



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & TAX DIVISION**  
**CIVIL CASE NO 1 OF 2012**

**ALI ABDI SABRE.....PLAINTIFF**

**VERSUS**

**CMC MOTORS GROUP LTD.....DEFENDANT**

**RULING**

**INTRODUCTION**

1. The Plaintiff's Notice of Motion application dated and filed on 12<sup>th</sup> August 2014 was brought pursuant to the provisions of Order 40 Rules 1 (a), (b), 2 and 4, Order 8 Rule 3 and Order 51 Rule 3, 4(sic) of the Civil Procedure Rules, Sections 1A, 1B, 3, 3A, 63 (c) and (e) of the Civil Procedure Act and all other enabling provisions of the law and procedure. Prayers Nos (a), (b) and (b) (sic) were spent. The said application sought the following remaining orders:-

- a. Spent.
- b. Spent.

**b. (sic) Spent**

- c. **THAT the Honourable Court be pleased to set aside the consent orders entered into herein between the Plaintiff/Applicant and the Defendant/Respondent on 11<sup>th</sup> March 2013.**
- d. **THAT this Honourable court be pleased to grant an order compelling the Defendant/Respondent to tender proper accounts of the amounts paid to date by the Plaintiff/Applicant in settlement of the outstanding account.**
- e. **THAT the Plaintiff/Applicant be granted leave to amend the Plaint as had been set out in the Draft Amended Plaint annexed to the Supporting Affidavit.**
- f. **THAT the Defendant/Respondent be ordered to release Motor Vehicle Registration Number KBN 701N to the Plaintiff/Applicant herein pending hearing and determination of the suit.**
- g. **THAT the costs of the application be provided for.**

**PLAINTIFF'S CASE**

2. The Plaintiff's application was supported by his Affidavit that was sworn on 12<sup>th</sup> August 2014. His Supplementary Affidavit was sworn and filed on 3<sup>rd</sup> March 2015. His Written Submissions

- were also dated and filed on 3<sup>rd</sup> March 2015.
3. The Plaintiff's case was that the Defendant advertised for the sale of Motor Vehicle Registration Number KBN 701N (hereinafter referred to as "the subject motor vehicle") in a public auction that was to be held on 18<sup>th</sup> August 2014 without proper notice and proclamation.
  4. He stated that the Defendant had frustrated his efforts to meet the financial obligations by including payment of Motor Vehicle Registration Number KBM 149V which was not part of the contract. He said that the Defendant had failed to account for the monies it had received and also refused to furnish him with the Statements of Accounts of the amounts he had paid. It was his contention that the attachment of the subject motor vehicle was motivated by the takeover of the Defendant by Al Futtaim Auto & Machinery LLC.
  5. He therefore prayed that he be allowed to amend his Plaintiff to enable the court determine the real questions in controversy herein and that the consent he entered into with the Defendant be set aside as the same had been obtained by fraud, coercion, mistake, misrepresentation and undue influence.

### THE DEFENDANT'S CASE

6. On 22<sup>nd</sup> October 2014, Joseph Wambugu, the Defendant's Head of Credit and formerly the Asset Finance Manager filed a Replying Affidavit on behalf of the Defendant herein. The said Affidavit and Grounds of Opposition both dated 22<sup>nd</sup> October 2014 were filed on 23<sup>rd</sup> October 2014. The Defendant's Written Submissions was dated and filed on 26<sup>th</sup> November 2014.
7. Its grounds of opposition could be summarised as follows:-
  - a. **THAT the Plaintiff's application lacked merit and was an abuse of the court process.**
  - b. **THAT there had been inordinate and unexplained delay in bringing the present application.**
  - c. **THAT there were no grounds to review, vary and/or set aside the consent order that was given on 11<sup>th</sup> March 2013.**
  - d. **THAT the Plaintiff's prayer for injunction and release of the subject motor vehicle had been overtaken by events as the said vehicle was sold by public auction on 18<sup>th</sup> August 2014.**
8. The Defendant averred that on 5<sup>th</sup> January 2012, the court granted the Plaintiff a temporary injunction. It stated that the application for hearing came severally in court and on 6<sup>th</sup> March 2012, the court rejected the Plaintiff's application for an adjournment and vacated the said orders.
9. Subsequently, parties entered into out of court negotiations which culminated into the consent that was adopted as an order of the court on 11<sup>th</sup> March 2013. The Defendant averred that pursuant to the said consent, the Plaintiff issued it with cheques totalling Kshs 41,960,977.87 being the balance of purchase price of several motor vehicles but the same were returned unpaid due to insufficient funds.
10. The Defendant pointed that the Plaintiff sought orders from this court after injunction orders that had been given in **HCCC 15 of 2013 Kitale** in respect of the subject motor vehicle amongst others, were discharged. It contended that in any event, the subject motor vehicle had already been disposed of.
11. It was categorical that the taking over of its business by Al Futtaim Auto Machinery Company LLC did not affect the Plaintiff's obligations to it because it continued to exist as a separate entity. It was its contention that there was no legal basis to set aside and/or vary the consent that the parties had entered into. It therefore urged the court to dismiss the Plaintiff's application.

