REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL SUIT NO 186 OF 2013

NIC BANK LIMITED…….....PLAINTIFF

VERSUS

GENERAL MOTORS EAST AFRICA LIMITED……..1ST DEFENDANT

DUKE JOB OYAGI……..……2ND DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff's Notice of Motion application dated 13th May 2012 and filed on 14th May 2013 was brought under the provisions of Section 1A & 1B of the Civil Procedure Act and Order 40 Rules 1 and 2 of the Civil Procedure Rules and all enabling provisions of the law. Prayer Nos (1) and (2) of the said application are spent. It sought the following remaining prayers:-

a. **Spent.**
b. **Spent.**
c. **THAT pending the hearing and determination of this suit a temporary injunction be and is hereby granted restraining the Defendants either by themselves or through their agents, servants or employees from selling, disposing off (sic), transferring, using and/or dealing with Motor Vehicle Registration Number KBQ 723U.**
d. **THAT Motor Vehicle Registration Number KBQ 723U be released to the Plaintiff.**
e. **THAT the costs of this application be provided for.**

2. The grounds under which the said application was premised were generally that:-
    a. **On or about December 2011, the Plaintiff entered into a Hire-Purchase Agreement with the 2nd Defendant pursuant to which the Plaintiff purchased the aforementioned motor vehicle, an Isuzu bus for a sum of Kshs 6,831,168/= which was registered in their joint names.**
    b. **On or about 13th December 2011, the subject vehicle was involved in an accident but after being repaired by Messrs Associated Motors Limited, the same developed mechanical problems soon after release.**
    c. **The subject vehicle was repaired by the 1st Defendant but that the 2nd Defendant had refused to pay the repair charges which amounted to Kshs 4,500,000/= as a result of which the 1st Defendant detained the said motor vehicle.**
    d. **The Plaintiff had an overriding interest over the said motor vehicle which was its only**

security and that as at the time of the filing the application herein, the outstanding loan due to it stood at Kshs 9,000,000/=.

e. **Pursuant to the said Hire-Purchase Agreement, the title of the subject vehicle remained with the Plaintiff until the 2nd Defendant fully repaid the loan and as such the 1st Defendant could not exercise lien over the subject vehicle as it did not belong to the 2nd Defendant.**

f. **The 2nd Defendant was under an obligation to meet the repair expenses and as such, it was just and mete that the orders sought herein be granted.**

