



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO.3 OF 2015**

**COUNTRY MOTORS LIMITED .....1ST PLAINTIFF/APPLICANT**

**COUNTRY FARMS LIMITED .....2ND PLAINTIFF/APPLICANT**

**VERSUS**

**CMC MOTORS GROUP LIMITED .....DEFENDANT/RESPONDENT**

**R U L I N G**

1. The plaintiffs/applicants application dated 22.1.15 prays for the following reliefs:

1. **THAT this application be certified as urgent and be heard ex-parte in the first instance with respect to prayers 2 and 4 of the application**
2. **THAT pending the inter-parties hearing and determination of this application the Honourable Court be pleased to issue a temporary injunction restraining the defendant/respondent, its servants, agents, employees or any other person acting through or under the instructions from repossession, removing, disposing, interfering with selling, wasting, damaging, alienating, or in any other way dealing with motor vehicles registration Nos. KBE 690V, KBE 679V, KBC 099G and chassis 010062, KBA 001G, Suzuki Vitara, KBW 099D (WMA26WZZ9CAM1579842), KBW 0991 (WWMA26WZZ8CM579847), KBW 0091 (WMA26ZZ1CM5798521), KBW 9001 (WMA26WZZ2CM579861), KBW 990K(WWA26WZZ5CM579899), KBW 909K (WMA26WZZ9CM579856);**
3. **THAT: the honourable court be released to issue a temporary injunction restraining the defendant/respondent, its, servants, agents, employees or any other person. acting through or under its instructions from repossessing, removing, disposing, interfering with, selling, wasting, damaging, alienating or in any other way dealing with motor vehicles registration numbers KBE 690V, KBE 697V, KBC 099G & Chassis 010062, KBA 001G Suzuki Vitara, KBW 099D (WMA26WZZ9CM579842), KBW 0991 (WMA26WZZSCM579852), KBW 9001 (WMA26WZZCM579861), KBW 990K (WMA26WZZ5CM579899) KBW 909K (WMA26WZZ9CM579856) pending hearing and determination of this suit.**
4. **THAT a date for hearing inter-parties be given;**
5. **THAT the costs of this application be awarded to the Plaintiffs/Applicants.**

2. The application is supported by the sworn affidavit of **PRITHPAL PANDHAL**, the director sworn on 27.1.15. The gist of the application is that the plaintiffs purchased several motor vehicles as evidenced on the face of the motion. The same were financed by **M/S ALIOS FINANCE KENYA LIMITED** which paid US Dollars 557648 on 17.12.13 to the defendant trucks were subsequently delivered to the plaintiffs later in December,2013.

3. However the defendant has since issued two invoices for Kshs.18,778,271/= in respect to arrears for

the said vehicles. Thereafter the defendant sent **M/S SUPERVIEW AUCTIONEERS** to repossess the said vehicles. The plaintiff further states that on 16.1.15 the said auctioneers went back claiming a further sum of Kshs.22,977,244.67 for non payment of motor vehicle registration Nos. KBA 001G, KBE 690V and KBE 679V. The above action by the defendant prompted the plaintiffs to file this suit and the application.

4. Vide the replying affidavit of **B. M. KINYANZUI** sworn on 25.2.15 the respondent opposed the said application arguing that indeed the applicants are indebted to the respondent. Whereas the applicant acknowledged the contract dealing with the applicants in respect to the 6 trucks it went on to argue that by the time the transaction took place V.A.T Bill 2014 (Act No.35) had not been enacted and it could not therefore levy the same upon the applicants. He went further to state that by the time the transaction took place in August 2013, there was exemption of V.A.T in respect to such kind of trucks. Since the deliveries were done in December, 2013 and the Act came into operation in 2013 September there was therefore every reason to demand VAT from the applicants.

5. I have perused the entire application together with the rival affidavits as well as the parties submissions herein. The issue to determine for now is whether in light of the facts herein the threshold in **GIELLA VRS CASSMAN BROWN & CO., LTD [1973] EA 358** has been met by the applicants namely:

- a. **that there is a prima-facie case with a probability of success;**
- b. **that if the injunction is refused, an award of damages would not be adequate compensation**
- c. **whether the balance of convenience tilts in the applicants favour;**

6. There is no doubt that there was a contract between the parties herein. The trucks were supplied to the plaintiffs and the same was paid by M/S ALIOS FINANCE KENYA LIMITED on 17/12/13. The amount paid was US dollars 557648. This payment was in respect to motor vehicles reg. Nos. KBW 099D, KBW 099L, KBW 009L, KBW 900K, KBW 990K and KBW 909K.

7. Apparently, I do not find any invoice or payment or contract in respect to motor vehicle KBE 690K, KBC 0996 and chassis No.010062 and, KBA 001G, Suzuki Vitara. In the above series the respondent has demanded a sum of Kshs.22,977,244.07/=. Apparently the respondent has not replied to the same.

In light of the above facts its clear that there are two invoices or demands from the respondent, namely the sum of shs.22,977,244.67/= which I find unsupported for now and Kshs.18,778,271/=. It would therefore be difficult to know whether the sum of Kshs.18,778,271/= is the balance of the purchase price for the trucks or the V.A.T. Chargeable. The same is charged in Kenya shillings, whereas the invoice and the initial payment was in US Dollars. This I find is something worth subjecting to strict proof.

8. The question of when V.A.T. Is chargeable cannot be determined by way of interlocutory application. The respondent contents that it could not have issued the invoice as the units remained uncollected until December 2013 as the trailers were being fabricated (Refer to annexure PP5). Whether this was part of the agreement is something evidence ought to be taken.

9. Consequently I think I have said much to show that the application ought to be allowed. There are weighty issues on the face of this application which I find that unless temporary injunction is granted applicants stand to suffer loss and damages. In any event the applicants have made substantial payment towards the purchase of the said trucks.

10. The application dated 22.1.15 is allowed in terms of prayer (2) and (3) pending the hearing and determination of the suit. The costs shall abide the outcome of the suit.

**Dated, signed and delivered this 28TH day of OCTOBER 2015.**

**H. K. CHEMITEI**

# **JUDGE**