



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**(MILIMANI LAW COURTS)**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO.126 OF 2008**

**JOHN MWANGI MUCHIRA..... PLAINTIFF**

**VERSUS**

**HYPER CARS LIMITED .....1<sup>ST</sup> DEFENDANT**

**NIC BANK LIMITED.....2<sup>ND</sup> DEFENDANT**

**AHMED MOHAMED ABDALLAH.....THIRD PARTY**

**R U L I N G**

1. By a Notice of Motion dated 6<sup>th</sup> December 2011 brought, inter alia, under Order 40 Rules 1(a) and 2 of the Civil Procedure Rules the Plaintiff sought an order to compel the 2<sup>nd</sup> Defendant to reverse the debit entries in the Plaintiff’s current account number SA 3236000195 as applied to set off the arrears in loan account number HP3-5-310-003670. The Plaintiff sought a further order to restrain the 2<sup>nd</sup> defendant from interfering with his current account number SA 3236000195 or any other account operated by him with the Defendant in so far as such interference was intended to offset the arrears in the Plaintiff’s loan account number HP3-5-310-003670. The Plaintiff further sought an alternative order for the 2<sup>nd</sup> Defendant to deposit in an interest-earning account a sum of Kshs.2,873,821/70 pending the registration by the 2<sup>nd</sup> Defendant of motor vehicle KAU 333F (hereinafter “the suit vehicle”)in the joint names of the Plaintiff and the 2<sup>nd</sup> Defendant. The Plaintiff relied on the grounds on the body of the motion and his supporting affidavit sworn on 6<sup>th</sup> December, 2011.

2. The Plaintiff contended that the basis of the dispute was an action for breach of contract in respect of a Hire Purchase Agreement (hereinafter “the Agreement”) between the Plaintiff and the 2<sup>nd</sup> Defendant over the suit vehicle. The Plaintiff averred that the 2<sup>nd</sup> Defendant had financed the balance of the purchase price of the suit vehicle, that the 2<sup>nd</sup> Defendant had undertaken to effect the registration of the suit vehicle in both its name and the name of the Plaintiff in which case the original logbook of the suit vehicle was availed by the 1<sup>st</sup> Defendant and left in the custody of the 2<sup>nd</sup> Defendant for that purpose. According to the Plaintiff, the Hire Purchase agreement was subsequently perfected and the suit vehicle released to him by the 2<sup>nd</sup> Defendant. That he was thereafter furnished with a copy of the logbook showing that the joint registration was effected in the names of both the 2<sup>nd</sup> Defendant Bank and himself. Problems arose when the Plaintiff attempted to import a spare ignition key for the suit vehicle. It was then discovered that the

chassis details in the motor vehicle control unit and those shown on the logbook were different which meant that the vehicle must have been stolen from the country of origin.

3. Following this discovery, the Plaintiff reported this to the Criminal Investigation Department (CID) who impounded the suit vehicle investigation. Thereafter, a search carried out by the Plaintiff at the Registrar of Motor Vehicles revealed that subsequent to the registration of the Plaintiff and the Defendant as joint owners, the Suit Vehicle was registered in the name of another person. The Plaintiff contended that it was only the 2<sup>nd</sup> Defendant that was in a position to confirm how the latter transfer had been effected as it was in the custody of the original logbook for the suit vehicle.

4. In the premises, the Plaintiff contended that there was no legitimate hire purchase agreement in existence between the 2<sup>nd</sup> Defendant and himself as there was no security upon which the 2<sup>nd</sup> Defendant could hinge the loan account and that if any contract existed between him and the 2<sup>nd</sup> Defendant, the same had been frustrated. He contended that for there to be a legitimate agreement between the 2<sup>nd</sup> Defendant and himself, the suit vehicle should have been registered in the joint names of both the 2<sup>nd</sup> Defendant and the Plaintiff. That the 2<sup>nd</sup> Defendant therefore had no legal basis to demand any sums of money from the Plaintiff until it carried out investigations on how the Suit vehicle was transferred from the names of the 2<sup>nd</sup> Defendant and the Plaintiff to the 3<sup>rd</sup> Defendant.

