



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII

CIVIL SUIT NO.6 OF 2015

IRENE NYASUGUTA ASESE..... PLAINTIFF/APPLICANT

VERSUS

S M P CAPITAL LTD.....1ST DEFENDANT/RESPONDENT

OKUKU AGENCIES AUCTIONEERS.....2ND DEFENDANT/RESPONDENT

RULING

Introduction

1. By a Notice of Motion application dated and filed on 12th March 2015 brought under the provisions of **Order 40 Rule 1 and 2 of the Civil Procedure Rules, Section 1a, 1b, 3, 3a, and 63(e) of the Civil Procedure Act** and all enabling provisions of the law, the Plaintiff/applicant sought the following remaining prayers:

1) Spent.

2) Spent.

3) **THAT** pending the hearing and determination of this suit inter-parties, the Honourable court be pleased to issue a temporary order of injunction to restrain the 1st defendant/respondent by herself and or through her agents/servants from committing a breach of contract by impounding and seizing motor vehicle registration **NOS.KBZ 026J, KCA 034D, KBZ 955H, KBZ 921K, KBZ 028J, KBZ 029J, and KBZ 069P** and order the respondent/defendant to release motor vehicles registration numbers **KBZ 026J and KCA 034D** to the applicant/plaintiff.

4) **THAT** the Honourable court be pleased to issue an order staying any public auction in respect to motor vehicle registration **KCA 034D and KBZ 026J** till the hearing and determination of this application interparties from committing a breach of contract by impounding and seizing motor vehicles registration numbers **KBZ 026J and KCA 034D** to the applicant/plaintiff.

5) **Costs of this application be borne by the defendants/respondents.**

2. The application was supported by the following grounds:

a) The applicant/plaintiff is the beneficial owner of the vehicle registration Nos.**KBZ 955H, KBZ 921K, KBZ 028, KBZ 026J, KBZ 069P, KCA 034D and KBZ 029J** by virtue of hire purchase Agreement entered on the 26th day of June 2014.

b) The defendants/respondents acting on herself and or through **OKUKU AGENCIES AUCTIONEERS** seized and towed motor vehicle registration numbers **KBZ 026J** and **KCA 034D** to her yard.

c) That the hire purchase agreement is scheduled to lapse on the 26th day of June 2016 and so far made as deposit of Ksh.4.9 (Four million, six hundred thousand) only and monthly payments of Ksh.1.6 M (One million, six hundred thousand) only **TOTALLING TO KSH.6.5M** (Six million, five hundred thousand shillings) only as against the purchase price of Ksh.9.8M (nine million, eight hundred and thirty eight thousand) only.

d) THAT the sum paid so far is over 50% of the purchase price.

e) The 2nd defendant/defendant did not follow the laid procedure by issuing a notice, taking on inventory of seized motor vehicle together with its luggage of which act is not only illegal but unconstitutional.

f) The applicant is apprehensive that the 1st respondent/defendants may proceed to attached and seized motor vehicle in the same manner.

g) The 2nd defendant/respondent may auction the seized motor vehicles after the expiry of 7 (seven) days and or in disregard of the law and the rights of the applicant.

h) THAT the 1st respondent is in breach of the hire purchase agreement by seizing two (2) motor vehicles valued at Ksh.3,700,000/= (Three million seven hundred thousand shillings) only when the sum payable monthly is Ksh.350,000/= only.

i) The 1st respondent/defendant is much aware about the re-negotiated hire purchase agreement which is yet to be signed.

j) The applicant has established a prima facie case and the balance of convenience tilts towards her.

Plaintiff's affidavit evidence

3. The said application was supported by the affidavit of the Plaintiff sworn on 12th March 2015 in which she reiterated the grounds on the face of the Notice of Motion application and added that on 16th June 2014 she signed a Hire Purchase agreement with the 1st Respondent/Defendant marked Exhibit 'INSI' in which she became a beneficial owner of 7 vehicles namely:

KBZ 955 H

KBZ 921 K

KBZ 028 J

KBZ 026 J

KBZ 069 P

KBZ 029J and

KCA 034D

4. Pursuant to the said Hire Purchase agreement the applicant paid to the 1st Respondent an initial sum of **Ksh.4,900,000/=** and was to remit a sum of **Ksh.465,500/=** monthly towards the clearance of the

remaining sum.

