



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURT
CIVIL CASE NO 326 OF 2013

JOSEPH GICHUKI MUGO.....1ST PLAINTIFF

JOHN MBUGUA NG'ANG'A.....2ND PLAINTIFF

VERSUS

FUJI MOTORS E.A. LIMITED.....1ST DEFENDANT

MOHAMED GANI.....2ND DEFENDANT

GHALIB KARA.....3RD DEFENDANT

SAMIA KAUR.....4TH DEFENDANT

DON COLYN.....5TH DEFENDANT

RULING

INTRODUCTION

1. The Plaintiffs' Notice of Motion application dated and filed on 26th July 2013 was brought under the provisions of Order 40 Rule 1, Order 51 of the Civil Procedure Rules, 2010, Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act Cap 21 of the laws of Kenya and all the enabling provisions of the law. It sought the following prayers:-
 - a. Spent.
 - b. **THAT pending the hearing and determination of the suit the Honourable Court be pleased to grant a temporary injunction restraining the Defendants herein from disposing, alienating, impounding, seizing, repossessing, soliciting or advertising for sale and/or in any manner dealing with motor vehicle (sic) registration numbers KBQ 473X and KBT 931P from breaching, or terminating the motor vehicle sale agreement entered into with the Plaintiff.(sic)**
 - c. **THAT this Honourable Court be pleased to grant a temporary injunction restraining the**

- Defendants by themselves or their agents and the D.C.I.O Starehe and D.C.I.O Mombasa whether by themselves their officers, servants and/or agents from doing any of the following acts that is to say from impounding, repossessing, detaining, arresting or in any way interfering with the Plaintiffs (sic) possession, user and enjoyment with motor vehicles registration numbers KBQ 473X and KBT 931P.**
- d. **THAT the Defendants be compelled to forthwith complete the transaction between them and the Plaintiffs by releasing original logbooks for motor vehicle registration numbers and transfer documents for motor vehicles numbers KBQ 473X and KBT 931P respectively.**
 - e. **THAT pending *inter partes* hearing of the application, interim orders do issue in terms of prayers (b) and (c) above.**
 - f. **THAT costs of this application be provided for.**
2. When the matter was placed before Havelock J on 29th July 2013, he granted prayer nos (b) and prayer (c). The said orders are in conflict with each other as under prayer (b), a temporary injunction was granted **pending the hearing and determination of the suit** (emphasis court) herein while prayer (c), an injunction was granted **pending the *inter partes* hearing of the application** (emphasis court), which hearing was scheduled for 9th August 2013. When the said orders lapsed on 9th August 2013, which was a public holiday, Kimondo J reinstated the same.
 3. Except for 19th September 2013, the Plaintiffs never requested the court to extend the interim orders. Based on the assumption that the orders that had been granted on 29th July 2013 were temporary in nature, this court extended the said orders *suo moto* whenever the matter came up in court so as not to render its decision nugatory, in the event it was to finally find in favour of the Plaintiffs herein.
 4. On 7th October 2013, the 1st, 3rd and 4th Defendants filed a Notice of Motion application dated the same date seeking to vacate the orders for injunction in the event the Plaintiffs did not deposit a sum of Kshs 2,000,000/=. They withdrew the said application on 18th December 2013 paving way for the hearing of the Plaintiffs' application presently before this court for determination.
 5. The court has found it necessary to address the issue of the orders initially granted by Havelock J at this preliminary stage for the simple reason that if indeed there was a temporary injunction pending the hearing and determination of the suit herein as had been captured in the order of 29th August 2013, it would therefore be a waste of judicial time to render a decision herein when in fact parties should be gearing to proceed for the trial of this matter.
 6. Perusal of the order by Kimondo J made on 12th August 2013 alluded to **“the interim order first granted on 29th July 2013”**. On page 1 of the Plaintiffs' written submissions dated and filed on 28th February 2014, they indicated that they had sought the following prayers:-

“2. THAT pending the *inter partes* (emphasis court) hearing and determination of this application...”

