



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CIVIL CASE NO. 28 OF 2014**

**KAMPALA COACH LIMITED..... PLAINTIFF**

**VERSUS**

**CMC MOTORS GROUP LTD.....1<sup>ST</sup> DEFENDANT**

**PANAFRICA COACHES LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

**1.** In the Notice of Motion dated 23<sup>rd</sup> September 2014, the plaintiff *Kampala Coach Ltd* (hereinafter the applicant) moved this court seeking the following substantive orders:-

**(a)** That the 1<sup>st</sup> defendant, its agents or servants be restrained by an order of temporary injunction from threatening repossession, repossessing, selling and or transferring the undernoted eight (8) motor vehicles registration numbers KBN 928N, KBN 926N, KBF 865M, KBH 245V, KBJ 894E, KBJ 944E, KBJ 696E and KBK 773Q which are in possession and use of the applicant pending the hearing and determination of this application interpartes and thereafter pending the conclusion of the main suit.

**(b)** An order for attachment before judgment be and is hereby issued in respect of the following motor vehicles which are in the custody of the 1<sup>st</sup> defendant being registration numbers KBH 287V, KBH 340V, KBL 617, KBK 771Q, KBK 772Q, KBK 269X, KBN 925N, KBJ 990E, KBN 927N (all buses) and KBK 203Q (Truck) and the said motor vehicles be kept at Eldoret Police station for safe custody and preservation. The OCPD Eldoret police station to ensure compliance with the Order.

**(c)** An order for attachment before judgment be and is hereby issued in respect of ten (10) motor vehicles registration numbers KBE 339E, KBB 028M, KBE 686V, KBF 977H, KBD 289P, KBC 087Y, KBE 087E, KBC 887S, KBG 320E Truck (all buses) and KBD 407W (Truck) which are currently in the custody of the 2<sup>nd</sup> defendant and the said motor vehicles be kept at Eldoret Police station for safe custody and preservation. The OCS Eldoret police station to ensure compliance of the order.

**(d)** In the alternative, and without prejudice to prayers (c) and (d) above, the respondents both jointly and severally be ordered to deposit security in such a sum of not less than Kshs.161,086,634/= being the valuation of the Twenty (20) suit motor vehicles per the respective sale agreements.

**(e)** Further, the defendants both jointly and severally be ordered to deposit such amount as the court

may determine being security for loss of user of the twenty (20) suit motor vehicles aforesated.

**(f)** That this honorable court do make any such other/further orders as it may deem fit and just in the circumstances.

**(g)** That the costs of the application together with the costs of attachment of the motor vehicles aforesated be borne by the respondents.

2. The application is premised on grounds stated on its face which are substantially replicated in the supporting and supplementary affidavit sworn by *Mohamed Abdul Basiet*, the applicant's Managing Director on 20<sup>th</sup> September, 2014 and 12<sup>th</sup> November, 2014 respectively. It is the applicant's case that on diverse dates, it entered into various agreements for the purchase of 28 (twenty eight) motor vehicles from the 1<sup>st</sup> defendant on credit. The vehicles comprised of buses and trucks which were to be used for commercial transport services by the plaintiff.

3. The applicant contends that upon execution of each sale agreement, the 1<sup>st</sup> defendant would open an account through which the applicant would remit the purchase price for the vehicles supplied to it as per the mode of payment agreed upon by the parties.

4. In order to secure the amounts owed, the vehicles were registered in the joint names of the applicant and the 1<sup>st</sup> defendant. Subsequently, disputes arose as to the actual indebtedness of the applicant due to what the applicant alleges were the 1<sup>st</sup> defendant's fraudulent and unlawful actions of *inter alia*, inflating invoices or amounts payable; duplication and or deliberate miscalculation of amounts owed in statements of accounts issued by the 1<sup>st</sup> defendant and unjustified claims for payment of lawyers, auctioneers fees or other miscellaneous claims.

5. Following emergence of the disputes, the parties held several meetings to reconcile their accounts and verify the applicant's indebtedness to the 1<sup>st</sup> defendant which culminated into execution of the agreement dated 10<sup>th</sup> December, 2012. In the said agreement, the total indebtedness of the applicant to the 1<sup>st</sup> defendant was acknowledged to be Kshs.104,815,800 as at 7<sup>th</sup> December, 2012 which was to be liquidated in daily instalments of Ksh.150,000 or by the sale proceeds of the applicant's property in LR No. 209/138/95 after a second charge on the property was registered in favour of the 1<sup>st</sup> defendant.

6. It is the applicant's contention that after execution of the above agreement, it immediately started making daily payments towards clearing its debt as agreed and performed its other obligations under the contract but to its dismay, the 1<sup>st</sup> defendant breached the terms of the agreement by fraudulently and illegally transferring title to ten of the vehicles to the 2<sup>nd</sup> respondent which were subsequently unlawfully repossessed by the 2<sup>nd</sup> respondent. Ten other vehicles were also unlawfully repossessed by the 1<sup>st</sup> respondent who was also threatening to repossess the remaining eight vehicles still in the applicant's possession. The registration details of the vehicles affected by both defendants alleged illegal actions are disclosed in paragraph 10 and 11 (a) of the applicant's supporting affidavit while those of the eight vehicles threatened with repossession are disclosed in paragraph 15.

7. The applicant further asserts that as a result of the defendant's illegal actions, it had suffered immense injury, irreparable loss and damage; that it had demonstrated that the remittances made to the 1<sup>st</sup> defendant were not only in compliance with their agreement but was in excess of what was due and payable by the time the sale and unlawful repossession was made; that the applicant was therefore entitled to the orders sought.

8. The application is opposed by both defendants. There is a replying affidavit sworn by the 1<sup>st</sup> defendant's head of credit *Mr. Joseph Wambugu* on 21<sup>st</sup> October, 2014 while the 2<sup>nd</sup> defendant's director *Mr. Abdul daim Mahub* swore a replying affidavit on behalf of the 2<sup>nd</sup> defendant on 6<sup>th</sup> December, 2014.

**9.** The 1<sup>st</sup> defendant denied the applicants claim that its action of repossessing the aforesaid vehicles and selling ten of them to the 2<sup>nd</sup> defendant was fraudulent or illegal. It contended that its actions were perfectly legal as it was a term of the purchase agreements executed by the parties that the property in the vehicles remained vested in the 1<sup>st</sup> defendant despite the fact that the applicant had their possession; that it was also expressly agreed that in the event of default by the applicant in making the agreed payments towards settlement of the full purchase price, the 1<sup>st</sup> defendant was entitled to repossess the buses and either hold them until full payment was made or dispose of the same to recover the sums owed.

**10.** It is the 1<sup>st</sup> defendant's further contention that as of 6<sup>th</sup> December, 2012, the applicant owed the 1<sup>st</sup> defendant a sum of Kshs.104,815,800 which by a further agreement executed on 10<sup>th</sup> December, 2012 was to be liquidated by daily remittances of Kshs.150,000; that when the applicant defaulted in making the agreed payments, the 1<sup>st</sup> defendant had no choice but to exercise its right to repossess the vehicles and sell ten of them to the 2<sup>nd</sup> defendant to recover the outstanding amounts.

**11.** In addition, the 1<sup>st</sup> defendant urged the court to find that the applicant was not entitled to the grant of orders of temporary injunction as sought as in its view, the applicant had not established a prima facie case with a probability of success; that the application had been overtaken by events given the sale of ten vehicles to the 2<sup>nd</sup> defendant. With regard to the prayers for attachment of the vehicles before judgement, the 1<sup>st</sup> defendant invited the court to find that the legal pre-requisites for grant of such orders had not been met by the applicant. It implored the court to dismiss the application for want of merit.

**12.** On its part, the 2<sup>nd</sup> defendant in the main attacked the application by contending that the applicant's suit was incompetent as it did not allegedly have capacity to institute it in its own name; that it had properly bought the ten vehicles from the 1<sup>st</sup> defendant; that it was now the legal and registered owner of the vehicles and that the applicants claim over them had been overtaken by events.

**13.** By consent of the parties, the application was canvassed by way of written submissions. The 2<sup>nd</sup> defendant was the first to file its brief submissions on 8<sup>th</sup> December, 2014; those of the applicant were filed on 23<sup>rd</sup> January, 2015 while those of the 1<sup>st</sup> defendant were filed on 22<sup>nd</sup> May, 2015. To further buttress their respective positions, counsel for the parties highlighted the written submissions before me on 10<sup>th</sup> May, 2017.

**14.** I have carefully considered the pleadings herein, the lengthy and elaborate affidavits filed on behalf of the parties, the written and oral rival submissions made by counsel on behalf of the parties and all the authorities cited.

**15.** Having done so, I find that it is not disputed that the applicant and the 1<sup>st</sup> defendant executed a sale agreement for the sale and purchase of 28 vehicles on credit on terms that the full purchase price together with interest was to be paid in monthly instalments until payment in full; that in the initial agreement titled "conditions of sale" and a further agreement dated 5<sup>th</sup> August, 2011 annexed to the 1<sup>st</sup> defendant's replying affidavit as JW 2 and JW3, the parties agreed that the 1<sup>st</sup> defendant was to retain title to the vehicles even though the applicant had their possession; that in the event of default in making the agreed monthly instalments towards payment of the purchase price, the 1<sup>st</sup> defendant had a right to repossess and to sell the vehicles to recover the sums owed.

