



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO.67 OF 2020

DAVID KANIARU NDUATI.....PLAINTIFF/APPLICANT

VERSUS

EYRE MOTORS LIMITED)

MISAM AUCTIONEERS).....DEFENDANTS/RESPONDENTS

RULING

1. The Plaintiff/Applicant has filed a **Plaint** together with a **Notice of Motion** application dated **10th September, 2020** brought under **Order 40 Rules 1, 2, 3** and **Order 51 Rule 1** both of the **Civil Procedure Rules, Sections 1A, 1B, 3 and 3A** both of the **Civil Procedure Act Cap. 21, Section 20** of the **Consumer Protection Act, 2012** and all other relevant enabling provisions of the Laws of Kenya. The Applicant prays for the following orders:-

1. Spent;

2. Spent;

3. THAT this honorable court be pleased to issue an injunction against the defendant/Respondents herein jointly and severally to preserve and deliver motor vehicle KCV 200J to the Plaintiff herein pending the hearing and determination of this suit;

4. THAT an order/declaration that the Applicant herein has acquired proprietary interest over the motor vehicle Registrations Number KCV 200J and the 1st Respondent to transfer and issue him with a Log book accordingly;

5. THAT OCS Central Police Station Mombasa do ensure the orders herein are complied with accordingly;

6. THAT the costs of this application be provided for.

2. The **Notice of Motion** is as supported by an **Affidavit** sworn on **10th September, 2020** by **David Kaniaru Nduati**. The Motion is premised on the grounds that the 1st Respondent entered into an **agreement** with the Applicant for the sale of a Motor Vehicle Registration Number **KCV 200J BMW, S. Wagon** for an agreed price of Kshs.2,097,250/= inclusive of insurance, tracker services and log book transfer fee.

3. The Applicant avers that he has so far paid Kshs.1,683,600/=, an equivalent of 80% of the purchase price and so far the only amount owing is Kshs.413,650/= which the Applicant claims he has been unable to pay due to extraneous circumstances.

4. The Applicant states that on **31st August, 2020**, the 2nd Respondent under instructions from the 1st Respondent repossessed the Motor Vehicle Registration Number **KCV 200J** from the Plaintiff in Nairobi and took it to an unknown location.

5. The Applicant further states that he tried to follow up the issue with the 1st Respondent at their Mombasa office so he could pay the balance but the motor vehicle was unavailable. When he inquired, there was a back and forth between Nairobi and Mombasa. He states that he fears the 1st Respondent may interfere with the motor vehicle to his detriment.

6. The Applicant contends that the transaction between him and the 1st Respondent is protected under **Section 20** of the **Consumer Protection Act, 2012** that prohibits a supplier from retaking, repossessing goods/Services upon default of payment by the consumer except

with leave of the High Court where the consumer has paid two-thirds or more of the payment obligation. The Applicant claims the payment of Kshs.1,683,600/= out of Kshs. 2,000,000/= translates to 80% which is way over two-thirds and thus the option to repossess the said motor vehicle was not available to the Respondents.

THE RESPONSE

7. The 1st Respondent filed a **Replying Affidavit** sworn on **6th October, 2020** by **Mohamed Rashad**, the Chief Operational Officer. He avers that indeed there is a **Sale Agreement** for the sale of a Motor Vehicle Registration No.**KCV 200J**.

8. The 1st Respondent has stated that the **Sale Agreement's Clause 4** set a condition that the suit motor vehicle remains the property of the 1st Respondent until all payments are made in full and if the Applicant defaults, the 1st Respondent has a right to repossess the said motor vehicle.

9. The 1st Respondent has stated that several demands were sent to the Applicant to pay the remaining amount but the Applicant never responded and neither did he approach the 1st Respondent to explain why he defaulted.

10. It has been averred by the 1st Respondent that the Applicant has not shown the extraneous circumstances that caused him not to pay the amounts as required nor has he shown how he intends to pay the remaining balance.

11. It is a contention of the 1st Respondent that the **Sale Agreement** of the Motor Vehicle Registration No.**KCV 200J** was not done under the provisions of **Section 20** of the **Consumer Protection Act, 2012** and thus the same does not apply. That in any case, the said provision was not enacted to protect defaulters from fulfilling their obligations.

12. With regard to the injunction as sought by the Applicant, the 1st Respondent has stated that the Applicant has not established a *prima facie* case having been in breach of the **Sale Agreement**. He has not shown the loss he is going to suffer in the event the orders sought are not granted and the balance of convenience does not tilt in his favour, but the 1st Respondent's because the Applicant is still in arrears of the purchase price which stands at Kshs.483, 650/= inclusive of Auctioneers costs/fees.

DIRECTIONS OF THE COURT

13. The parties took directions on submissions. The Applicant filed its submissions on the **30th November, 2020** while the Respondent filed submissions on the **14th January, 2021**. Parties opted to rely on their written submissions.

ANALYSIS AND DETERMINATION

14. Having considered the pleadings and the written submissions of the parties, I find the issues that arise for determination are: -

i) Whether the Applicant has satisfied the conditions for grant of an interim injunction;

ii) Whether the Applicant has acquired proprietary interest over Motor Vehicle Registration No.KCV 200J, and;

iii) Whether the 1st Respondent can proceed to transfer and issue the Log book

i) Whether the Applicant has satisfied the conditions for grant of an interim injunction

15. The law on injunctions is now settled that the Applicant must satisfy the court that they have a *prima facie* case with a probability of success, they might suffer irreparable injury which would not be adequately compensated by an award of damages, and lastly that the balance of convenience tilts in their favour. See the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] EA 358**.