7. This prayer was a complete turn-around from what was contained in the Notice of Motion application dated and filed on 26th July 2013. It does appear from their written submissions and those of the 1st, 3rd and 4th Defendants dated 13th March 2014 and filed on 17th March 2014 that both the Plaintiffs and the said Defendants were *ad idem* that the orders that had been granted by Havelock J were temporary and pending the *inter partes* of the application herein. This also does appear to have been the understanding of all the courts that handled this matter.
8. While this court cannot review the said orders on its own motion and the fact that it is not sitting on appeal over the decision of Havelock J, it has inherent power under Section 3A of the Civil Procedure Act to make such orders as may be necessary for the ends of justice or to prevent the abuse of the court process. The drafting of the prayers sought by the Plaintiff was misleading bearing in mind prayer (e) shown hereinabove. The Plaintiffs could not purport to seek, in the body of the same application, an order pending the *inter partes* hearing in terms of prayers which they had sought to have been granted pending the hearing and determination of the suit. It is not clear to this court whether the same was an inadvertent error or it was intentional to obtain orders pending the hearing and determination of the suit herein irregularly.

9. To prevent the abuse of the court process, this court shall for all purposes and intent of the present application deem the orders granted by Havelock J on 29th July 2013 to have been made pending the hearing and determination of the application herein. In any event, the court has power to set aside an order that has been made *ex parte* under Order 51 Rule 15 of the Civil Procedure Rules, 2010 which provides as follows:-

“The court may set aside an order made ex parte.”

10. The conclusion arrived at by this court is premised on Section 1B (1)(a) of the Civil Procedure Act which provides that the court shall handle all matters presented before it for the purpose of attaining the just determination of the proceedings amongst other aims. It would be grossly unjust and inequitable for the Plaintiffs to enjoy orders of temporary injunction pending the hearing and determination of the suit granted on an *ex parte* basis which would have effectively been granted without affording the 1st, 3rd and 4th Defendants an opportunity of canvassing their arguments as to whether or not the Plaintiffs had made out a *prima facie* case so as to be granted an interlocutory injunction pending the hearing and determination of the suit herein.
11. Having said so, the court will now proceed to determine the Plaintiffs’ application on its own merits. The grounds under which the said application was premised were generally that:-
- The 1st and 4th Defendants were the registered owners of motor vehicles registration numbers KBQ 473X and KBT 931P respectively.**
 - The 1st Plaintiff entered into a written agreement dated 23rd March 2013 with the 1st Defendant for the purchase of motor vehicle registration number KBQ 473X for a sum of Kshs 1,550,000/= while the 2nd Plaintiff entered into a written agreement with the 4th Defendant dated 26th June 2013 for the purchase of KBT 931P in the sum of Kshs 2,450,000/=.**
 - The Plaintiffs took possession of the said vehicles and repaired the same whereat the values of motor vehicles registration numbers KBQ 473X and KBT 931P were currently valued at Kshs 2,590,000/= and Kshs 4,000,000/= respectively.**
 - The 1st and 4th Defendants reported at the Criminal Investigation Offices at Thika that the said vehicles had been stolen and that they had been abusing the criminal process to repossess the said vehicles.**
 - The Plaintiffs were to pay the balance of the purchase price upon receipt of logbooks of the said vehicles.**
 - The right of repossession was removed by dint of the provisions of the Hire Purchase Act as over 70% of the purchase price had been paid.**
 - There was imminent and grave danger that the Defendants would tamper with the said vehicles to the detriment of the Plaintiffs and thus cause them to suffer irreparable loss and harm that could not be compensated by way of damages.**

AFFIDAVIT EVIDENCE

12. The Plaintiffs’ affidavits in support of the said application were both sworn on 26th July 2013. In his affidavit, the 1st Plaintiff said that he found the 2nd Defendant at a yard full of vehicles and he had informed him that the 1st Defendant was selling a motor vehicle belonging to one Peter Kimani Karungo who had purchased the said vehicle from it but had defaulted on hire purchase terms. He contended that he gave the 2nd Defendant paid a sum of money in cash at Family Bank Thika Branch instead of a banker's cheque he had purchased as the 2nd Defendant had informed him that the 1st Defendant preferred cash instead of bankers’ cheques. It was his contention that the transaction was captured on CCTV.
13. He said that they went back to the yard and wrote down an agreement with the 1st Defendant which was signed by the 2nd Defendant, a copy which he annexed to his affidavit. He averred that he took possession of the vehicle and repaired it to the tune of Kshs 922,500/= It was his evidence that the balance of Kshs 200,000/= was to be paid upon receipt of the logbook, an amount he was willing to deposit in court. He deponed that although the 2nd Defendant asked him to send the