5. It was the Plaintiff's further contention that he had serviced his loan under the Agreement to the tune of Kshs.1,926,020/= before the discovery of the anomalies as to the ownership of the suit vehicle. That the 2<sup>nd</sup> Defendant's action of debiting Kshs.947,801/70 from the Plaintiff's current account number SA 3236000195 which sums were applied to offset the alleged arrears in the hire purchase account number HP3-5-310-003670 was irregular since the Agreement had been frustrated. That since the 2<sup>nd</sup> Defendant had filed a counterclaim for the sum advanced, the issue of what the Plaintiff owed the 2<sup>nd</sup> Defendant was for the determination of the Court. In the foregoing, the Plaintiff contended that the 2<sup>nd</sup> Defendant could not purport to award itself the sums demanded under the guise of combining and setting off accounts. He therefore urged the court to allow the application.

6. The 2<sup>nd</sup> Defendant opposed the application through a Replying Affidavit by Lilian Sogo sworn on 8<sup>th</sup> October, 2012 and submissions filed on 31<sup>st</sup> October, 2012. The 2<sup>nd</sup> Defendant deponed that the agreement between the parties made on or about 9<sup>th</sup> December, 2005, the 2<sup>nd</sup> Defendant financed the Plaintiff to the tune of Kshs.3,008,600/= for the purchase of the Suit vehicle. That in addition to the said sum, the Plaintiff was to pay hire purchase charges of Kshs.1,010,890/- making a total contract or principal sum of Kshs.4,010,490/-. The said sum was to be repaid in 47 monthly installments of Kshs.83,740/- with effect from 9<sup>th</sup> January, 2006 and a final installment of Kshs.85,210/- including Kshs.1,500/- being the option to purchase all payable on or before 9<sup>th</sup> December, 2009. The principal amount was to attract interest at the rate of 8.4% per annum save for any late payments which would attract an interest of 30% per annum. The 2<sup>nd</sup> Defendant contended that it effected the joint registration of the suit vehicle in both its name and that of the Plaintiff on 21<sup>st</sup> December, 2005. A logbook reflecting the said joint registration was issued on 26<sup>th</sup> August, 2005 which the 2<sup>nd</sup> Defendant produced.

7. It was the 2<sup>nd</sup> Defendant's further contention that under the agreement, it was the duty of the Plaintiff to duly inspect the condition of the suit vehicle before purchase. That the 2<sup>nd</sup> Defendant did not make any representation as to the condition, performance or merchantability of the suit vehicle. That the 2<sup>nd</sup> Defendant was not a party to the purported disputes between the Plaintiff and the 1<sup>st</sup> Defendant or the Plaintiff, 1<sup>st</sup> Defendant and the Kenya Police and that such disputes were immaterial to the 2<sup>nd</sup> Defendant's title over the suit vehicle and/or its right to recover the hire purchase debt. It was also contended on its behalf that it was only after the institution of this suit that the 2<sup>nd</sup> Defendant became aware of the purported defects in the registration details of the suit vehicle. That the 2<sup>nd</sup> defendant had since written to the Registrar of Motor Vehicles on several occasions requesting the certification of the anomalies.