### LEGAL ANALYSIS

12. After poring over the contents of the lengthy affidavits that were filed by the deponents herein, the court found that the issues for its determination were really two (2) and that the same could be summarised as follows:-
  - a. **Whether the Plaintiff demonstrated grounds for the setting aside of the consent that**

was recorded on 11<sup>th</sup> March 2013?

b. **Whether the Plaintiff was entitled to an interlocutory injunction pending the hearing and determination of the suit herein?**

13. The Plaintiff submitted that consents are treated as contracts and must therefore satisfy all the ingredients of a valid and binding contract. He averred that the consent that was recorded herein was not entered in open court but rather it was from correspondence that was exchanged between the parties. He denied ever having signed the same and contended that the said consent was against public policy.
14. He pointed out the consent was in respect of five (5) vehicles, one (1) vehicle had been fully paid for while the remaining vehicles were sold by the Defendant. He averred that two (2) vehicles that were repossessed by the Defendant ought not to have been part of the said consent and because they did not form part of the consent and/or that their inclusion changed the substratum of the consent, this rendered the consent voidable.
15. It was also his contention that the consent was of no effect as the same was not endorsed by the court. He was also emphatic that the said consent was oppressive, unconscionable and tainted with conspiracy and misrepresentation on the part of the Defendant.
16. He referred the court to the case of **Gateway Insurance Company Limited vs Aries Auto Sprays [2011] eKLR** wherein the Court of Appeal held that a consent must be clearly entered into, it must be unambiguous and contain a default clause in case of breach. He also placed reliance on the case of **Civil Appeal No 11 of 1952 Ismail Sunderji Hirani vs Noorali Esmail Kassam (citation not given)** where the Court of Appeal held that it could interfere with a consent if there were grounds to show that it was not *bona fide*.
17. Notably, the case of **Gateway Insurance Company Limited vs Aries Auto Sprays** (Supra) addressed the question of whether or not the extension of time by a party to do an act that had been agreed to be done pursuant to a consent that had been recorded by the parties would be considered as altering, varying or setting aside the compromise. It was thus distinguishable from the facts of this case.
18. Additionally, the case of **Ismail Sunderji Hirani vs Noorali Esmail Kassam** (Supra) was not of assistance to the Plaintiff herein as he failed to justify why the court should interfere with the consent that was entered into in similar to how the appellant in the said case failed to demonstrate the same to the Court of Appeal.
19. On the other hand, the Defendant annexed several letters showing the discussions that were held between the parties before a written consent was finally drawn up, filed and recorded in court. It referred the court to the case of **Wasike vs Wamboko [1988] KLR** to buttress its argument that a consent could only be set aside on grounds of collusion, fraud, being contrary to public policy, there being absence of material facts or any other general reason that would enable the court to set aside the said agreement.
20. Evidently, the parties entered into negotiations several times with a view to having several motor vehicles including the subject motor vehicle that had been repossessed by the Defendant, released. There was evidence that despite agreements that had been entered into by the parties, the Plaintiff defaulted in effecting payments and in fact, cheques which he had issued to the Defendant were returned unpaid for insufficient funds.
21. The consent letter dated 26<sup>th</sup> November 2012 and filed on 27<sup>th</sup> November 2012 on page 55 of the Defendant's Replying Affidavit shows that Clause 6 therein provided as follows:-

**“That the defendant shall release the motor vehicles to the plaintiff subject to and upon the following terms and conditions:-**

**(d) That in default of payment of any one instalment, the unpaid balance of the debt together with interest shall become due and payable and the defendant shall be at liberty to seize, repossess and sell the motor vehicles to recover the balance of the debt together with the attendant costs.”**

22. The court order that endorsed the aforesaid consent verbatim on 11<sup>th</sup> March 2013, was on page 53 of the Defendant's Replying Affidavit. The same was duly executed by M/S Biwott Korir & Co Advocates and M/S Kefa Ombati & Co Advocates for the Plaintiff and Defendant respectively.