- balance by Mpesa, he declined to do so until he received the said logbook.
14. On his part, the 2nd Plaintiff stated that he paid a sum of Kshs 1,900,000/= to the 2nd Defendant in cash at Equity Bank in Thika after he had met the 2nd Defendant who informed him of the sale of a motor vehicle which the 1st Defendant wanted to dispose of quickly. He said that he paid the 2nd Defendant and the 5th Defendant a further sum of Kshs 100,000/= whereupon he took possession of the vehicle. He said that he was willing to deposit the balance of Kshs 450,000/= in court.
 15. Both Plaintiffs annexed copies of the receipts evidencing repairs to the said vehicles, which they contended had appreciated in value. It was their case that the property passed to them and that the Defendants were trying to criminalise a civil matter by reporting the matter to the police at Thika.
 16. In his Replying Affidavit sworn on 14th August 2013 on behalf of the 1st and 4th Defendants, the 3rd Defendant who was the 1st Defendant's Managing Director stated that the subject motor vehicles were indeed on sale but that they were never sold to the Plaintiffs as alleged or at all. He said that the 1st, 3rd and 4th Defendants were not aware of the agreements entered into with the Plaintiffs who, he said, were unknown to them. He deponed that the said agreements were forgeries as they were never executed by the 1st Defendant.
 17. It was his evidence that the said vehicles were stolen from the 1st Defendant's yard at Thika whereupon the matter was reported to the police. He contended that the 2nd Defendant was being sought by the police in that regard and they had never authorised the 2nd or the 5th Defendants to sell the vehicles on their behalf as they were neither the employees, directors, shareholders or authorised officials of the 1st Defendant.
 18. It was his further contention that the purported sale of the vehicles was illegal, null and void as no good title could pass to the Plaintiffs, the said vehicles having been stolen from their yard. He was categorical that the 1st Defendant's official mode of payment was cash deposit in its bank account or by bankers' cheques and not by cash as had been alleged by the Plaintiffs or at all.
 19. It was therefore the 1st, 3rd and 4th Defendants' case that the Plaintiffs transacted with conmen who were not associated with the 1st Defendant and being victims of their own misfortunes, the issue of suffering any loss did not arise. They therefore prayed for the dismissal of the Plaintiffs' application.
 20. The 2nd Plaintiff's Supplementary Affidavit sworn on 3rd September 2013 was sworn on the same date in which he reiterated the averments in the two (2) Supporting Affidavits and added that they had a cause of action against the 1st, 3rd and 4th Defendants, who in a bid to swindle them of their money embezzled by their own employees, had alleged theft.. It was their contention that if there was any dispute, then the said Defendants should direct the same to the 2nd and 5th Defendants.

LEGAL SUBMISSIONS BY THE PLAINTIFF

21. The Plaintiffs submitted that they had made out a *prima facie* case with a probability of success as they had furnished agreements to support their claim of *bona fide* ownership of the said vehicles. It was their contention that there was an implied warranty that they would enjoy quiet possession of the goods.
22. They argued that the 1st, 3rd and 4th Defendants had admitted that the said vehicles were on sale and that good title had passed to them. They argued that the said Defendants had not adduced any evidence to impugn their said good title to the vehicles. They relied on the case of **Mrao vs First American Bank of Kenya Limited & 2 Others (2003) KLR 125** where the court held that a *prima facie* case in a civil application included but was not confirmed to a genuine and arguable case.
23. They submitted that damages would not be an adequate remedy and referred the court to several cases where the common thread was that damages was not a substitute of an interlocutory judgment- See **Joseph Siro Mosioma vs HKCK & 3 Others [2008] eKLR** and **Waithaka vs ICDC (2001) KLR at pg 774**.
24. They also referred the court to the cases of **Mawji vs USIU (1976) KLR 185** and **Sophia House Limited vs Barclays Bank of Kenya Limited [2005] eKLR** to buttress their argument that the court must protect the status quo pending the hearing and determination of a suit.

