



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. 016 OF 2020

BETWEEN

MAN AUTOMOTIVE (SOUTH AFRICA)

PROPRIETARY LIMITEDPLAINTIFF

AND

AFRIKON LIMITED1ST DEFENDANT

MWANANCHI CREDIT LIMITED2ND DEFENDANT

EMU INYA ENTERPRISES LIMITED 3RD DEFENDANT

MOMENTUM CREDIT LIMITED..... 4TH DEFENDANT

MY CREDIT LIMITED5TH DEFENDANT

PLATINUM CREDIT LIMITED 6TH DEFENDANT

NATIONAL TRANSPORT AND SAFETY AUTHORITY 7TH DEFENDANT

RULING

The Application

1. The plaintiff has filed a Notice of Motion dated 16th July 2020, inter alia, under section **1A, 1B** and **3A** of the **Civil Procedure Act** and **Order 40** of the **Civil Procedure Rules** seeking the following order of injunction pending the hearing and determination of the suit restraining the 1st, 2nd and 3rd defendants from interfering or otherwise dealing with its ownership rights in motor vehicles registration number KCV 364A, KCV 353A, KCW 505E, KCW 506E, KCV 354A and KCV 357A. It also seeks a mandatory injunction directing the 1st, 2nd and 3rd defendants to deliver up to its custody and that of its agent motor vehicles registration number KCV 364A, KCV 353A, KCW 505E, KCW 506E, KCV 354A and KCV 357A. It further seeks a mandatory order directing the 1st, 2nd, 3rd, 4th, 5th and 6th defendants to deposit the original logbooks for motor vehicles registration numbers KCW 505E, KCW 506E, KCV 353A, KCV 364A, KCV 311A, KCV 360A, KCV 359A and KCV 357A in court pending the hearing of the suit.

2. The application is supported by the affidavit and supplementary affidavit of Sholton Simbarashe Takuva, the Plaintiff's Head of legal and Risk and Company Secretary, sworn on 16th January 2020 and 24th January 2020 respectively. The facts of the case and the nature of the Plaintiff's claim are set out in the deposition and plaint and may be summarized as follows. I note at this point that the 1st defendant ("Afrikon") did not file any response to the Plaintiff's depositions hence the case between the Plaintiff and Afrikon is uncontested.

Plaintiff's Case

3. The Plaintiff, a limited liability company incorporated in South Africa, is a leading manufacturer of medium, heavy and extra-heavy

MAN and VW-branded trucks, commuter buses and luxury coaches which it sells to customers in sub-Saharan Africa including in Kenya. Between January 2016 and March 2017, it sold to Afrikon 30 prime mover trucks (“the vehicles”) which it dispatched to Kenya with Afrikon cited as the original consignee for 10 vehicles. Afrikon requested that a third party entity, IVRCL Limited (“IVRCL”), be noted as the consignee for the other 20 vehicles. Afrikon represented to the Plaintiff that IVRCL was its agent. It was also agreed that Afrikon would pay the purchase price upon its clearing of the consignment and delivery of the vehicles.

4. The Plaintiff shipped the vehicles to Mombasa but Afrikon was unable to pay the purchase price, import taxes due to Kenya Revenue Authority (“KRA”). As a result, KRA impounded the vehicles. By Gazette Notice No. 2535 published on 16th March 2018, KRA intimated that it would sell the vehicles by public auction on 18th April 2018 unless import taxes were paid and the vehicles removed from its custody before the auction date.