AFFIDAVIT EVIDENCE

3. In support of its Notice of Motion application, the Plaintiff relied on the affidavit of Lilian Sogo, its Legal Officer. The same was sworn on 13th May 2013. She reiterated the grounds on the face of the application *in extenso* and added that the Plaintiff was ready to abide by any conditions or requirement that the court would impose to pave way for the grant of the orders sought in the application herein. The Plaintiff attached documentation evidencing the Hire-Purchase Agreement between it and the 2nd Defendant, schedule of loan repayments by the 2nd Defendant and invoices from the 1st Defendant.
4. The 1st Defendant filed its Replying Affidavit on 20th June 2013. It was sworn by Anthony Musyoki, its Legal Officer on 19th June 2013. He stated that the present application was mischievous and deliberately designed to stop the 1st Defendant from exercising its statutory rights under the Disposal of Uncollected Goods Cap 38 (laws of Kenya).
5. He added that the 2nd Defendant had refused to pay the repair charges in the sum of Kshs 3,395,984/= which amount was still outstanding and that the 1st Defendant was not aware of the Plaintiff's claim on the subject vehicle before it commenced the said repairs. It was his contention that the Plaintiff's interest in the said motor vehicle was limited to securing its financial interests and was not an owner *per se* and that even if the Plaintiff had an interest in the subject vehicle, the said Hire-Purchase Agreement made provisions for its remedy/remedies.
6. It was his contention that the Plaintiff had not made out a *prima facie* case with probability of success and therefore prayed for the dismissal of the application herein for being baseless, illusionary, speculative, frivolous, vexatious and an abuse of the court process. It annexed copies of documents to support its claim for repair charges.
7. In response thereto, the 2nd Defendant swore his Replying Affidavit on 11th June 2013. The same was filed on 17th June 2013. He admitted that he had obtained a loan from the Plaintiff to enable him purchase the said motor vehicle. It was his averment that after the aforesaid accident, the Plaintiff's assessor, namely Livingstone Soi, informed him that the engine was fine and that only the body work on the subject vehicle would need to be done.
8. He gave a detailed account of how the subject vehicle was repaired culminating in the same finally stalling on 13th September 2012. He said that it was discovered that it was the crank shaft that had been the problem and that the parts that were replaced were second hand contrary to the agreement that the said parts were to be sourced from the 1st Defendant herein. He stated that he had been unable to supervise the repairs on the said vehicle as he had been unwell. He averred that he had objected to the repairs to the said vehicle being effected after the said accident preferring instead to write off the vehicle which later developed engine problems.
9. He pointed out that during the time the vehicle was being repaired after the accident, he lost business for six (6) months at an average of Kshs 20,000/= per day after deduction of expenses and also suffered a loss of a sum of Kshs 60,000/= which CMC Kisumu charged him for storage. He contended that the Plaintiff did not give him a sum of Kshs 1,000,000/= to cover his instalments as it had promised but that it instead kept on demanding for payment yet it knew that the subject vehicle was "indisposed". He added that the Plaintiff levied charges of Kshs 3,000,000/= as penalties during this period and that on 28th March 2012, it took possession of his motor vehicles registration numbers KBL 421T and KBM 905T which he had given as collaterals.
10. He, however, averred that he made payments of Kshs 389,000/=, Kshs 200,000/= and Kshs

500,000/= in April, May and July respectively. He stated that he had spent over Kshs 7,000,000/= for the repair of the subject vehicle and that it was only fair that the amount be considered while making a decision of the Plaintiff's case. It was his contention that the Plaintiff ought to waive the interest which had inflated the amount due from him considering the history of the vehicle they had financed.

11. He also said that the subject vehicle had a warranty of one (1) year and that he could not understand how it could have accrued the amounts claimed by the Plaintiff and prayed for the release of the subject vehicle to enable him pay the loan.

LEGAL SUBMISSIONS BY THE PLAINTIFF

12. The Plaintiff's written submissions were dated 24th July 2014 and filed on 25th July 2014. It argued that it had satisfied the conditions for the granting of an interlocutory injunction as was set out in the case of **Giella vs Cassman Brown & Co Ltd [1973] EA 358** which were that, an applicant had to show a *prima facie* case with a probability of success at the trial, that an interlocutory injunction will not be granted unless the applicant might otherwise suffer irreparable loss that cannot be compensated by way of damages, if the injunction was not granted and that if the court was in doubt, then it ought to grant the interlocutory injunction on a balance of convenience.

13. It submitted that the subject motor vehicle was duly registered in its joint name and that of the 2nd Defendant and that it therefore had an overriding interest over the same as its financier and owner the possession of which ought to be restored to it. It referred the court to the case of **Mrao Limited vs First American Bank Limited & 2 Others (2003) KLR 125** where the court defined a *prima facie* case as:-

> **"… a case in which on the material presented to the court or tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."**

14. It was its contention that the 2nd Defendant was truly indebted to it in the sum of Kshs 9,576,453.32 as at 6th July 2012 as was evidenced by the statement of accounts. It added that the 2nd Defendant had not denied the terms of the said Hire-Purchase Agreement and in particular Clause 4 therein which provided that it remained as the owner of the subject vehicle until the said 2nd Defendant paid the entire Hire- Purchase Price with an option of him purchasing the said vehicle me but that having defaulted in payment, the 2nd Defendant was not in possession of the subject vehicle with its consent as was stipulated in Clause 7 of the said Hire-Purchase Agreement.

