



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

COMMERCIAL AND ADMIRALTY DIVISION AT MOMBASA

CIVIL CASE NO. 9 OF 2020

SAKURA LIMITED.....PLAINTIFF

VERSUS

PAK MUMTAZ MOTORS LIMITED.....1ST DEFENDANT

ANJUM JAWAID.....2ND DEFENDANT

AMJAD RAFIQUE.....3RD DEFENDANT

RULING

1. This ruling is in respect of four applications dated 7th February, 2020, 25th February, 2020, 2nd October, 2020, and 3rd November, 2020. The Notice of Motion dated 7th February, 2020 is brought under the provisions of Section 3A of the Civil Procedure Act, Cap 21 of the Laws of Kenya, Order 40 Rules 1 & 2, Order 39 Rules 1, 2, 4, 5 and 6, Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all enabling provisions of the law. The plaintiff seeks the following orders.

(i) Spent;

(ii) Spent;

(iii) That pending the hearing and determination of this suit, a temporary order of injunction to issue restraining the 1st and 2nd defendants whether by themselves or their representatives, servants, agents and/or assigns from howsoever selling, alienating and/or in any other manner whatsoever or otherwise dealing with motor vehicles registration numbers KCW 787S, KCV 555E, KCU 235E, KCV 734Q, KCT 001V, KCU 223N, KCV 379X, KCX 054P, KCU 091J, KCT 028R, KCU 086B, KCV 530J, KCW 896F, KCU 462K, KCU 094J, KCX 758C, and KCS 706A;

(iv) That the defendants be compelled to avail the documents in the notice to produce pending the hearing and determination of this application and suit;

(v) That an order of attachment pending Judgment be issued attaching motor vehicles KCW 787S, KCV 555E, KCU 235E, KCV 734Q, KCT 001V, KCU 223N, KCV 379X, KCX 054P, KCU 091J, KCT 028R, KCU 086B, KCV 530J, KCW 896F, KCU 426K, KCU 094J, KCX 758C and KCS 706A and in the alternative the Defendant to show cause as to why they should not deposit the sum of Kshs. 31,341,078/= in court as security pending the hearing of this suit or warrant of arrest thereof to issue in the alternative and the passport to be deposited in

(vi) That the 1st and 2nd defendants be ordered to avail proper records for an audit of the accounts to be done by a qualified Accountant in respect of all the motor vehicles bought and shipped by the plaintiff and received by the 1st defendant to ascertain what amount has been duly paid to the plaintiff and what has not been paid pending the hearing of this application and suit; and

(vii) That the costs of this application be awarded to the applicant.

2. The application is brought on the grounds on the face of the Motion and is supported by an affidavit sworn on 7th February, 2020, by Naved Qureshi, the director of the plaintiff company herein.

3. In opposition to the application dated 7th February, 2020, the defendants on 23rd March, 2020 filed grounds of opposition and a replying

affidavit sworn on the same day by Anjum Jawaid, the 2nd defendant and the director of the 1st defendant herein.

4. The Notice of Motion dated 25th February, 2020 is brought under the provisions of Section 3A of the Civil Procedure Act, Cap 21 of the Laws of Kenya, Order 40 Rules 1 & 2, and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all enabling provisions of the law. The plaintiff/applicant seeks the following orders.

(i) Spent;

(ii) That an order to issue directing the Regional Manager of National Transport and Safety Authority Mombasa branch to register a caveat against the records of each of the twenty-seven (27) motor vehicles specified hereunder intended to stop sale, transfer and/or any dealings on the said motor vehicles by the 1st, 2nd and 3rd defendants pending the hearing of this application and suit;

	Chassis No.	Reg No.	Current owner as per search dated 19th February, 2020
1	DEJFS-100279	KCT 141M	PAK MUMTAZ
2	GRS210-6006925	KCV 555E	PAK MUMTAZ
3	HA25S-925338	KCU 524Q	PAK MUMTAZ
4	J200E-0034555	KCT 033V	PAK MUMTAZ
5	J200E-0035097	KCU 235G	PAK MUMTAZ
6	J200E-0036334	KCV 734Q	PAK MUMTAZ
7	KDH201-0086617	KCU 484D	PAK MUMTAZ
8	KDH206-8043381	KCV 379X	PAK MUMTAZ
9	KGC30-0092214	KCU 271S	PAK MUMTAZ
10	NCP51-0282284	KCU 091J	PAK MUMTAZ
11	NCP51-0307617	KCT 028R	PAK MUMTAZ
12	NCP81-5164116	KCU 424J	PAK MUMTAZ
13	NNP10-5076020	KCU 325C	PAK MUMTAZ
14	NSP120-2023555	KCU 425J	PAK MUMTAZ
15	NSP120-2027789	KCU 836V	PAK MUMTAZ
16	NSP130-2058343	KCU 421J	PAK MUMTAZ
17	NZE184-6001954	KCX 054P	PAK MUMTAZ
18	ZGE20-0133007	KCV 522E	PAK MUMTAZ
19	NCP50-0131291	KCU 095J	PAK MUMTAZ
20	NCP55-0102021	KCU 093J	PAK MUMTAZ
21	NRE160-7003557	KCU 639L	PAK MUMTAZ
22	NSP130-2061270	KCU 218S	PAK MUMTAZ

23	ZRT260-3079733	KCU 423J	PAK MUMTAZ
24	ACA38-5221773	KCV 530J	PAK MUMTAZ
25	KSP130-2036026	KCW 896F	PAK MUMTAZ
26	NZE151-4009468	KCX 759C	PAK MUMTAZ
27	TRH200-0148130	UNREGISTERED	PAK MUMTAZ

(iii) That the 1st, 2nd and 3rd defendants be ordered to surrender to the plaintiff forthwith, the original logbooks and/or import documents of the motor vehicles listed under prayer 2 above and those listed below, which vehicles the plaintiff collected from the defendants before the filing of this suit;

	Chassis No	Reg. no.	Current owner as per search dated 19 th February, 2020
1	NCP50-0131297	KCU 095J	PAK MUMTAZ
2	NCP55-0102021	KCU 093J	PAK MUMTAZ
3	NRE160-7003557	KCU 639L	PAK MUMTAZ
4	NSP130-2061270	KCU 218S	PAK MUMTAZ
5	ZRT260-3079733	KCU 423J	PAK MUMTAZ
6	GRX130-6051734	UNREGISTERED	PAK MUMTAZ
7	GA4W-0200416	UNREGISTERED	PAK MUMTAZ
8	NZE151-401077	KCX 758C	PAK MUMTAZ
9	TRH200-5017850	UNREGISTERED	PAK MUMTAZ
10	ZSU65-0005518	UNREGISTERED	PAK MUMTAZ

(iv) That an order directing (sic) the Regional Manager of National Transport and Safety Authority Mombasa to transfer the motor vehicles listed under prayers 2 and 3 to the plaintiff's appointed agent Renown Motors Limited;

(v) That the Officer in charge of Central Police Station to assist the applicant in the implementation of the attachment Court order issued on 7th February, 2019, attachment of cars listed under order 2 herein and recovery of documents for motor vehicles listed under prayers 2 and 3;

(vi) That this application be listed for hearing on 5th March, 2020 with the application dated 7th February, 2020; and

(vii) That the costs of this application be awarded to the applicant.