25. In respect to the issue of a balance of convenience, the Plaintiffs relied on the cases of **Francis Opiyo Ng'onga vs Housing Finance Co of Kenya Limited [1998] eKLR**, **Prof David Musyimi Ndeti vs Housing Finance Company of Kenya Limited [2007] eKLR** and **Dr Joseph Kpkoech Yego & Another vs Allan Mujisu & Others [2004] eKLR** to fortify their case.
26. They therefore prayed that they be granted the orders they had sought as they had satisfied the test set out in the case of **Giella vs Cassman Brown (1973) EA 358** in which it was held that:-

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

LEGAL SUBMISSIONS BY THE 1ST, 3RD AND 4TH DEFENDANTS

27. On their part, the 1st, 3rd and 4th Defendants submitted that the Plaintiffs were in possession of stolen motor vehicles contrary to Section 352 of the Penal Code. They contended that there was no evidence adduced by the Plaintiffs to show that they were abusing the court process. They argued that the Plaintiffs' assertion that they paid the alleged monies was not supported by any evidence and that having dealt with a person who was unknown to the 1st Defendant, the purported sale was contrary to Section 23 of the Sale of Goods Act which provides that a person who is not the owner of goods cannot purport to pass good title to third parties in respect of that property.
28. They denied that the provisions of the Hire Purchase Act were applicable in the case herein and pointed out that the Plaintiffs had obtained the court orders by concealing relevant material facts. They referred the court to the case of **Civil Application Nai No 140 of 1995 Uhuru Highway Development Limited vs Central Bank of Kenya & Others** (unreported).
29. It was their contention that the Plaintiffs had not proved that they had a *prima facie* case with a probability of success for the reasons, amongst others, that the vehicles were stolen, they Plaintiffs were unknown to them, the monies were purportedly paid to the 2nd and 5th Defendants who were not the 1st Defendant's agents, proxies or employees or at all and that there was no proof that the monies were ever paid to them amongst others.
30. They submitted that they were not liable for the loss occasioned to the Plaintiffs who had not shown that they would suffer irreparable loss if the orders sought were not granted. They placed their reliance on the case of **HCCC No 1234 of 2002 Air Land Tours & Travel vs National Industrial Credit Bank Limited** (unreported) and several other cases to support their argument.
31. It was their argument that they continued to suffer loss as the values were reducing each day and prayed that the orders issued herein be vacated as equity will not assist law breakers.

LEGAL ANALYSIS

32. The law is clear that an injunctive order is granted to an applicant to preserve subject matter pending the hearing and determination of an action. The applicant must demonstrate a *prima facie* case with probability of success, satisfy the court that it would suffer irreparable damage which would not be adequately compensated if the court did not grant the injunction and if the court is in doubt, then it should decide the case on a balance of convenience. These main principles were clearly spelt out in the case of **Geilla vs Cassman Brown** (Supra).
33. The court requires tangible evidence when considering an application for interlocutory injunction pending the hearing and determination of the suit. It is therefore incumbent upon an applicant to submit a cogent case during the interlocutory stage to show that it has an arguable case. This is important because at this time, the court would not have had an opportunity to listen to the evidence in support of each party's case. This is a burden that lies on the applicant.
34. In **Civil Application Nai No 140 of 1995 Uhuru Highway Development Limited vs Central Bank of Kenya & Others** (Supra) the Court of Appeal held as follows:-

“...it must be clearly understood that a party who goes to a judge in the absence of the other side assumes a heavy burden and must put before the judge all the materials, including even material which is against his interest...”