8. It was the 2<sup>nd</sup> Defendant's contention that by virtue of the agreement the suit vehicle belonged to it until the Plaintiff pays the hire charges and exercised the option to purchase. That the Plaintiff was in arrears of the principal sums and interest to the tune of Kshs.3,682,834/45. Even though the 2<sup>nd</sup> Defendant had on 27<sup>th</sup> April, 2011 waived and wrote off the late payment charges levied on the Plaintiff's account, the Plaintiff still failed to service the loan. That on such failure, the 2<sup>nd</sup> Defendant invoked Clauses 11 and 12 of the agreement and set off the sum of Kshs.947,311/76 from the Plaintiff's Account number SA3 2-350-002389 in or about July, 2011. That the said set off was lawful and done in accordance with the agreement between the Plaintiff and the 2<sup>nd</sup> Defendant. That in the foregoing, the Plaintiff's application was meant to defeat the 2<sup>nd</sup> Defendant's rights under the agreement. That the Plaintiff had not met the requirements for a grant of a mandatory injunction at the interlocutory stage and that therefore the said application should be dismissed with costs.

9. I have carefully considered the Affidavits on record. I have also considered the cited authorities and the written submissions by the respective counsel. The issue is whether the Plaintiff has satisfied the requirement for the grant of both a mandatory injunction and a prohibitive injunction as prayed for in his application. The threshold for the grant of an interlocutory injunction is to be found in the case of **Giella – vs- Cassman Brown (1973) EA 358**. This is to the effect that an applicant must establish a prima facie case with a probability of success, that an injunction will not normally be granted unless the applicant might otherwise suffer damage that cannot be compensated by an award of damages and that when the court is in doubt, it will decide the application on a balance of convenience. On the other hand, in considering an application for a mandatory injunction, it is clear that such orders are given at the interlocutory stage only under exceptional circumstances. My view is informed by the holding in the case of **East African Fine Spinners Ltd (In Receivership) & 3 Others vs. Bedi Investments Ltd Civil Appl. NAI. 72/94 (ur)** where Gicheru, JA (as he then was) cited **Megarry J** (as he then was) in **Shepherd Homes Ltd v Sandahm [1971] 1 ch. 34**, that:

**“....., it is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will, of course grant such injunctions as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation.....” (emphasis mine)**

10. Further, in **Halsbury's Laws of England volume 24 paragraph 948** it is stated that:-

**“A mandatory injunction can be granted on an interlocutory application, as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the plaintiff, such as where, on receipt of notices that an injunction is about to be applied for, the defendant hurries on the work in respect of which complaint is made so that when he receives notice of an interim injunction it is completed, a mandatory injunction will be granted on an interlocutory application.”**  
**(Emphasis added)**

11. Those then are the principles applicable to the case before me. The question therefore that arises is whether the Plaintiff has shown sufficient cause to warrant the grant of mandatory and prohibitory orders at this stage. The Plaintiff contended that the 2<sup>nd</sup> Defendant had stolen a march on him by abusing its superior position in combining his accounts held itself during the pendency of this suit and after having filed a counterclaim which is yet to be heard and determined. It was his contention that the 2<sup>nd</sup> Defendant took this step only after realizing that the Hire Purchase Contract between them did not stand on safe legal ground as the same had been frustrated. To the Plaintiff, agreement was frustrated when the Suit Vehicle was impounded by the CID at a time when investigations were lodged into determining the ownership of the Suit Vehicle. That under the circumstances the Plaintiff was under no obligation to service the hire purchase charges agreed upon and that therefore the 2<sup>nd</sup> Defendant could not purport to

exercise the right of set off when the performance of the contract proved impossible.

12. To those contentions, the 2<sup>nd</sup> Defendant retorted that the agreement had not been frustrated but was still valid and enforceable. Counsel for the 2<sup>nd</sup> Defendant sought to distinguish the Case of **Gimalu Estates Ltd & 4 others –v- International Finance Corporation & Another (2006) eKLR** relied upon by the Plaintiff to illustrate how performance of the agreement had been frustrated. It was the 2<sup>nd</sup> Defendant's contention that the performance of the agreement had not been rendered impossible as it was not radically different from what was undertaken under the agreement nor did the nature of the contractual obligation change. Finally the 2<sup>nd</sup> Defendant contended that since the Plaintiff was still in possession of the suit vehicle pursuant to the said Agreement and was enjoying the use of the same, the issue of frustration cannot arise.