5. The application has been brought on the grounds on the face of the Motion and is supported by an affidavit sworn on 25th February, 2020, by Naved Qureshi, the director of the plaintiff company herein.

6. The Notice of Motion dated 2nd October, 2020 has been brought under the provisions of Order 22 Rule 52 of the Civil Procedure Rules and any other enabling laws. The affected party seeks the following orders from this Court-

(i) Spent;

(ii) Spent;

(iii) That this Honourable Court be pleased to set aside the orders issued on the 7th February, 2020 specifically in terms of attaching motor vehicle Reg No. KCU 462K pending the hearing and determination of this application; and

(iv) That the plaintiff and the defendant do pay costs of this application.

7. The application has been brought on the grounds on the face of the Motion and is supported by an affidavit sworn on 2nd October, 2020, by Pascalia Naku Walekhwa, the affected party herein.

8. In opposition to the application dated 2nd October, 2020, the plaintiff on 27th November, 2020 filed a replying affidavit sworn on 20th November, 2020 by Naved Qureshi, the director of the plaintiff herein and grounds of opposition dated 26th November, 2020.

9. The Notice of Motion dated 3rd November, 2020 is brought under the provisions of Section 3A of the Civil Procedure Act Cap 21 of the Laws of Kenya, Order 40 Rules 1 & 2, Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all enabling provisions of the law. The plaintiff/applicant seeks the following orders from this Court-

(i) Spent;

(ii) That an order to issue directing the Director General through the Regional Manager of National Transport and Safety Authority Mombasa branch to register a caveat against the records of each of these Nineteen (19) motor vehicles, which are motor vehicle registration numbers KDA 914A SKP2V-200728, KDA 936A MH23S-452361, KDA 933A ZC72S-205882, KDA 918A HA25V-747165, KCZ 469Y DA64V-808781, KCZ 703T MH34S-344120, KCV 729V HA25V-747983, KCV 923E VY12-104048, KCT 727E K13-346842, KCR 591S HA25S-771946, KCM 161H DE3FS-302326, KCM 731F NCP51-0251310, KCJ 456D SKF2VN-202795, KCD 286P NCP55-0061810, KCG 196A VWE25-211137, KCD 847C VWE25-187221, KBX 508X SK82VN-338188, KBX 689L VFY11-701054 and KBU 580Z KR42-5068614 intended to stop any sale, transfer and/or any dealings on the said motor vehicles by the 1st, 2nd and 3rd defendants pending the hearing of this application and suit;

(iii) That a temporary order of injunction to issue against the 1st, 2nd and 3rd defendants herein, their agents and/or servants or any person working under their instructions, restraining them from selling, transferring or in whatever manner from dealing with motor vehicles registration and chassis numbers KDA 914A SKP2V-200728, KDA 936A MH23S-452361, KDA 933A ZC72S-205882, KDA 918A HA25V-747165, KCZ 469Y DA64V-808781, KCZ 703T MH34S-344120, KCV 729V HA25V-747983, KCV 923E VY12-104048, KCT 727E K13-346842, KCR 591S HA25S-771946, KCM 161H DE3FS-302326, KCM 731F NCP51-0251310, KCJ 456D SKF2VN-202795, KCD 286P NCP55-0061810, KCG 196A VWE25-211137, KCD 847C VWE25-187221, KBX 508X SK82VN-338188, KBX 689L VFY11-701054 and KBU 580Z KR42-5068614 pending the hearing and determination of this application and suit;

(iv) That an order of attachment and sale before Judgment be issued against the said motor vehicles being motor vehicles registration and chassis numbers KDA 914A SKP2V-200728, KDA 936A MH23S-452361, KDA 933A ZC72S-205882, KDA 918A HA25V-747165, KCZ 469Y DA64V-808781, KCZ 703T MH34S-344120, KCV 729V HA25V-747983, KCV 923E VY12-104048, KCT 727E K13-346842, KCR 591S HA25S-771946, KCM 161H DE3FS-302326, KCM 731F NCP51-0251310, KCJ 456D SKF2VN-202795, KCD 286P NCP55-0061810, KCG 196A VWE25-211137, KCD 847C VWE25-187221, KBX 508X SK82VN-338188, KBX 689L VFY11-701054 and KBU 580Z KR42-5068614; and

(v) That the costs of this application be awarded to the applicant.

10. The application is brought on the grounds on the face of the Motion and is supported by an affidavit sworn on 29th October, 2020, by Naved Qureshi, the director of the plaintiff company.

11. In opposition to the application dated 3rd November, 2020, the defendants on 16th November, 2020 filed a Notice of Preliminary Objection dated 16th November, 2020 and on 20th November, 2020, they filed a replying affidavit sworn on 17th November, 2020 by Anjum Jawaid, the 2nd defendant and the director of the 1st defendant herein.

12. The plaintiff also filed a supplementary affidavit sworn on 4th December, 2020 by Naved Qureshi, the director of the plaintiff company.

13. The applications were canvassed by way of written submissions. The plaintiff's submissions were filed on 27th November, 2020 by the law firm of Chala & Company Advocates, the respondents' submissions were filed by the law firm of Opolu & Co. Advocates on 18th January, 2021. The affected party's submissions were filed on 21st January, 2021 by the law firm of Nanjali & Kirui Associate Advocates. Further submissions by the law firm of Aziz & Associates were filed on 30th April, 2021 on behalf of the plaintiff.

14. Ms. Chala, learned Counsel for the plaintiff relied on Order 39 Rule 5(1) of the Civil Procedure Rules and submitted that the role of the plaintiff is to prove that there was mischief on the part of the actions of the defendants to either defeat, obstruct or delay payment of any decree that may ensue. She submitted that on 23rd March, 2020, the plaintiff supplied 57 motor vehicles to the defendants which were sold on hire purchase but the defendants were claiming that the vehicles had not been paid in full. The plaintiff however contended that from the attached sale agreements, all the said vehicles had been paid in full and the total sum paid was Kshs. 65,210,000/=. She submitted that the defendants had remitted to the plaintiff a sum of Kshs. 27,554,301.00 leaving a balance of Kshs. 37,655,699.00 which had not been accounted for.

15. It was submitted by Ms. Chala that the plaintiff was to cover the export expenses and the defendants were to cover all the running expenses of the show room in order for the parties to be able to share the profit equally. She contended that the defendants were intending to close shop in an attempt to obstruct justice, as could be seen by the fact that the defendants claimed that the previous premises were repossessed by the landlord, thus they moved to another premises as from 20th August, 2020. She urged this Court to take notice of the defendants' admission that they were out of business.

16. She submitted that in light of the foregoing, the burden shifted to the defendants yet they had not endeavored to attach any evidence that would persuade this Court that they had started business again. She further submitted that the defendants had not demonstrated that they have properties in Kenya yet they are foreigners who could leave the country at any time. She stated that the plaintiff had valid grounds to persuade this Court to order for security to be deposited in Court.

17. Ms. Chala submitted that the defendants were not contesting the issue of transfer of the vehicles that had been handed over to the plaintiff by the defendants, since they asked for details of the plaintiff's appointed agent to enable them transfer the said vehicles. She urged that the vehicles listed under prayer 3 of the application dated 25th February, 2020 be transferred to its appointed agent Renown Motors Limited.