5. In order to forestall the auction, the Plaintiff, Afrikon and IVRCL entered into a Memorandum of Undertakings dated 13th April 2018 under which the Plaintiff would pay taxes to KRA to secure release of the vehicles upon Afrikon providing all the necessary documents to the Plaintiff to ensure that the consignment is cleared and the vehicles are released to the Plaintiff or its agent. Notwithstanding the fact that Afrikon and IVRCL were listed as the original consignees, upon clearance and release of the vehicles by the KRA, it was agreed that Afrikon would be automatically recorded as the registered owner of the vehicles but it was agreed that Afrikon and IVRCL would not have any ownership rights or interests in the vehicles while the legal and beneficial ownership of the vehicles would remain vested in the Plaintiff at all times. Afrikon consented to the Plaintiff’s right to unilaterally transfer the vehicles and further undertook to sign and furnish all documentation necessary to enable the Plaintiff to effect a transfer of the vehicles as and when requested by the Plaintiff. In that regard Afrikon pre-signed NNTSA transfer of ownership of the vehicle forms in respect of each vehicle to enable the Plaintiff effect transfer of the vehicles to third parties. In the same vein, Afrikon undertook not to challenge, interfere with or impede the Plaintiff’s rights of ownership in the vehicles.

6. As agreed, the Plaintiff paid the taxes, cleared the vehicles and took possession through its duly appointed agent in Kenya. Although the vehicle logbooks were registered in the name of Afrikon as consignee, the Plaintiff contended that it remained the owner. Based on the Memorandum of Undertakings, the Plaintiff sold 20 of the 30 vehicles to its authorized dealer in Kenya and Afrikon transferred the vehicles in its name to the Plaintiff’s agent.

7. Upon Afrikon’s request, the parties entered into a subsequent agreement where the Plaintiff agreed to sell to Afrikon 10 of the 20 vehicles at a price of € 804,601.76 on terms incorporating the previous agreements. The Plaintiff avers that Afrikon failed to pay the purchase price and procure immediate transfer of each of the vehicles to the Plaintiff or its agent as agreed. On 19th September 2019, Afrikon represented to the Plaintiff that it had secured funding and it was ready to finalise purchase of the 10 vehicles. Afrikon however failed to pay the purchase price and fraudulently procured the transfer and/or registration of the vehicles in the joint names of 2nd to 6th defendants.

8. On 9th January 2020, the Plaintiff learnt that the 2nd defendant had addressed Afrikon intending to repossess the following vehicles sold by the Plaintiff to Afrikon: *KCW 506E*, *KCV 353A* and *KCV 364A* for breach of agreements between Afrikon and the 2nd defendant for failure to pay the sum of Kshs 2,910,176.00. At the same time, the Plaintiff became aware that the 3rd defendant had instructed its agents to seize and repossess vehicle registration number *KCV 357A* to recover Kshs 2,309,020.84 owed by Afrikon.

9. After conducting searches with the National Transport and Safety Authority (NTSA), the Plaintiff realized that 9 of the 10 vehicles had been registered in the joint names of Afrikon and the other defendants as follows; Vehicles *KCW 506E*, *KCV 353A*, *KCV 354A* and *KCV 364A* were registered in the names of Afrikon and 2nd defendant; *KCV 357A* was registered in the name of Afrikon and the 3rd defendant; *KCV 311A* was registered in the names of Afrikon and 4th defendant; *KCV 358A* and *KCV 360A* in the names of Afrikon and the 5th defendant and *KCV 359A* registered in the names of Afrikon and 6th defendant.

10. The Plaintiff stated that on 9th January 2020, the 3rd defendant’s agents forcefully gained entry into its agent’s premises and seized possession of vehicle registration number *KCV 357A*. It is therefore apprehensive that the other 8 motor vehicles in its possession may be seized, attached, transferred and/or repossessed by the 2nd, 4th, 5th and 6th defendants in the enforcement of the agreements or contracts between them and Afrikon to its detriment.

11. The Plaintiff’s case is that Afrikon procured transfer and/or registration of the 9 vehicles in its name and that of the 2nd to 6th defendants contrary to the Memorandum of Undertakings. It contended that it was not privy to any agreements or other dealings between Afrikon and the 2nd to 6th defendants and as such, any dealings or attempts by the defendants to interfere with its ownership rights was fraudulent and illegal.

