REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Appeal 59 of 2006

JACKSON NZARO……APPELLANT

VERSUS

KAVITA BHATT…….. RESPONDENT

J U D G M E N T

This is an appeal against the decision of the Principal Magistrate given on the 30th March 2006 allowing the Respondent's applications dated 17th March 2006 and 15th March 2006 in Mombasa CMCC Numbers 817 of 2006 and 993 of 2006 respectively which had been consolidated. A summary of the facts in the two cases will make the issues raised in this appeal clear.

By an agreement dated 18th March 2005 the Respondent bought from the appellant unregistered motor vehicle makeV26 Mitsubishi Pajero Chasis Number V26-4004939 white/grey in colour for Sh.1Million. Of this amount a sum of Sh.700,000/= was paid upon the execution of the agreement and the balance was payable in two instalments of Sh.200,000/= and Sh.100,000/= on dates therein stated. The first instalment was paid. Upon failure to pay the final instalment of Sh.100,000/= the Appellant filed CMCC Number 817 of 2006 claiming that sum or in the alternative the return of the vehicle in which case the Appellant was to refund the sum of Sh.900,000/= paid to the Respondent. Along with the filing of that suit the Appellant also applied to restrain the Respondent from selling or even using the vehicle. The Resident Magistrate who heard the application on 6th March 2006 only restrained the Respondent from selling the vehicle.

The appellant was apparently not happy with that order as the court did not restrain the Respondent from using the vehicle. Purporting to exercise his right under the agreement which allowed him to repossess the vehicle in event of failure to pay either of the said instalments he repossessed the vehicle on 8th March 2006. Aggrieved by that act the Respondent filed HCCC Number 45 of 2006 and sought *inter alia* a declaration that that repossession was illegal and a mandatory injunction to compell the Appellant to return the vehicle to her. Contemporaneously with the filing of that suit the Respondent also applied for a prohibitory injunction to restrain the Appellant from selling the vehicle and a mandatory injunction compelling him to return the vehicle to her. The Honourable Justice Sergon who heard that application **suo moto** transferred that suit to the lower court to be consolidated with CMCC number 817 of 2006 which the Appellant had filed and restrained the Appellant and the co-defendant in that case from selling that vehicle.

About the same time that the respondent filed HCCC Number 45 of 2006, she also filed High court Miscellaneous Civil Application Number 261 of 2006 and obtained leave on 21st March 2006 to apply or judicial review order of certiorari to quash the Resident Magistrate's order of 6th March 2006 in CMCC number 817 of 2006 restraining the Respondent from selling the vehicle as the same was given without jurisdiction and prohibition to prohibit that magistrate from further dealing with the matter.

That leave operated as a stay and prohibited the Resident Magistrate Mr. Mwangi from further dealing with the matter.

As I have already said the Respondent had in HCCC number 45 of 2006 which was transferred to the lower court applied for a mandatory injunction. She had also applied in CMCC Number 817 of 2006 to strike out the plaint in that suit for being an abuse of the process of court as the Appellant had after filing that suit, as it were, ignored it and repossessed the vehicle pursuant to the said clause in the agreement.

Both the applications which had been served upon the Appellant's advocate were fixed for hearing on 30th march 2006 before the Principal Magistrate who had jurisdiction in the matter. Counsel for the Appellant who had not filed any pleadings in opposition to those applications argued that the order of stay in HC Mis. Civil Application number 261 of 2006 had stayed all further proceedings in the matter. The learned Principal Magistrate overruled that arguement and ordered the applications to proceed. Thereupon counsel for the Appellant walked out after his oral application for stay of the proceedings to enable him appeal against that order to proceed with the hearing of the applications was refused. The applications were then heard and allowed. The Appellant's plaint in CMCC Number 817 of 2006 was strike out and he was ordered to return the vehicle to the Respondent. This appeal is against the ruling allowing those applications.

The Appellant has listed 10 long grounds of appeal which raise three main issues. The first one is that the learned Principal magistrate erred in proceeding to hear the two applications in the face of the stay order in HC Misc. Civil Application Number 261 of 2006.

The second one is that the Appellant had not been given enough notice for the hearing of the application and the third one is that the plaint in CMCC number 817 of 2006 was not an abuse of the process of court. I will deal with those issues in that order.

Counsel for the Appellant was plainly wrong in not ascertaining that the stay order in HC Misc Civil Application Number 261 of 2006 had not stayed all proceedings in the lower court cases which were consolidated. As the learned Principal Magistrate found that order speaks for itself and did not require any interpretation. It only restrained the Resident magistrate Mr M.K. Mwangi who had no pecuniary jurisdiction from dealing with the matter or enforcing or extending the orders of 6th March 2006 and 8th March 2006 which he had issued in that case. My hunch is that counsel for the Appellant who had not filed replying affidavits or grounds of opposition to those applications was not ready to argue them and instead of saying so he asserted that the matter had been stayed. His oral application to stay the proceedings pending the appeal against the Magistrate's ruling that the matter proceeds was frivolous and intended to achieve the same purpose. I find that the learned trial magistrate was right to refuse to stay the proceedings and proceeding to hear the applications. There is therefore no merit in the grounds of appeal on that point.

The second issue that the Appellant was not given sufficient notice for the hearing of the applications has equally no merit. The applications had been served much earlier. So the two or three days notice given for the hearing of the applications was sufficient. In any case as I have said counsel did not apply for adjournment on the ground that he had not been given enough notice. That argument has only been

advanced in this appeal. His argument was that the matter had generally been stayed which was not the case.

The last issue is that in spite of failure to oppose the applications and in particular the one that sought to strike out the Appellant's plaint in CMCC number 817 of 2006 the learned trial magistrate was nonetheless obliged to consider the application and decide it on its merits. I entirely agree with Mr. Ndegwa's argument on that point. Though the learned trial magistrate does not appear to have considered the merits of the application I find that that omission has nonetheless not occasioned any failure of justice. This is because even if she had she would still have come to the same conclusion.

In the result I find no merit in his appeal and I hereby dismiss it with costs.

Before I conclude this appeal I would like to observe that the parties have as it were been thrown back to square one. The Appellant is still owed Sh.100,000/= being the balance of the purchase price and the Respondent has yet to transfer the vehicle to the Appellant. I hope that reason will prevail and the parties will settle the matter and avoid further litigation on such simple issue.

DATED and delivered this 29th day of December 2006

D.K. MARAGA

JUDGE