18. In regard to the application dated 2nd October, 2020, Ms. Chala submitted that the attachment orders that were issued on 7th February, 2020 were varied on 5th March, 2020 to the extent that only vehicles that had not been sold to third parties would be affected by the said order, therefore the application dated 2nd October, 2020 was bad in law. She indicated that the orders sought in the said application had no perpetuity since they were sought pending the hearing and determination of the application and as such, once the application was determined, the orders would automatically lapse.

19. Mr. Opolu, learned Counsel for the defendants submitted that by seeking for proper records for an audit to ascertain what had been duly paid to the plaintiff and what has not been paid, the plaintiff had confirmed that it could not lay out and establish a *prima facie* case at this stage and requires the Court to grant an order to establish whether they are owed any money. He further submitted that the plaintiff by its own admission cannot lay any basis for the order for deposit of Kshs. 31,341,078.00 as security whereas they do not have a proper claim.

20. He relied on the case of **Giella v Cassman Brown & Co. Ltd** (1973) EA 358, where the conditions to be satisfied in order for a Court to grant an interlocutory injunction were settled. He submitted that the motor vehicles the subject of the suit herein were not in the possession of the defendants since they were sold before the institution of the suit herein and were now owned and were in the names of third parties, who were not parties to this suit. He stated that an order for injunction could not be granted in vain. Mr. Opolu further submitted that having established that all the suit motor vehicles were sold to various buyers and were no longer in the custody and/or possession of the defendants, the prayer for attachment before Judgment could not stand.

21. With regard to the application dated 25th February, 2020, Mr. Opolu indicated that all the vehicles covered under the said application had been sold out to third parties, thus the orders sought were adverse to the said third parties who were not parties to this suit.

He submitted that the application dated 3rd November, 2020, seeks for registration of caveats against various motor vehicles imported and sold by the defendants from 2013 up to 2020, which vehicles were not supplied by the plaintiff neither were they the subject to the suit herein. In addition, the registered owners of the said vehicles were not parties to the suit herein. The defendants' Counsel submitted that the defendants were not in possession of the said vehicles and for some of them, what was outstanding was the transfer of the same to the requisite owners.

22. It was submitted by Mr. Opolu that the defendants had not closed their business and that the company was still fully operational. He stated that the previous business premises were repossessed by the landlord due to rent arrears after the monthly rent was hiked beyond the defendants' ability to pay and due to the effects of the Covid-19 pandemic. He stated that the defendants had to relocate the showroom to Ganjoni next to Ganjoni Wananchi Hotel, which was cheaper and affordable, from 20th August, 2020.

23. Mr. Opolu argued that the question of the defendants continuing to trade was not an issue in this case and the parameters for grant of orders for attachment and sale before Judgment had not been met. He contended that the plaintiff had stolen data and information from the defendants' last records of sales dating back to 2013 hence misleading the Court to grant orders in vain. He submitted that there is a set off and counter-claim in this matter since it is the plaintiff who owes money but it had lodged this suit to evade and escape their responsibility to settle the debt.

24. He relied on Section 63 (b) and (e) of the Civil Procedure Act, Order 39 (1) and Order 39 Rule 5 of the Civil Procedure Rules and submitted that for an order of attachment before Judgment to issue, the applicant ought to establish a *prima facie* case with a probability of success. He further submitted that the plaintiff had failed to establish a *prima facie* case since there was no valid claim against the defendants hence there exists no reasonable chance of a decree being passed against the defendants.

25. He argued that the plaintiff shoulders the burden of proof, to prove that the action taken by the defendants had been taken intentionally and deliberately with the sole aim and purpose of frustrating, obstructing and delaying the plaintiff's enjoyment of a future decree against the defendants. He stated that the said action must be pleaded with clarity and proved with cogent evidence. He also stated that in the present application, the said burden had not been discharged and grant of an order for attachment before Judgment shall be wrong in law before ascertainment of the rights of the third party purchasers of the vehicles.

26. Mr. Opolu cited the case of **Kanyoko t/a Amigos Bar and Restaurant v Francis Nderu & 2 others** [1988] KLR, where the Court of Appeal set down the conditions to be satisfied to warrant conditional attachment before Judgment. He indicated that the Court in the said case held that the power to attach before Judgment must not be exercised lightly and should only be exercised upon clear proof of the mischief aimed at by Order 38 Rule 5 of the Civil Procedure Rules, namely, that the defendant was about to delay any decree that may be passed against him. The defendants' Counsel submitted that without proof of the deliberate dealing with the property with the goal and intention to obstruct and delay justice, Order 39(1)5(b) of the Civil Procedure Rules was not available to the plaintiff.

27. Ms. Nanjali, learned Counsel for the affected party submitted that the plaintiff herein obtained orders on 7th February, 2020 against the affected party without her involvement in the suit which is against the rules of natural justice which demands that a person should not be condemned unheard. She further submitted that as a result of the said orders, Auctioneers on instructions of the plaintiff harassed the affected party herein by stopping her along the highway with the intention of attaching her motor vehicle. She stated that as a result, the affected party was forced to park her car and use public means to go to work and was only able to start using her car when she obtained orders on 9th October, 2020.

28. It was submitted by Ms Nanjali that the said orders were quashed on 8th October, 2020 after the application dated 2nd October, 2020 was filed. She indicated that the affected party deserves to be awarded costs for the trouble she was put in and the costs of the application. She cited the case of **Pacis Insurance Company Ltd v Francis Njeru Njoka** [2018] eKLR, where the Court held that a party having been caused by the other to participate in a suit, is entitled to costs incurred in the event that the party instituting the suit decides to withdraw it unless parties agree otherwise or the Court in exercising its discretion decides otherwise after giving the parties an opportunity to submit on costs.

29. Mr. Azizi, learned Counsel for the plaintiff in his further submissions stated that the plaintiff supplied to the defendants a total of 67 motor vehicles whose investment value is a sum of Kshs. 56,795,000/=. He indicated that by way of a verbal agreement between the parties, Sakura Limited would cater for all the expenses in Japan and supply the cars on credit while Pak Mumtaz Motors Ltd would clear the cars upon arrival and thereafter sell the cars whereafter, the profit was to be shared in equal measure.

30. He submitted that due to discrepancies in the statement of accounts sent to the plaintiff by the defendants, and the defendants' failure to disclose the available stock of motor vehicles and the cash collected from the buyers, the plaintiff reported the matter to Central Police Station. He further submitted that from the discrepancies explained in the plaintiff's supplementary affidavit, it could be proved that the defendants were being paid the full purchase price for the vehicles which they ended up using in their own business, but in the account sheets given to the plaintiff, the defendants declared as having sold the vehicles on part payments leaving balances to hide the fact that they had received full payments for the said vehicles.

31. Mr. Azizi argued that the defendants had received a lot of money from the sale of motor vehicles supplied to them by the plaintiff which they did not want to disclose and/or remit the money to the plaintiff, thus blocking the plaintiff's investments for two and a half years. He argued that since the defendants were getting the cars on credit and the plaintiff was paying the custom duties, the issue of factoring in running expenses in the business was neither discussed nor included in the terms of engagement between the parties herein. He contended that the plaintiff was not responsible for the director's salaries and the running expenses of the defendants' business.