16. It is not in dispute that parties entered into an **Agreement** on **6th November, 2019** for the sale of Motor Vehicle Registration No.**KCV 200J** and the agreed purchase price was set at Kshs.2,097,250/= inclusive of insurance, tracker services and log book transfer fee. It is also not in dispute that the Applicant has since paid Kshs.1,683,600/= as part of the payment for the suit motor vehicle herein.

17. The Applicant has stated that it is unfair for the Respondents to acquire the Motor Vehicle Registration No.**KCV 200J** after he has already paid almost 80% of the of the purchase price.

18. The Applicant has relied on **Section 20(1)** of the **Consumer Protection Act** to support his case that: -

“Where a consumer under a future performance agreement has paid two-thirds or more of his or her payment obligation as fixed by the agreement, any provision in the agreement, or in any security agreement incidental to the agreement, under which the supplier may retake possession of or resell the goods or services upon default in payment by the consumer is not enforceable except by leave obtained from the High Court”

19. The Respondent on the other hand claims that the Applicant was on several occasion sent notices/demands to fulfill his obligations as per the **Sale Agreement** but he never did so, only to rush to court when the car was repossessed as per the legal procedure.

20. It is trite in law that in any agreement for sale whenever a party is in default, the seller is always allowed to repossess the items from the buyer until such a time that the buyer will be able to fulfill the obligations as per the **Sale Agreement**.

21. In this case, however, the Applicant has paid a substantial amount of the purchase price being Kshs.1,683,600/= which is almost 80% of the purchase price of Kshs.2,097,250/=.

22. I agree with the finding of Lady Justice Njoki Mwangi, in the case of **Shiva Carriers Ltd –vs- NIC Bank Kenya PLC & Another [2018]eKLR**, where she stated that: -

“... The provisions of Section 20 of the Consumer Protection Act are aimed at protecting a person or entity such as the applicant which has paid the bulk of the loan advanced to it as it would result in inscrupulous lenders looking for reasons to call off loans when the entire amount is just about to be fully settled. It is the finding of this court that the said provisions are applicable in this instance and that the 1st respondent should have obtained leave of the court before moving to repossess the motor vehicles in issue...”

23. It was therefore a requirement that the Respondents obtain an order from this Honourable Court before they repossessed the Motor Vehicle Registration No.**KCV 200J** from the Applicant.

24. The repossession of the Motor Vehicle Registration No.**KCV 200J** by the Respondent is an unfair trade practice that the drafters of the **Consumer Protection Act No. 46 of 2012** intended to protect the public from.

25. On the question of whether the Applicant will suffer irreparable loss, he stated that he has not been able to locate the Motor Vehicle Registration No.**KCV 200J** and that the 1st Respondent is taking him in loop of its availability.

26. The Respondents on the other hand have stated that the Applicant has not shown any loss that he has suffered that cannot be assuaged by damages and that Applicant is yet to pay the outstanding amount of Kshs.483, 650/=.

27. The Respondent herein is a Company whose financial muscle is unknown as they have not attached any financial statements for this court to ascertain that it is capable of compensating the Applicant with an award of damages.

28. Further, the Applicant has shown that he stands to lose Kshs.1,683,600/= as an amount that has already been paid to the 1st Respondent for the Motor Vehicle Registration No.**KCV 200J**.

29. In the circumstances, I find that the Applicant has shown that he has a *prima facie* case with a high probability of success, that he stands to suffer irreparable damage that cannot be compensated by way of damages and the balance of convenience tilts in his favour for the issuance of an order of injunction.

30. On whether the Applicant has acquired proprietary rights over Motor Vehicle Registration No.**KCV 200J** and that this Court should order the 1st Respondent to transfer and issue him with a log book, I find that it is not denied that an amount of Kshs.413,650/= is still owing.

31. The agreement of sale as signed by the Applicant and the 1st Respondent on **6th November, 2019** maintains that the Motor Vehicle Registration No.**KCV 200J** remains a property of the seller (the 1st Respondent herein) until the Applicant pays the purchase price in full, that is Kshs.2,097,250/=.

32. This Court is a respecter of contracts and agreements of sale as entered into by parties that come before it. In this case, the agreement is clear that the log book will only be transferred once the whole purchase price is settled. The Applicant has agreed that there is an arrears of Kshs.413,650/=.

33. For the above stated reasons, the application dated **10th September, 2020** has partially succeeded in the following terms:-

a) That an order of injunction be and is hereby issued against the Defendants/Respondents herein jointly and severally to preserve and deliver Motor Vehicle Registration No.KCV 200J to the Plaintiff herein pending the hearing and determination of this suit on condition that the Applicant continues to offset the amounts owed to the 1st Respondent.

b) Prayers (a) and (b) are hereby dismisses accordingly.

c) Costs shall abide by the outcome of the suit.

It is so ordered

DELIVERED, DATED AND SIGNED VIRTUALLY AT MOMBASA THIS 24TH DAY OF JUNE, 2021.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mrs. Kyalo counsel for Plaintiff/Applicant

No appearance for and by Respondent

Court Assistant - Winnie