5. The Applicant avers that in the month of October, 2014, she approached the 1st Respondent through the telephone for a renegotiation of the monthly remittance so as to have the sum of **Ksh.465,500/=** reduced to **Ksh.350,000/=** and that as at the time of filing of this instant application, she had paid a total of **Ksh.1,700,000/=** to the 1st Respondent which the 1st Respondent acknowledge.

6. The Applicant further claims that the renegotiated sum of Ksh.350,000/= together with the arrears of two months was to be paid at the end of the month of March, 2015. It is the Applicant's case that the 1st Respondent was to prepare print and send the renegotiated agreement for signing at Kisii which arrangement the 1st Respondent reneged on, when on 7th March 2015 the 2nd Respondent proceeded to secretly seize motor vehicles registration numbers **KBZ 026J** and **KCA 034D**.

7. The Applicant contends that she was not given any notice of the intended, seizure and therefore the due legal process was not followed thereby rendering the Respondent's actions illegal *ab initio*.

8. The Applicant further took issue with the fact that the seizure of the motor vehicles was done in her absence and in the absence of her driver whereupon each motor vehicle was given a value of Ksh.800,000/= in the absence of a valuation report.

9. The Applicant also reiterated that the 1st Respondent was demanding a total sum of Ksh.8,304,042/= to be paid within 7 days from the 9th March 2015 in total disregard of their Hire Purchase Agreement.

Respondent's statement of ground of opposition:

10. The Defendants/Respondents filed a statement of grounds of opposition dated 17th June 2015 in which they stated that the application dated 12th March, 2015 was bad in law, malafides and defective as it did not comply with the provisions of **Order 5 Rule 1(1) of the Civil Procedure Rules** in so far as no summons ordering the Defendant to appear within a specified time were caused to issue. The Respondents further stated that the Applicant's suit offends **Order 5 Rule 1(3) and 1(5), Order 5 Rule 3 and Section 19 of the Civil Procedure Act**.

11. The Respondent's further stated that the suit was misconceived, incompetent and bad in law since it was clear that the applicant was materially in breach of the terms of the Hire Purchase Agreement made between her and the 1st Respondent as she had failed to remit the necessary installments, issued cheques that were not honoured and continued in her default even after seeking and obtaining relief orders from the court.

12. The Respondents reiterated that the repossession of motor vehicles KBZ 026J and KCA 034D by the 1st Respondent through the 2nd Respondent was lawful pursuant to clause No.4 of their Hire Purchase Agreement and that the Applicant was guilty of misleading the court through the distortion of facts.

13. The Respondents contended that their action to seize the motor vehicles was in line with **Section 16(3) (b) of the Hire Purchase Act Cap.507 Laws of Kenya** which entitles them to reposes the hired goods in the event of a default by the Applicant for 2 successive months and that the seizure was aimed at protecting the subject matter from damage or depreciation pending the hearing of the suit.

14. The Respondent lamented that the Applicant continues to use the hired motor vehicles as public service vehicles thereby earning an income but was not paying the agreed installments thereby unjustly benefitting from the ex-parte orders she obtained from the court through the concealment of material facts.

15. The Respondents contended that the exparte orders should be discharged in view of the fact that the Applicant was defaulter who has persisted in her default as she enjoys the use of the vehicles for her own

gain without paying her installments in blatant breach of the Hire Purchase Agreement.

Subsequent applications:

16. Following the obtaining of ex-parte Interim Orders on 13th March, 2015 by the Plaintiff/Applicant in the application dated 12th March, 2015, the Respondents/Defendants filed 4 subsequent applications on 18th May, 2015, 24th June, 2015, 28th July, 2015 and 10th August, 2015. In the application dated 14th May, 2015 filed on **18th May, 2015**, the Respondents/Defendants sought orders for:

1) **THAT** the Notice of Motion filed herewith be certified as urgent, service thereof be dispensed with in the first instance and this Application be heard ex-parte.

2) **THAT** consequent upon it being certified urgent, the said Notice of Motion together with the other four (4) pending urgent applications filed in this court on 12th March, 2015, 18th May, 2015, 24th June, 2015 and 31st July 2015 be admitted to hearing during the High Court August vacation of 2015.

17. In the Defendants/Respondents' application filed on **24th June 2015** they sought orders for:

1) Spent.

