



**REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. 472 OF 2013**

**OCEANIC OIL LIMITED ::: PLAINTIFF**

**VERSUS**

**TOYOPET AUTOMOBILE (K) LIMITED :::::::::::::::::::::: 1ST DEFENDANT**

**GEOFREY GITHIKA KIAMA ::::::::::::::::::::::::::::::: 2ND DEFENDANT**

**DENIIS MUKURIA ::::::::::::::::::::::::::::::::::::::: 3RD DEFENDANT**

**RULING**

1. The application before the court is a **Notice Of Motion** dated **31<sup>st</sup> October, 2013** filed in court on **1<sup>st</sup> November, 2013**. It seeks the following prayers:-
  1. *That this application be certified urgent and be heard ex-parte in the first instance on account of the urgency.*
  2. *That pending inter-partes hearing and determination of this application, this Honourable court be pleased to grant an order of temporary injunction, restraining the 1st, 2nd and 3rd Respondents whether by themselves, servants, agents, employees or anyone claiming through them or on their behalf from doing the following acts or any of them, that is to say from offering for sale, advertising, selling or completing the sale of the motor vehicle registration number KBT 110E and this order be served on the Registrar of motor vehicles.*
  3. *That pending inter-partes hearing and determination of this application, this Honourable court be pleased to order the 1st, 2nd and 3rd Respondents whether by themselves, servants, agents, employees or anyone claiming through them to deliver the motor vehicle registration number KBT 110E to the Plaintiff or at such place as may be determined by the court together with the transfer document, the logbook and all other documents relating to the said motor vehicles.*
  4. *That prayer 2 above be granted pending hearing and determination of this suit.*
2. The application is premised on the grounds set out therein and is supported by the affidavit of **JOSEPH KAROBA** dated **31<sup>st</sup> October, 2013** and a Supplementary Affidavit dated **29<sup>th</sup> day of November, 2013**. It is the Applicant's case that on or about September, 2012 the 1<sup>st</sup> Defendant

offered and the Plaintiff agreed to purchase the Motor Vehicle Registration Number KBT 110E at a price of Kshs.6,500,000/= and thereafter paid a deposit of Kshs.2,000,000/=. The Applicant alleges that the 2<sup>nd</sup> Defendant was its representative to the said sale and that the 2<sup>nd</sup> Defendant would eventually on its behalf take possession of the said motor vehicle after the transaction was complete. The Plaintiff alleges that he made a further payment of Kshs.2,900,000/= through the 2<sup>nd</sup> Defendant. The Plaintiff, however, does not state how the balance of the purchase price was paid, but alleges that the transaction was completed and the said motor vehicle was given to the 2<sup>nd</sup> Defendant, who, instead of giving it to the Plaintiff, took it as his property, and indeed purported to sell the same to the 3<sup>rd</sup> Defendant. The Plaintiff now seeks orders of this court to stop the Defendants from dealing with the said motor vehicle howsoever until this matter is heard and determined.

