDGE

