



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO.226 OF 2015

TITUS GITAU NGUGIPLAINTIFF

VERSUS

CHASE BANK LIMITED1ST DEFENDANT

ANN WANJIRU KANANDA.....2ND RESPONDENT

RULING

This ruling determines the plaintiff/applicant's application dated 17th June 2015 filed on 18th June 2015 under certificate of urgency. The application seeks orders that:

1. Spent
2. Spent
3. Pending hearing and determination of this suit the 1st defendant, themselves their agents and or their employees or anyone or any officers working under them be restrained by an order of injunction from repossessing, interfering, alienating and or otherwise dealing with motor vehicle registration No. KBW 254J.

The application is predicated on the grounds that:

- a) The plaintiff is the owner of motor vehicle registration number KBW 254 (Range Rover) having bought the same from the second defendant for valuable consideration in the total sum of kshs 6.2 million pursuant to a sale agreement dated 14th October 2013.
- b) The 1st defendant has through its agents attempted to repossess the same premised on an alleged debt of kshs 2.7 million owed to it by the 2nd defendant.
- c) By the sale agreement aforesaid the plaintiff paid a total of sum of kshs 6.2 million.
- d) The plaintiff has no legal or contractual liability or relationship to the 1st defendant and is a stranger to any alleged debt owing or involving the 2nd defendant.

The application was further supported by an affidavit sworn by Titus Gitau Ngugi on 17th June 2015 wherein he deposes that he purchased the subject motor vehicle from one Anne Wanjiru Kananda the 2nd plaintiff at an agreed sum of kshs 6.2 million on 14th October 2013 which sums he duly paid and that the said Anne Wanjiru Kananda undertook to indemnify him for any claims that could possibly arise from any third parties. That contrary to the terms of the sale agreements, the 1st defendant has laid claim to the said motor vehicle and send auctioneers to purport to repossess it yet he is not privy to any arrangement affecting the said car save that he deposited cheques into the 2nd defendant's account with the 1st defendant hence he was a bona fide purchaser for value without notice and therefore the 1st defendant is in no way justified in repossessing the subject motor vehicle which act amounts to trespass to property.

Further, that the plaintiff had severally asked for transfer of the logbook from Anne to his name in vain hence the cause of action herein. The plaintiff annexed copies of payment vouchers, sale agreement and copy of logbook to his affidavit in support.

The 1st defendant opposed the plaintiff's application and filed a replying affidavit sworn by Kevin Kimani on 3rd July 2015 deposing that the application is riddled with dishonestly and calculated to resist the 1st defendant's right to enforce a Chattels and Mortgage Instrument which grants it the right to repossess the motor vehicle registration No.KBW 254J. That the 2nd defendant applied and was granted a banking facility by the 1st defendant for kshs 3 million on terms of Chattels Mortgage created over the subject motor vehicle and she voluntarily deposited the subject motor vehicle's log book which was retained for finalization of registration of the Chattels Mortgage to protect the 1st defendant/bank's interest, which registration took effect on 23rd October 2013. That the plaintiff should therefore have known of the registered Chattels Mortgage instrument affecting the subject motor vehicle hence he should have sought consent of the 1st defendant before dealing with the 2nd defendant. That the 1st defendant sought to repossess the motor vehicle for reasons that the 2nd defendant had stopped remitting the loan payments amounting to kshs 2,795,875.37 as at 23rd June 2015.

That the plaintiff's conduct in the purchase of the subject motor vehicle shows that he had constructive /implied knowledge of the joint registration of the motor vehicle between the 1st and 2nd defendants that is why he never did a search or even ask for its logbook. It was also deposed that the purported sale agreement must have been prepared for purposes of these proceedings hence it should be disregarded and that in view of the legal interest that the 1st defendant has shown in the motor vehicle, the plaintiff has not established a prima facie case with a probability of success; and the balance of convenience tilts in its favour and that there is no explanation why the sale was allegedly concluded in December 2013 but he did not seek orders of specific performance as a purchaser. It prayed for dismissal of the application with costs.

