

IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

MISC APPEAL CASE NO. 75/2006

EPHRAIM MBEWE

V

MABVUTO M'BOBO

CORAM : JUDGE I.C. KAMANGA (MRS)
: Legal Aid Advocates for Applicant (Absent)
Makono for Respondent
Gonaulinji Court interpreter

RULING

This is the respondent's application to vacate the order of the Court that was granted on 6th December, 2006 ordering the respondent to return a motor vehicle registration number 5643 Toyota Corolla and blue book to the applicant.

The background to the application is as follows: The applicant had filed a certificate of extreme urgency indicating that a mandatory ex-parte application for an injunction was indeed urgent on the ground

that the applicant's rights to enjoy, manage and control his property peacefully and to economic activity were being greatly violated. The applicant was seeking an order that the respondent be ordered and that an injunction be granted requiring the respondent to deliver possession of a motor vehicle Registration Number BN 5643 Toyota Corolla.

Information deponed by the applicant indicated that the applicant is in the business of buying and selling motorvehicles. That the motor vehicles in issue was offered to the respondent at K500,000.00. The respondent paid K470,000.00 subject to completing payment upon applicant clearing the motor vehicle with the Customs Department and other bodies. The Respondent took possession of the motor vehicle. Later there were some disagreements which resulted in parties agreeing that money be paid back and motor vehicle be returned. And respondent was failing to comply with his part of the agreement.

Upon going through affidavits the Court ordered that the application should be made inter parties, At the inter party hearing, the Court ordered as follows:

- (a) *That the respondent should return the motor vehicle and blue book to the applicant with immediate effect.*
- (b) *That the applicant should resale the motor vehicle and refund the respondent what was legitimately due to him.*

This order was made on 6th December 2006. Thereafter the respondent sought to vary the order to allow the defendant to keep possession of the motor vehicle. Upon hearing both parties the Court maintained the position that the respondent was to release possession of the motor vehicle to the applicant. The Court observed that failure to do so would amount to contempt of Court. This was on 4th January, 2007.

On 23rd February, 2007, the respondent filed a defence indicating that he was ready and willing to pay the balance of K30,000.00 to the plaintiff and take possession of the motor vehicle.

Let me mention that when the initial application and inter party applications were being made, the applicant was being represented by Legal Aid and the respondent was unrepresented. Then he sought Legal Counsel and Creysole, Derson and Associates filed the defence on his behalf, in February, 2007. The matter went stale until the 3rd of December, 2007 when once again, the respondent sought Counsel and Makolego and Company are now on record as representing the respondent. Makolego and Company have moved the present application which is in essence the same as that of 4th January, 2007. The respondent seeks to vacate the injunction on the ground that the same was obtained in bad faith and on wrong principles of law.

In supporting the application Counsel for the applicant submitted that the order for return and sale of the motor vehicle was intended that

the return be made with immediate effect and the respondent complied with the mandates of the order but the applicant has not been given back his K470,000.00 up to now. Counsel for respondent has observed that the applicant was not given a time frame to comply with the order. He observed that in view of the lacunae the applicant has not been vigilant to sell the motor vehicle and pay back to the respondent what is due to him since the date of the injunction order to date. He observes that by not making an effort to sell the motor vehicle, the applicant is enjoying the respondent's money without any consideration that the respondent is suffering loss of use of his money. The respondent no longer wants the motor vehicle but a refund of the K470,000.00 plus interest from the date that the motor vehicle was given back to the applicant.

The applicant and his Counsel did not appear before Court despite service of hearing being served on the applicant's Counsel.

This is my observation Vis-a-Vis the application in issue. Looking at the background, one can observe that the respondent's application is based on the order of the Court of 6th December, 2006 when the Court made a two-fold order. One part was to apply to the applicant the other part was to apply to the respondent. The respondent's part was to surrender the motor vehicle to the applicant. The applicant's part was to sell the motor vehicle and refund to the respondent what is legitimately due to him.

With that as the background, if the respondent states that he has not yet been refunded the K470,000.00 up to now, the same means that the applicant has failed to comply with the Court order of 6th December, 2006. Hence the application should not have been one to vacate the order of 6th December, 2006, but one of seeking Court's intervention following the applicant's non-compliance with the order of 6th December, 2006. Perhaps the applicant can argue that he is not in compliance because a time frame had not been provided. I note that a period of twelve months has lapsed since the Court made the order for the sale of the motor vehicle and the refund. In a business transaction, a period of twelve months without effecting a sale is a grave breach that can not be termed to be reasonable.

In the circumstances, I order that the applicant does refund the respondent the K470,000.00 within 60 days of this order otherwise he should show cause why he should not be sent to prison for contempt of the Court Order of the 6th December, 2006.

The respondent seeks that the sum be paid with interest from the date that the motor vehicle was given to the respondent. I will not grant the same. I will provide the basis for the denial. The applicant in this matter moved the Court seeking a mandatory injunction that had the effect of disposing of the substantive action. This was very unfortunate. Unfortunately, the respondent never indicated to the Court that by moving the Court in the manner that the applicant did the applicant would inevitably dispose of the matter by the back door and deny him the appropriate remedies. The respondent allowed the

applicant to use the back door. When one looks at the matter, one is able to appreciate that this is breach of contract matter. There was a sale agreement. There were terms to the sale agreement. One of the parties failed to fulfill the terms and was therefore in breach of contract. Now, instead of parties dealing with the issue as it was, a simple contract matter, the parties were now seeking to misuse the constitution by versing their application in constitutional language just to impress the Court and persuade the Court to provide an immediate resolution. The Court did. It made mandatory orders. Now the respondent is seeking damages for breach of contract for a matter to wit the Court had been moved otherwise. That will not happen.

Time has now come when legal Counsels should be versed with the Court processes and know of the consequences of moving the Court by way of different processes. And the burden falls upon Counsels, as officers of the Court to move the Court using the appropriate procedures. Where fellow Counsel moves the Court using the wrong procedure, the same should be argued by opposing Counsel. If legal Counsels accommodate one another when a fellow Counsel moves the Court through an inappropriate process, the aggrieved Counsel cannot at a later stage seek a remedy that the initial process ordinarily does not provide. Hence, I will not award damages.

Let me also observe that the applicant had moved the Court seeking an interlocutory remedy.

Interlocutory remedies are sought on the basis of a substantive action being filed and if the case is one of extreme urgency, the substantive action is to be filed as soon as possible. In the matter at hand, the interlocutory injunction was sought and granted in December, 2006. Up to now, the Court record does not bear a substantive action. All processes that are on record are dealing with the interlocutory application. Much as there is a defence on record, it was supposed to respond to a substantive action. It is therefore my observation that the applicant herein sought to pre-empt and therefore abuse the Court process by seeking a mandatory remedy that was in essence concluding on the substantive issue. Once more this was an unfortunate movement of the Court. Hopefully the same will not take root in the system.

Once more, I order that applicant herein refunds the respondent K470,000.00 as per the Court Order of 6th December, 2006

Costs to the respondent.

Made in Chambers this 22nd day of February, 2008.

I.C. Kamanga (Mrs)

J U D G E

22/02/08