



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI

CIVIL CASE NO.393 OF 2017

SOKOMANIA LIMITED.....1ST PLAINTIFF/APPLICANT

CYRUS NGATIA KANYUGO.....2ND PLAINTIFF/APPLICANT

VERSUS

TSUSHO CAPITAL KENYA LIMITED.....1ST DEFENDANT/RESPONDENT

TOYOTSU AUTO MART (K) LIMITED.....2ND DEFENDANT/RESPONDENT

LEAKEY AUCTIONEERS.....3RD DEFENDANT/RESPONDENT

RULING

This is a ruling on the Plaintiffs' application dated 26th September, 2017. It seeks orders that the Court issue a temporary injunction order prohibiting the Defendant/Respondents, their agents, employees and or servants from advertising for sale, selling whether by way of public auction, private treaty or in any other way however, interfering with the 1st Applicant's ownership of the Motor Vehicle Registration Number KBQ 629L Toyota Land Cruiser Hardtop pending the hearing and determination of this application inter-parties. It also seeks to have the costs of the 3rd Defendant and its storage charges be borne by the 1st Defendant.

Grounds On The Face Of the Application

1. **THAT** the 1st Plaintiff/Applicant and the 1st Defendant/Respondent are the owner of the Motor Vehicle Registration Number KBQ 629L Toyota Land Cruiser as evidenced by the records of the National Transport and Safety Authority.
2. **THAT** the 3rd Defendant acting on the instruction of the 1st Defendant, had unlawfully, unfairly, un-procedurally and maliciously attached and purported to sale through a public auction the Motor Vehicle Registration Number KBQ 629L Toyota Land Cruiser without justifiable and reasonable grounds.
3. **THAT** the 3rd Defendant acting on the instruction of the 1st Defendant, had unlawfully, unfairly, un-procedurally and maliciously listed and purported to sale the Plaintiff's Motor Vehicle Registration Number KBQ 629L Toyota Land Cruiser Hardtop among the vehicles that were to be auctioned by public auction on 20th September, 2017 and that the Defendant/Respondents did not issue the requisite statutory notice notifying the Applicant of the intended sale.
4. **THAT** the listing and intended auction of Motor Vehicle Registration Number KBQ 629L Toyota Land strict compliance and adherence to the provisions of the law Cruiser is illegal and was not in any relating to the exercise of the statutory power of sale of properties.
5. **THAT** the omission to serve a valid statutory notice is not an irregularity to be remedied in damages, it is a fundamental breach of the law, which derogates from the 1st and 2nd Defendant/Respondents equity of redemption in so far as the same arises.

The application is supported by Affidavit sworn by Anthony Maina Mithanga who is the Managing Director of the 1st Plaintiff/Applicant Company herein dated 26th September, 2017. He averred that when the motor vehicle wasn't sold at the auction the 2nd Plaintiff acting on the advice and being financed by the 1st Defendant made an application to purchase the car from the 2nd Defendant. The car was released to the 1st and 2nd Plaintiff and while it was being transported it developed serious mechanical problems which were rare for a brand new car.

He averred that the Plaintiffs communicated the same to the General Manager of the 2nd Defendant who confirmed that they were aware of the defect. The motor vehicle was towed back and was in the custody of the 2nd Defendant who despite several attempts to reach out failed to repair or replace the motor vehicle. He averred that the Plaintiff doesn't owe the 1st Defendant any money since the 1st Defendant fraudulently financed and allowed the 2nd Defendant to sell the motor vehicle fully aware of its defects. He further averred that the 2nd Plaintiff had made a down payment of **Kshs. 900,000** to the 2nd Defendant to finance the purchase of the motor vehicle.

In response the 1st Defendant/Respondent filed a Replying Affidavit dated the 2nd October, 2017 sworn by Joseph Nyandemu, the Senior Manager – Operations and Collections of the 1st Defendant. He averred that under the agreement, the 1st Defendant paid on the 1st Plaintiff's behalf **Kshs. 3,446,415.00** to the 2nd Defendant being the financed portion of the purchase price. He averred that it was agreed that the 1st Plaintiff would pay a deposit of **Kshs. 860,000.00** to the 2nd Defendant and thereafter pay the financed amount in monthly instalments of Kshs. 114,942.13 to the 1st Defendant commencing 20th July 2014 until 20th May 2018. It was a term of the agreement that title to the vehicle would partly remain vested in the 1st Defendant as a loan security until the financed amount was paid in full by the 1st Plaintiff herein.