15. It relied on the case of **Bowmaker Limited vs Wycombe Motors Limited [1946] 2 ALL ER 113** in which it was held that where a hire purchase agreement has been terminated, the hirer ceases to have any authority or consent to be in possession of the goods and cannot deliver the goods for repair in which event the deposit thereof does not create a lien on the goods as against the owner of the goods. The Plaintiff argued that there was no basis for the 1st Defendant to continue retaining the said motor vehicle when it had claimed the same as the rightful owner.

16. It was therefore its submission that the sale of goods under the Disposal of Uncollected Goods Act would be inequitable and unfair to it and to any third party purchaser taking on such goods with defect in title. It pointed out that in contemplation of the deposit of goods by persons other than the owner, Section 7 of the stipulated that **"a sale of such goods would not give any good title to such goods as against the owner of the goods."**

17. On the issue of irreparable damage that could not readily or adequately compensated by damages if an interlocutory judgment was not granted, the Plaintiff submitted that the 2nd Defendant was indebted to it in the aforesaid sum and that if the 1st Defendant was allowed to sell the subject vehicle, it would lose the security it held over the same. It said that repossession and sale of the subject vehicle was its primary recourse as the owner and that any sale would put it to additional expenditure of indeterminable quantities of time and money to assert and/or re-establish its rights.

18. In his oral submissions, counsel for the Plaintiff submitted that there was very little chance of

recovery from the 2nd Defendant as his financial affairs did not show his ability. He argued that this was therefore a strong *prima facie* case that the Plaintiff would suffer irreparable loss that could not be compensated by damages if the interlocutory injunction was not granted.

19. It submitted that the balance of convenience titled in its favour as the Defendants would not suffer any prejudice but that instead, it was the one that would suffer greater hardship if the application herein was not allowed. It argued that the 1st Defendant had been made aware of the termination of the said Hire-Purchase Agreement and could therefore not assert its lien over the subject vehicle. It further averred that if the 1st Defendant had a lien over the subject vehicle, then the same was inferior in priority and defeasible in view of the Plaintiff's right as the registered owner.

LEGAL SUBMISSIONS BY THE 1ST DEFENDANT

20. On its part, the 1st Defendant filed its written submissions dated 3rd October 2013 and filed on 10th October 2013. It was emphatic that the Plaintiff was not the actual owner of the said motor vehicle and that its joint registration with the 2nd Defendant was merely to secure the Plaintiff's interests as a financier.

21. It referred the court to the case of **Jane Wangui Kairu vs Gusii Deluxe Limited HCCC No 178 of 2001;[2001] LLR 7527 (HCK)** in which Anganyanya J stated that:-

> **"Once a Hire Purchase company provides necessary facilities for the hirer to buy and take away his/her property like a motor vehicle its interests is to receive monthly instalments whether or not the vehicle is operated. It has no custody or control over such motor vehicle or those operating it including the hirer or the driver. That its name is included in the registration is no more to secure its financial interest in the motor vehicle and this is why after full repayment of the loan have been made, its mane is removed therefrom. It is not a servant or agent of the hirer."**

22. It said that the 2nd Defendant had stated in his Replying Affidavit that the Plaintiff wilfully handed back possession of the subject vehicle to the 2nd Defendant who in turn delivered it to the 1st Defendant for repairs. It therefore submitted that the 1st Defendant had possessory lien over the subject vehicle and could lawfully exercise its right to dispose of the same under the provisions of the Disposal of Uncollected Goods Act. It pointed out that a similar holding had been made by Diplock L.J. in **Tappenden vs Artus & Another [1963] 3 ALL ER at page 213-221**.

23. In his oral submissions, counsel for the 1st Defendant contended that a party was not affected by secret limitations if it was not aware of the same and that the Plaintiff was estopped from denying it its rights of lien by virtue of Clause 7 of the said Hire-Purchase Agreement as it was not aware of the same.