The plaintiff with leave of court filed a further affidavit on 31st July 2015 contending that he was not privy to the Chattels Mortgage instrument executed between the defendants and that following the sale agreement he deposited monies into the 2nd defendant's account in full after the 2nd defendant showed him a copy of log book which had no interest of the 1st defendant and she promised to avail the original log book hence he is a purchaser for value without notice of the vehicle being jointly registered in the two defendants' names.

That payment of the entire purchase price to the 2nd defendant raises a prima facie case and that he could not have rushed to court immediately after meeting his part of the bargain.

The 2nd defendant did not respond to the application despite service of process upon her.

The respective parties' advocates canvassed the subject application orally before me on 2nd December

2015. Mr Madara counsel for the plaintiff submitted relying on the grounds, supporting and further affidavit sworn and filed by the plaintiff and some authorities and annexures, maintaining that the plaintiff had demonstrated that he was a bona fide purchaser of the subject motor vehicle for value without notice since he had also surrendered his motor vehicle KBB 872H valued at KShs 600,000 to cover part of the purchase price after paying cash Shs 2 million as a trade in. It was further submitted that the Chattels Mortgage is dated 20th November 2013 about one month after the sale agreement was executed and that it appears that the 2nd defendant mortgaged the motor vehicle after receiving purchase price from the plaintiff and after giving possession of the purchased motor vehicle to the plaintiff. He relied on Section 19 of the Sale of Goods Act and maintained that he was the bona fide owner of the subject motor vehicle. He also relied on the Sections 14, 15 and 16 of the Chattels Transfer Act, Chitty on contracts; Bullen Leake Precedent of Pleadings; **Wagichiengo V Gerald 1988 KLR page 400**; and **Ugenya Bus Services s V Gachoki [1970-1985]**.

Mr Chenge for the 1st defendant submitted relying on the replying affidavit filed on behalf of the 1st defendant bank and urged the court to dismiss the application by the plaintiff with costs since he had not satisfied the conditions for grant of interlocutory injunction. Further, that as there was no property registered, the sale agreement which was not registered as required by the Stamp Duty Act, and as the plaintiff had refused to produce the original agreement despite notice to produce served upon him, he had no cause of action against the 1st defendant as the agreement was inadmissible. In the alternative it was submitted that should the court find that agreement admissible then the said sale agreement of 14th October 2013 had conditions that the 2nd defendant would indemnify the plaintiff.

Further, that before the last condition of 15th December 2013 the 1st defendant had already registered an interest into the subject motor vehicle. In addition, that the plaintiff had not produced any document from the Registrar of motor vehicles to prove ownership thereof. And that in the absence of evidence of payment of any money to the 2nd defendant as no bank transfer was shown; and that as the payment vouchers had no nexus with the plaintiff, the sale agreement was purposively made for this suit. In addition, that there was no evidence of how motor vehicle KBB 872H was transferred to the 2nd defendant as such no prima facie case had been made out.

On irreparable loss, it was submitted that the agreement was clear that the 2nd defendant would indemnify the plaintiff. Further, that should the orders be confirmed then a mandatory injunction will have been issued against the 1st defendant in the unclearest of all cases. As the 2nd defendant had not responded to the claim it was submitted that the agreement for sale and payment vouchers were prepared to defeat the Chattels Mortgage instrument. The 1st defendant's counsel urged the court to dismiss the plaintiff's application.

Mr Wageni counsel for the 2nd defendant attempted to submit on points of law but ventured into factual matters hence he was stopped by an objection raised by Mr Chenge which objection was upheld by the court.

I have carefully considered the plaintiff's application, grounds, annexures, further affidavits, statutory and case law relied on as well as the 1st defendant's replying affidavit and the parties' advocate's rival submissions in court on 2nd December 2015.

The only issue for determination in this application is whether the plaintiff/applicant has made out a case for the grant of an interlocutory injunction sought.