2) **THAT** pending the hearing and determination of the Defendants' application dated 14th May 2015, and pending the hearing and determination of this application and in order to protect the suit motor vehicles from damage and depreciation, this Honourable Court be pleased to issue an order prohibiting the Respondent/Plaintiff whether by herself her employees, servants or agents from using the suit motor vehicles registration Nos.KBZ 069p, KBZ 029J, KBZ 026J, KBZ 028J, KBZ 955H and KCA 034D.

3) **THAT** pending the hearing and determination of the Defendant's application dated 14th May 2015 and pending the hearing and determination of this application, in order to protect the suit motor vehicles from damage and depreciation, this Honourable Court be pleased to issue an order permitting the 1st Defendant by itself, its employees, servants or agents to remove the suit motor vehicles registration Nos.KBZ 069P, KBZ 029J, KBZ 026J, KBZ 028J, KBZ 955H and KCA 034D from the custody and control of the Respondent/Plaintiff into the custody and control of the 1st Defendant's business premises in Nairobi.

4) **THAT** in the interest of justice and in adherence to the law on institution of suits, this suit be forthwith transferred to the High Court in Nairobi for hearing and determination.

5) **THAT** this Honourable Court be pleased to strike out the Complaint filed in Court on 12th March, 2015 as it discloses no reasonable cause of action law, is slanderous frivolous or vexatious and is an abuse of the process of Court.

6) **THAT** costs of this application be awarded to the 1st Defendant.

18. In the Defendants' application dated **28th July 2015**, the Respondents sought orders for:

1) Spent.

2) **THAT** pending the hearing and disposal of this suit, and for the purpose of preventing the wasting, damaging, alienation, sale, removal or disposition of the suit motor vehicles registration Nos. KBZ 955H, KBZ 028J, KBZ 029J, KBZ 069P and KBZ 921K, this Honourable Court be pleased to issue an order requiring the Plaintiff whether by herself, her employees, servants or agents, to return the said suit motor vehicles to the Defendant's premises in Nairobi from which

they were originally supplied to the Plaintiff or to hand them over to the 1st Defendant's authorized agents or servants, or to surrender them to such other safe neutral premises as the Court may direct.

3) **THAT** costs of this Application be awarded to the 1st Defendant.

19. The Respondent's application dated **10th August, 2015** sought the following orders:

1) Spent.

2) Consequent upon it being certified urgent, the said Notice of Motion together with the other four (4) pending urgent applications filed in this court on 12th March 2015, 18th May, 2015, 24th June 2015 and 31st July 2015 be admitted to hearing during the High Court August vacation of 2015.

20. During the hearing of the applications on 12th October 2015 the Defendants/Respondents' advocate Mr. Topot informed the court that the Respondent no longer wished to pursue the application dated 10th August 2015 but would be pursuing the rest of their 3 applications which, taken together, were basically seeking the preservation of the motor vehicles the subject of the Hire Purchase agreement by holding them in a neutral ground pending the hearing and determination of the main suit.

21. The Respondents expressed fears that the motor vehicles could be depreciating in value as time goes by if the applicant was allowed to use them as public service vehicles without paying the monthly hire purchase repayments.

22. Looking at the initial application dated 12th March 2015 and the 3 subsequent and related applications, I note that even though the court had stated that only the first application dated 12th March 2015 would be dealt with the parties had in their written submissions also canvassed the issues raised in the subsequent applications thereby making it necessary and indeed desirable that this ruling covers all the 4 applications, the main one being the application dated 12th March 2015.

Submissions by the Plaintiff/Applicant

23. In her written submissions dated 20th July 2015 and filed on 22nd July 2015, the Applicant's counsel argued that she had satisfied all the conditions of granting injunctive orders as envisaged in the case of **Giella vs Cassman Brown [1973] EA 358**. The Applicant also relied on the case of **Suileman vs Amboseli Resort Ltd. (2004) 2 KLR 589**.

24. The Applicant's counsel submitted that motor vehicle registration No.KCA 034D was not part of the hire Purchase Agreement and therefore, its seizure by the respondents was questionable and illegal.

25. The Applicant argued that the 1st Respondent failed to honour their renegotiated deal by proceeding to attach two motor vehicles thereby leading to the filing of the instant suit. The applicant contended that she had paid a total sum of Ksh.6,600,000/= towards the purchase price of Ksh.12,900,000/= and therefore the 1st Respondent was not entitled to seize the motor vehicles.

