



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL SUIT NO. 181 OF 2011

DUNCAN KIBET KIRONG PLAINTIFF/APPLICANT

VERSUS

MOTOR WORLD LIMITED DEFENDANT/RESPONDENT

RULING

The application is by way of Notice of Motion dated 19th October, 2011 brought under Order 39 Rules 1, 5, 6 and 7, Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act in which the plaintiff seeks two main prayers, namely:-

1. The motor vehicle Reg. No. KAU 559 X Toyota Pick-up (Double cabin) and Reg. No. KBM 666 W] be attached and placed at Eldoret Police Station for safe custody pending the hearing and determination of this application and thereafter pending the conclusion of the main suit.
2. In the alternative to prayer (b) above, the court do order the Defendant/Respondent within a time to be fixed by the court to show cause why it should not furnish security by depositing with court the monetary values of the subject motor vehicles Nos. KAU 559X and [KBM 666 W or such a portion thereof as may be sufficient to satisfy the decree that may be passed against the Defendant/Respondent in the suit.

The application is based on the following grounds:-

- (i) The Defendant/Respondent unlawfully and fraudulently seized motor vehicle Reg. No. [KBM 666 W Toyota Lexus from the Plaintiff/Applicant without returning or restituting motor vehicle Reg. No. KAU 559 X upon the Plaintiff and also failed to refund the sum of Ksh. 300,000/= paid by the Plaintiff as part payment of the purchase price.
- (ii) The seizure of motor vehicle Reg. No. KBM 666W Toyota Lexus was done suddenly and without any notice to the Plaintiff/Applicant and the Defendant/Respondent did not have a court order or decree sanctioning the seizure.
- (iii) The Plaintiff/Applicant being an international athlete has been unfairly, unjustly and wrongfully deprived of the use of any of the motor vehicles by reason of which his training and

competition schedule has been adversely hampered. Consequently, of which he has and continues to suffer substantial loss, damage, prejudice and inconveniences.

(iv) The Defendant/Respondent being a dealer in motor vehicles is likely to dispose of the subject motor vehicles thereby affording reasonable probability that the Plaintiff/Applicant will or may be obstructed, frustrated or delayed in the execution of the decree that may be passed against the Defendant/Respondent.

(v) In the event the Defendant/Respondent disposes the two suit motor vehicles then the Applicant will suffer a double jeopardy as the suit may be rendered nugatory.

(vi) The Defendant/Respondent stands to unjustly and unfairly enrich itself through unorthodox, illegal and dubious means to the detriment of the Applicant.

(vii) The circumstances herein justifies the attachment of the two vehicles before judgment and in the alternative, the Defendant be ordered to furnish security as prayed.

(ix) This court has inherent and unfettered jurisdiction and discretion to grant the prayers sought herein.

It is further supported by the affidavit of the Applicant sworn on 19th October, 2011.

The summary of depositions in the Supporting Affidavit are as follows:-

That the Applicant who is an athlete, bought motor vehicle number KAU 559X Toyota Pick-up (Double Cabin) from Rosa Associated Limited, a company which he runs, at a consideration of Ksh. 2,350,000/= for which he paid the entire amount. That on 23/12/2010 he entered into an exchange agreement with the Defendant/Respondent company whereupon he traded in his motor vehicle KAU 559X then valued at Kshs. 1,700,000/= with Respondent's motor vehicle Reg. No. KBM 666 W Toyota Lexus Harrier valued at Ksh. 2,400,000/=. That he was to pay the difference of the purchase price of Ksh. 700,000/= in two months instalments of Ksh. 350,000/= each.

He avers that he took possession of motor vehicle Reg. No. KBM 666 W and the Respondent took possession of motor vehicle KAU 559 X. That he paid Ksh. 300,000/= on 12th January, 2011 leaving a balance of Ksh. 400,000/=. That the Respondent later informed him that it was not able to effect transfer of motor vehicle KAU 559 X into its name due to accumulated unpaid duty of about Ksh. 820,000/=. That he was not aware of the existence of the unpaid duty, and had he been aware of the same, he would not have purchased the said vehicle KAU 559 X from Rosa Associates Limited.