24. The 1st Defendant pointed out that whereas Clause F of the Hire-Purchase Agreement provided that the 2nd Defendant could not pledge the owner's credit or permit any to be created over the subject vehicle, such right did not affect the rights of a repairer. It also relied on the case of **Bowmaker vs Wycombe Motors Limited** (Supra) where it was held that:-

> **"An arrangement between the owner and the hirer shall not be entitled to create a lien does not affect the repairer. A repairer has a lien although the owner has purported to limit the hirer' authority to create a lien in that way…"**

25. It argued that the Plaintiff had not demonstrated that it had satisfied the test in the case of **Giella vs Cassman Brown & Co Limited** (Supra) as was reinforced in the case of **Abel Salim & Others vs Okongo & Others [1976] KLR 42.** It submitted that it had rebutted all the Plaintiff's assertions in its submissions. It also stated that while the amount in question was huge, it was not sufficient to propose that the injury would be irreparable. This was also a conclusion that was arrived at by Anganyanya J in **Civil Appeal No 90 of 2002 Shelter Credit Limited vs The Kenya National Assurance Company Limited** (unreported).

26. It was its contention that the Plaintiff had not demonstrated that the 2nd Defendant did not have

other assets or sources of income or that the 2nd Defendant would not be able to meet the remainder part of the Plaintiff's claim. It therefore submitted that the balance of convenience titled in its favour and urged the court to dismiss the Plaintiff's application with costs to it.

27. It denied that the repossession and sale of the subject vehicle was the only recourse available to the Plaintiff. It pointed out that the 2nd Defendant had contended in his Replying Affidavit that the Plaintiff had repossessed his motor vehicles registration numbers KBL 421T and KBM 905T that he had given to it as collateral to secure the loan to purchase the subject vehicle.

LEGAL SUBMISSIONS BY THE 2ND DEFENDANT

28. In his written submissions dated 26th February 2013 and filed on 28th February 2013, the 2nd Defendant contended that the Plaintiff had no overriding interest over the subject vehicle and that the Plaintiff had no basis for making the said assertions. He also relied on the case of **Mrao Limited vs First American Bank** (Supra) to show that the Plaintiff had not demonstrated that it had established a *prima facie* case.

29. In his oral submissions, his counsel argued that he had not defaulted in payment and no such proof had been provided by the Plaintiff. He averred that if there had been such default, the Plaintiff ought to have attached the subject vehicle. It was his further argument that having repossessed motor vehicles registration numbers KBL 421T and KBM 905T in March 2012, the Plaintiff was not entitled to the reliefs sought. He referred the court to the case of **HCCC No 272 of 2013** where he had sued Associated Motors Limited and Amaco Insurance Company as the insurer had not yet released payment of the repairs done by the 1st Defendant. He therefore prayed for the dismissal of the Plaintiff's application with costs to him.

LEGAL ANALYSIS

30. Both the 1st and 2nd Defendants submitted that the Plaintiff had not met the threshold of being granted an interlocutory injunction as it had not established a *prima facie* case. They were emphatic that the Plaintiff's rights over the subject vehicle did not supersede the 1st Defendant's mechanic's lien. On the other hand, the Plaintiff was categorical that it was entitled to repossession the said subject vehicle as it was the security against which it advanced the 2nd Defendant financial facility to purchase the same.

31. The 2nd Defendant was entitled to use the said subject vehicle for the purpose of which he purchased it. However, he was bound by the terms and conditions of the said Hire-Purchase Agreement as far as repairing and maintaining the said vehicle in good condition was concerned.

32. Clause 2 (f) of the said Hire-Purchase Agreement stated that the 2nd Defendant was obligated to:-

"Keep the Goods properly repaired and maintained but shall not pledge the Owner's credit or permit any lien to be created on them."