26. The Applicant contended that since the Hire Purchase Agreement was signed in Kisii, the cause of action arose in Kisii and therefore the Respondents had no basis for seeking the transfer of the instant suit to Nairobi.

27. The Applicant submitted that **Section 16(3) (9)** of the **Hire Purchase Act** gives this court the powers to make interlocutory orders and give directions as to the custody of the suit motor vehicles taking into account the fact that the Plaintiff had paid a sum equivalent to 3 vehicles with a balance of Ksh.800,000/= and that the orders sought by the 1st Respondent in some two subsequent application would prejudice the applicant.

Respondents Submissions

28. The Respondents filed their written submissions on 6th July 2015 in which they outlined the background of the case, the dispute at hand, the Respondents 2 subsequent applications and the issues for determination.

29. The Respondents stated the issues for determination as follows:

- 1) Whether the suit should be transferred to the High court at Nairobi.**
- 2) What is the agreed Hire Purchase price?**
- 3) Whether the Plaintiff is entitled to the interlocutory injunctive order.**
- 4) Whether the 1st Defendant/Respondent is entitled to retake and resume possession of the suit motor vehicles.**

30. On the place of suing the Respondents submitted that both the 2 Defendants carry on business in Nairobi where all the negotiations and executions took place and that being the case, **Section 15 of the Civil Procedure Act** requires that every suit be instituted in the court within the local limits of whose jurisdiction the Defendant actually and voluntarily resides or carries on business. Moreover, clause 9 of their Hire Purchase Agreement expressly provided that any dispute would be tried by a court having jurisdiction where the agreement was signed. In this regard, the Respondents relied on the case of **Hangzhou Agrochemical Industries Ltd vs Panda Flowers Ltd NBI HCCC No.97 of 2009 (2012).**

31. The Respondents submitted that the character of the proceedings, the nature of the remedy sought, the interests of the litigants, the more convenient administration of justice, the expense which the parties are likely to incur in transporting and maintaining witnesses, the balance of convenience, questions of expense and possibility of hardship, all favour the transfer of this suit to Nairobi. On the aspect of the Hire Purchase price, the Respondents referred to their Hire Purchase Agreement No.HP00325 executed by both parties on 26th June 2014 in which the total price of the 7 vehicles was stated as Ksh.12,950,000/= plus hire charges of Kshs.3,122,000/= bringing the total sum payable to the 1st Respondent to Ksh.16,072,000/=.

32. The Respondents therefore contended that it was totally dishonest for the applicant to allege that the purchase price was Ksh.9,828,000/= out of which she had paid Ksh.6,500,000/=.

33. On whether or not the Applicant is entitled to the interlocutory injunctive orders the Respondents submitted that the Applicant had defaulted in the repayment of the installments for the months of November 2014 to date and therefore the Plaintiff had not met the conditions set out in the case of **Giella vs Cassman Brown** (*supra*) for the granting of an interlocutory injunction.

34. According to the Respondents, the Applicant was in default of repaying the monthly installments and therefore under the provisions of clause 4 of the Hire Purchase Agreement the 1st Respondent was entitled to reposses the suit motor vehicles without any notice to the applicant. The Respondents relied on the decision in the case of **Amicabre Travel Services Ltd vs Alios Kenya Finance Ltd. Nairobi (Milimani) HCCC No.436 of 2013.**

35. On whether the 1st Respondent was entitled to retake custody of the suit motor vehicles the Respondents submitted that **clause 2(b)** required the Plaintiff to be punctual with the monthly repayments failure of which clause 4 of the said agreement entitles the 1st Respondent to resume control and custody of the suit vehicles.

36. According to the Respondents, **clause 16(3)** of the **Hire Purchase Act** empowers the court to grant interlocutory orders prohibiting the use of the said vehicles and giving orders as to their custody pending

the hearing of the suit in order to prevent them from being damaged through depreciation.

37. The Respondents submitted that **Section 16(3) (b)** of the **Hire Purchase Act** permits the 1st Respondent, where 2 installments are due and unpaid, to remove all or some of the vehicles to any premises under their control for the purposes of protecting them from damage and depreciation pending the hearing of the suit.