13. It is common ground that the Plaintiff and the 2<sup>nd</sup> Defendant entered into a Hire Purchase Agreement for the purchase of the Suit Vehicle. It is also not in dispute that discrepancies as to the particulars of the suit vehicle arose along the way which necessitated the involvement of the CID. Under the circumstances, were the parties exempted from fulfilling their respective obligations under the agreement? The Plaintiff does not deny that he is still indebted to the 2<sup>nd</sup> Defendant. He has also not denied that he is still in possession of the Suit Vehicle. I have perused the contract between the parties and specifically Clauses 3.3.2 to 3.3.4. It is clear from the said Clauses that the Plaintiff had inspected the suit vehicle before purchase and had been satisfied with it. Further, the agreement stipulates that the 2<sup>nd</sup> Defendant did not make any representation as to the condition, performance or merchantability of the suit vehicle. In the Plaintiff dated 7<sup>th</sup> March, 2008, the Plaintiff avers that he had identified the Suit Vehicle for purchase from the 1<sup>st</sup> Defendant, that he had made the deposit before involving the Defendant Bank in the financing of the remainder of the purchase price. Up to that point, my view is that the Plaintiff must have satisfied himself of the condition of the suit vehicle before the 2<sup>nd</sup> Defendant came in. It has not been alleged that the 1<sup>st</sup> and 2<sup>nd</sup> Defendant acted in concert with each other. I will in the premises agree with the 2<sup>nd</sup> Defendant's contention that the circumstances surrounding the suit vehicle before purchase cannot be visited upon the 2<sup>nd</sup> Defendant, as it may have been for all intents and purposes an innocent financier.

14. With regard to the registration of the suit vehicle, I have perused the documents presented with regard to the same. It is clear from the Plaintiff's own exhibit "A1" and the 2<sup>nd</sup> Defendant's exhibit "LS3" which is a copy of the Logbook and copy of records from the Registrar of motor vehicles, that the suit vehicle was at one time registered in the names of both the Plaintiff and the 2<sup>nd</sup> Defendant. There is however no explanation how the names of Westwood Childrens Centre and the 3<sup>rd</sup> Defendant ended on the records of the Registrar of motor vehicles in relation to the suit vehicle. That is a matter however, that can be established at the trial. That notwithstanding, I have perused the Hire Purchase Agreement and I have not seen any requirement for the 2<sup>nd</sup> Defendant to effect joint registration of the suit vehicle as a pre-requisite to the performance of the Plaintiff's obligations. I have also noted the effort of the 2<sup>nd</sup> Defendant to have the Registrar of Motor vehicles rectify the anomalies of the suit vehicle's registration. This culminated in the 2<sup>nd</sup> Defendant instituting Judicial Review Proceedings against Kenya Revenue Authority and the Kenya Transport Authority, in which the Plaintiff is enjoined as an interested party. Those proceedings are still pending. To that extent, I do not find anything to suggest that the agreement had been frustrated or that the 2<sup>nd</sup> Defendant had acted wrongly. It is trite that he who seeks equity must do equity.

15. The Plaintiff seek equity while he is admittedly owing the 2<sup>nd</sup> Defendant and is in possession and use of the suit vehicle? Can a court of equity look at him with favour when he is categorical that he won't pay the monies owing under the contract for the reasons he advances? I think not. In my view, the circumstances of this case do not amount to frustration of the Hire Purchase Agreement between the Plaintiff and the 2<sup>nd</sup> Defendant. I do not think the Plaintiff is excused from performing his part of the obligations under the agreement.

16. On the 2<sup>nd</sup> Defendant's right to set off, this had been reserved under clauses 11 and 12 of the

contract. The 2<sup>nd</sup> Defendant had the right to combine, consolidate all or any of the Plaintiff's Accounts and set off all monies so held against the amount of the Plaintiff's indebtedness under the agreement. Given that the 2<sup>nd</sup> Defendant's security in terms of the suit vehicle was about to be compromised, I believe the 2<sup>nd</sup> Defendant took the only other available option open to it.