33. The 2nd Defendant thus had ostensible authority to take the said subject vehicle for repairs during the pendency of the Hire-Purchase Agreement at his own cost but not to pledge the Plaintiff's credit or to create a lien on the said vehicle. It is evident from the facts of this case that the initial repairs to the said subject following the aforesaid accident on 13th December 2012 which was not so long after he had purchased the same were met by Amaco Limited who were his insurers. Under the same authority, he took the said vehicle to the 1st Defendant's garage after it was discovered on 2nd April 2012 it had an engine problem.

34. Whether the engine problem was connected to or as a result of the accident that occurred on 13th December 2012 was not a fact that was within the knowledge of this court. What is, however, clear is that the 2nd Defendant took the said vehicle to the 1st Defendant's garage and after the same was repaired, he failed and/or refused to pay the 1st Defendant the repair charges in the sum of Kshs 4,500,000/= which the Plaintiff said was evidenced by a copy of the 1st Defendant's invoice attached to its Supporting Affidavit and marked "LS 4". It is noteworthy that the said

invoice alluded to repair charges in the sum of Kshs 3,026,867/= and not Kshs 4,500,000/= as had been contended by the Plaintiff.

35. Bearing in mind that Clause 2 (f) of the said Hire-Purchase Agreement permitted the 2nd Defendant to keep the said subject vehicle in good repair and maintenance while the said Hire-Purchase Agreement subsisted, he was perfectly entitled to deliver the said vehicle to the 1st Defendant's garage as he had ostensible authority to have the said vehicle repaired. It is therefore abundantly clear that the 1st Defendant acquired a mechanic's or artificer's lien over the said subject vehicle once he effected the repairs and the 2nd Defendant refused, ignored and/or declined to pay for the same.

36. The 1st Defendant's authority to exercise the common law lien upon making repairs on the said subject vehicle could only be exercisable if the 2nd Defendant was in lawful possession of the said motor vehicle. Under the said Hire-Purchase Agreement, the Plaintiff was the owner of the said subject vehicle under the Hire-Purchase Agreement while the 2nd Defendant was only a hirer with an option to purchase the said subject vehicle. There are three (3) ways in which the said subject vehicle could revert to the possession of the Plaintiff from the 2nd Defendant.

37. The said vehicle could revert to the Plaintiff if the 2nd Defendant terminated the Hire-Purchase Agreement by giving the Plaintiff seven (7) days notice and delivering to the Plaintiff the said subject vehicle. This has been provided for under Clause (5) of the said Hire-Purchase Agreement. The 1st Defendant did not exercise this option and for all purposes and intent, the said Clause (5) was inapplicable or irrelevant in the circumstances of this case.

38. The said subject vehicle could also revert to the Plaintiff under Clause 6 of the said Hire-Purchase Agreement which provided for an automatic termination. The said clause stipulated as follows:-

" The hiring of the Goods and the consent of the Owner to the Hirer continuing in possession of the Goods shall automatically terminate on the happening of any of the following events in consequence of which the Owner shall have right to immediately take possession of the Goods:-

a. **If the landlord of any premises where the Goods may be by himself or his agent shall threaten to take any steps to distrain upon the Goods;**
b. **The commission by the Hirer (being an individual) of any bankruptcy;**
c. **The levy against the Hirer of any distress (other than a distress by a landlord within clause 6.1 above) or execution;**
d. **The Hirer entering into or attempting to enter into a composition with its creditors or (in the case of a limited liability company) going into liquidation except a voluntary liquidation for the purpose of amalgamation or reconstruction on terms previously approved in writing by the Owner;**
e. **A receiver or an administrator being appointed in respect of the Hirer's assets or any part thereof of a meeting, whether formal or informal, being called of the Hirer's creditors or any of them;**
f. **Upon the death of the Hirer.**

am. The third way in which the Plaintiff could repossess the said subject vehicle would have been under Clause 7 of the said Hire-Purchase Agreement. it stipulated as follows:-