38. The Respondents concluded their written submissions by seeking orders that:

a) The ex-parte Interlocutory Orders issued by this Honourable Court on 13th March 2015 be set aside.

b) The suit be transferred to the High Court in Nairobi (Milimani Commercial and Admiralty Division) for trial and final determination.

c) In the meantime, the Plaintiff be prohibited from using the suit motor vehicles as public service vehicles or in any other manner whatsoever.

d) Pending the hearing and determination of the Defendants application and or suit, this court be pleased to issue an order permitting the 1st Defendant to remove the suit motor vehicle from the custody and control of the Plaintiff into the custody and control of the 1st Defendant's premises in Nairobi.

e) Costs of this application.

39. During the hearing of the application on **12th October, 2015** counsels for both parties highlighted their filed submissions as follows:

Mr. Ogari counsel for the applicant submitted that the repossession of the hired motor vehicles by the Respondents was unlawful because it was done without notice and without regard to the renegotiated terms of their agreement.

Mr. Ogari reiterated that since the applicant had already paid Ksh.6,600,000/= towards the hire purchase agreement, the amount was sufficient to purchase 3 similar vehicles with a credit balance of Ksh.800,000/= and thus, the 1st Respondent ought to have considered the sum already paid instead of the default and outstanding installments arrears.

40. Counsel for the applicant argued that the sum listed as penalties are not provided for in the **Hire Purchase Act** and that the 1st Respondent would recover the sum of money they claimed in the counterclaim together with interest. In the event it succeeded in the main case and would thus not be prejudiced or suffer any loss if the orders sought were granted.

41. Furthermore, Mr. Ogari contended that the Hire Purchase Agreement was to run till the year 2016 and as such, the applicant had ample time to pay all the outstanding arrears without any threat of repossession.

42. Lastly, Mr. Ogari submitted that motor vehicle registration No.KCA 034D did not form part of the schedule of vehicles under the Hire Purchase Agreement and therefore, its attachment was unlawful and it ought to be released back to the applicant forthwith.

43. The Respondents' counsel Mr. Topot on his part submitted that the applicant was in outright breach of their duly registered Hire Purchase Agreement No.90000500 and that the **Hire Purchase Act** at **Section 16(3) (b)** permits the 1st Respondent to reposses the hired goods in the event of such a default/breach.

44. Mr. Topot added that the mere fact that the Hire Purchase Agreement was to lapse in 2016 was not a

ground or an excuse for the applicant to default in the monthly repayments and that it was instead, a clear admission of default.

45. The counsel for the Respondent denied that there was any attempted renegotiation of the Hire Purchase installments amount by stating that the alleged renegotiation was a statement made by the applicant's counsel from the bar. Counsel further contended that the figures of the amount so far due from the applicant were clearly spelt out in the hire purchase agreement which figures, the applicant was attempting to distort by putting across amounts that were neither factual nor proven.

46. Lastly, counsel for the Respondents submitted that the mandatory conditions set out by the **Giella vs Cassman Brown (supra)** case had not been met by the applicant.

47. From the above facts and the submissions by the parties, I derive the issues requiring this court's determination as follows:

- 1) Whether the Plaintiff and the Defendants entered into a hire purchase agreement.
- 2) Whether the 2 motor vehicles, the subject matter of the Hire Purchase agreement were repossessed by the Respondents.
- 3) Whether the applicant was in default of the monthly installments as at 7th March 2015.
- 4) Whether the terms of the hire purchase agreement were renegotiated in October 2014 as alleged by the applicant.
- 5) Whether motor vehicle registration number KCA 034D formed part of the scheduled vehicles hired by the applicant.
- 6) Whether this suit should be transferred to Nairobi for hearing and determination.

Analysis and Determination

48. A review of the foregoing pleadings, depositions and submission together with all the cited authorities by both parties will form the basis of my final orders. My analysis of the entire application and response thereto reveals the following factual matters:

- 1) THAT on 26th June 2014 the applicant and the 1st Respondent entered into a hire purchase agreement in respect to some 7 motor vehicles.**
- 2) THAT on 7th March 2015, the 2nd Respondent under the instructions of the 1st Respondent repossessed 2 vehicles out of the 7 hired vehicles citing default in the monthly repayments.**
- 3) THAT the applicant is in default of the monthly installments since November, 2014 to the time of the repossession and to-date.**
- 4) The applicant claims that the terms the hire purchase agreement were in October 2014 renegotiated with the 1st Respondent over phone and that she was awaiting the confirmation of the renegotiated terms when the 1st Respondent surprised her with the repossession.**
- 5) THAT motor vehicle registration No.KCA 034D did not form part of schedule of vehicles hired by the applicant.**

Of great importance however is whether or not this matter should be transferred to Nairobi High Court.