32. He contended that according to the plaintiff's shipment data, the cars arrived at the Port of Mombasa in November, December, January and March, 2019, and that the first 45 days were free of charges which was enough time to clear the consignment without suffering costs on demurrage and storage. He stated that the defendants were not clearing the cars in time since they were using the plaintiff's investment to purchase more vehicles from other suppliers and not returning the payments to the plaintiff.

33. Mr. Aziz submitted that when selling over a bill of lading, the first consignee surrenders and amends the ownership to its purchaser through the shipping line, thus the bill of lading would show a new consignee and the goods would be cleared under the other company's name so as to obtain ownership of the vehicle with the Registrar which is the National Transport Safety Authority (NTSA). He stated that in this case, the import date was February, 2016 and the first owner was Pak Mumtaz as per the NTSA records which means that custom duty and clearance was paid by Pak Mumtaz motors. He contended that the defendants were misleading the Court by posing as commission agents yet they own the said vehicles which form part of their property.

34. It was submitted by Mr. Azizi that the defendants failed to comply and/or violated Court orders issued on 7th February, 2020 in which the defendants were restricted from selling and transferring the suit motor vehicles and a caveat was registered with the NTSA. He further submitted that the defendants transferred motor vehicles registration number KCV 530J, KCT 033V, KCU 235G, KCV 379X using their internal connections at the NTSA, which are unknown to the plaintiff despite the fact that a caveat had been registered against them at the NTSA.

35. In relation to the application dated 2nd October, 2020, Mr. Azizi submitted that the plaintiff never instructed the Auctioneer to proceed with attachment and in any event, the orders issued in the lower Court file being Miscellaneous Case No. 193 of 2020 authorizing the Auctioneer to get police assistance and proceed with attachment were quashed by the High Court on 8th October, 2020 rendering that matter closed. He contended that there was neither proof that the applicant's motor vehicle was ever attached nor was there proof of any harassment as claimed thus, the said application should be dismissed with costs to the plaintiff.

ANALYSIS AND DETERMINATION.

36. I have considered the applications filed herein, the affidavits filed in support thereof and the replying affidavits by the defendants. I have also considered the grounds of opposition, the Preliminary Objection and the written submissions by Counsel for the parties herein. The issues that arise for determination are: -

- i Whether the Preliminary Objection dated 16th November, 2020 is merited;**
- ii Whether the plaintiff has satisfied the conditions to warrant the grant of a temporary injunction;**
- iii Whether an order of attachment pending Judgment should issue;**
- iv Whether the application dated 25th February, 2020 is merited;**

v Whether the applicant in the application dated 2nd October, 2020 is entitled to costs against the plaintiff herein; and

vi Whether the application dated 3rd November, 2020 is merited.

37. In the affidavit filed by the plaintiff in support of the application dated 7th February, 2020, it deposed that the plaintiff and the defendants got into a business agreement sometime in the year 2018 to the effect that the plaintiff would buy motor vehicles in Japan, ship them to Kenya and pay the relevant customs duty. Thereafter, the defendants being agents of the plaintiff would receive the said motor vehicles on arrival in Kenya, sell them and pay the plaintiff the actual costs of the motor vehicles and half profit.

38. It averred that since the year 2018, it had sent the defendants a total of 62 motor vehicles and the defendants had paid the sum of Kshs. 27,554,301.00 after the sale of some of the motor vehicles, leaving an outstanding sum of Kshs. 31,341,078.00 in respect to the unavailable motor vehicles, being motor vehicles registration numbers KCW 787S, KCV 555E, KCU 235E, KCV 734Q, KCT 001V, KCU 223N, KCV 379X, KCX 054P, KCU 091J, KCT 028R, KCU 086B, KCV 530J, KCW 896F, KCU 462K, KCU 094J, KCX 758C, KCS 706A and some available motor vehicles that had not been transferred to the plaintiff or his appointed agent. The latter motor vehicles being chassis numbers TRH200, ZSU6S-005518 and GA4W-0200416.

39. It was stated by the plaintiff that the defendants had refused to give an account of the money in respect of the aforementioned motor vehicles thus causing the plaintiff's director great prejudice. It further stated that other than failing to avail proper records, the defendants had also been understating the duty paid on the vehicles.

40. The plaintiff averred that a search at the National Transport and Safety Authority revealed that some of the missing motor vehicles were still registered in the name of the 1st defendant which meant that it was in custody of the said motor vehicles but hiding them with the sole intention of not handing over possession to the plaintiff. It further averred that vide an agreement dated 2nd February, 2020, the defendants returned to the plaintiff four of its motor vehicles which were found in the defendant's show room. It was also averred that they were to do accounts of all the motor vehicles that were shipped by the plaintiff so as to ascertain that what was paid to the plaintiff was the true sum due to it, but the defendants had refused to render any account on the motor vehicles shipped by the plaintiff and transfer the four motor vehicles to the plaintiff and/or its appointed agent thus necessitating this suit.

41. It was stated by the plaintiff that the defendants ought to furnish documents in respect to the suit motor vehicles so as to assist the Court to substantiate what happened to the said motor vehicles and money in issue. The plaintiff contended that a temporary injunction order ought to issue so as to safeguard the cars from changing hands since any further change would greatly prejudice the plaintiff.

42. In opposition to the application dated 7th February, 2020, the defendants filed grounds of opposition dated 23rd March, 2020.

43. The defendants in their replying affidavit sworn on 23rd March, 2020 deposed that the plaintiff had deliberately hidden the fact that the recurrent expenses and disbursement costs were to be factored in before computation of profits from the sale of the subject motor vehicles and the plaintiff had declined to undertake a joint account taking for purposes of determining profits.

44. They averred that only 56 vehicles were supplied by the plaintiff pursuant to an oral partnership agreement where the plaintiff was to supply the 1st defendant with second hand motor vehicle units for sale in the Kenyan market, but one unit was still uncleared at the Port. The defendant further averred that it was agreed upon by the parties that the 1st defendant would be restricted only to deal in motor vehicle units supplied by the plaintiff at the rate of 15 units per month, and would not deal with any other suppliers.

45. It was stated by the defendants that in breach of the said agreement, the plaintiff only supplied four units on average monthly, which affected the defendants cash flows and running expenses. That in the month of October, November and December, 2018, the plaintiff supplied 11 units for a company called Indus motors Limited based in Nairobi and on arrival, the said units had to be changed to the 1st defendant as the consignee who had to pay port charges, duty and other levies such as storage, V.A.T and demurrage charges. It was also stated that the said vehicles took 4 months to clear causing substantial loss of Kshs. 1,717,000/= to the 1st defendant, which the plaintiff had refused to refund.

46. It was claimed that the plaintiff had refused to pay profits and disbursements on 6 other separate units received from Indus Motors, Nairobi and sold by the defendants on instructions of the plaintiff. It was stated by the defendants that the cost and freight value of the motor vehicles disclosed by the plaintiff was Kshs. 48,547,359.00 thus if one was to reduce the amount already paid to the plaintiff, it leaves a balance of Kshs. 20,993,058.00 and not Kshs. 31,341,078.00. It was stated that in view of the fact that the plaintiff had been given back 5 vehicles including the one that was yet to be cleared at the Port, which are valued at approximately Kshs. 10,000,000/=, the plaintiff had received a total of Kshs. 37,554,301.00.