3. The application is opposed by all the three Defendants. The 1<sup>st</sup> Defendant has filed a defence on 6<sup>th</sup> March, 2014 in which it denies all the allegations. It has also filed a Replying Affidavit to this application through its Director **Mr. Mehr Abdul Mumin** dated **5<sup>th</sup> March, 2014**. The 1<sup>st</sup> Defendant denies any agreement between it and the Plaintiff but acknowledges that it sold the suit motor vehicle to the 2<sup>nd</sup> Defendant and annexed a copy of the sale agreement marked **“MAM1”**. According to the 1<sup>st</sup> Defendant, the 2<sup>nd</sup> Defendant represented that he was paid by the Plaintiff and that the deposit of Kshs.2,000,000/- was to be employed by his employer the Plaintiff. This was indeed done on 19<sup>th</sup> September, 2012. The balance of the purchase price was to be paid by the 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> Defendant duly did the as per annexure **“MAM2”** and the 1<sup>st</sup> Defendant duly released the suit motor vehicle to the 2<sup>nd</sup> Defendant. The 1<sup>st</sup> Defendant states that they have no further interest in the matter as they had discharged their duty as per Annexure **“MAM4”**.
4. The 2<sup>nd</sup> Defendant has opposed the application through a Replying Affidavit dated and filed in Court on **21<sup>st</sup> November, 2013**. He has denied that he was a representative of the Plaintiff in the said sale and states that he bought the vehicle for himself. When he saw the said vehicle on show, he had to pay Kshs.100,000/- cash in order to secure the vehicle and to take it out of the showroom. He has attached an agreement as **“GGK1”** showing that he was the buyer of the said motor vehicle. The purchase price was Kshs.6,500,000/= plus Kshs.425,000/- being the insurance. He declined to take the insurance cover and so the price remained at Kshs.6,500,000/=. Even at this stage the Plaintiff was not in the picture. The 2<sup>nd</sup> Defendant states that he had worked for the Plaintiff as a commission agent and that the Plaintiff owed him an accumulated sum of Kshs.2,000,000/=. He negotiated this pay with the Plaintiff who paid this sum directly to the 1<sup>st</sup> Defendant. He disowned a letter dated 20<sup>th</sup> September 2012 by the Plaintiff in which the Plaintiff had informed the 1<sup>st</sup> Defendant that the 2<sup>nd</sup> Defendant was their agent and that they the Plaintiff had paid Kshs.2,000,000/= in the 1<sup>st</sup> Defendant’s account and that they would finance the balance through a bank loan. The 2<sup>nd</sup> Defendant states that this letter was a fabrication. It is noted that the 1<sup>st</sup> Defendant also denied receiving the said letter. The 2<sup>nd</sup> Defendant then narrates, rather convincingly, how he paid the balance of the purchase price:-
  - **Cash of Kshs.2,400,000 deposited by the 2<sup>nd</sup> Defendant to the account of 1<sup>st</sup> Defendant. See Annexure “GG2”.**
  - **Personal cheque of the 2<sup>nd</sup> Defendant for Kshs.790,000/=.**
  - **A trade in of the 2<sup>nd</sup> Defendant’s motor vehicle KBQ 675S for Kshs.1,200,000.**
  - **The final payment of Kshs.504,000/= paid on 3<sup>rd</sup> October, 2012 by the 3<sup>rd</sup> Defendant see “GGK3(a)”, “GGK 3(b)” and “GGK4”.**

The 2<sup>nd</sup> Defendant was then given the possession of the said motor vehicle in September, 2012 and has been using the same openly and without any question from the Plaintiff for more than one year. He subsequently sold the same to the 3<sup>rd</sup> Defendant.

