



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 392 OF 2014

ATHMAN MUSTAFA MOHAMMED.....PLAINTIFF

- VERSUS -

ECOBANK KENYA LIMITED.....1ST DEFENDANT

AIG KENYA INSURANCE CO. LTD.....2ND DEFENDANT

TOYOTA KENYA LIMITED.....3RD DEFENDANT

RULING

1. The plaintiff's application is for an injunction to restrain the defendants from advertising for sale, disposing of, selling, transferring or in any other manner whatsoever interfering with the plaintiff's quiet use, possession and enjoyment of the motor vehicle registration Number KBU 666K, a **TOYOTA LAND CRUISER**.
2. The plaintiff is the registered owner of the motor vehicle in issue, jointly with **ECO BANK KENYA LIMITED**, the 1st Defendant.
3. In the application, the plaintiff stated that he has all the money to pay for the outstanding loan. He was therefore waiting to be advised on the status of the damage to the vehicle, so that he could know whether or not the vehicle could be repaired.
4. According to the plaintiff, the 1st Defendant conspired and colluded with the 2nd Defendant, **AIG KENYA INSURANCE COMPANY LIMITED**, to remove the vehicle from **TOYOTA KENYA LIMITED**, where the said vehicle had been taken for repairs.
5. The plaintiff considered the actions of the defendants to have been malicious and in bad faith because;
 - a. *He was not given any notice of what was about to happen;*
 - b. *ECO BANK did not give him any Notice or Demand Letter, requiring him to make any payments;*
 - c. *The vehicle was advertised for sale in the Daily Nation of 8th September 2014;*
 - d. *At that time, the plaintiff had only a few more months within which he would have paid off the balance of the loan;*
 - e. *By acting behind the back of the plaintiff, the defendants' intentions were to unlawfully deprive him of the vehicle.*

6. At this point, it is necessary to place into perspective, the facts giving rise to the plaintiff's complaints.
7. **ATHMAN MUSTAFA MOHAMED** (the plaintiff) was financed by **ECO BANK KENYA LIMITED**, when he bought the vehicle which is the subject matter of this case. The said vehicle was a **TOYOTA LAND CRUISER** Registration Number KBU 666K.
8. The vehicle was registered in the joint names of Athman and Eco Bank.
9. As between Athman and Eco Bank there was an express understanding that as soon as Athman repaid the loan to the bank, the vehicle would be transferred to him. In effect, the vehicle was the security for the loan which the bank granted to Athman.
10. As an additional security for the loan facility Athman executed a Chattels Mortgage over the subject vehicle.
11. The vehicle was insured by **AIG KENYA INSURANCE COMPANY LIMITED**, and the said policy of insurance was in force at the material time.
12. On 12th July 2014, the vehicle was involved in an accident, and Athman informed AIG Kenya Insurance about the said accident.
13. AIG Kenya Insurance appointed **SAFETY SURVEYORS LIMITED** to assess the extent of the damage and the estimated costs for the repairs to the vehicle. In other words, the insurer needed to obtain appropriate information, which could enable it ascertain whether or not it was economically viable to repair the vehicle.
14. The insurer has a list of Approved Garages, where it encourages its insured to take the insured vehicles for assessment or repairs.
15. **TOYOTA** Kenya Limited is one of the Approved Garages.
16. On 19th July 2014 Athman delivered the vehicle to Toyota Kenya Limited. On 31st July 2014 Toyota Kenya Limited estimated the cost of the repairs at Kshs. 2,299,901/-. When AIG Kenya Insurance was informed about those estimates they made the decision that that was too costly. That decision was premised upon the initial estimates which Safety Surveyors Limited had given, and which was in the sum of Kshs. 1,082,475/81.
17. Meanwhile, Athman was continuing to pursue the insurer for a speedy resolution to the damaged vehicle.
18. Therefore, as Toyota Kenya gave a very costly estimate, and considering that it took them 2 weeks to do so, AIG Kenya Insurance concluded that it was better to have the repairs carried out at a different garage.
19. Thereafter, the vehicle was moved from Toyota Kenya to Motorways (K) Limited, on 7th August 2014. The said Motorways (K) Limited estimated the cost of the repairs at Kshs. 1,178,193/44.
20. On 8th September 2014 Motorways gave to AIG Kenya Insurance an invoice, in the sum of Kshs. 1,052,112/81.
21. According to Athman, he was not consulted before the vehicle was moved from Toyota Kenya to Motorways. However, AIG Kenya Insurance insists that Athman not only knew about the proposed movement, but he also expressly authorized the same.
22. Secondly, the insurer said that Athman expressed his satisfaction with the work done by Motorways, by signing a Satisfaction Note on 4th September 2014.
23. However, the plaintiff denied the contention that he had authorized the movement of the vehicle from Toyota Kenya to Motorways. It was Athman's contention that the alleged authorization was a forgery.
24. Athman also denied signing the alleged Satisfaction Note dated 4th September 2014.
25. In a nutshell, Athman sees in the alleged authorization and Satisfaction Note, the conspiracy that was intended to deprive him of his car, permanently, and without any notice.
26. Athman cited the following cases, to support his quest for an interlocutory injunction;
 - i. *ST. STEPHEN'S EDUCATIONAL INSTITUTE LTD VS NIC BANK LIMITED, HCCC NO. 338 of 2013.*
 - ii. *GLOBAL BABIPO HOLDINGS LTD VS DIAMOND TRUST BANK (K) LTD & ANOR (MSA) HCCC NO. 36 of 2010.*
 - iii. *SIMON CHEGE KAMANGU VS JOSEPH D.K. KIMANI t/a PYRAMID AUCTIONEERS & ANOR*