47. The defendants averred that the agreement that was executed on 2nd February, 2020 was drafted by the director of the plaintiff herein and the 2nd and 3rd defendants were forced to sign it so as to acquire their freedom and release from a police cell since the said director had caused their arrest and they were being held at Central Police Station Mombasa. They contended that the said agreement was not only illegal but also a nullity.

48. They also contended that they were aware that the Japanese Government grants rebates and refunds for second hand vehicles mopped out of their market and reconditioned for export and the plaintiff had been refunded money for each export by the Government of Japan but had refused to disclose the amount which was estimated at a total of Kshs. 4,800,000/=.

49. They averred that the true cost and freight for the vehicles was Kshs. 45,050,606.00 and the bill of lading price for the 3 vehicles sold on behalf of Indus Motors on instruction of the plaintiff was Kshs. 2,659,300/=. They stated that whereas the plaintiff had been paid Kshs.

27,554,301.00 the value of the 4 motor vehicle units returned to the plaintiff was Kshs. 8,650,000/=. That the defendants' overheads and expenses for the duration of seventeen months from October, 2018 stood at Kshs. 12,205,226.00, making a total of Kshs. 48,409,527.00. They further averred that the approximate taxes and Value Added Tax due to KRA for all the units sold was Kshs. 1,200,000/=

50. The defendants stated that out of the 57 units received from the plaintiff, on instruction of the plaintiff, 11 units valued at Kshs. 11,950,000/= were sent to Indus Motors Limited, thereafter, 6 units were received from Indus Motors Limited which were later sold at Kshs. 8,140,000/=. It was stated that the defendants claim against the plaintiff in respect of the said 6 units in terms of profits, disbursements and opportunity costs is Kshs. 4,060,000/=. Kshs. 250,000/= expenses for the 11 units returned and Kshs. 599,552.00 in terms of the 57 units.

51. In the affidavit sworn in support of the application dated 25th February, 2020, the plaintiff deposed that as per the defendants' hand written records, they had received Kshs. 60,000,000/= but had paid the plaintiff only Kshs. 22,707,825.00. It deposed that through searches that were conducted at NTSA on 19th February, 2020, the plaintiff found that some of the motor vehicles valued at Kshs. 27,845,000/= were still registered in the name of the 1st defendant which would mean that the said vehicles had either been sold on installments or were being hidden by the defendants.

52. The plaintiff averred that when one looks at the various account sheets provided by the defendants, it is clear that there is a under declaration on the hand written records on some of the motor vehicles in terms of; what has been sold, fully paid for and successfully transferred to a *bonafide* purchaser; what has been sold, fully paid for and yet to be transferred to a *bonafide* purchaser; what has been sold, fully paid for and still in the defendants' possession but not physically available in the show room; and the selling price indicated in the account sheets vis a vis what the customer actually paid.

53. It was stated that the plaintiff was seeking the surrender of original logbooks and import documents of the vehicles listed under prayer 3 of the application dated 25th February, 2020 since it had already collected and re-allocated those vehicles to one of its other agents in Nairobi. The plaintiff averred that its investment costs in the said motor vehicles was Kshs. 56,795,359.00 and that the defendants had received Kshs. 59,787,800/= from the sale of the said motor vehicles but had only paid the plaintiff a sum of Kshs. 22,707,825.00, leaving a balance of Kshs. 34,087,537.00 investments costs.

54. In the application dated 2nd October, 2020, the affected party deposed that on her way to work she was stopped by Auctioneers who showed her a Court Order dated 14th July, 2020 which emanated from the order of this Court dated 7th February, 2020 directing the attachment of her motor vehicle registration number KCU 462K. She averred that she bought the said motor vehicle on 22nd June, 2019 and upon full payment of the purchase price, she had the said motor vehicle transferred to her name in the month of September, 2019.

55. It was stated by the affected party that pursuant to the Court order that was issued on 7th February, 2020, the plaintiff's agents had on several occasions been harassing her and threatened to take away the said motor vehicle. She further stated that the said order was issued due to the plaintiff's failure to disclose key material facts of the ownership of motor vehicle registration number KCU 462K thus occasioning her an injustice as she was not even enjoined in the suit to verify the ownership of the said motor vehicle.

56. In opposition to the application dated 2nd October, 2020, the plaintiff deposed that indeed attachment orders were issued on 7th February, 2020 and the affected party's motor vehicle was among the vehicles to be attached, but the said orders were varied on 5th March, 2020 to the extent that only vehicles that had not been sold to third parties would be affected by the said order. It was stated that on 2nd October, 2020, this Court made further clarification that the order issued on 5th March, 2020 was a freeze of sale order for the vehicles not sold to third parties only thus the orders seeking to be stayed no longer exist.

57. The plaintiff averred that it never instructed the Auctioneer to proceed with attachment since the documents filed in the lower Court were drawn and filed by the Auctioneer and not the plaintiff. It stated that in any event, the orders issued in the lower Court file being Miscellaneous Case No. 193 of 2020 authorizing the Auctioneer to get police assistance and proceed with attachment were quashed by the High Court on 8th December, 2020.

58. In opposition to the application dated 2nd October, 2020, the plaintiff filed grounds of opposition dated 26th November, 2020.

59. In the affidavit filed in support of the application dated 3rd November, 2020, the plaintiff deposed that vide an order issued on 7th February, 2020 the defendants were restrained from selling seventeen motor vehicles however, they still sold the said motor vehicles which were in stock at the time and failed to deliver payment to the plaintiff. That the defendants were also ordered to show cause why they should not deposit Kshs. 31,341,078.00 in Court but they also failed to do so.

60. The plaintiff averred that the defendants had closed business and their current place of business and residence was not known. It further averred that after engaging the services of a private investigator, it found out that the defendants are the owners of several other motor vehicles which the plaintiff seeks to attach and secure before Judgment since these are the only known assets of the defendants at present.

61. The plaintiff contended that motor vehicles are very fluid assets and they can be sold at any time and should the defendants fail to deposit any security in Court or should they fail to deposit their passports in Court, it would be a mere academic exercise because from their actions the defendants are a flight risk since they have no place of business and their place of aboard in unknown to the plaintiff.

62. In opposition to the application dated 3rd November, 2020, the defendants filed a Notice of Preliminary Objection dated 16th November, 2020 on the following grounds: -

(i) The application dated 3rd November, 2020 by the plaintiff has been filed in abuse of Section 6 of the Civil Procedure Act Cap 11

of the Laws of Kenya.

(ii) The respondent shall plead that the application is *res subjudice* and therefore an abuse of the Court process and should be struck out and dismissed with costs.

(iii) All the subject properties in the application are owned by 3rd parties who are not parties to the suit and as such no adverse orders can issue against them without a fair hearing as it will be an affront to their right to property.

63. In opposition to the application dated 3rd November, 2020, the defendants deposed that the motor vehicles listed in the application herein did not form part of the suit properties since they were not even supplied by the plaintiff. They averred that there were no orders of injunction restraining the defendants from carrying on with their business. They also averred that they had not closed their business and their company was fully operational.