He states that due to the foregoing, the sale agreement had become frustrated and he was constrained to return motor vehicle KBM 666W to the Respondent who released motor vehicle KAU 559 X to him, but failed to refund Ksh. 300,000/= which he had paid as part-payment of the purchase price.

The Applicant states that he approached Director of Rosa Associates the Limited, one Claudio Berardelli who promised to pay the owing duty to Kenya Revenue Authority in two months. That based on this understanding, himself and the Respondent resumed the exchange agreement and he (Applicant) took possession of motor vehicle KBM 666 W and returned motor vehicle KAU 559 X to the Respondent.

That on 16th June, 2011, and without notice, the Respondent seized motor vehicle KBM 666 W from the Applicant, though in his absence. He depones that such seizure denied him of his lawful use of the motor vehicle and was illegal and fraudulent for the following reasons:-

- (a) Purporting to seize motor vehicle Reg. No. KBM 666 W without returning or restituting motor vehicle Reg. No. KAU 559 X to him and failing to refund the sum of Ksh. 300,000/= deposited by him as further payment of the purchase price.
- (b) Seizing motor vehicle Reg. No. KBM 666 W without any valid notice to him or a valid court order or decree authorizing its seizure.
- (c) Fraudulently depriving him of the motor vehicle and money and exposing him to unwarranted hardships and inconveniences.
- (d) Breaching the terms of exchange/sale agreement and then purporting to levy illegal, baseless and undue penalty charges in furtherance of its illegal conduct.
- (e) Being actuated by bad faith and acting in unorthodox and dubious manner.
- (f) Purporting to demand alleged unpaid duty from him and subtly demanding for a sum of Ksh. 700,000/= as the balance when it knew that the actual balance was Ksh. 400,000/=.
- (h) Acting in a manner tantamount to theft of his motor vehicle.

He further states that he has now been left without a motor vehicle which can facilitate him to train as an athlete.

In response, the Respondent has filed a replying affidavit sworn by Alex Otuke Ondimu, one of the directors of the Defendant Company.

According to him, the exchange agreement became frustrated due to the unpaid duty to Kenya Revenue Authority in respect of motor vehicle KAU 559 X. He says that motor vehicle KBM 666 W was returned to the Applicant on understanding that he forfeited Ksh. 300,000/= that he had paid as part of the purchase price. That despite the promise that the owing duty would be paid in two months, which date fell by February, 2011, the same remained unpaid as at the time the Replying Affidavit was filed.

He avers that, although the parties reverted to the original terms of the exchange agreement on understanding that the duty would be paid within two months, neither the duty nor the balance of the purchase price was paid as at June, 2011. That as a result, the Respondent repossessed the motor vehicle KBM 666W and sold it on 6th July, 2011 by way of Public Auction. That at the time of its repossession, the vehicle was in a state of disrepair and Ksh. 363,080/= was spent in repairing it. That the proceeds of the sale was used to clear the balance of the purchase price and meet the repair and auctioneers charges.

He further states that motor vehicle KAU 559 X was sold to a third party with whom the Respondent agreed would pay the accumulated duty and seeks its refund.

In further reply to the Replying Affidavit the Applicant has filed a Further Affidavit sworn by himself on 28th November, 2011. The gist of the Further Affidavit is that there was no understanding between himself (Applicant) and the Respondent that he would forfeit Ksh. 300,000/= he had deposited upon resumption of the exchange agreement. He denies that the Respondent even served him with a letter dated 12th May, 2011 in which he was purportedly notified of the consequences of failing to pay the balance of the purchase price. That there was no clause in the exchange/sale agreement that provided for the repossession or seizure of the motor vehicle, and that such seizure or sale by public auction was never authorized by the court.