27. In the case of **St. Stephen's Educational Institute Limited**, Waweru J. granted an injunction to restrain the defendant from selling the plaintiff's vehicle. The plaintiff had paid Kshs. 2,286,010 towards the loan which it had been given pursuant to a Hire-Purchase Agreement.
28. The court made a finding that the plaintiff was, nonetheless, still in default. But there was a dispute about the amount of money that was still outstanding.
29. As the defendant had failed to provide a reconciled statement of account, the court expressed the view that it would be unjust to permit the defendant to sell the vehicle.
30. Meanwhile, in the case of **Global Babipo Holdings Limited** M. Odero J. restrained the defendant, by an injunction order, from further attachment of the applicant's moveable property.
31. In that case the plaintiff asserted that it had paid over two-thirds of the amount due under the Hire-purchase agreement, but the defendant's contention was that the unpaid portion of the loan was substantial.
32. The learned Judge expressed herself thus;

"It is not in dispute that the plaintiff company did enjoy a credit facility from the 1st defendant. What the parties appear unable to agree upon is the amount of the arrears due and owing to the bank. As a court, I am mindful of the principle that a lender ought to be able to realize his security. However, I must also weigh this as against any irreparable harm that may result to the plaintiff from the repossession and sale of the vehicles before the amount due and owing is ascertained. In my view, the balance of convenience favours the plaintiff company. Therefore, I am inclined to grant the plaintiff's prayer for interlocutory relief pending a full determination of the suit.

However, in view of the fact that, as I have stated above, the fact of the loan is not in dispute, I would be loathe to order the 1st defendant to reconstitute by way of mandatory injunction any vehicles already attached".

33. In those two cases, there was a dispute regarding the amount of money which the plaintiff still owed to the financial institution.
34. In contrast, there is no dispute in this case, concerning the balance of the loan still outstanding. Therefore, this case is distinguishable from those 2 authorities.
35. Secondly, the financial institution in this case has made available the statements of account, and the plaintiff has not raised any issues concerning the accuracy of the said statements.
36. A perusal of the statement of accounts reveals that there were several months when Athman failed to remit the installments which were due and payable.
37. Pursuant to clause 8 of the Chattels Mortgage, any default made by the grantor (Athman) in the payment of any amount, on its due date, would immediately thereafter give to the financial institution authority to take possession of the vehicle, and to dispose of it by either private treaty or by public auction.
38. In the circumstances, it would appear, on a prima facie basis, that Eco Bank was entitled to take possession of the vehicle which is the subject matter of this case, and to thereafter dispose of it either by private sale or by public auction.
39. It is important to note that the payment of monthly installments was not made conditional upon the status of the vehicle. In other words, the loan agreement was not subject to the contract of insurance.
40. As the plaintiff said, the only interest which Eco Bank had in the vehicle is that it was the security for the financial facility which the bank gave to Athman. Provided Athman was paying the monthly installments, and doing so within time, Eco Bank would have had no reason to take possession of the vehicle unless Athman violated any other term of the agreement between them.
41. It is Eco Bank who had taken steps to dispose of the vehicle. They had one so, according to Athman, without first giving him Notice or any Demand Letter.
42. Even assuming that Notice was not issued by Eco Bank to Athman, that would not, on a prima facie basis, have rendered unlawful or irregular the proposed sale. I so hold because clause 8 of

- the Chattels Mortgage expressly stipulated that the power to take possession of the vehicle and to dispose of it accrued immediately to Eco Bank, when there was a default; and that it accrued without any previous or further notice or concurrence on the part of the grantor (Athman).
43. In so far as the relief is sought against the insurer (AIG Kenya Insurance Company Limited) and Toyota Kenya Limited, I find that neither of them has been shown to be taking any steps to sell the vehicle. Therefore, in my considered view, no injunction could have issued against them.
44. During the hearing of the application Athman confirmed that the last payment was made by him in June 2014. That means that the arrears have accumulated substantially. In the circumstances, it would not be right to stop Eco Bank from selling-off the car whilst Athman was not paying the loan.
45. Athman cannot have his cake and eat it. He cannot keep a car which he was not paying for.
46. I therefore find that the plaintiff has not demonstrated any *prima facie* case with a probability of success. Accordingly, the application for an interlocutory injunction fails. The plaintiff will pay to the defendants the costs of the application.
47. Athman just needs to pay the balance of the loan, in order to become entitled to the car. He does not need any orders of the court to enable him fulfill his obligations.

DATED, SIGNED and DELIVERED at NAIROBI this 17th day of April 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Gachie for the Plaintiff

Bundotich for the 1st Defendant.

No appearance for the 2nd Defendant.

Miss Rintari for the 3rd Defendant.

Collins Odhiambo – Court clerk.