64. It was deposed by the defendants that the orders issued by the Court on 7th February, 2020 were later varied, thus there exist no valid orders on notice to show cause, on record. They also stated that the motor vehicles listed in the application herein were imported from different suppliers and sold long before the suit herein was filed and they were not in the defendants' possession and that all that remained for some of them was transfer to the requisite owners.

65. They averred that in the course of their business, they had received supplies from their historical trade partners to sell on commission as is the norm in the industry since they act as commission agents of the various suppliers and do not own the said vehicles. The defendants contended that the plaintiff had stolen data and information from their records for sales dating as far back as 2013 thus misleading the Court.

66. It was stated by the defendant that the 6 units that were yet to be sold were returned to the plaintiff and the only outstanding issue was the transfer for which the plaintiff had not supplied a nominee since they are a foreign entity not registered in Kenya.

67. In the supplementary affidavit sworn on 4th December, 2020, the plaintiff deposed that the defendants received a total of 67 motor vehicles from it, whose value was Kshs. 55,050,000/=. Thereafter, they were paid Kshs. 27,554,301.00 which reduced the sum owed to Kshs. 27,495,699.00 after receiving 4 units. It stated that the expenses and damages the plaintiff is demanding from the defendants is Kshs. 44,390,000/=.

68. The plaintiff averred that in the account sheet sent by the defendants they confirmed all the amounts they paid the plaintiff and declared a loss of Kshs. 9,885,471.00 indicating it as a missing amount while in the other sheets, the missing amount was Kshs. 10,073,679.00 which amounts were still unpaid. The plaintiff contended that out of the 42 vehicles that were sent in the first lot, only 15 units were sold at Kshs. 16,055,000/= but the plaintiff only received Kshs. 2,743,200/=, leaving a balance of Kshs. 13,311,800/= that was never accounted for. They stated that the 6 units that were locally supplied by the plaintiff's agent, Indus Motors sold at Kshs. 8,140,000/= was not accounted for.

69. The plaintiff deposed that it received the last account sheet dated 5th January, 2020 having 28 units indicating that they had all been sold and the balance of Kshs. 6,760,000/= was yet to be collected from the customers. It deposed further that the sale agreements indicate that the defendants received the full amounts, thereby confirming that the defendants made irregular accounts declaration to the plaintiff.

70. It was stated by the plaintiff that it was able to obtain information about the available stock which indicated that there were 17 units which were yet to be sold that were being kept in different show rooms but the defendants refused to transfer the logbooks of the said vehicles to the plaintiff even after it offered to keep them. It was deposed that the defendants also refused to deliver the said 17 units to the plaintiff's agents in Kenya for sale and transfer. It also stated that when its director arrived in Kenya, he tried to convince the defendants to reconcile the accounts and payments but they refused.

71. That as per the sale agreements availed by the defendants, all the vehicles sold by the defendants are valued at approximately Kshs. 65,000,000/= and this Court should issue an order for the deposit of the maximum amount prayed for in the plaint and in the alternative, this Court should issue an order to allow the plaintiff to attach all the vehicles which are registered under the 1st defendant and in their possession, and keep them in a neutral place but not to sell them until Judgment is delivered.

Whether the preliminary objection dated 16th November, 2020 is merited.

72. It is trite that a Preliminary Objection should be raised on a pure point of law which has been pleaded, or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit. I am guided by the decision in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd** [1969] EA 696, where the Court held that: -

“a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

73. This Court has to determine whether the grounds raised in the Preliminary Objection dated 16th November, 2020 go to the root of whether the application dated 3rd November, 2020 is competent. The main ground raised is that the said application is *res subjudice*. Section 6 of the Civil Procedure Act provides as hereunder: -

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them

claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

74. The rationale for this principle was restated in Kampala High Court Civil Suit No. 450 of 1993 - **Nyanza Garage vs. Attorney General** in which the Court held that: -

“In the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided. It is in the interest of the parties because the parties are kept at a minimum both in terms of time and money spent on a matter that could be resolved in one suit. Secondly, a multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating and or adding to the backlog of cases courts have to deal with. Parties would be well advised to avoid a multiplicity of suits.”

75. In **Thika Min Hydro Co. Ltd vs. Josphat Karu Ndwiga** [2013] eKLR the Court stated that: -

“It is not the form in which the suit is framed that determines whether it is sub judice. Rather it is the substance of the suit and looking at the pleading in both cases.”

76. In light of the foregoing, it can clearly be deduced that the doctrine of *sub-judice* entails; same parties litigating over similar subject-matter in various suits in different Courts. In the instant case, the application dated 3rd November, 2020 seeks to have the NTSA register a caveat against the records of the nineteen vehicles listed therein, a temporary injunction restraining the defendants from selling the said motor vehicles and an order of attachment and sale before Judgment against the said motor vehicles.

77. The application dated 7th February, 2020 on the other hand seeks for a temporary injunction against the defendants restraining them from selling the vehicles listed thereunder, an order compelling the defendants to avail the documents in the notice to produce, an order directing the defendants to avail proper records for an audit and an order of attachment and sale before Judgment of the said motor vehicles.

78. It is not in dispute that the vehicles referred to in the application dated 3rd November, 2020 are different from the ones referred to in the application dated 7th February, 2020. The motor vehicles referred to in the application dated 3rd November, 2020 do not form part of the subject matter of the suit herein since they were not even supplied by the plaintiff herein. The plaintiff submitted that the said motor vehicles are the only properties of the defendants that are known to the plaintiff therefore this Court ought to preserve them before Judgment so that in the event Judgment is passed in its favour, the same is not just a paper decree but one that can be executed.

79. Inasmuch as the parties and the prayers sought in the two applications are similar, the subject matter is not the same. It is clear that no matter how one looks at the two applications, the resolution thereof will ultimately depend on the determination of whether an order for attachment pending Judgment should issue in the instant suit. Be that as it may, the outcome of the application dated 7th February, 2020 may not have an impact on the application dated 3rd November, 2020 for the reasons explained hereinabove. Therefore, the doctrine of *sub judice* fails in this case as the subject matter in both applications are different.

80. The third ground raised in the Notice of Preliminary Objection herein revolves around the issue of ownership of the vehicles referred to in the application dated 3rd November, 2020, this is not a pure point of law as to adequately determine the same, parties will need to adduce evidence in support of their case, thus the same does not qualify as a Preliminary Objection. To conclude, the Preliminary Objection dated 16th November, 2020 is devoid of merit and the same is dismissed.

Whether the plaintiff has satisfied the conditions to warrant the grant of a temporary injunction.