a. **The Owner may, on the happening of any of the events specified in clause 7.2 below without notice to the Hirer terminate the hiring of the Goods in consequence of which the Hirer shall no longer be in possession of the Goods without the consent of the Owner and the Owner shall have the right to immediately retake possession of the Goods.**
b. **The following are the events referred to in clause 7.1 above:-**

i. **Any instalment or other sum payable hereunder by the Hirer remaining unpaid after the expiry of Fourteen (14) days of becoming due;**

ii. A breach by the Hirer of any of the provisions of this Agreement other than relating to the payment of money;

iii. The Goods, being in the sole opinion of the Owner, concealed, missing or in jeopardy;

iv. The Goods being abandoned by the Hirer.

40. In support of its application, the Plaintiff attached copies of the Hire-Purchase Agreement, an Instrument under the Chattels Transfer Act Cap 28 (laws of Kenya), a Certificate of Registration of the said subject vehicle, letters from the 2nd Defendant addressed to it, an invoice and Vehicle Check List from the 1st Defendant, a letter from Express Agency Auctioneers informing the Plaintiff that they had proclaimed the subject vehicle but that the 1st Defendant was intending to dispose of the same under the Disposal of Uncollected Goods Act and Customer Account Report showing that the 2nd Defendant owed it a sum of Kshs 9,576,453.32.
41. It is evident to this court that there was no documentation that was placed before it by the Plaintiff to show that the Hire-Purchase Agreement was terminated either under Clauses (6) or (7) of the same. There was no documentation to show a demand of the payment of the instalments from the 2nd Defendant. Indeed, none of the events referred to in the said clauses were demonstrated by the Plaintiff leading this court to conclude that as at the time the Plaintiff sought repossession of the said subject vehicle, it had not terminated the said Hire-Purchase Agreement.
42. The fact that the 2nd Defendant was indebted to it in excess of Kshs 9,000,000/= or the fact that the said subject vehicle was registered in its joint names with the 2nd Defendant could not give it superseding rights over the 1st Defendant in exercise of its artificer's lien. The 2nd Defendant was lawfully in possession of the said vehicle as the Plaintiff had by that time not exercised its rights under Clauses (6) or (7) of the said Hire-Purchase Agreement, whichever it deemed to be relevant in the circumstances of its case.
43. The 2nd Defendant had placed the said vehicle in the hands of the 1st Defendant under a valid contract that was subsisting between him and the Plaintiff at the material time. The issue of the 2nd Defendant not having the said vehicle without the Plaintiff's consent was not applicable by the time the 2nd Defendant took the vehicle to the garage. However, the Plaintiff's consent for the 2nd Defendant to continue having possessing the said vehicle lapsed when he caused a lien to be created on the said vehicle as a result of which the Hire-Purchase Agreement between them was determined.
44. The interpretation of the holding in the case of **Bowmaker Limited vs Wycombe Motors Limited** (Supra) by the Plaintiff did not, in the view of this court, represent the correct position of the law. In that case, it was held as follows:-

"the authority of the hirer, P, had been duly determined under the terms of the agreement and at the time when he took the car to the appellant's garage, he had no more right to the car than a thief would have; in those circumstances the appellants could not establish a lien on the car against the owners who were no parties to placing it with them for repairs."

45. The facts of that case were distinguishable from the facts herein as the said Hire-Purchase Agreement herein had not been determined. The court is more persuaded by the 1st Defendant's analysis of the above cited case of **Bowmaker Limited vs Wycombe Motors Limited** (Supra) and that of **Tappenden vs Artus & Another** (Supra) where the Court of Appeal held as follows:-

"the artificer was entitled to a common law lien on the van in respect if the repairs which he had effected because the bailee, when entrusting the van to the artificer, was lawfully in possession of it under a contract with the owner, the motor dealer and in giving possession of it to the artificer for the purposes of effecting repairs necessary to render it roadworthy the bailee (notwithstanding that the motor dealer was himself a motor mechanic) was acting within his authority since the act was reasonably incidental to the bailee's reasonable use of the van…"