The conditions for the granting of an interlocutory injunction were set out in the **Giella V Cassman Brown & Company Ltd [1973] EA 358 at page 360** where it was stated:

“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of

damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience (EA industries V Trufoods [1972] EA 420)”

Applying the above principles to this case, on the first condition as to whether the applicant has shown that he has a prima facie case with a probability of success, it becomes necessary to examine the pleadings. In the plaint dated 17th June 2015, it is alleged that the plaintiff by an agreement dated 14th October 2013 purchased motor vehicle KBW 254J from the 2nd defendant at a total cost of shs 6.2 million which amount was paid in full as per the terms of the agreement. The 2nd defendant undertook to indemnify the plaintiff for any claims or claim that could possibly arise from any third parties.

The plaintiff alleges that contrary to the terms of the agreement, the 1st defendant Chase Bank Ltd had unwarrantedly and without justification sent auctioneers to repossess motor vehicle KBW 254J (Range Rover) on the basis of a debt allegedly owed to it by the 2nd defendant. He averred that he is a stranger to the 1st defendant and did not know the basis for the repossession since he was not privy to and had no knowledge of any contractual or legal relationship between the 1st defendant and 2nd defendant and that he was a buyer for value without notice and therefore sought for specific performance of the agreement dated 14th October 2013 and or damages for breach of contract. He also sought to permanently injunct the 1st defendant from repossessing, interfering, alienating and or otherwise dealing with motor vehicle KBW 254J and a declaration that he is the legal bona fide owner of the subject motor vehicle plus costs of the suit.

The above facts are the basis for the application dated 17th June 2015 under certificate of urgency. To the plaint and supporting affidavit the plaintiff/applicant annexed payment vouchers “TG 1” dated 13th November 2013 for 2 million payable to Ann Wanjiru Kananda the 2nd defendant by MEA Ltd, “TG 3” dated 16th October 2013 for 200,000 to the 2nd defendant by MEA Ltd, motor vehicle sale agreement dated 14th October 2013 between the plaintiff and 2nd defendant at an agreed price of shs 6.2 million payable as follows:-

1. 2 million to be paid upon appending signature on the sale agreement and receipt of a blank motor vehicle transfer form.
2. 2 million on or before 15th November 2013 and upon effective transfer of the motor vehicle at KRA from seller to buyer.
3. Kshs 1.6 million on or before 15th December 2013.

In addition, the agreement stipulates that the buyer had given out a van Toyota Granvier KBB 872 H to the seller on an as is where the basis being part of the shs 600,000. The motor vehicle KBW 254 J was said to be already in possession of the buyer.

The plaintiff also annexed copy of registration certificate No. 20132590741 in favour of the plaintiff being the first original owner thereof ‘TG 5’.

The question therefore is, do the above facts establish a prima facie case with a probability of success? I think not and proceed to give reason for my findings. First, it that the agreement is clear that clause B that the seller undertook to indemnify the buyer for any claim that may arise from the third parties. It therefore follows that the plaintiff’s claim lies as against the 2nd defendant wholly, which 2nd defendant has not responded to the application to explain the circumstances under which the 1st defendant third party came to lay claim to the subject motor vehicle.

Secondly, there is absolutely no nexus between the payment vouchers annexed to the supporting affidavit and the plaintiff’s purported payments to the 2nd defendant. The plaintiff did not attempt in

his pleadings, grounds or supporting or even further affidavit, or submissions to explain how MEA Ltd was making payments to Anne Wanjiru Kananda on the two occasions a sum of kshs 2,200,000. The document against which the purported cheque payments, without even quoting the bank on which the cheques were drawn were not annexed to the affidavit.

Albeit the allocation code and name of Mr Gitau's account was given, Mr Gitau the plaintiff has not explained why MEA Ltd was paying the 2nd defendant on his behalf.