5. The 3<sup>rd</sup> Defendant opposed the application through his Affidavit dated and filed in court on 14<sup>th</sup> November, 2013. The 3<sup>rd</sup> Defendant states that he took the possession of the suit property as security of a debt owed to him by the 2<sup>nd</sup> Defendant of over Kshs.3,000,000/= pursuant to a Sale Agreement dated 18<sup>th</sup> September, 2013. The undertaking was that the 2<sup>nd</sup> Defendant would look for money to pay the 3<sup>rd</sup> Defendant his debts but if the 2<sup>nd</sup> Defendant failed to get the money the 3<sup>rd</sup> Defendant would be at liberty to sell the suit motor vehicle and any sums realized over Kshs.3,000,000/= would be given back to the 2<sup>nd</sup> Defendant.
6. I have carefully considered the application and the opposition to the same. I would not be able to determine who is telling me the truth until this matter is heard and determined in full trial. So at this stage the issues to be determined are whether or not, in terms of the established principles upon which an injunction maybe granted, the Plaintiff:-
  - i. ***Has established a prima facie case with probability of success.***
  - ii. ***Will suffer loss which are not likely to be adequately compensated for by damages.***
  - iii. ***When the court is in doubt, who has the balance of convenience?***
7. I will go straight to the point. The Plaintiff's case as presented is not very convincing. To begin with, if the Plaintiff was the party buying the suit motor vehicle, why did the Plaintiff not start the process itself? Granted that the Plaintiff paid Kshs.2,000,000/= why did the Plaintiff not pay the balance of the purchase price? The Plaintiff has alleged that they paid Kshs.2,900,000/= through the 2<sup>nd</sup> Defendant. There is no evidence of such claim. If the Plaintiff initially paid Kshs.2,000,000/= directly to the 1<sup>st</sup> Defendant, why would the Plaintiff later pay Kshs.2,900,000/= through the 2<sup>nd</sup> Defendant? It is easier to believe the 2<sup>nd</sup> Defendant that he withdrew the Kshs.2,400,000/= money from his bank and paid the 1<sup>st</sup> Defendant. The other issue is why did the Plaintiff not conclude the purchase? Why did it not pay the balance even after admittedly paying Kshs.4,900,000/= ? Where has the Plaintiff been since it paid the Kshs.4,900,000/= ? And when did the Plaintiff actually make the payments? It is noted that the transaction herein commenced in September, 2012. The 2<sup>nd</sup> Defendant paid Kshs.2,400,000/= to the 1<sup>st</sup> Defendant on 3<sup>rd</sup> October, 2013 more than one year after the transaction began. The Plaintiff does not state why it delayed to complete the transaction if indeed the transaction was its own. The 2<sup>nd</sup> Defendant on his part states that he had no money to conclude the transaction sooner and that indeed for this delay, the 1<sup>st</sup> Defendant penalised him in interest. The 1<sup>st</sup> Defendant also completely, and rather convincingly, disowns knowledge of the Plaintiff in this transaction. Without making a conclusive finding on this issue, it is clear to me that the Plaintiff's claim in this suit would only be justified to the extent that this court would want to establish the circumstances under which the Plaintiff paid Kshs.2,000,000/= in the transaction. It is clear to me that the balance of the purchase price was paid wholly by the 2<sup>nd</sup> Defendant. That being so, the Plaintiff has established a *prima facie* case, but I am not very sure, as at now, that it is a *prima facie* case with a likelihood of success. That answers issue number one.
8. For the second issue, and in the light of what I have stated above, if the Plaintiff's case is established, it can only be limited to Kshs.2,000,000/= which the Plaintiff paid. In that event, the Plaintiff's claim is a money claim and would be adequately compensated by damages. Needless to add, and to answer the third issue, the balance of convenience does not tilt in favour of the Plaintiff.
9. One thing which bothers me is this. If the Plaintiff was the owner and the initiator of the said transaction, which commenced in September, 2012, the Plaintiff was obviously aware that the 2<sup>nd</sup> Defendant had imposed himself on the transaction. What did the Plaintiff do to salvage its position or so assert its rights? Why did the Plaintiff come to court after one year when the 2<sup>nd</sup> Defendant had had possession of the suit motor vehicle for over one year? Was this action by the Plaintiff an afterthought? Does it point to a later disagreement of whatever nature between the Plaintiff and the 2<sup>nd</sup> Defendant? Whatever the disagreement, the inclusion of the 1<sup>st</sup> and the 3<sup>rd</sup>

Defendants in this suit is wrong. They appear to me to have been innocent parties who successfully concluded the transaction they may have had with the 2<sup>nd</sup> Defendant and moved on. 10. In conclusion, I decline to grant the orders sought in this application which I herewith dismiss with costs to the Respondents.

**DATED, READ AND DELIVERED AT NAIROBI**

**THIS 23RD DAY OF MAY 2014**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

Gathua for Plaintiff

M/s Gathera holding brief for S. M. Chege for Defendants

Teresia – Court Clerk