It is further contended that the seized motor vehicle was not in a state of disrepair and any

documentation to the contrary is a fabrication intended to deprive the Applicant of his motor vehicle. That there was no such agreement between the parties to repair the motor vehicle. That the said motor vehicle was in good mechanical condition save for a dent on the frontal bumper and weak shock absorbers for which the Applicant sent Ksh. 20,000/= and 17,000/= respectively for their replacement but which none was done.

I directed that the matter be canvassed by way of filing of written submissions. It came up for mention on 20/2/2013 to confirm that submissions had been filed. This had been done, but Mr. Njuguna for the Applicant insisted on highlighting his submissions. He only emphasized on issues he had raised in the oral submissions.

I have now carefully considered the application, the Supporting and Further Affidavits filed in support of the application, the Replying Affidavit and the respective submissions filed.

I consider the following to be the issues for determination:-

(a) Whether motor vehicles Reg. No.KAU 559 X and KBM 666 W should be attached pending the decree of this court.

(b) Whether the Defendant should furnish security to court as to satisfy the decree that may be passed by the court.

As for attachment before Judgment, Order 39 Rule 1 of the Civil Procedure Rules provides that:-

“1. Where at any stage of a suit, other than a suit of the nature referred to in paragraphs (a) to (d) of section 12 of the Act, the court is satisfied by affidavit or otherwise -

(a) that the defendant with intent to delay the plaintiff, or to avoid any process of the court, or to obstruct or delay the execution of any decree that may be passed against him-

(i) has absconded or left the local limits of the jurisdiction of the court; or

(ii) is about to abscond or leave the local limits of the jurisdiction of the court;

or

(iii) has disposed of or removed from the local limits of the jurisdiction of the court his property or any part thereof; or

(b) that the defendant is about to leave Kenya under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may issue a warrant to arrest the defendant and bring him before the court to show cause why he should not furnish security for his appearance:

Provided that the defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiff's claim; and such sum shall be held in deposit by the court until the suit is disposed of or until the further order of the court” (See Order 39 Rule 1 of the Civil Procedure Rules 2010).”

In light of the foregoing provision, the principles governing the attachment before judgment were laid down in the case of **KURIA KANYOKO t/a AMIGOS BAR AND RESTAURANT -VS- FRANCIS KINUTHIA NDERU, HELEN NJERU NDERU AND ANDREW KINUTHIA NDERU (1988) 2 KAR, 1287-1334**, when the Court of Appeal reiterated as follows:-

“The power to attach before judgment must not be exercised lightly and only upon clear proof of the mischief aimed at by Order 38, r 5, namely that the defendant was about to dispose of his property or to remove it from the jurisdiction with intent to obstruct or delay any decree that may be passed against him.”

Note that Order 39 under 2010 rules is the initial Order 38 of the old rules.

In the instant application the Plaintiff/Applicant has prayed as follows:-

“The motor vehicle Reg. No. KAU 559 X Toyota Pick up (Double Cabin) and Reg. No. KBM 666 W be attached and be placed at Eldoret Police Station for safe custody pending the hearing and determination of this application inter parties and thereafter pending the conclusion of the main suit.” (See prayer (b) on the face of the application)

The Applicant has argued that the Defendant/Respondent being a dealer in motor vehicles is likely to dispose of the subject motor vehicles and hence obstruct and/or frustrate and/or delay the execution of the anticipated decree. I have no doubt that this is a likely scenario.

The above provisions contemplates disposition of the property while the suit is pending in court.

According to the Defendant it is apparent that the subject matter being the two motor vehicles have already been disposed of to third parties and they do not therefore exist for purposes of attachment. In respect of motor vehicle KBM 666W the deponent to the Replying Affidavit, Alex Otuke Ondimu states that upon its repossession, it was sold on 6th July, 2011 by way of public auction.

In respect of motor vehicle KAU 559 X he says it was sold to a third party.

As for prove of the sales, it remains a mystery. None has been demonstrated so far. Be that as it may, court cannot give an order in vain. It would serve no purpose to order for an attachment that may not be realized. As such the Applicant may not find relief with regard to prayer (b) of the application.