46. The fact that the 2nd Defendant was mandated to keep the said subject vehicle in good repair and

maintenance during the subsistence of the Hire-Purchase Agreement implied that the Plaintiff was estopped from asserting or denying that the 1st Defendant had acquired a common law lien. The Plaintiff's interest over the said subject vehicle as a financier could not defeat the 1st Defendant's said lien for as long that the said Hire-Purchase Agreement had not been determined herein. However, that is not to say that the Plaintiff was under any obligation to meet the repair charges that were levied by the 1st Defendant.

47. Clause 2 (f) of the Hire-Purchase Agreement and Clause (4) (a) of the Instrument under the Chattels Transfer Act clearly stipulated that the 2nd Defendant could not pledge the Plaintiff's credit or create a lien over the said subject vehicle. The responsibility of meeting the 1st Defendant's repair charges squarely fell upon the 2nd Defendant.

48. The peculiarity of this case, however, is such that the 2nd Defendant has refused and/or declined to pay the said repair charges on the ground that there is **HCCC No 272 of 2013** in which the 2nd Defendant has sought to have his insurer compelled to pay the said charges. The 1st Defendant was not privy to the agreement between the Plaintiff and the 2nd Defendant and cannot therefore be dragged into the dispute of who is to pay the said charges. Its remedy upon repairing the subject motor vehicle lay only in holding the said vehicle as a lien to secure payment of the repair charges it had undertaken to bring it in good repair and maintenance.

49. The court has noted the Plaintiff's submission that it would suffer hardship if the vehicle was disposed of by the 1st Defendant and the 1st Defendant's position that it was entitled to a repairer's lien over the subject vehicle to recover its charges therefrom. Where the court finds itself in a situation where more than one (1) party asserts a right which all the parties would ordinarily be entitled to claim under their respective agreement against a party (ies), the court is called upon to exercise its equitable jurisdiction in addition to considering the law so as to do justice to all parties.

50. This aspect of recovering costs of all repairs is well captured in Clause (8) of the Hire-Purchase Agreement that provides that:-

" If the hiring of the Goods is terminated pursuant to clauses 5, 6 and 7 above, the Hirer shall become liable to pay to the Owner (in addition to all other sums [if any] in respect of which the Hirer shall be indebted to the Owner):-

a. **Any overdue instalments with interest thereon as provided;**
b. **Any other sum due under this Agreement with interest thereon as herein provided;**
c. **Any expenses and costs incurred by the Owner in tracing, storing, insuring and/or recovering possession of the Goods;**
d. **The cost of all repairs required to be done to the Goods to put them in a condition consistent with the performance of the Hirer's obligations under the Agreement…"**(emphasis court)

ay. If one was to assume that the said subject vehicle was not in a good state before the 2nd Defendant took it to the 1st Defendant's garage and the Plaintiff had to repossess it either under Clauses (5), (6) and (7) of the said Hire-Purchase Agreement, the Plaintiff would have had to repair the said subject vehicle to ensure that it was in good repair and was properly maintained before it could dispose of the same in accordance with the said Hire-Purchase Agreement. It could then recover the said repair charges as has been provided under Clause (8) (d) therein.

az. From the circumstances of this case, the court finds that it would be the 1st Defendant who would suffer the most prejudice if its charges are not settled. However, all would not be lost as the Plaintiff already has remedies available to it under the said Hire-Purchase Agreement. It already had collateral that it had repossessed from the 2nd Defendant and it also had the option of meeting the said repair charges to enable it repossess the said subject vehicle and recover the same from the Plaintiff.

