



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 140 OF 2012

CHINA PETROLEUM PIPELINE BUREAU LTD. :::: PLAINTIFF

-VERSUS-

ANDERSON NDWIGA NJERU

T/A BRAJAN ENTERPRISES ::::::::::::::: 1ST DEFENDANT

MARY WAMBUI ::::::::::::::: 2ND DEFENDANT

DUNCAN MUGAMBI

T/A WRIGHT AUCTIONEERS ::::::::::::::: 3RD DEFENDANT

J U D G E M E N T

1. By a **Plaint** dated and filed in court on **8th March 2012**, the Plaintiff, a Limited Liability Company sued the 1st, 2nd and 3rd Defendants for the following prayers:-
 - a. ***A declaration that the said motor vehicles known as KBL 525M and KBL 526M belong to the Plaintiff.***
 - b. ***A permanent injunction restraining the Defendants either by themselves or their servants or agents from interfering with the Plaintiff's ownership and possession of the said motor vehicles, Toyota Land Cruiser Prado registration number KBL 525M and Toyota Land Cruiser Prado registration number KBL 526M.***
 - c. ***Costs of this suit.***
 - d. ***Interest on (c) at court rates.***
2. The Plaintiff's claim is that on or about 12th May 2010, it entered into a Sale Agreement with Toyota East Africa for the purchase of two Toyota Land Cruiser Prado Motor Vehicles at a sum of Kshs.6,132,890,39/= each and on 14th May 2010, it paid the total purchase price of Kshs.12,265,780/= and the said motor vehicles were registered under the Plaintiff's name as KBL 525 and KBL 526 and the Plaintiff was given possession thereof.
3. Sometime in 2011 the 1st Defendant Anderson Ndwiga Njeru training as Brason Enterprises claimed to have offered the 2nd Defendant a loan facility of Kshs.3,000,000/= and the 2nd Defendant allegedly offered both the said motor vehicles as security for the said loan. The Plaintiff states that this was a fraud between the Defendants who using fraud and forgery procured illegal original registration books for the motor vehicles with counterfeit registration books.

- Having done this, the 1st Defendant then instructed the 3rd Defendant to repossess the said vehicle, while also seeking to recover ownership and possession of the same though the 3rd Defendant pursuant to alleged consequence of the 2nd Defendant defaulting in payment of the alleged loan facility. Arising from the above actions the Plaintiff has not enjoyed quiet possession, ownership and use of the said motor vehicles.
4. Together with the Plaintiff the Plaintiff also filed an injunction stopping the Defendants or their agents from repossessing, selling, disposing off, transferring using and/or in any way dealing with the said motor vehicles KBL 525 M and KBL 526M. The injunction was heard *inter-partes* and was granted on 19th April 2012 on condition that the Plaintiff deposited a sum of Kshs.3,600,000/= in a joint interest earning account to be opened in the names of the advocates for the parties within 21 days. That Order was later complied with after some initial difficulties arising from a Repossession Order pursuant to Hon. S. Atambo Principal Magistrate on 23rd May 2012 in Msc. Cause No. 393 of 2012. That order had allowed the repossession of the suit motor vehicles pursuant to alleged failure by the Plaintiff herein to deposit the said Kshs.3,600,000/= in time.
 5. In the cause of the proceedings, the 1st Defendant brought an application dated 13th November 2012 seeking for a measure of security by way of an order directing that the suit motor vehicles be held and kept in the custody of the court or elsewhere as the court may direct pending the hearing and determination of the suit or an interim measure of protection by way of *mareva* injunction stopping the Plaintiff from dissipating the suit assets pending the determination of this suit. This application was rejected by the court in a Ruling dated 30th April 2014 on the grounds that the 1st Defendant's interest in the said motor vehicles was limited to Kshs.3,600,000/= which is already deposited in an interest earning account in the joint names of the parties' advocate and so the 1st Defendant' interest was already secured. The said application dispensed with, this suit was now ready for hearing.
 6. The 1st and 3rd Defendants opposed the suit through a joint defence dated 14th May 2012 and filed in court on 15th May 2012. While denying the contents of the Plaintiff the 1st and 3rd Defendants state that the suit motor vehicles belonged to the 2nd Defendant who used the same as security for a loan of Kshs.3,000,000/= given to the 2nd Defendant by the 1st Defendant. They also alleged that the 2nd Defendant had the original logbooks for the suit motor vehicles, and that the loan transaction was approved after the legal searches at the motor vehicles registry revealed that indeed it was the 2nd Defendant who was the owner of the said vehicles.
 7. In a reply to defence of the 1st and 3rd Defendants filed in court on 30th May 2012 the Plaintiff denied that defence and reinstated the contents of the Plaintiff. The 2nd Defendant never filed his defence, and has never participated in these proceedings. In fact, it is alleged that the 2nd Defendant disappeared underground when the police started investigating his possible involvement in the alleged fraud relating to the alleged fraudulent procurement of the fake logbooks to the suit motor vehicles which he used to allegedly secure the said loan from the 1st Defendant. By the time of going to the hearing, the 2nd Defendant had not been traced to take part in these proceedings and the court is not aware of his whereabouts.
 8. By a Chamber Summons application dated 2nd July 2014 and filed in court on 3rd July 2014 Messrs Osundwa & Company Advocates applied to cease acting for the 1st Defendant. By the time the hearing of the suit took place on 10th July 2014, Messrs Osundwa & Company Advocates' application had not been heard but they had for all intents and purposes which are recorded, ceased to act for the 1st Defendant. The court did on 1st July 2014 direct Mr. Osundwa to serve his client with that application and to notify his client that the suit would proceed on 10th July 2014. On 10th July 2014, Mr. Osundwa did not turn up in court, and being satisfied that the process was right, I allowed the Plaintiff to proceed with its case.
 9. P.W.1 LENG DONGSHENG, adopted his witness statement dated 8th March and filed in court on the same day. P.W. 1 testified that he is the Financial Supervisor of the Plaintiff herein. He testified that about 12th May 2010, the Plaintiff entered into a Purchase Agreement with Toyota East Africa for the purchase of two Toyota Land Cruiser Prado Motor Vehicles at a total sum of