Against the above facts and issues, I will now consider the law.

Jurisdiction:

49. On the place of suing the Respondents in their application dated 24th June 2015 sought to transfer this case to Nairobi for hearing and determination. The Hire Purchase agreement signed by the applicant and the respondent on 24th June 2014 stipulated at **clause 9** as follows;

“Limitation of Jurisdiction. Any dispute arising out of or in connection with this Agreement, will be referred to, only at the place of signing of the Agreement and If triable by court of law, shall be tried and determined by the court having jurisdiction over the place where this agreement has been signed.”

50. I have carefully perused the said Hire Purchase agreement and noted that it does not expressly state where exactly it was signed and therefore, clause 9 of the agreement is not very helpful in assisting the court in determining the place of suing. Consequently, this court falls back on case law and the provisions of the **Civil Procedure Act** and **Rules** on this aspect.

51. **Section 17** and **18** of the **Civil Procedure Act** do not provide for the transferring of a case from one High Court to the next while **Order 47 Rule 6** of the **Civil Procedure Rules** only states that the High Court at the registry where a court case has been instituted can direct that the case be heard at a particular place **Order 47 Rule 6** of the **Civil Procedure Rules** states:

“6(1) Every suit whether instituted in the Central Office or in a District Registry of the High Court shall be tried in such a place as the court may direct; and in the absence of any such direction a suit instituted in the Central Office shall be tried by the High Court sitting in the area of such Central Office and a suit instituted in a District Registry shall be tried by the High Court sitting in the area of such District Registry.

(2) The court may of its own motion or on the application of any party to a suit and for cause shown order that a case be tried in a particular place to be appointed by the court:

Provided always that in appointing such particular place for trial the court shall have regard to the convenience of the parties and of their witnesses and to the date on which such trial is to take place, and all the other circumstances of the case.”

52. My reading and understanding of **Order 47 Rule 6** is that it does not empower the High Court to transfer cases from one High Court station to the next, but allows the High Court to direct that the case can be heard at particular place.

53. Faced with a similar situation, Emukule J, had inter alia following to say in the case of **Rapid Kate Services Ltd –vs- Freight Forwarders Kenya Ltd & 2 others [2005] I KLR 292:**

“Although there is only one High Court in Kenya which sits in different areas as directed by the Chief Justice (as opposed to subordinate courts established under various laws) it is not forbidden for a Kenyan High Court sitting in one location to order a transmission or allocation of a case file before him to another judge sitting in another location. It must be a matter of discretion for the judge and it must be for compelling reasons which would be for the purposes of ensuring justice and this is all within the inherent power of the Court under Section 3A of the Civil Procedure Act...Whereas there is no express provision in the Civil Procedure Act Cap 21 for transfer of cases from one High Court to another, it does not mean that in a proper case the court cannot transfer a case before it to another registry of the High Court. The fact that there is no provision on the matter cannot prevent the High Court from deciding it, if by doing so, it will be able to deliver justice. In doing so the Court will employ its unlimited and inherent jurisdiction.”

54. In the instant case both the Defendants carry out their business in Nairobi and ideally it would have been desirable to have the case tried in Nairobi. However having regard to the urgent nature of the case at hand, time being of essence, I decline to direct that the case be transferred to Nairobi so as to have a speedy trial and determination.

55. It was not disputed by either of the parties that they entered into a Hire Purchase Agreement and that the applicable Act in this case is the **Hire Purchase Act**. Under **Section 2(1) of the said Act**, a hire purchase business is defined as follows:

“a business whether carried alone or with other business, of entering into hire purchase agreement, whatever the hire purchase price under any agreement.”

56. **Schedule 1** of the hire purchase agreement made on 26th June 2014 between the applicant and the 1st Respondent listed the following vehicles as the vehicles the subject of the agreement:

KBZ 955 H

KBZ 921 K

KBZ 028 J

KBZ 026 J

KBZ 291 K

KBZ 029 J

KBZ 069 P

57. Under the said Hire Purchase deal the applicant is referred to as the “**Hirer**” while the 1st Respondent is the “**Owner**.”