**16.** It is also not contested that at the time of executing the agreement exhibited as JW3, the applicant was indebted to the 1<sup>st</sup> defendant in the sum of Ksh.138,929, 397.45 which amounts decreased to shs.104,815,800 at the time of executing the third agreement dated 10<sup>th</sup> December, 2012. In this later agreement, the parties amended their earlier agreements with respect to the mode of liquidating the debt and agreed that it was to be paid by way of daily deposits of Kshs.150, 000 until full settlement.

**17.** What is disputed is the applicant's claim that after 10<sup>th</sup> December, 2012, it started making the daily

Kshs.150, 000 remittances as agreed and that by the time the defendants repossessed the twenty out of the twenty eight vehicles, it did not have any arrears and that it had actually overpaid the debt by Kshs.120,000. The 1<sup>st</sup> defendant has maintained that at the time of the sale of ten vehicles to the 2<sup>nd</sup> defendant and repossession of the other ten vehicles, the applicant was still indebted to it as it had defaulted in the payment of the Kshs. 150,000 daily instalments.

**18.** Given the foregoing, I find that the key issue arising for my determination is whether or not the applicant has demonstrated that it had complied with the terms of the agreement dated 10<sup>th</sup> December, 2012 by the time the 1<sup>st</sup> defendant sold and repossessed the aforesaid vehicles and whether the applicant was entitled to the orders sought.

**19.** Before addressing the above issue, let me very briefly deal with the preliminary point of law raised by the 2<sup>nd</sup> defendant since to some extent it has a bearing on whether the applicant is deserving of the reliefs sought in the application. It is the 2<sup>nd</sup> defendant's contention that the applicant's suit is incompetent because the applicant did not have capacity to institute it in its own name as it was undergoing liquidation; that the suit should have been commenced in the name of the interim liquidator. The 2<sup>nd</sup> defendant did not however avail any evidence to substantiate its claim. In the absence of such evidence, the 2<sup>nd</sup> defendant's claim amounts to a mere allegation which this court cannot take seriously. Since there is no evidence to prove the applicant's lack of capacity as alleged, for purposes of the instant application, I will hold which I hereby do that the 2<sup>nd</sup> defendant's objection lacks merit and it is hereby overruled.

**20.** With regard to the prayer for an order of temporary injunction, the law as stated in the celebrated case of *Geilla V Cassman Brown & Co. Ltd (1973) EA 358* is now settled. To become entitled to such orders, the applicant must prove that he has a prima facie case with a probability of success; that in the event the orders are not granted, he will suffer irreparable loss or damage that cannot be adequately compensated by an award of damages and if in doubt, the court will decide the matter on the balance of convenience.

**21.** Applying the above principles to the present case, I find that though the 1<sup>st</sup> defendant has maintained that its contractual right to repossess the motor vehicles had accrued as the applicant had fallen into arrears having defaulted in its instalment payments, the applicant has asserted that the 1<sup>st</sup> defendant had inflated its invoices, demanded payment for unjustified costs which were not due or payable by the applicant and that the 1<sup>st</sup> defendant had failed to keep proper accounts regarding all payments made by the applicant. This claim was not specifically controverted by the 1<sup>st</sup> defendant in its replying affidavit.

**22.** The applicant has annexed evidence in the form of a statement of accounts issued by the 1<sup>st</sup> defendant confirming remittances totaling Kshs.2, 726,200 and a bundle of banking slips showing payment of US Dollars banked in the 1<sup>st</sup> defendant's Rwandan K.C.B bank account in a sum equivalent to Kshs.2,494,000. The statement and banking slips are annexed to the applicants supplementary affidavit marked as annexures *MA B 13* and *MAB 14* which according to the applicant proved that at the time the 1<sup>st</sup> defendant repossessed the vehicles on 8<sup>th</sup> January, 2013, it was not in arrears within the meaning of their agreement dated 10<sup>th</sup> December, 2012 and that it had actually overpaid the debt by Kshs.120,000.

**23.** Given the foregoing, I find that whether or not the applicant had defaulted in making the daily remittances of Kshs.150,000 to the 1<sup>st</sup> defendant towards clearing the purchase price of the vehicles as agreed in the agreement dated 10<sup>th</sup> December, 2012 and whether or not the 1<sup>st</sup> defendant's action of repossessing ten vehicles from the applicant and selling ten others to the 2<sup>nd</sup> defendant was lawful or illegal are issues which cannot be effectively determined by the court at this interlocutory stage. These are substantive issues which must be determined at the trial especially when one considers that the taking of accounts is one of the reliefs sought in the plaint.