With regard to the second issue for determination, Order 39 Rule 5 of the Civil Procedure Rules provides:

“(1) Where at any stage of a suit the court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him-

(a) is about to dispose of the whole or any part of his property; or

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court,

the court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the

disposal of the court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

(2) The plaintiff shall, unless the court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) The court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.”

Having found that attachment cannot hold, the court should be satisfied, before ordering that a security be furnished, that the Plaintiff has a case, and that failure to concede to the request may pre-empt his case.

In this regard, while I note that the Defendant repossessed motor vehicle KBM 666W to cushion itself against loss, it was imperative that it returned motor vehicle KAU 559 X to the Plaintiff. By retaining both motor vehicles, it advanced a case of benefiting twice, whereas in the first instance, partial payment for the difference of the purchase price pursuant to the exchange/sale agreement had been made.

May I add, though, that the exchange/sale agreement dated and executed between the parties had no provision for repossession and/or retention of both vehicles in the event the Plaintiff was not able to satisfy its terms.

Moreso, such repossession and subsequent sale of both vehicles had no legal basis.

In my view, the Plaintiff has advanced a genuine case which cannot be wished away. Pursuant to Order 39 Rule 5, the remedy available is one of furnishing security. The only hitch is that the Plaintiff did not specify the value of the security that he wishes be furnished. He has neither identified any property of the Defendant that the latter may be ordered to produce for purposes of advancing this course.

But one thing is clear in my mind, that the (Plaintiff) would only be entitled to one of the motor vehicles. The question is, which one between the two?

If the Defendant felt obliged to repossess motor vehicle KBM 666 W it ought to have returned motor vehicle KAU 559 X. At the time of the exchange agreement it was valued at Ksh. 1,700,000/=. In addition, he paid Ksh. 300,000/= in clearing the difference of the purchase price of this vehicle and KBM 666 W.

I will however not take into account the payment of this deposit of Ksh. 300,000/= as its expenditure is subject to prove during the trial. I would find it prudent at this stage that the Defendant should furnish such security as would bring the Plaintiff close to the position he was before the sale transaction turned sour.

In the case of **KARL JENNING -VS- ALLIWALI, HIGH COURT AT MOMBASA CIVIL CASE NO. 630 OF 1990 (Unreported)**, the then Honourable Justice Waki said:-

“I am of the view that this is a proper case where orders should be issued for the defendant to either furnish security or appears and show cause why he should not furnish such security.”

And in **BAYUSUF GRAIN MILLERS -VS- BREAD KENYA LIMITED** (2005) e KLR, the learned Judge Kimaru noted as follows:-

“Our Order 38 which sanctions this practice was borrowed from the Indian Civil Procedure. The learned author, Mulla in his treaties on the Indian Code (13th Ed. Pg. 1502), says inter alia, of order 38 rule 35:-

“The object of this rule is to prevent the decree that may be passed from being rendered infructuous ... The order that has is contemplated by this rule, is not unconditional one directing attachment of property, but one calling upon the defendant to furnish security or to show cause why security should not be furnished. Where the defendant offers to give security, the court should go into the question of its sufficiency before issuing final order of attachment.”

The Applicant cited other case law, to wit, **WANJOHI -VS- RESMA COMMERCIAL AGENCIES LIMITED AND ANOTHER (2005) e KLR, ANTHONY NG'ANG'A -VS- JOHN MAINA (2005) e KLR AND PETER WAIKWO NJAGI -VS- OMAR ALI SHABAL (2011) e KLR**. I have specifically singled these authorities because they touch on issues determining whether the seizure and subsequent sale of the motor vehicles was lawful. They point out towards a seizure that was not based on any contractual agreement or legal basis.

It is my view that, If I failed to issue the order in respect of prayer (c), this court may in the end issue a decree that may never be executed. It may chase the wind. This may end up embarrassing the court. That is not the objective of meeting justice where a decree issued cannot be executed, whereas such an embarrassment would have been curtailed by a foreseeable remedy.

As for the Preliminary Objection dated 9th November, 2011 filed by the Defendant it argues that this court has no jurisdiction to entertain the matter.