58. The said Schedule 1 of the agreement also contained the particulars of Finance as follows:

Price of the vehicles	Ksh.12,950,000/=
Less deposit	Ksh. 4,900,000/=
Balance	<u>Ksh. 8,050,000/=</u>
Add hire charges	Ksh.3,122,000/=
TOTAL	<u>Ksh.11,172,000/=</u>

59. The payment terms also contained in the same Schedule 1 was as follows:

Payable in 23 monthly installment of Kshs.465,500/= commencing on 28th July 2014 and the final 24th installment of Ksh.465,500/= payable on 26th June, 2016.

60. Under **clause 2(b)** of the said agreement, the hirer agreed:-

“To pay punctually and without fail whatsoever, the hire rentals as set out in Schedule 1 such payments shall be made by cash or cheque to the offices of the owners situated in Nairobi or to any place that may from time to time be notified by the owners to the Hirer provided it is hereby agreed that any monies sent by post or bankers order or by direct debit shall be at the

sole risk of the Hirer.”

61. **Clause 4** of the agreement stated as follows in respect to the consequences of a default or breach by the Hirer:

“If the Hirer:-

- a) Defaults in paying or punctually paying any of the hire rentals or any other sum or sums payable to the Owners under this agreement; or**
- b) Is in breach of this agreement or any part thereof or suffers any such breach to be committed; or**
- c) Does or allows to be done any act or omission which may prejudice or jeopardize in any way or to whichever extent the Owner’s property or any other right or rights in the said vehicle/s; or**
- d) Permits any judgment against him/her/it in relation to the vehicle/s or which may in any way affect the vehicle/s to remain unsatisfied.**

Then on the happening of any such event or events the Owners may, without prejudice to their claim for arrears of monthly rentals or payment of any interest or any other sum or sums due or for damages for breach of this agreement, immediately terminate the hiring and shall thereupon without notice or demand and notwithstanding that they may have waived some previous default or defaults on the part of the Hirer, become entitled to the immediate possession of the said vehicle/s and to retake and resume possession of the same and the Hirer shall thereupon cease to be entitled to the possession of the vehicle/s without the express consent in writing of the Owners. By signing this agreement the hirer also understands that in case of default or late payment of 30 days or more the Owner will automatically submit this information to the Credit Reference Bureau and that the hirer is explicitly allowing this.”

62. The applicant/Hirer has alleged that in the month of October 2014, she entered into a renegotiation of the deal with the 1st respondent/owner in which it was agreed that the monthly repayments would be reduced to Ksh.350,000/= instead of the initial agreed sum of Ksh.465,500/= and which reduced figure she was to commence paying at the end of March 2015. The applicant further claimed that the 1st Respondent was, under the new “*renegotiated*” deal, to prepare a fresh agreement and send to her the same for her execution in Kisii.

63. I find the applicant’s above allegation to be incredible and untenable to say the least, because other than her allegation before the court that such a new arrangement existed, the applicant did not provide any tangible proof of such a monumental change or intended change in their terms of engagement.

64. I find that a prudent businessman or woman, under the above circumstances, should have been kept in follow up any agreement arrived at verbally on phone, if indeed such an agreement existed, with a letter, an email or a memo confirming the agreed new terms. I find it hard to believe that the fundamental terms and conditions of a signed and registered Hire Purchase Agreement could be altered in a casual manner over a phone call as the applicant wanted this court to believe. It is trite law that a written agreement can only be altered by another written agreement and not abstract oral agreement.

65. The basis of the applicant’s case is that the 1st Respondent did not fulfill the terms of their renegotiated deal by not only failing to send to her the new contract for her execution, but by repossessing the vehicles prematurely before the expiry of the agreed period of end of March 2015.

66. I find that if indeed such a new deal existed, then the applicant was aware that she would be on the receiving end of the deal in the event it was not reduced into writing to make it binding on both parties.

Instead, the applicant appears to have sat on her laurels and gone into a deep slumber from which she was awoken by the repossession of the vehicles.

67. It is not in dispute that the applicant had defaulted in her monthly repayments from November 2014 up to the time of the repossession in March 2015 and even to-date. I find that the applicant is in this application seeking the court's equitable order of an injunction, yet she has come to court with unclean hands which are tainted by her own default.

68. The applicant did not expect an owner, who had hired out a record 7 vehicles, to just fold his arms, lament and wait for her to pay the already agreed monthly installments on her own terms, at her own time and convenience. The applicant has under those circumstances not shown that she has an arguable case, against the Respondent.