12. Due to this apprehension, the Plaintiff seeks an injunction against the 1st to 6th defendants restraining them from seizing, transferring, trespassing upon or otherwise dealing with the vehicles and a mandatory injunction to compel them to restore the log books of the subject vehicles to the custody of Plaintiff. The Plaintiff’s claim against the 7th defendant is for a mandatory injunction to compel it to register the 9 vehicles in the name of the Plaintiff. In addition, Afrikon has failed, refused and/or neglected to restore the log books of the 9 vehicles to the custody of the Plaintiff.

Defendants’ Case

13. The 2nd, 3rd, 4th, 5th and 6th defendants (“hereinafter “the defendants”) all opposed the Plaintiff’s application. The 7th defendant did not participate in these proceedings.

14. The 2nd defendant relied on the replying affidavit of Dennis Mwangeka Mombo, its director, sworn on 19th February 2020. He deponed that it advanced Afrikon upon its request Kshs. 11,000,000.00 using vehicles registration *KCV 354A*, *KCV 364A*, *KCV 353A*, *KCW 506E* and

KCW 505E as collateral. The vehicles were registered on the joint names of Afrikon and the 2nd defendant and the chattels mortgage executed and registered.

15. The 3rd defendant opposed the application through the replying affidavit of Wycliffe Kiprono, its Loan Recovery Officer, sworn on 21st February 2020. In the deposition he stated that Afrikon requested and the 3rd defendant advanced to it a loan facility for Kshs. 2,000,000.00 secured by vehicle registration KCV 357A which was jointly registered in the names of the 3rd defendant and Afrikon. Mr Kiprono deponed that when Afrikon defaulted in re-paying the loan, it proceeded to take steps to repossess the vehicle.

16. The 4th defendant opposed the application through the replying affidavit of Sheila Imali, its Legal Officer, sworn on 6th February 2020. The thrust of that deposition was that the 4th Defendant was requested and did advance Afrikon Kshs. 2,018,950.00. As security for the advances, Afrikon pledged vehicle registration number KCV 311A which was registered in the joint names of the 4th Defendant and Afrikon and the security agreement between the parties registered at the Collateral Registry under the **Movable Property Security Rights Act, 2017** (“the **MPSRA**”).

17. The 6th defendant also opposed the application through the replying affidavit of Richard Sambala, its Assistant Legal Officer, sworn on 10th February 2020. He deponed that the 6th defendant advanced to Afrikon at its request, Kshs. 2,000,000.00 secured by vehicle registration number KCV 359A which was registered in the names of Afrikon and the 6th Defendant and the security agreement registered at the Collateral Registry established under the **MPSA**.

The Submissions

18. The parties have filed written submissions in support of their respective positions. The application before the court for consideration is an application for an interlocutory injunction and a mandatory injunction. The principles applicable are not disputed. As regards an interlocutory injunction, I would only quote **Nguruman Limited v Jane Bonde Nielsen and 2 Others NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR** where the Court of Appeal reiterated the conditions for grant of an interim injunction settled in **Giella v Cassman Brown [1973] EA 360** 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) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

*These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. (See **Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86**). If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.*

19. In regard to mandatory injunctions, the principles were summarized by the Court of Appeal in **Kenya Breweries Limited and Another v Washington Okeyo NRB CA Civil Appeal No. 332 of 2000 [2002] eKLR** as follows:

*The test whether to grant a mandatory injunction or not is correctly stated in **Vol. 24 Halsbury’s Laws of England 4th Edn. para 948** which reads:*

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff a mandatory injunction will be granted on an interlocutory application”.

*Also in **Locabail International Finance Ltd v Agroexport and others [1986] 1 ALL ER 901** at pg. 901 it was stated:*

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

20. Turning to the facts of the case, let me reiterate matters that common ground or at any rate not disputed. The Plaintiff and Afrikon entered into certain agreements that are not disputed. It is also not disputed that Afrikon pledged some of the vehicles to the defendants to

secure advances. The vehicles were thereafter registered in the joint names of Afrikon and the respective defendants and the securities also registered at the Collateral Registry established under the **MPSRA**.