**24.** Having found as I have above, it is imperative that the substratum of the suit be preserved pending the hearing of the main suit. Regrettably, the applicant only sought orders of temporary injunction to restrain the 1<sup>st</sup> respondent from threatening repossession, repossessing, selling or transferring eight vehicles

which were in its possession namely motor vehicle's registration number KBN 928N, KBN 926 N, KBF 865M, KBH 245V, KBJ 894E, KBJ 696E and KBK 773Q. It did not seek similar orders in respect of the twenty vehicles repossessed by the defendants. The law is that parties are bound by their pleadings and the court cannot grant reliefs which have not been expressly sought in the pleadings.

25. Having taken into account all the relevant factors, though I am unable to make a clear finding that the applicant has established a prima facie case with a probability of success, I find that the scales of justice and the balance of convenience tilts in favour of the applicant since it is not disputed that it still has possession of the eight aforesaid vehicles. If the orders of injunction are granted as prayed, the defendants do not stand to suffer any loss that cannot be adequately compensated by an award of damages unlike the applicant who if the orders are not granted is likely to suffer great loss to its business which can lead to its economic ruin.

26. For the foregoing reasons, I am satisfied that the applicant is entitled to orders of temporary injunction. I accordingly grant prayer (b) of the application on terms that the 1<sup>st</sup> defendant is hereby restrained either by itself or through its servants or agents from repossessing, selling and or transferring the eight aforesaid motor vehicles pending the conclusion of the main suit.

27. With regard to the orders of attachment before judgement as sought in prayer (c) and (d) of the application, the conditions precedent to the granting of such orders are clearly set out under *Order 39 Rule 5(1)* of the *Civil Procedure Rules 2010* which states as follows:-

***“ 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”.***

28. The Court of Appeal in *Kuria Kanyoko t/a Amigos Bar and Restaurant V Francis Kinuthia Nderu & 2 others (1988) 2 KAR 1287* re-iterated the above principles when it held that ***“the power to attach before judgment must not be exercised lightly and only upon clear proof of the mischief aimed at by order 38 rule 5 (the current order 39 rule 5) namely that the defendant was to dispose of his property or to remove it from the jurisdiction with intent to obstruct or delay any decree that may be passed against him”.***

29. Following the above principles, it is my finding that the applicant in this case has completely failed to adduce any evidence to demonstrate or even suggest that the defendants have done anything that would be an indicator that they were about to dispose of any of their properties or remove them from the court's jurisdiction with the intention of obstructing or delaying any decree that may be issued against them in this suit.

The pleadings show that the transfer of ownership of the ten vehicles to the 2<sup>nd</sup> defendant was done around January, 2013 when the vehicles were repossessed long before the instant suit was instituted on 22<sup>nd</sup> September, 2014 which was about a year later. This means that in effecting the said transfers, the 1<sup>st</sup> defendant did not have any intention of obstructing or delaying any decree because by then, the suit did not even exist.

30. In view of the foregoing, I am unable to find any basis upon which I can grant orders of attachment before judgment as sought. Those prayers must therefore fail.

**31.** With respect to the alternative prayer seeking that the defendants be compelled to furnish security, it is not disputed that the 1<sup>st</sup> defendant is a multinational company which carries on business in Kenya among other countries. It has not been alleged nor proved that either of the defendants have absconded or is about to abscond the jurisdiction of this court in circumstances that give rise to a probability that the applicant may be obstructed or delayed in the execution of any decree that may be passed against the defendants in the suit. In the premises, I am not satisfied that this is a proper case for the issuance of an order requiring the defendants to furnish security as prayed. That prayer equally fails.

**32.** In conclusion, the upshot of this ruling is that the applicant has only succeeded in prayer (b) for orders of interlocutory prohibitory injunction which has been granted on terms set out above but the orders sought in prayers (c), (d), and (e) of the application have been rejected.

**33.** On costs, since the applicant has partially succeeded in the application, I order that each party shall bear its own costs.

It is so ordered.

**C.W GITHUA**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 27<sup>th</sup> day of July, 2017**

In the presence of:

Mr. Mwinamo for the 2<sup>nd</sup> defendant/Respondent

Ms Koech for the plaintiff/Applicant

No appearance for the 1<sup>st</sup> defendant/Respondent

Mr. Lobolia -court clerk