



REPUBLIC OF KENYA

High Court at Machakos

Civil Case 137 of 2012

JONATHAN MUSAU NDEKE PLAINTIFF/APPLICANT

VERSUS

1. ERIC KYALO MUTUKU

2. JOHN MUTUKU KIOKO DEFENDANTS/RESPONDENTS

RULING

The application by way of **Notice of Motion** dated 27/4/2012 is premised on **Section 1A, 1B(i), 3 and 3A** of the **Civil Procedure Act and Order 40 and 51** of the **Civil Procedure Rules, Cap 21 Laws of Kenya** and any other enabling provisions of the **Laws of Kenya**.

The application seeks the following orders:-

1. "(Spent).

2. (Spent).

3. THAT, this Court be pleased to issue a temporary injunction restraining the defendants by themselves, their agents and/or servants or any other person whatsoever from transferring, disposing, using and, conducting any business with or in any other manner dealing with the lorry Reg. No. KBN 396A until the hearing and determination the suit herein.

4. THAT, in the alternative the defendants be ordered to deposit the sum of Kshs.3,715,000/= with this Honourable Court or with the plaintiff's/applicant's advocates pending the hearing and determination of the suit herein.

5. THAT, this Court be pleased to further order that lorry Reg. No. KBN 396A be impounded and kept in a neutral place preferably at the Machakos Police Station pending the hearing and determination of this application.

6. THAT, this court be pleased to further order that lorry Reg. No. KBN 396A be impounded and kept in a neutral place preferably at the Machakos Police Station pending the hearing and determination of the suit herein.

7. THAT, the court be pleased to order that the Officer Commanding Machakos Police Station do assist in the execution of the court orders made herein.

8. Costs of this application be provided for.”

The application is supported by the supporting affidavit sworn by the applicant, **Jonathan Musau Ndeke** on 27/4/2012 and a supplementary affidavit sworn on 30/5/2012. According to the said affidavit, the Appellant and the Respondents were Partners in the transport business involving motor vehicle reg. No. **KBN 396 A**. That the Applicant paid Kshs.400,000/= towards the purchase of the said lorry and a further Kshs.53,000/= before the lorry was released by the seller. The Applicant thereafter started running the business in a profitable manner during the period 12/10/2010 and 7/9/2011. On 7/9/2011 the 2nd Respondent repossessed the lorry from the Applicant and handed over the management of the same to the 1st Respondent.

Although the parties herein were to sit and calculate the profits made by the lorry in February 2012 for the Applicant to be bought out of the business, this never came to be. The Applicant calculated what was owed to him by the Respondents at a total of Kshs.3,715,000/=.

In opposition to the application, the 2nd Respondent swore a replying affidavit on 23/5/2012. The 2nd Respondent denied the averments made by the Applicant. According to the 2nd Respondent, he entrusted the Applicant with a lorry Reg. No. **KAU 891 D** for the Applicant to be the driver and the broker on the condition that the Applicant would pay him Kshs.10,000/=per day.

According to the 2nd Respondent, the Kshs.400,000/= paid by the Applicant was the accumulative earnings from the lorry registration No. **KAY 891D** which the Applicant had not paid him. The 2nd Respondent's contention is that he bought the lorry in question through a loan and he repossessed the lorry from the Applicant when he discovered that the Applicant was not adhering to the servicing schedule and had given it to another driver who was not authorized by the 2nd Respondent.

The application was canvassed by way of written submissions. The Applicant was represented by the firm of **F. Katunga Advocates** while the Respondent was represented by **Nzioki Mutua Advocates**.

I have duly considered the application, the reply to the same and the submissions made by the counsels.

From the aforesaid affidavits, the issue whether the lorry was jointly owned by the two parties herein boils down to the word of one side against the other. There seems to have been no written agreement. The motor vehicle in question is registered in the name of **CFC Bank Ltd** and **Eric Kyalo Mutuku** (1st Respondent). It does not come out clearly at this stage how the profits were to be shared out equally, considering that the Applicant has put his contribution towards the purchase price at Kshs.400,000/= while he has given the half value of the lorry as Kshs.2,500/=.

The Applicant has quantified his total claim at Kshs.3,715,000/= general damages and interest. This is therefore a monetary claim and does not meet the threshold for a grant of injunctive orders.

Consequently, the application is dismissed with costs.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 25th day of **April** 2013.

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JUDGE