Kshs.12,265,780/=. The Plaintiff thereafter paid the sum of Kshs.12,265,780/= as purchase price for the said motor vehicles. Upon payment of the purchase price for the said motor vehicles, the Plaintiff was issued with a receipt. The Plaintiff thereafter applied for registration of the motor vehicles and was issued with logbooks confirming the same. The said motor vehicles were delivered to the Plaintiff on 26th May 2010. The said motor vehicles have at all material times belonged to the Plaintiff. The Plaintiff has never transferred the said motor vehicles to anyone. On or about 5th March 2012, as the said motor vehicles were in the possession of the Plaintiff, the 3rd Defendant acting on behalf of the 1st Defendant sought to repossess the said motor vehicles. The 1st Defendant alleged to have offered a loan facility of kshs.3,000,000/= to the 2nd Defendant in exchange of the 2nd Defendant offering both the motor vehicles as security for payment. The 1st Defendant claimed that the 2nd Defendant was the owner of the said motor vehicles. Together with the other officers of the Plaintiff, the witness reported the matter to Kileleshwa Police Station. In light of the aforesaid circumstances. He retrieved the logbooks for the said motor vehicles to present to the OCS Kileleshwa Police Station. Upon presentation. He was told that the logbooks were forgeries. The witness believed that the 1st, 2nd and 3rd Defendants had colluded in defrauding the Plaintiff of ownership and possession of the said motor vehicles.

10. In his submissions, Mr. Arimi Kimathi counsel for the Plaintiff framed the issues as follows:=-

- i. ***Who is the legitimate owner of the suit motor vehicles?***
- ii. ***What is the validity of the loan facility to the 2nd Defendant from the 1st Defendant?***
- iii. ***What is the validity of the security of the suit motor vehicles as security for above mentioned loan facility?***

11. I also adopt the same issues as they are relevant in determining the issues at hand. Mr Kimathi submitted that it is the Plaintiff's humble submission that the Defendants fraudulently claimed the Plaintiff's legally acquired motor vehicles, which were legally acquired by the Plaintiff. The Plaintiff tendered numerous documents affirming this position. For the Defendants to claim ownership of the suit motor vehicles is a blatant attempt at fraud. Section 18 of the Chattels Transfer Act provides,

“Save as is otherwise expressly provided by this Act, an instrument shall be void as against the persons mentioned in Sections 13 and 14 in respect of any chattels which the grantor acquires or becomes entitled to after the time of the execution of the instrument.”