81. The principles guiding the grant of interlocutory injunction are now well settled. In the case of **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others** [2014] eKLR, the Court held as follows -

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- a) establish his case only at a prima facie level,*
- b) demonstrate irreparable injury if a temporary injunction is not granted, and*
- c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.”*

82. A *prima facie* case was defined in the case of **Mrao Ltd v. First American Bank of Kenya Ltd & 2 Others** [2003] eKLR, as follows: -

“So what is a prima facie case” I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

83. In the present case, the applications dated 7th February, 2020, 25th February, 2020 and 3rd November, 2020 were all brought under the provisions of Order 40 Rule 1 of the Civil Procedure Rules, 2010 which provides that: -

“Where in any suit it is proved by affidavit or otherwise—

a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

84. It is noteworthy that the plaintiff and the defendants herein had a contractual relationship whereby the plaintiff would supply the defendants second hand vehicles from Japan and thereafter the defendants would sell the said vehicles in the Kenyan market and share the profit equally with the plaintiff. It was agreed between the parties herein that the plaintiff would ship the said motor vehicles and pay the duty while the plaintiff would cater for the running expenses of the show room here in Kenya. The plaintiff averred that since 2018, it had sent a total of 62 motor vehicles to the defendants and after the sale of some of the motor vehicles, the defendants had paid the plaintiff Kshs. 27,554,301.00, leaving an outstanding sum of Kshs. 31,341,078.00 in respect of the motor vehicles listed in the application dated 7th February, 2020. The plaintiff also contended that the defendant had refused to render accounts of all the vehicles that were supplied by the plaintiff for it to ascertain if the amount that was paid to it was the true sum or not.

85. The defendants on the other hand averred that during the existence of the contractual relationship between the parties herein, the plaintiff had supplied it with a total of 57 motor vehicles, 56 which were cleared and one which was still uncleared at the Port. They stated that before the plaintiff and the 1st defendant shared the profits from the sale of the said motor vehicles equally, the recurrent expenses and disbursement costs were to be factored in first. The defendants averred that the true cost and freight for the vehicles shipped by the plaintiff was Kshs. 45,050,606.00, and the bill of lading price for the 3 vehicles sold on behalf of Indus Motors on instruction of the plaintiff was Kshs. 2,659,300.00, and as such, the plaintiff had been paid Kshs. 27,554,301.00, the value of the 4 motor vehicle units returned to the plaintiff was Kshs. 8,650,000/=, the defendants’ overheads and expenses for the duration of seventeen months from October, 2018 was Kshs. 12,205,226.00, making a total of Kshs. 48,409,527.00. They further averred that the approximate taxes and Value Added Tax due to KRA for all the sold units was Kshs. 1,200,000/=. The defendants denied being indebted to the plaintiff and averred that the plaintiff was indebted to them.

86. I have given due consideration to the plaintiff’s application and noted that it comprises two arguments, namely: that the defendants are yet to fully pay the plaintiff the cost of buying and importing the suit motor vehicles and their share of the profit after the sale of the said motor vehicles and that the defendants have refused to render accounts of all the vehicles received from the plaintiff and thereafter sold by the defendants.

87. I note that prayer 6 of the application dated 7th February, 2020 seeks an order directing the 1st and 2nd defendants to avail proper records for an audit of the accounts to be done by a qualified Accountant in respect of all the motor vehicles bought and shipped by the plaintiff and received by the 1st defendant to ascertain what amount has been duly paid to the plaintiff and what has not been paid, pending the hearing of this application and suit. Looking at the prayer as framed, I am of the view that the plaintiff is not entirely sure whether the defendants still owe it any money and if they do, how much it is.

88. I am therefore of the considered view that since the suit herein is based on a debt that is allegedly owed to the plaintiff by the defendants, for the plaintiff to establish that there exists a *prima facie* case against the defendants, it is of great importance for the plaintiff to first show the existence and extent of the debt before the Court can grant an order of temporary injunction. Secondly, the plaintiff has to establish that the motor vehicles it seeks to restrain the defendant from selling, actually belong to the defendants and form the subject matter of the suit herein.

89. The defendants aver that the motor vehicles referred to in the application dated 7th February, 2020 were sold long before the suit herein was filed and are in possession of third parties and the ones that were not sold, have been given back to the plaintiff. This is evidenced by the affected party’s application dated 2nd October, 2020 and the plaintiff’s own admission in the applications dated 25th February, 2020 and 3rd November, 2020. As such, injunctive orders cannot issue against motor vehicles that are neither owned by the defendants nor in their possession without enjoining the current owners of the said vehicles to this suit.

90. In respect of the application dated 3rd November, 2020, the said motor vehicles are not subject to the dispute between the plaintiff and the defendants since it is not disputed that the said vehicles were not supplied by the plaintiff. In view of the foregoing, I find that the plaintiff has failed to establish a *prima facie* case.

91. Having found that the plaintiff has not established a *prima facie* case with the a probability of success, I find no reason to deal with the other conditions. This was the finding in the case of **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others** (supra), where the Court held that;

“If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.”

Whether an order of attachment pending Judgment should issue.

92. Order 39 Rule 5 of the Civil Procedure Rules, 2010 provides as follows -

“1) Where at any stage of a suit the court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him—

a) is about to dispose of the whole or any part of his property;

b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court, the court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

2) The plaintiff shall, unless the court otherwise directs, specify the property required to be attached and the estimated value thereof.

3) The court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.”

93. In the applications before me, the plaintiff submitted that the defendants have closed shop and despite the fact that they allege to have moved to other premises, there is no evidence of a lease agreement or tenancy agreement to confirm the same. They further submitted that the defendant admitted to be out of business. The plaintiff also contended that the defendants are foreigners and can leave the country at any time and that those are valid grounds to persuade the Court to order for security to be deposited in Court.

94. The defendant averred that they are still in business and that they have not closed their business as all that they had done was to relocate to another show room in Ganjoni next to Ganjoni Wananchi Hotel as from 20th August, 2020 and that they were not leaving the country.

95. Order 39 Rule 1 of the Civil Procedure Rules, 2010 provides that: -

“Where at any stage of a suit, other than a suit of the nature referred to in paragraphs (a) to (d) of section 12 of the Act, the court is satisfied by affidavit or otherwise—

a) that the defendant with intent to delay the plaintiff, or to avoid any process of the court, or to obstruct or delay the execution of any decree that may be passed against him—

i has absconded or left the local limits of the jurisdiction of the court; or

ii is about to abscond or leave the local limits of the jurisdiction of the court; or

iii has disposed of or removed from the local limits of the jurisdiction of the court his property or any part thereof; or

b) that the defendant is about to leave Kenya under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may issue a warrant to arrest the defendant and bring him before the court to show cause why he should not furnish security for his appearance:

Provided that the defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiff’s claim; and such sum shall be held in deposit by the court until the suit is disposed of or until the further order of the court.”

96. The principles governing the grant of an order under the provisions of Order 39 of the Civil Procedure Rules and/or a freezing injunction as they are commonly referred to, were laid down by the Court in the case of **Beta Healthcare International Limited v Grace Mumbi Githaiga & 2 others** [2016] eKLR, as hereunder: -

“a) The claimant has ‘a good arguable case’ based on a pre-existing cause of action;

b) The claim is one over which the court has jurisdiction;

c) The defendant appears to have assets within the jurisdiction;

d) There is a real risk that those assets will be removed from the jurisdiction or otherwise dissipated if the injunction is not granted; and

e) There is a balance of convenience in favour of granting the injunction;

f) The Court can also order disclosure of documents or the administration of requests for further information to assist the claimant in ascertaining the location of the defendant’s assets.

97. It is my considered view that the plaintiff would need to not only prove that the defendants are about to either dispose of or to remove the property from the jurisdiction of the Court; but also that the reason for such disposal or removal of the property was intended to obstruct or delay the execution of any decree which may be passed against them. On whether the plaintiff herein has a good and arguable case, it has already been held hereinabove that the plaintiff has failed to demonstrate a *prima facie* case.

