



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 78 OF 2014

MERICO GREASY WOOL LIMITED APPELLANT/APPLICANT

VERSUS

ORIENTAL COMMERCIAL BANK LTD 1ST RESPONDENT

JEDROM BUILDING CIVIL LIMITED 2ND RESPONDENT

RULING

The Notice of Motion for determination is dated 16th June, 2014. It is brought under Order 40 of the Civil Procedure Rules and Section 63 (e) of the Civil Procedure Rules. The Appellant prays that pending the hearing and determination of the appeal there be an order of injunction to restrain the 1st Respondent, its agents, and or servants from attaching, disposing or in any manner dealing with motor vehicle registration number KBJ 073 W.

The application is based on the following grounds;

- (i) The appellant bought the motor vehicle registration number KBJ 073W on 22/12/2011.***
- (ii) The purchase was done with approval of the 1st Respondent.***
- (iii) Part of the purchase sum was paid directly to the 1st Respondent.***
- (iv) The 1st Respondent has refused to release the logbook to the appellant.***
- (v) The 1st Respondent's conduct is unconscionable.***
- (vi) The Appellant has a prima facie case with a probability of success.***
- (vii) The Appellant stands to suffer irreparable loss.***
- (viii) The 1st Respondent has attempted and is intent on repossessing the motor vehicle to the detriment of the Appellant.***
- (ix) The ends of justice and fair play.***

It is also supported by the affidavit of Mwangi Karuri the Director of the Appellant company sworn on 16th June, 2014. He depones that the Appellant bought motor vehicle registration No. KBJ 073W from

the 2nd Respondent at a cost of Ksh. 1,600,000/=. There was a sum of Ksh. 550,000/= owing to the bank which it was agreed would be paid directly to the bank. The 1st Respondent was then to release the log book of the motor vehicle upon payment of the said sum of Ksh. 550,000/= to it. The sale agreement was then executed after the payment. Unfortunately, the 1st Respondent did not release the motor vehicle log book. Instead, it started looking for the motor vehicle with a view of attaching it.

The Applicant adds that such action of the 1st Respondent is unconscionable, illegal and unfair, hence the prayer in this application.

On behalf of the 1st Respondent, a Replying Affidavit was sworn by Antony Kipsang, the credit officer of the 1st Defendant's Bank, Eldoret Branch. It is deposed that the 1st Respondent was not privy to the sale agreement made between the Applicant and the 2nd Respondent that the sum of money referred to by the Applicant was paid into the 2nd Respondent's account and not the 1st Respondent. That in any event, the log book was deposited to secure a facility with the 1st Respondent and the loan outstanding was Ksh. 1,604,609 as at 30th June, 2014.

The 2nd Respondent also opposes the application vide a Replying Affidavit sworn by William Kipkorir Kipkurui, the director of the 2nd Respondent. The 2nd Respondent agrees with the Applicant and insists that the 1st Respondent consented to the sale agreement between the Applicant and 2nd Respondent. The outstanding amount of Ksh. 550,000/= was fully paid to the 1st Respondent but it declined to release the log book. That the 1st Respondent is not sincere with what it had told the court.

The application was canvassed before me on 22nd July, 2014. Oral submissions were made which I have considered. I now take the following view of the application.

The application herein is premised on Order 40 of the Civil Procedure Rules which refers to temporary injunctions and interlocutory orders. The test herein is for the Applicant to demonstrate the following:-

- (a) That he stands to suffer irreparable loss or damage if the orders sought are not granted.**
- (b) Whether he has an arguable case with a probability of success.**
- (c) Whether the balance of convenience tilts in his favour.**

On the first and second point of determination, what is at stake is a motor vehicle. The same was bought by the Applicant vide a sale agreement dated 22nd December, 2011 between itself and the 1st Respondent Clause (2) of the agreement stipulates as follows:-

"2) That the balance of Kenya Shillings 550,000/= shall be paid in equal instalments of 77,000/= (Seventy Seven Thousand Shillings starting from end of December, 2011. Payments shall be within seven months. Attached cheque No. 000177 dated 30th January, 2012 – paying Oriental Commercial Bank Ltd. "

The agreement is annexed to the Supporting Affidavit as annexure MK.1. Annexure MK.2 is cheque No. 000177 referred to in the above clause.

Annexure MK.3 is a copy of Records from Kenya Revenue Authority dated 1st August, 2013 showing that the registered owner of the vehicle as at that date was Jedrom Building and Civil Engineering Limited, the 2nd Respondent herein.

Whereas the 2nd Respondent agrees that indeed it had a loan facility with the 1st Respondent, the copy of Record from K.R.A indicates that the owner of the vehicle is solely the 2nd Respondent. Again, if truly the 2nd Respondent had not fully repaid the facility, I would expect the 1st Respondent to exhibit the vehicles log book indicating that the motor vehicle is jointly registered in its name and that of the 2nd Respondent. That of course is the norm when any property is charged to a bank as security for a loan facility. The 1st Respondent then having failed to demonstrate this vital aspect of its claim means that it

cannot claim the ownership of the subject motor vehicle.

Besides, it also failed to avail any documents, say a loan account in respect of the 2nd Respondent. Hence, this court has no prove that any monies are owed to it by the 2nd Respondent. And the Applicant having prima facie demonstrates that it had fully paid for the motor vehicle, then the 1st Respondent has no justifiable cause of purporting to repossess the said motor vehicle. Any repossession or sale of the vehicle would certainly occasion the Applicant irreparable loss and damage. I do also hold that, in the circumstances, the Applicant has demonstrated that it has a prima facie with a probability of success. It then follows that the order sought tilts in favour of the Applicant.

I do accordingly allow the application with costs in the cause.

DATED and **DELIVERED** at **ELDORET** this 21st day of November, 2014.

G. W. NGENYE - MACHARIA

JUDGE

In the presence of:

Mwinamo holding brief for Momanyi for the Appellant/Applicant

Rop holding brief for Mwetich for the 1st Respondent

Kilsii holding brief for Kariuki for the 2nd Respondent