17. On the counterclaim, I agree with the Plaintiff that it may not have been proper for the 2<sup>nd</sup> Defendant to set off the amount whilst a counterclaim was pending. But I am alive to the fact that there having been a right to set off under the agreement, there was nothing to bar the 2<sup>nd</sup> Defendant from exercising the same. Further, as noted earlier on, the Plaintiff has not disputed the debt owed to the 2<sup>nd</sup> Defendant nor has he alleged that the sum demanded by the 2<sup>nd</sup> Defendant bank is excessive and unwarranted. I am therefore of the view that given the evidence before me at this stage, I am unable to hold that the 2<sup>nd</sup> Defendant was not within its right to set off the Hire Purchase debt against the Plaintiff's other accounts having in mind that the debt was not contested.

18. As to the issue of non-registration of the Hire purchase agreement, Section 3 of the Hire Purchase Act Cap. 507 Laws of Kenya provides:-

***“3. (1) This Act applies to and in respect to all hire-purchase agreements entered into after the commencement of the Act, under which the hire-purchase price does not exceed the sum of four million shillings (4,000,000/=) or such other higher or lower sum as the Minister may, after taking into account market forces from time to time prevailing, prescribe other than a hire purchase agreement in which the hirer is not a body corporate; but that monetary limitation does not apply so as to affect the definition of “hire-purchase business in section 2 (1)” (emphasis mine)***

Section 2 defines the term hire purchase price as:-

***“..... the total sum payable by the hirer under a hire-purchase agreement in order to complete the purchase of goods to which the agreement relates, including any sum payable by the hirer by way of a deposit or other initial payment or credited or to be credited to him under the agreement on account of any such deposit or payment, whether that sum is to be or has been paid to the owner or to any other person or is to be or has been discharged by a payment of money or by the transfer or delivery of goods or by any other means but excludes any sum payable as penalty, compensation or damages for a breach of the agreement; (emphasis mine)”***

With the above provisions in mind and from the contents of the agreement before court, it would seem clear that the Hire Purchase price for the suit vehicle was Kshs.4,019,490/=. This included the hire purchase charges made of Kshs1,010,890/= and the sum financed by the 2<sup>nd</sup> Defendant of Kshs. 3,008,600/=. With Section 2 of the Hire Purchase Act in mind, it is clear that the Hire Purchase Act would not apply to Hire Purchase Agreement whose purchase price is in excess of Kshs.4million. In this regard, I am of the view that the Act would not apply to the agreement between the parties to this suit. In this regard, that agreement would only be enforced through the tenets of Contract Law.

19. From the foregoing, I am of the view that the Plaintiff has failed to establish any special circumstances which would warrant a grant of a mandatory injunction. Further, I do not think that the Plaintiff has established a prima facie case against the 2<sup>nd</sup> Defendant for the grant of a temporary injunction sought. I therefore reject prayer Nos. 2 and 3 of the application.

20. As for the alternative prayer for the deposit of Kshs. 2,873,821/70 in a joint interest earning account pending the registration of the Suit Vehicle in the joint names of the Plaintiff and the 2<sup>nd</sup> Defendant, I have not seen any sufficient basis established to warrant the grant of such an Order. It has not been shown what the said sum of Kshs.2,873,821/70 constitute of. The amount allegedly wrongfully deducted

from the Plaintiff's accounts was in the region of Kshs.900,000/-. Why apply for an amount far in excess thereof? A reason therefor lacking, I also reject that prayer. The upshot of this is that the Plaintiff's application dated 6<sup>th</sup> December, 2011 is without merit and is hereby dismissed with costs.

**DATED** and **DELIVERED** at Nairobi this 7<sup>th</sup> day of **June**, 2013.

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**A. MABEYA**

**JUDGE**