Third, is that examining the sale agreement particulars and the application for facility form 'KK1,' I find that the 2nd defendant's address as given is not uniform. On the sale agreement dated 14th October 2013 it is Box number 103688 Nairobi without even a code number whereas on the application form for the facility it is 41286-00100 GPO Nairobi. It is dated 24th September 2013.

In addition the 1st defendant's annexures 'KK1' shows that on 15th October 2013 a day after the 2nd defendant purported to sell the subject motor vehicle to the plaintiff, she signed a Chattels Mortgage instrument with the 1st defendant for an overdraft facility of shs 3,000,000 which she had applied way back on 24th September 2013 before the purported sale and she went ahead to execute all other documents to facilitate the registration of the 1st defendant's interest in the motor vehicle, in lieu of the overdraft facility.

The 2nd defendant's address given on the registered Chattels Mortgage on 20th November 2013 KK-3 is 41286-00100 different from the one she gave in the sale agreement dated 14th October 2013 and she did undertake to service her overdraft facility faithfully and promptly and in default, the lender would have to repossess or collect and remove the vehicles, sell or let the vehicle.

From the terms of the Chattels Mortgage instrument which was signed after the purported sale of the subject motor vehicle, this court can infer that the 2nd defendant's agreement for sale of the subject motor vehicle to the plaintiff was a sham. She knew in her mind that she was entering into an arrangement that bound her legally. The motor vehicle she was mortgaging, she had purportedly sold it and received all the purchase price and even passed over possession to the plaintiff yet she was covenanting to allow the 1st defendant inspect it and even repossesses it in the event of default in the loan repayment.

In my view, the plaintiff was under an obligation to have the motor vehicle that he had purchased registered in his names. In accordance with the 2nd condition of the sale agreement. Albeit he alleged that he had been asking for the original log book which the 2nd defendant promised to avail in vain, two and half years was too long for him to wait for legal documents relating to the subject motor vehicle. In addition, this court finds the sale agreement suspect in that it was entered into a day before the 2nd defendant entered into another transaction of a chattels Mortgage facility with the 1st defendant, and a month after the 2nd defendant applied for the said facility.

Albeit the plaintiff contends that he is an innocent purchaser for value without notice, and which purchase came before registration of the Chattels Mortgage instrument on the subject motor vehicle, I find that the 1st defendant too has good legal title to the motor vehicle and is equally an innocent purchaser of the legal interest for value without notice of the plaintiff's purported earlier purchase and or taking of possession with the plaintiff claiming an equitable interest whereas the 1st defendant claims a legal registered interest, I find that the 1st defendant is the first in time and is therefore is stronger in law. Furthermore, equity follows the law and not the reverse.

The authority of **Ugenya Bus Service V Gachoki EA LR [1976-1985] EA** gives a very valid point of law that in the passing of property in goods, part payment of purchase price accompanied by physical delivery of goods to purchaser without formal transfer of title to goods-property passes by delivery of goods to purchaser. However, that case must be distinguished from the current case in that in that

case, it concerned a denial of ownership of an accident motor vehicle on the ground that it never belonged to the plaintiff, for reason that it was not registered in his name. The principle laid down by that court was no doubt correct on all fours since Section 8 of the Traffic Act is clear that the person in whose name the motor vehicle is registered is prima facie the owner thereof unless the contrary is proved. In that case, the contrary evidence was that of purchase, part payment and taking possession thereof. The case never concerned circumstances as these where there was an alleged purchase yes as alleged, but the 1st defendant too had a registered interest under a Chattels Mortgage instrument without notice of prior sale and or parting with possession of the vehicle to the plaintiff. Albeit the plaintiff also relied on Chitty on Contracts without submitting on exactly what he wished the court to adopt as the legal position from those writings, and that notwithstanding, I have perused the authoritative write up and I am satisfied that the interest that the 1st defendant has in the suit motor vehicle is as good as the equitable interest which the plaintiff claims to have over the subject motor vehicle. In both instances there was 'consideration'. Nonetheless, the circumstances of this case are totally different from those where the court would be asked to strictly interpret a sale of goods contracts. It involves conflicting interests. In as much as there may have been a contract between the plaintiff and the 2nd defendant, that contract is only enforceable as between those parties to it. The plaintiff has a right to be indemnified by the 2nd defendant, as per his contract with her. In view of the fact that there is a claim by the 1st defendant raised on the subject motor vehicle as was contemplated in the sale agreement. That is what was held in the case of **Wagichengo V Gerald CA 72/1984 [1988] KLR 408**.