Mr. Kimathi submitted that records provided by the Plaintiff show that it is indeed the rightful owner of the suit motor vehicles. Further, the plaintiff through its Finance Manager, Mr. Leng Dongsheng denied any knowledge of the 2nd Defendant the purported owner of the suit vehicles. Thus, the 2nd Defendant could not purport to offer the suit vehicles as security for a loan from the 1st Defendant as they did not rightfully belong to her in the first place. Mr. Kimathi submitted that the loan agreement between the 1st and 2nd Defendants was *ab initio* null and void as it was drafted and completed by Robert Mwaura, a person masquerading as an advocate of the High Court in the style and name of Roberk K. Mwaura & Company Advocates. This is a principle well expounded in *Huq – Vs – Islamic University in Uganda* [1995 – 98] EA 117. Wambuzi, C.J., in the aforementioned Ugandan case was categorical. He said:-

“Any documents prepared or filed by such an (unqualified) advocate were invalid and of no legal effect . . .”

This decision was supported in our own celebrated case of ***National Bank of Kenya Limited – Vs – Wilson Ndolo Ayah*** [2009] eKRL.

In addition, the court submitted that the plaintiff continues to suffer as the said suit vehicles cannot be put into proper, constructive use due to the fear from the plaintiff that the 3rd Defendant may

attempt to repossess them. The vehicles are currently lying parked, deteriorating in value and usability.

12. I have carefully considered the suit, the interlocutory applications which had been determined and the submissions of the counsel for the Plaintiff. To begin with, who is the legitimate owner of the suit motor vehicles? It is clear from the evidence before the court that the 2nd Defendant cannot be the owner thereof. There are good reasons for this statement. Firstly, the 2nd Defendant has never appeared before this court to defend the suit despite being served with the suit. He is actually a fugitive running away from the law due to the allegation that he may have forged the logbooks relating to the suit motor vehicles. His alleged logbooks are casted in doubts and he has not explained how he came by the said logbooks. It is said on his behalf by the 1st Defendant that he bought the suit motor vehicles from the Plaintiff. That statement is hearsay. But even if it was a fact, the Plaintiff has the original but counterfeit logbooks to the suit motor vehicles. Those logbooks have been shown to the court and are not disputed. So, without going into any other relationship between the three Defendants with themselves with the 2nd Defendant, it is my finding that the suit motor vehicles belong to the Plaintiff and to nobody else.
13. On the second issue of validity of the loan facility to the 2nd Defendant from the 1st Plaintiff, it goes without saying that there was no such valid transaction. The 2nd Defendant could not purport to pledge for security property that he did not own in the first place. I am also satisfied that there was a fraudulent collusion between the 1st and 2nd Defendant in that transaction. This is also given credence by the fact that the 1st Defendant has decided to abandon those proceedings and has chosen not to testify. So in answer to issue numbers 2 and 3, there was no such loan facility against which the suit motor vehicles were offered for security by the 2nd Defendant. Secondly, it also follows that any allegation to the effect that the suit motor vehicles were offered as security is false.
14. Arising from the foregoing this court finds the testimony of the Plaintiff's witness cogent, candid and truthful and is acceptable to this court. I am satisfied that the Plaintiff has proved its case on a balance of probabilities and that the Plaintiff's documents filed in court on 8th March 2014 vindicates beyond any doubt the Plaintiff's claim to the suit motor vehicles. Those documents, which include copies of the logbooks, receipts for payments, for the purchase of the suit motor vehicle were produced and have not been challenged by the Defendants, and I accept them as valid and adequate proof of the Plaintiff's testimony.
15. In the upshot I enter judgement for the Plaintiff against the Defendants jointly and severally as follows:-
 - a. ***A declaration that the said suit motor vehicles known as KBL 525M and KBL 526M belong to the Plaintiff.***
 - b. ***A permanent injunction restraining the 1st, 2nd and 3rd Defendants either by themselves or their agents or servants from interfering with the Plaintiff's ownership and possession of the said Suit motor vehicles being Toyota Land Cruiser Prado registration numbers KBL 525M and KBL 526M.***
 - c. ***An order directed to the Registrar of Motor Vehicles to issue new logbooks in respect of above suit motor vehicles being KBL 525M and KBL 526M to the Plaintiffs.***
 - d. ***Cost of the suit and interest thereon at court rates.***
 - e. ***An order that the Kshs.3,600,000/= deposited herein in the joint names of the parties advocates being security in terms of the order of this court on 19th April 2012 be forthwith released to the Plaintiff with accrued interest.***

That is the Judgement of the court.

DATED, READ AND DELIVERED AT NAIROBI THIS 30TH DAY OF JULY 2014

E. K. O. OGOLA

JUDGE

PRESENT:

Kimathi for Plaintiff

No appearance for Defendant

Teresia – Court Clerk