21. The Plaintiff relied on the uncontested facts which I have set out earlier in this ruling, to submit that as Afrikon did not pay the purchase price for the vehicles, it could not pass any title or pledge the vehicles to the defendants. It submitted that the Court should take judicial notice of the fact that the Plaintiff could not register the vehicles in its name as it did not have the documents required to create an account in the Transport Integrated Management System (“TIMS”) online platform managed by NTSA namely; a document of registration as an entity in Kenya; Kenya Revenue Authority Personal Identification Number (“KRA PIN”). The Plaintiff contended that even though it was not registered, it remains the legal owner of the vehicles because **section 8** of the **Traffic Act** raises a rebuttable presumption as follows; “*the person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.*” Counsel referred to several cases including **JBS Group Limited v Kennedy Oshiambo Andwak Civil Appeal No. 180 of 2010 [2016] eKLR**, **Ignatius Makau Mutisya v Reuben Musyoki Muli Civil Appeal No. 192 of 2007 [2015] eKLR** and **Charles Nyambuto Mageto v Peter Njuguna Njathi Civil Appeal No. 4 of 2008 [2013] eKLR** where the Court of Appeal has affirmed the position that under **section 8** of the **Traffic Act** that the registration of a motor vehicle is not conclusive proof of ownership and party may prove otherwise. The Plaintiff submitted that on the basis of the uncontested evidence, it was the owner of the vehicles.

22. Counsel for the Plaintiff submitted that based on fraudulent statements and misrepresentations, Afrikon purported to offer the vehicles as collateral to the defendants who were induced to enter into loan arrangements and resulting in joint registration. The Plaintiff further submitted that Afrikon did not have any legal or beneficial interest in the vehicles and could not transfer title hence any pledge of the vehicles to the defendants is null and void. The Plaintiff relied on the principle of *nemo dat quod non habet* which, as the court stated in **Daniel Kiprugut Maiywa v Rebecca Chepkurgat Maina ELC Case No. 38 of 2018 [2019] eKLR** means;

[O]ne cannot give what he does not have. The principle is intended to protect the title of the true owner. The rationale behind this principle is that whoever owns the legal title to the property holds the title thereto until he decides to transfer it to someone else. Accordingly, an unauthorized transfer of the title by any other person other than the owner generally has no legal effect.

23. The Plaintiff submitted that the defendants are not *bona fide purchasers* for value and without notice and cannot rely on the exception to the *nemo dat* principle as they, by virtue of their loan arrangements, are creditors of Afrikon and not purchasers. The Plaintiff argued that the defendants’ rights cannot override its rights and at this stage of the proceedings, it was seeking to preserve the subject matter of the suit pending determination of its rights in particular the right to enforce the Memorandum of Undertakings between it and Afrikon. The Plaintiff urged that it did not part with possession and control of the vehicle hence, the defendants ought to have known that the Plaintiff remained the legal owner of the vehicles. In the circumstances, the Plaintiff submitted that it was entitled to the injunctions to protect its interests.

24. The defendants took a common stance in response to the Plaintiff’s submissions which I shall summarise. They contended that they were not party to the agreements and understandings between the Plaintiff and Afrikon hence those agreements could not confer any rights or impose any obligations on the defendants. Accordingly, the agreements could not be enforced by the Plaintiff against the defendants. Among the cases cited by the parties was the Court of Appeal decision in **Agricultural Finance Corporation v Lengetia NRB CA Civil Appeal No. 104 of 1984 [1985] eKLR** which cited with approval **Dunlop Pneumatic Tyre Co., Limited v Selfridge & Company Ltd [1915] AC 847**.

25. The defendants also stated that they carried out due diligence before accepting the vehicles as security. They pointed out that according to vehicle searches carried out at NTSA, Afrikon was the registered owner and that there were no encumbrances. The defendants also relied on **section 8** of the **Traffic Act** and contended that since there nothing to the contrary at the time the vehicles were pledged to them, the defendants duly registered their interests in the vehicles.

