



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 436 OF 2015

FLOURINE MBINYA SILA.....1ST APPLICANT

DERRICK SILA NGONYO.....2ND APPLICANT

VERSUS

KENYA WOMEN FINANCE TRUST LIMITED.....RESPONDENT

RULING

1. By Notice of Motion application herein dated 9th September, 2015 the Plaintiff/Applicant seeks the following Orders;

1. *This application be heard during the Court Vacation.*
2. *This application be certified as urgent and be heard ex-parte in the first instance due to the urgency nature of the reliefs sought and service of this application be dispensed with in the first instance.*
3. *As an interim measure of protection, the Respondent be and is hereby restrained whether by itself, its officers, agents, employees, servants, branches or any other person whomsoever from advertising for sale, selling whether by way of public auction, private treaty or in any other way however, interfering by with the 2nd Applicant's ownership of the motor vehicle registration number KBK 560B pending the hearing and determination of this application inter-partes.*
4. *As an interim measure of protection, the Respondent be and is hereby restrained whether by itself, its officers, agents, employees, servants, branches or any other person whomsoever from advertising for sale, selling whether by way of public auction, private treaty or in any other way however, interfering by with the 2nd Applicant's ownership and possession of the motor vehicle registration number KBK 560B pending the hearing and determination of the dispute by way of arbitration.*
5. *An order directing the parties to refer the dispute to arbitration within 14 days.*
6. *Costs of this Application to the Application.*

2. The application is premised on the grounds stated therein and is supported by affidavit of **DERRICK SILA NGONYO** sworn on 9th September, 2015. The suit herein is filed solely for the purpose of obtaining interim measures of protection under Section 7(1) of the Arbitration Act pending the referral of this matter to arbitration.

3. The application is opposed by the Defendant vide a Replying affidavit sworn by **CAROL**

CHERLIYOT on 28th September, 2015. The Respondent does not oppose prayer 5 of the application which seeks to refer the matter to arbitration, but opposes other prayers on the basis that the Plaintiff/Applicant has not made full disclosure to this court, especially the existence of a similar suit in Makindu SRM CC. NO. 249 of 2015 which has not been stayed. The other ground upon which the Respondent opposes the application is that the Applicant has annexed hereto a false Statement of Account showing the balance or loan arrears as Ksh.250,000/= instead of Kshs.650,484/=. The Respondent submitted that the Applicant is therefore guilty of non disclosure of material information and this court should not give the Applicant any orders.

4. With the leave of Court parties filed submissions which I have considered. The only issue for determination is whether an injunction in terms of prayer 4 can be granted as the parties proceed to arbitration in terms of prayer 5 of the application.
5. The Respondent does not oppose prayer no. 5 for reference of this matter to arbitration. If that is so, the question that arises is, what would be the purpose of arbitration if the subject matter of the suit is dissipated and is no longer in existence?
6. I have noted the grounds upon which the Respondent objects to the application. One is that there has been non-disclosure of the matter filed in the Makindu case. This is correct since in the verifying affidavit the Plaintiffs do not refer to the Makindu court matter; yet in paragraph 12 of the plaint the Plaintiffs avers that there is no suit pending and that there have been no previous proceedings in any court between the Plaintiffs and the Defendant over the same subject matter. This was a blatant mischief, and a clear non disclosure of material information. The other non disclosure concerns the statement of account that the balance due is Ksh.250,000/= instead of Kshs.650,484/=. I am not at this stage able to know who is telling the truth. That is a matter of evidence and so this court cannot at this stage tell if the Applicant is misleading the court.
7. It has since emerged that the suit motor vehicle is in the possession of the Defendant. It therefore means that the said vehicle is in safe hands provided it is not sold pending the referral of this matter to arbitration and the finalization of arbitration.
8. In the upshot, I make the following Orders;
 - a. This matter is herewith referred to arbitration and the parties to do that within 10 days from today.
 - b. The Defendant or its agents are herewith restrained from advertising for sale, selling either by public auction or private treaty the motor vehicle registration no. KBK 560B pending the determination of the dispute by way of arbitration.
 - c. It is noted that the said motor vehicle KBK 560B is in the possession of the Defendant who is now obligated to ensure the safety and security of the same as long as it is in its custody.
 - d. Costs herein shall be for the Defendant/Respondent.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 4th DAY OF DECEMBER 2015.

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. Thangei h/b Muumbi for the Plaintiff/Applicant

N/A for Defendant/Respondent

Teresia - Court Clerk