On the issue of the traded in vehicle, it could be considered an exchange but that notwithstanding, there must be evidence of the plaintiff too passing off title of the exchanged motor vehicle to the 2nd defendant. There was none and therefore I agree with 1st defendant's submission that most probably, it was a contract of convenience to defeat the claim by the 1st defendant bank.

I warn myself that I am not fully determining the merits or demerits or the finality of this case at this stage. But I have to make some analysis of the case to establish whether in my view the plaintiff has shown a prima facie case with a probability of success. In the end I find that a prima facie case with a probability of success has not been made out.

On the second condition of whether the plaintiff/applicant shall otherwise suffer any irreparable injury which would not adequately be compensated by an award of damages, I note that the 1st defendant is a stable financial institution. In addition, the 2nd defendant as per the Chattels Mortgage documents and curriculum vitae is a car dealer and in the sale agreement she undertook to indemnify the plaintiff against any claims by third parties which clearly show that she was conscious of the situation that the plaintiff might find himself in requiring compensation. For that reason I find that the plaintiff has not demonstrated that he stands to suffer any irreparable injury that cannot be compensated by an award of damages.

I must mention that at the commencement of these proceedings there was every indication that the plaintiff and the second defendant were negotiating for a possible settlement of the matter out of court. The plaintiff has not placed any material before this court which would tend to show that an award of damages cannot adequately compensate him for the loss of the suit motor vehicle in the event that the 1st defendant repossesses it and disposes it off before this suit is heard and determined. Furthermore, he ought to have known the risks of possessing a motor vehicle whose original logbook he had not seen for over two years.

I therefore think that the second limb of the **Giella V Cassman Brown** case has not been satisfied and to that extent I need not consider the last limb which espouses that in case I am in doubt, I would decide an application on the balance of convenience. This is in line with the holding by the Court of Appeal in **NBK Ltd & 2 Others V Samcon Ltd [2003] KLR 462** where the Court of Appeal adopted with approval the conditions for granting an interlocutory injunction as stated in **Giella V Cassman Brown** and at page 464 went on to state as follows:-

“With respect, these are arguable points. First, he attempted to have other circumstances apart

from the conditions set out above to be considered. Such a course was roundly rejected by the Court of Appeal in Abel Salim & Others V Okongo & Others [1976] KLR 42 at page 48 where it was held inter alia:

“In granting or refusing to grant an interlocutory injunction, a court exercises its discretion. I am of the view that the conditions for the grant of an interlocutory injunction are now well settled in East Africa, and I can see no reason to depart from them. These are stated in Giella V Cassman Brown & Company Ltd [1973] EA 358 at 360:

Secondly, the court will decide an application on a balance of convenience only if it is in doubt. The finding by the Learned Judge that the respondent had no prima facie case was clear and express.”

The Court of Appeal in the case of **East African Development Bank V Hyundai Motors K Ltd [2006] e KLR CA 194/2004** further held:

“ We are satisfied that the Learned Judge made very clear findings as regards the conditions for granting an interlocutory injunction which were to the effect that the respondent had failed to meet these conditions then there was no other avenues open to the Learned Judge to grant interlocutory injunction. An attempt to consider other circumstances apart from the laid down conditions was rejected in Abel Salim & Others V Okongo & Others (supra).”

From the foregoing, therefore I find that the plaintiff’s application must fail and I proceed to dismiss it with costs to the 1st defendant.

Dated, signed and delivered in open court at Nairobi this 27th day of January 2016.

R.E. ABURILI

JUDGE

27/1/2016