23. The Plaintiff's argument that he did not sign the said consent was neither here nor there as he was sufficiently represented by the said firm of M/S Biwoot Korir & Co Advocates. He did not provide any evidence to demonstrate that the said advocates acted without and/or contrary to his instructions and/or that the said advocates were no longer on record on his behalf. There was also no evidence of any factors that would vitiate the consent or make it voidable as he had seemed to suggest.
24. Going further, while counsel for the Plaintiff alluded to the Guarantee for Supply of Vehicles Exhibit marked "AKS 1" that was annexed to his Supplementary Affidavit for which he said stamp duty ought to have been paid, he did not advance this argument further making it difficult for the court to comprehend what his argument was.
25. All the court noted from the Defendant's submission was that on 16<sup>th</sup> December 2010, the Plaintiff issued the Defendant with a Guarantee and Indemnity in respect of the entire outstanding purchase price, interest thereon and costs in respect of the user of the motor vehicles and for payment of sums payable for the supply of the said motor vehicles. The Plaintiff executed the Transfer Forms and on the said date and 17<sup>th</sup> December 2010, he took delivery of the subject motor vehicles.
26. When the Plaintiff defaulted in effecting payments after entering into agreements and consents with the Defendant, the Defendant was perfectly entitled to repossess and dispose of the subject motor vehicles. On that ground alone, the Plaintiff was therefore not able to demonstrate that it had a *prima facie* case with probability of success, or that he would suffer irreparable harm that could not be compensated by way of damages if the interlocutory injunction was not granted or that the court could grant the interlocutory injunction if it was in doubt, criteria that was well set out in the case of **Giella vs Cassman Brown Company Limited (1973) EA 360.**
27. In any event, the subject motor vehicle was disposed of in a public auction on 18<sup>th</sup> August 2014, a fact that the Plaintiff did not rebut. This same vehicle was also subject of the proceedings in **HCCC 15 of 2013 Ali Sabre vs CMC Motors Group Limited & Another Kitale** where the court therein had granted orders restraining the Defendant from disposing it and several other vehicles by way of public auction. For all purposes and intent, the court was of the view that the matter in respect of the subject motor vehicle was *res judicata*.
28. Indeed there was no reason that was advanced by the Plaintiff to explain why he did not continue with the proceedings in Kitale as the court was of equal, concurrent and competent jurisdiction as this court. Parties must not be allowed to litigate in courts in different jurisdiction with the hope that they might get favourable orders in one (1) court.
29. Having said the above, the Defendant also appeared to have abandoned his prayer for injunction as he did not submit on the same in his written submissions. The court did not, therefore find it necessary to consider the question of injunction any further. The affidavit and submissions regarding the taking over of the Defendant by Al Futtaim Auto & Machinery LLC were side issues that had no relevance to the present application.
30. Similarly, the court did not deem it address itself to the question of whether or not the Plaintiff could be amended or if the Plaintiff should be issued with Statements of Accounts for the simple reason that it was not clear to the court whether he was still pursuing the said prayers. He did not provide proof to the court that he had applied for the said Statements of Accounts and that the Defendant denied him the same.
31. It is the responsibility of an applicant to be diligent in making out its case regarding the prayers it seeks and not leave it to the imagination of the court. Indeed, a court must be very careful not to wade into and/or descend into the arena of a dispute between parties as it must always remain a neutral arbiter.
32. Assuming that the Plaintiff was still keen on pursuing those issues, it would definitely prejudice the Defendant as the Plaintiff did not demonstrate or support his case that it was in the interests of justice that he be granted an order to amend his plaint particularly because there was no evidence that the Defendant would or had consented to the amendments the Plaintiff was seeking.
33. Accordingly, having found that the Plaintiff had not made out a *prima facie* case with a probability of success, the court found that the question of him suffering loss that could not be compensated by way of damages if the interlocutory judgment was not granted would not arise. The court was not in any doubt in this matter to warrant it granting the Plaintiff an interlocutory injunction on a balance of convenience.

34. Most importantly, there was indeed no ground that was demonstrated by the Plaintiff that would persuade this court to set aside and/or vary the consent order that was recorded on 11<sup>th</sup> March 2013. It was immaterial that it was not recorded in court for the reason that the Deputy Registrar has power to endorse written and duly executed consents. Parties are at liberty to extract orders emanating from the recording of such consents and also to act on the contents of consent recorded in such manner without the intervention of the court.

**DISPOSITION**

35. For the reasons foregoing, the Plaintiff's Notice of Motion application dated and filed on 12<sup>th</sup> August 2014 was not merited and the same is hereby dismissed with costs to the Defendant herein.

36. For the avoidance of doubt, the status quo order that was granted by consent of the parties herein on 22<sup>nd</sup> September 2014, is hereby discharged, set aside and/or vacated.

37. It is so ordered.

**DATED** at **NAIROBI** this      **14<sup>th</sup>** day of **May** 2015

**J. KAMAU**

**JUDGE**

**READ, DATED** and **DELIVERED** at **NAIROBI** this      **14<sup>th</sup>** day of **May** 2015

**E.K.O. OGOLA**

**JUDGE**