He averred that the 1st Defendant made attempts to reach the 1st Plaintiff when the account went into arrears but the efforts bore no fruits and the 1st Defendant had no option but to engage auctioneers to repossess the vehicle, however the auctioneers were not able to trace the vehicle. After several attempts to communicate with the Plaintiff, the vehicle was traced in Lodwar where it was supposedly undergoing repairs and repossessed.

He averred that the 1st Plaintiff being in substantial default of the terms and conditions of the Agreement, the 1st Defendant was forced to repossess the vehicle and is entitled under the agreement to dispose of the vehicle on the open market to recover the sums owing from the 1st Plaintiff. He averred that the 1st Defendant followed due process by issuing a notification of sale and advertising the same for auction on 20th September, 2017.

ANALYSIS AND DETERMINATION

- 1. Whether the 1st Defendant issued statutory notice for sale of the vehicle;*
- 2. Whether the 1st Defendant was entitled to repossess and sell Motor Vehicle Registration Number KBQ 629L Toyota Land Cruiser Hardtop herein for non-payment by the Plaintiff of monthly installments payable under the agreement;*
- 3. Whether the Applicants are entitled to orders sought.*

There is no dispute that the motor vehicle herein was financed by the 1st Defendant and that the said vehicle was used as security for repayment of the loan advance for purchase of the vehicle from the 2nd Defendant. It is not also disputed that the loan was repaid as agreed and that the loan is in arrears.

The Plaintiff has indicated that the vehicle had defect and that it was returned to the 2nd Defendant for repairs which was not done as expected.

Plaintiff indicated that he made deposit with the 2nd Defendant as per the agreement. The amount has been acknowledged by the 1st Defendant. However the Applicant has not shown any other payment apart from the deposit made. This clearly confirms that the loan is in arrears.

The Plaintiffs have alleged that no statutory notice was issued. On perusal of the agreement between Plaintiffs and the 1st Defendant I note that Clause 19 provide for notices to be issued by registered post or hand delivery to the borrower using their respective addresses and shall be deemed to have been received on delivery or 4 days of posting. The 1st Defendant attached to the Replying Affidavit formal demand dated 21st July 2015.

From the foregoing, the Defendant has demonstrated it issued notice as required by the agreement. Parties are bound by the terms in the contracts. It is not the business of the Court to rewrite contracts for parties.

The Plaintiff alleges defect in the vehicle supplied by the 2nd Defendant and that the 2nd Defendant failed to rectify the default. I am however of the view that the Plaintiff ought to have taken steps against the 2nd Defendant to remedy the breach if any. Demand to pay was made in 2015; it's about 3 years now and the Plaintiffs have not demonstrated any steps take either to seek recourse against 2nd Defendant or liquidate the amount. The 1st Defendant having advanced money against the vehicle as security has right to exercise its power of sale following default on part of the Plaintiff to pay. I see no reason to restrain the 1st Defendant from exercising its right to attach security as it is evident that there was default in loan repayment. I will however give the Applicant the opportunity to redeem the vehicle within a limited period.

FINAL ORDERS

1. That the Applicant do pay the 1st Defendant the amount in arrears as at today's date (27th July, 2018) plus Auctioneer fee within 14 days from today's date.

2. That failure to comply with order 1 above, advertisement and sale of motor vehicle registration number KBQ 629L Toyota Land Cruiser Hardtop to go on.

3. Costs in the cause.

Dated and Delivered at Nairobi this 27th day of July, 2018

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF

CATHERINE: COURT ASSISTANT

OGUYE H/B FOR MWALA: COUNSEL FOR PLAINTIFF/APPLICANT

MS. AGELA: COUNSEL FOR 1ST & 2ND RESPONDENTS