My view is that, by dint of Article 165 of the Constitution, the High Court has original jurisdiction in criminal and civil matter save for matters reserved for the Court of Appeal, Supreme Court, Employment and Labour Relations Court and the Environment and Land Court.

It has also argued that the suit does not disclose any reasonable cause of action. In the case of **DRUMMOND-JACKSON -VS- BRITISH MEDICAL ASSOCIATION AND OTHERS, (1970) 1 ALL ER. 1094** it was held that:-

“... over a long period of years it has been firmly established by many authorities that the power to strike out a statement of claim as disclosing no reasonable cause of action is a summary power which should be exercised only in plain and obvious cases”

In **D.T. DOBIE & COMPANY (KENYA) LTD -VS- MUCHINA (1982) KLR, 1**, the court had this to say:-

“... if a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward, for a court of justice not to act in darkness without the full facts of the case before it.”

Further, striking out of pleadings is a draconian remedy and procedure that can only be invoked in plain and obvious cases and such discretion must be exercised with extreme caution – See

REPUBLIC OF PERU -VS- PERUVIAN GUANO COMPANY 36 CH. DIVISION 489 AND D.T. DOBIE (K) LTD -VS- MUCHINA AND ANOTHER (SUPRA).

Further the Defendant prays that suit be dismissed for being scandalous, frivolous or vexatious. The nature of this application may be made under Order 2, Rule 15 (1) (b) of the Civil Procedure Rules.

The case of **KENYA AIRWAYS LTD -VS- CLASSICAL TRAVEL AND TOURS LTD (2003) LLR 2704 (CC K) – (found at www.lawafrica.com)** while citing **CHRISTIE -VS- CHRISTIE (1873) 8 CH. APP. 449** defines what is scandalous in the following words:-

“allegations in a pleading are scandalous if they state matters which are indecent or offensive or are made for the mere purpose of abusing or prejudicing the opposite party.”

From the foregoing it is clear that this case is not frivolous or scandalous. In fact it is based on solid claim founded on seizure and subsequent sale of the subject matter.

It is also contended that the suit should be struck out as it is an abuse of the court process. This term, **“abuse of the court process”** is well defined in the case of **METROPOLITAN BANK -VS- POOLEY (1885) 10 AC 2010 AT 221** as:-

“The term abuse of the process of the court is a term of great significance. It connotes that the process of the court must be carried out properly, honestly and in good faith; and it means that the court will allow its function as a court from being used as a means vexation or oppression in the process of litigation. It follows that where an abuse of process has taken place, the court will intervene to order stay or even dismissal of the proceedings, although it should not be lightly done yet it may often be required by the very essence of justice to be done.”

From the foregoing the Preliminary Objection must fail as the same should be **“based on a point of law which is resolved without considering the merits of the application before the court”** - See **NIAZSONS (K) LTD -VS- CHINA ROAD AND BRIDGE CORPORATION (K) (2002) 2 E.A., 502 – 514 AT PAGE 502.**

It is for the reasons in the foregoing, I should rule in favour of the Applicant.

In the result, I order that pending the hearing and determination of the suit, the Defendant shall furnish a security in the sum of Ksh. 1,700,000/=. Such security shall be either in cash or kind. In this regard, and for the court to satisfy itself as to the sufficiency of the security, the Defendant, through its directors shall appear in court within 21 days of this ruling to show cause why they cannot furnish the security ordered by the court.

In the meantime, the Plaintiff shall as well, provide evidence of existence of such security as would satisfy this order.

In this regard I order that the matter be mentioned before me on 26th June, 2013 for notice to show cause as directed above.

The Defendant/Respondent shall pay costs of this application.

DATED and DELIVERED at ELDORET this 6th day of June, 2013.

G. W. NGENYE - MACHARIA

JUDGE

In the presence of:

Mr. Njuguna Advocate for the Plaintiff/Applicant

No appearance for Gordon Ogolla Advocate for the Defendant/Respondent (Duly served with Ruling Notice)