ba. The 2nd Defendant's assertions that the Plaintiff ought to waive interest herein, that the Plaintiff had continued to levy penalties when the said subject vehicle when the same was grounded or what the 2nd Defendant referred to as being "indisposed" or that the Plaintiff was not entitled to repossess the said vehicles are merely side shows that would not find favour with this court. These are not issues that are before this court for determination.

bb. Having failed to rebut the Plaintiff's assertions that he was in arrears in payment of the instalments, the only inference the court can make is that there were payments that remained unpaid by the 2nd Defendant. For those reasons, the court disagrees with his submissions and finds that the Plaintiff was well within its right to repossess the said subject vehicle provided that the same was exercised within the terms of the said Hire-Purchase Agreement.

bc. The court is not persuaded by the Plaintiff's submissions that the 1st Defendant's lien over the subject vehicle was inferior in priority and defeasible in view of the Plaintiff's right as the registered owner of the said vehicle. The reasonableness of the 1st Defendant's repair charges have not been contested and/or challenged either by the Plaintiff or the 2nd Defendant.

bd. The power to grant an interlocutory injunction is a discretionary one and must be based on the law and evidence. The court finds that the balance of convenience tilts in favour of the 1st Defendant herein. Having found that the Plaintiff would not have been entitled to an interlocutory injunction, this would also not be appropriate case for the court to exercise its discretion to grant a mandatory injunction in favour of the Plaintiff herein.

be. For a court to have proceeded to grant a mandatory injunction to the Plaintiff, the circumstances of the case would have had to be so clear so as to persuade the court to grant such a summary order at the interlocutory stage. The court would have had to have been satisfied that the outcome after hearing the main suit would not have changed from the decision it would have given in the interlocutory stage. The principle behind granting an order for mandatory injunction is that it can only be granted in clear cut and obvious cases where it would be a waste of judicial time for the court to hear the matter in a full trial.

bf. In arriving at the said conclusion, the court has had due regard to the case of **Locabail International Finance Limited vs Agro-Export & Another [1986] 1ALL ER 901** where it was held as follows:-

> "**A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a match on the plaintiff. Moreover, before granting a mandatory injunction the court had to feel a high sense of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction."**

59. Having considered the parties' affidavits, the written and oral submissions and the case law in support of their respective case and having applied the principles of granting interlocutory injunction pending the hearing and determination of the suit herein and those of a mandatory injunction, the court has no hesitation in finding that the Plaintiff did not demonstrate a *prima facie* case with a probability of success at trial within the parameters that have been set out in the case o**f Giella vs Cassman Brown & Co Limited** (Supra).

60. In view of the fact that the Plaintiff was not able to demonstrate a *prima facie* case with probability of success at trial, the question of compensation by way of damages in the event the interlocutory injunction was not granted would also not arise. As can be seen from hereinabove, the Plaintiff would not be entitled to an order for mandatory injunction.

DISPOSITION

61. For the reasons foregoing, the Plaintiff's Notice of Motion application dated 13th May 2013 and filed on 14th May 2013 is not merited and the same is hereby dismissed. For the avoidance of doubt, the temporary injunctive orders issued by this court on 15th May 2013 are hereby discharged and/or vacated.

62. The Plaintiff is at liberty to pay the 1st Defendant the sums that it incurred in the repair of the said subject vehicle whereupon the 1st Defendant shall forthwith release the said vehicle to the Plaintiff to enable it exercise its rights under the Hire-Purchase Agreement.

63. The Plaintiff will bear the 1st Defendant's costs of this application but not those of the 2nd Defendant who will bear his own costs. The court has exercised its discretion not to award costs to the 2nd Defendant herein as he was the cause of the tribulations that have been suffered by both the Plaintiff and the 1st Defendant herein. He cannot expect to put the Plaintiff through hardship by refusing, neglecting and/or declining to pay the repairer's charges that he owed the 1st Defendant when he took the subject motor vehicle to its garage and hope to expect costs from the Plaintiff herein.
64. It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 26th day of June 2014

J. KAMAU

JUDGE