98. It is not disputed that the defendants are no longer in the business premises they used to operate from between 2018 and sometime in 2020. In fact, the defendant states that due to rent arrears and upon hiking of the monthly rent beyond the defendants' ability to pay, they relocated the show room to Ganjoni next to Ganjoni Wananchi Hotel. That despite the fact that the defendants have not produced a lease agreement to confirm the said allegations, the plaintiff in its application dated 3rd November, 2020 confirms that the defendants are still in business since they refer to various vehicles owned by the 1st defendant though not supplied by the plaintiff. The plaintiff further states that the defendants had a total of 31 motor vehicles as of September, 2020 registered in their name but they managed to sell 12 of those units within the same month. That alone confirms that as at the time the plaintiff was making allegations that the defendants were out of business, they were still in business.

99. As much as the defendants are foreigners, they operate and run a business within the jurisdiction of this Court and within Kenya. The plaintiff failed to support its allegation that the defendants may fly out of the country and/or demonstrate that the defendants intend to leave the Country and the jurisdiction of this Court during the pendency of the suit herein, so as to obstruct or delay the execution of any decree which may be passed against them.

100. It has also been found in this ruling that the motor vehicles referred to in the application dated 7th February, 2020 had been sold to third parties who are not parties to this suit and the said vehicles do not belong to the defendants. An order of attachment cannot therefore be issued against them.

101. In **Mareva Campania Naviera SA vs. International Bulk carriers SA** [1980] 1 All E.R. 213 Lord Denning (as he then was) held as follows at page 215:

"In my opinion that principle applies to a creditor who has a right to be paid the debt owing to him, even before he has established his right by getting Judgment for it. If it appears that the debt is due and owing, and there is a danger that the debtor may dispose of his assets so as to defeat it before Judgment, the court has jurisdiction in a proper case to grant an interlocutory Judgment so as to prevent him disposing of those assets."

102. In the absence of proof that the defendants' actions are intended to obstruct or delay the execution of any decree which may be passed against them, an order of attachment and/or deposit of security cannot issue.

Whether the application dated 25th February, 2020 is merited.

103. The plaintiff in its submissions stated that the main prayers pending in the application dated 25th February, 2020 are prayers No. 3 and 4. It further submitted that it is in relation to the release of documents in respect of the vehicles that were surrendered to the plaintiff prior to the filing of the suit herein but are yet to be transferred to the plaintiff herein and/or its agent Renown Motors Limited.

104. The defendants in their replying affidavit filed on 20th November, 2020 at paragraph 19 averred that they are ready and willing to transfer the vehicles that were physically returned to the plaintiff once the plaintiff supplies a nominee since they are a foreign entity not registered in Kenya.

105. It is not in dispute that the defendants returned four motor vehicles to the plaintiff and there is one vehicle which was yet to be cleared at the Port of Mombasa, making a total of five vehicles that were handed back to the plaintiff. I therefore find that it is only fair and just for the said vehicles to be transferred to Renown Motor Limited, the plaintiff's appointed agent.

Whether the applicant in the application dated 2nd October, 2020 is entitled to costs against the plaintiff herein.

106. It is noteworthy that the orders issued on 7th February, 2020 were varied on 5th March, 2020 to the extent that only vehicles that had not been sold to third parties were to be affected by the said order, thus marking the application dated 2nd October, 2020 as spent, save for the issue of who should bear the costs of the said application. Despite the fact that the said orders were varied on 5th March, 2020, Auctioneers on instructions of the plaintiff had obtained orders 7th February, 2020, authorizing police assistance and for attachment of the motor vehicle, which had already been bought by the affected party.

107. The affected party contended that the orders that were obtained on 7th February, 2020 by the plaintiff without her involvement in the suit was against the rules of natural justice which demands that a person should not be condemned unheard. She submitted that as a result of the said orders, Auctioneers on instructions of the plaintiff harassed her by stopping her along the highway and informed her that they had instructions to attach her motor vehicle. As a result, she was forced to park her car and use public means to go to work and was only able to start using her car when she obtained orders on 9th October, 2020.

108. It is evident that had the plaintiff not filed the suit herein and obtained attachment orders against several vehicles including the affected party's vehicle KCU 462K, the affected party would not have been compelled to file the application herein. The affected party averred that she had bought the said motor vehicle on 22nd June, 2019 and had the same transferred to her sometime in September, 2019, which means that by the time the suit herein was filed, the said vehicle had already been sold to the affected party.

109. Section 27(1) of the Civil Procedure Act provides that: -

(1) "Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order."

110. In **Republic vs Rosemary Wairimu Munene, Ex-Parte Applicant vs Ihururu Dairy Farmers Co-operative Society Ltd** Judicial Review application No. 6 of 2014, the Court held that: -

"The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case."

111. In view of the above legal provisions and case law, it is my finding that the plaintiff unnecessarily dragged the affected party into the suit herein and as a result, it will not only be fair but in the interest of justice for the affected party to be compensated for the trouble she took and the costs she incurred in filing the application dated 2nd October, 2020.

Whether the application dated 3rd November, 2020 is merited.

112. Having dealt with the issue of injunction and attachment, what is left in the application dated 3rd November, 2020 is prayer No. 2. As I have already held the vehicles referred to in the said application do not form part of the subject matter of the suit herein. I have also held that the plaintiff has failed to prove that the defendants' actions are intended to obstruct or delay the execution of any decree which may be passed against them, therefore an order of attachment and/or of security cannot issue

113. In light of the foregoing, there is no justification for directing the Director General through the Regional Manager of NTSA, Mombasa branch, to register a caveat against the records of the motor vehicles referred to in the application dated 3rd November, 2020. The application dated 3rd November, 2020 is as such devoid of merit and the same is dismissed.

114. Having considered the applications dated 7th February, 2020, 25th February, 2020, 2nd October, 2020 and 3rd November, 2020, the result is as follows-

(i) That the defendants shall avail the documents in the notice to produce within the next 30 days from today;

(ii) That the defendants and the plaintiff shall avail proper records in respect of all the motor vehicles supplied by the plaintiff since 2018 within 30 days from today;

(iii) That the parties shall appoint a qualified Accountant to carry out an audit of the accounts provided by the plaintiff and the defendants and file a report of the same in Court within 60 days from the date of receipt of the said records;

(iv) That the defendants shall transfer the five motor vehicles surrendered to the plaintiff to Renown Motors Limited, the plaintiff's appointed agent within 30 days from today;

(v) The affected party shall have costs of the application dated 2nd October, 2020 as against the plaintiff;

(vi) That there shall be no orders as to costs in regard to the applications dated 7th February, 2020, 25th February, 2020 and 3rd November, 2020; and

(vii) Parties are encouraged to pursue negotiations in order to amicably settle this matter out of Court.

It is so ordered.

NJOKI MWANGI

JUDGE

DATED, SIGNED and DELIVERED at MOMBASA on this 31st day of March, 2022.

In view of the declaration of measures restricting Court operations due to the Covid-19 pandemic and in light of the directions issued

by his Lordship, the then Chief Justice on the 17th April, 2020 and subsequent directions, the ruling herein has been delivered through Teams Online Platform.

In the presence of:

No appearance for the plaintiff

Mr. Opolu for the defendants

Mr. Oliver Musundi Court Assistant.