26. The defendants submitted that having been registered as co-owners of the vehicles, they assumed ownership and their rights to the vehicles were superior to the unregistered interests of the Plaintiff. That their rights were fortified when securities were registered under the provisions of the **MPSRA** entitling them to exercise the rights thereunder including the right to obtain possession of the vehicles in the event of default. Based on these arguments, the defendants submitted that the Plaintiff had not established a prima facie case with a probability of success.

Determination

27. I accept and indeed find that the agreements between the Plaintiff and Afrikon do not bind the defendants and the doctrine of privity of contract is clearly stated in **Agricultural Finance Corporation v Lengetia (Supra)** is applicable to this case. The court cited with approval the following passage in **Halsbury’s Laws of England, 3rd Edition, Volume 8** at para. 110:

As a general rule a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.

28. The implication of the doctrine of privity that the Plaintiff cannot Memorandum of Undertakings with Afrikon against the defendants as they were not bound by those stipulations. At the material time, Afrikon was the registered owner of the vehicles hence the prima facie owner under **section 8** of the **Traffic Act**. The question then is whom does the presumption operate against? In this case, as between the Plaintiff and Afrikon, the Plaintiff was the real owner in view of the agreements between the parties but as I have held, those agreements could not bind the defendants. As against the defendants, the registration is intended to protect third parties dealing with the vehicles and such person are entitled to rely on the register to ascertain ownership of the vehicle unless it can be shown that the purchaser or pledgee had actual knowledge of the fraud or misrepresentation by the registered or apparent owner.

29. Although the Plaintiff accused Afrikon of fraud and misrepresentation, there is no evidence that the defendants were involved in the fraud or misrepresentation. The Plaintiff did not plead any fraud or misrepresentation against the defendants impleading the registration of

the defendant's interest as creditors who were registered as co-owners. As creditors with interests registered under *MPSRA*, they have certain rights against the movable property, in this case the vehicles, which includes the right to take possession and dispose of it under **section 71 and 72 of the Act**.

30. It is under the aforesaid circumstances, that I hold that the plaintiff has not established a prima facie case with a probability of success against the defendants. The defendants have legal rights that have been registered and the plaintiff, as a third party in respect of those interests, cannot be restrained from exercising what in effect are statutory remedies against the debtor.

31. The inquiry would have stopped there but for the sake of completeness, I consider turn to the second condition for grant of an injunction; whether damages are an adequate remedy. In this instance, it is not disputed that the defendants are microfinance institutions hence they are in a position to compensate the plaintiff in the event the suit is successful. Moreover, the value of the vehicles is well known and can be ascertained. Since the Plaintiff's interest is now known to the defendants and has not been disputed by Afrikon, any surplus will be paid to the plaintiff and not Afrikon.

32. Lastly, the balance of convenience favours the party with a registered interest hence even if I was in doubt, I would not grant the injunctions sought by the Plaintiff.

33. For the same reason I have set out, the plaintiff has not established the threshold for the grant of a mandatory injunction.

Disposition

34. I dismiss the Notice of Motion dated 16th July 2020 with costs to the 2nd, 3rd, 4th, 5th and 6th defendants. The interim orders in force are accordingly discharged.

DATED and DELIVERED at NAIROBI this 27th day of JULY 2020.

D. S. MAJANJA

JUDGE

Mr Omondi instructed by Coulson Harney LLP for the plaintiff

Ms Kwang'a instructed by Mckay Advocates for 1st defendant.

Mr Kuloba instructed by A. S. Kuloba and Wangila Advocates for the 2nd defendant.

Mr Ochieng instructed by Naikuni, Ngaah & Miencha Company Advocates for the 3rd defendant.

Mr Otieno instructed by COL Advocates LPP for the 4th defendant.

Mr Maina instructed by Chege Kibathi and Company Advocates for 5th defendant.

Mr Ogombe instructed by Onyango and Tarus Advocates for 6th defendant.

No appearance for 7th defendant.