35. One of the prayers that the Plaintiffs had sought was an injunction to restrain the D.C.I.O. Starehe, D.C.I.O. Thika and D.C.I.O. Mombasa from impounding, repossessing, detaining, arresting or in any way interfering with the said motor vehicles. The court is, however, not entirely convinced that the Plaintiffs had adequate knowledge regarding the criminal proceedings which would have amounted to material non-disclosure as was contended by the 1st, 3rd and 4th Defendants.
36. However, the question of how the Plaintiffs came to be in possession of the subject vehicles is a pertinent issue. To prove that they had a *prima facie* case, the Plaintiffs were required to show at this early stage that they had good title to the said vehicles. The involvement of police was a fact that was admitted by both sides. It does in fact point to a dispute as to the ownership of the vehicles on the part of the Plaintiffs as the logbooks had never passed to them to enable them effect the transfers so that they would be deemed as the registered or *bona fide* owners of the said vehicles.
37. It was also upon the Plaintiffs to show that the 2nd and 5th Defendants were in fact acting for and on behalf of the 1st, 3rd and 4th Defendants when they allegedly received the monies in question. It was not sufficient for the Plaintiffs to have stated that the monies were given to the 2nd and 5th Defendants in cash. The 1st Plaintiff may have had the option of providing the CCTV footage as his proof that he paid the monies to the 2nd Defendant. However, it is the view of the court that that would still not have assisted the 1st Plaintiff's case for the reasons given later in this ruling.
38. Whilst there is no documentation regarding the nature of transaction between the 1st Defendant and the purported sellers of the subject motor vehicles, it is evident that the subject vehicles were on hire purchase. This is because the 1st, 3rd and 4th Defendants did not rebut this fact when the same was raised by the Plaintiffs. It therefore follows that neither the defaulters nor the 2nd and 5th Defendants had any colour of authority to enter into transactions directly with the Plaintiffs as the vehicles did not belong to them, the title having remained with the 1st Defendant.
39. Indeed, the Plaintiffs argument that they obtained good title as they had paid 70% of the Hire Purchase Price is not sustainable as they did not provide the court with any documentation that there was a hire purchase agreement between them and the 1st Defendant so as to bring the provisions of the Hire Purchase Act into play.
40. What was adduced before this court is Exhibit JGM 1 annexed to the 1st Defendant's Supporting Affidavit bearing the name of the said Peter Kimani Karungu as the Seller of motor vehicle registration number KBQ 473X. Although the 2nd Plaintiff alluded to an agreement dated 28th July 2013, he did not annex the same to his Supporting Affidavit.
41. For that reason, while the Plaintiffs may have parted with monies as they alleged, the vehicles remained the properties of the 1st Defendant, for all purposes and intent. No person other than the 1st Defendant, could receive any monies for the purchase of the said vehicles unless of course it could be shown such a person had authority from the 1st Defendant to transact on its behalf.
42. The loss that the Plaintiffs may suffer as a result of having incurred for the repairs of the subject motor vehicles cannot be visited upon the 1st, 3rd and 4th Defendants as they had not authorised the 2nd and 5th Defendants to act on their behalf. The Plaintiffs took a risk and transacted based on trust. The suggestion by the 1st Plaintiff to use the CCTV to prove that the 2nd Defendant received the monies at Family Bank at Thika would still not have been able to prove a nexus between the 2nd Defendant and the 1st, 3rd and 4th Defendants unless, of course, there would have been communication that would have been picked up to show the relationship between the 1st and the 2nd and 5th Defendants.
43. The court has considered all the case law submitted by the Plaintiffs and notes that they all dealt with statutory power of sale which was distinguishable from the facts of this case that involved parties who were yet to be registered as the lawful owners of the subject motor vehicles. The court did, however, note that the *ratio decidendi* on the principles of granting an interlocutory injunction pending the hearing and determination of the suit would still be applicable in the case herein.

44. The power to grant an interlocutory injunction is a discretionary one and must be based on the law and evidence adduced at this early stage. Applying the principles of granting interlocutory injunction to facts of this case, this court is not satisfied that the Plaintiffs established that they had made out a *prima facie* case against the 1st, 3rd, and 4th Defendants. They were not able to demonstrate that the monies they allegedly paid to the 2nd and 5th Defendants passed to the 1st Defendant or that the 2nd and 5th Defendants were agents of the 1st Defendant. These are issues that would require to be canvassed in a full trial.
45. Having perused the parties' affidavits, the written submissions and the case law in support of their respective case, this court is not persuaded by the Plaintiffs' submissions that they had demonstrated that they had met the criteria set out in the case of **Giella vs Cassman Brown** (Supra). The court finds and holds that the Plaintiffs would not be entitled to an injunction based on any of the grounds set out in the said case.
46. Clearly, having found that the Plaintiffs had not made out a *prima facie* case with a probability of success, the court finds that the question of the Plaintiffs suffering loss that cannot be compensated by way of damages or the court granting the interlocutory injunction on a balance of convenience would not arise.

DISPOSITION

47. Accordingly, the upshot of this court's ruling is that the Plaintiffs' Notice of Motion application dated and filed on 26th July 2013 is not merited and the same is hereby dismissed with costs to the 1st, 3rd and 4th Defendants. In the circumstances foregoing, the orders made by Havelock J on 29th July 2013 and reinstated by Kimondo J on 12th August 2013 are hereby discharged and/or vacated.
48. It is so ordered.

DATED and DELIVERED at NAIROBI this 21st day of May 2014

J. KAMAU

JUDGE