69. The consequences of default of the payment of the installments were well spelt out at clause 4 of the Hire Purchase Agreement. I therefore find that the 1st Respondent was well within its rights to invoke the provision of the said clause 4 of their agreement and reposses the motor vehicles.

70. The duty of the court is to respect the contracts entered into by the parties and not to rewrite the same. In the instant case, there is only one contract entered into on 24th June 2014 and allowing the applicant's claim on the alleged new reduced repayment terms would be tantamount to the court rewriting the contract between parties.

71. The plaintiff and the 1st defendant voluntarily entered into a contract in order to regulate their relationship, therefore, restraining the 1st respondent from exercising its rights under the contract would be tantamount to the court infringing on the 1st respondent's rights of repossession of the vehicles by imposing new terms to the contract when, in fact, the applicant had defaulted in the payments of the installments when they became due and she persists in such a default to-date.

72. The applicant has not explained to court why to-date exactly one year later after her initial default, she has not even in good faith made any efforts to make even a single payment to the 1st respondent, even if it is on the reduced monthly installment of Ksh.350,000/= which she alleges had been renegotiated.

73. The applicant is instead seeking to have her cake and eat it at the same time by seeking court's orders to stop the 1st respondent from exercising its rights under the agreement so that she can retain the said motor vehicles without meeting her financial obligations under the agreement.

74. This court finds that no valid grounds have been given by the applicant so as to entitle her to the grant of orders of interlocutory injunction. The applicant has not met any of the mandatory conditions set out in the case of **Giella vs Cassman Brown** (*supra*) for the grant of interlocutory injunction which are that the applicant must show that she has a prima facie case with high chances of success, and that she would suffer irreparable loss which would not be compensated by award of damages and if the court is in doubt, it will decide on the application on the balance of convenience.

75. Indeed, it is the 1st respondent who stands to suffer irreparable loss and damage should the orders sought by the applicant be granted in view of the fact that the applicant has been in default all this while and it is not known if she will be able to pay the outstanding sum due together with interest, when the time comes, bearing in mind that she was in default of their terms of agreement barely 6 months after the agreement was entered into. The subject matter of these proceedings are motor vehicles which the applicant continues to use for gain as public service vehicles without remitting even a single cent to the 1st respondent. The court is also alive to the fact that the said vehicles continue to depreciate in value as time goes by.

76. I however find that motor vehicle registration No.KCA 034D, which was also repossessed by the 1st defendant on 7th March, 2015 did not form part of the list of vehicles listed in Schedule 1 of the Hire

Purchase Agreement as subject of the agreement. The 1st respondent was not justified in repossessing it and it would only be just and fair that the sale of the said motor vehicle be stayed pending the outcome of the main suit.

77. For the foregoing reasons, only part of prayer 4 of the applicant's Notice of Motion dated 12th March 2015 has been granted. For clarity and avoidance of any doubt, the part granted is in respect to an order staying any public auction in respect to motor vehicle registration number KCA 034D pending the hearing and determination of the suit.

78. The upshot of this court's ruling is that in order to preserve the motor vehicles the plaintiff/applicant is from today henceforth prohibited from using the suit motor vehicles listed in Schedule 1 of the Hire Purchase Agreement as public service vehicles which vehicles will, pending the hearing and determination of the main suit, be placed into the custody and control of the 1st Defendant, in their Nairobi premises after their valuation is jointly carried out by valuers of both the Applicant and 1st Respondent's choice within 7 (**Seven**) days from today's date.

79. The court did not find any merits in the rest of the prayers made in the said application dated 12th March 2015 and they are hereby dismissed. In the circumstances, the interlocutory orders issued by Nagilla J, on 13th March 2015 are hereby vacated and/or discharged.

80. For the reasons stated hereinabove in this ruling, the Respondent's plea to transfer this case to Nairobi is disallowed.

81. The respondents will have the costs of this application.

82. Bearing in mind the nature of this case, it is also ordered that a hearing date for the main suit be taken in the registry on priority basis.

83. It is so ordered.

Dated, signed and delivered in open court this 17th day of November, 2015

HON. W. OKWANY

JUDGE

In the presence of:

- M/S Ogari for the Plaintiff/Applicant
- M/S Topot for the Defendants/Respondents
- Mr. Ogega: Court clerk