



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**CIVIL CASE NO. 193 OF 2012**

**SUSAN WAGIKUYU MWAURA.....PLAINTIFF**

**VERSUS**

**1. THE CO-OPERATIVE INSURANCE COMPANY LTD  
2. AUTOFINE LTD.....DEFENDANTS**

**R U L I N G**

1. The Plaintiff's case is rather poorly pleaded in the **plaint dated 26<sup>th</sup> April 2012**, but as I understand it, it is that she took out with the 1<sup>st</sup> Defendant a comprehensive insurance cover for her motor vehicle registration number KAH 372 Z; that on 12<sup>th</sup> December 2008 the vehicle was involved in an accident along Thika Highway; that the 1<sup>st</sup> Defendant authorized the 2<sup>nd</sup> Defendant to repair the motor vehicle; that the 1<sup>st</sup> Defendant did not pay for the repair and instead told the Plaintiff to deal directly with the 2<sup>nd</sup> Defendant; and that the 2<sup>nd</sup> Defendant refused or neglected to release the motor vehicle to her. She has sought two main reliefs against the Defendants jointly and severally -

- (i) An order of permanent injunction "barring the Defendants ...from holding, dealing (with), transferring or in any way alienating" the suit motor vehicle.
- (ii) General damages "for detention of the motor vehicle...till the date of release".

2. The Defendants filed separate defences. The 1<sup>st</sup> Defendant's case is that it fully discharged its obligation to the Plaintiff under the contract of insurance by paying to her KShs 83,404/00 for the accident repairs that had been duly assessed and which it then authorized; and that upon payment of that sum the Plaintiff executed a discharge voucher by which she discharged the 1<sup>st</sup> Defendant from any further liability.

3. The 2<sup>nd</sup> Defendant's case, as I understand it, is that the Plaintiff sought other repairs that were over and above those authorized by the 1<sup>st</sup> Defendant, which the 2<sup>nd</sup> Defendant carried out; that the Plaintiff then refused or neglected to pay for those repairs despite many demands; and that after due notice the 2<sup>nd</sup> Defendant disposed of the motor vehicle under the **Disposal of Uncollected Goods Act, Cap 38** to recover its repair and storage costs.

4. The Plaintiff filed her suit on 26<sup>th</sup> April 2012. On 9<sup>th</sup> July 2012 she filed **notice of motion dated 21<sup>st</sup> June 2012**. That application is the subject of this ruling. She seeks one main order as follows –

**“...permanent injunction barring the 1<sup>st</sup> and 2<sup>nd</sup> Defendants jointly and severally from holding, dealing (with), transferring and/or in any way alienating the Plaintiff’s motor vehicle Registration No KAH 372 Z”.**

The application is stated to be brought under **Order 40, Rules 1, 2, 4 and 10** of the **Civil Procedure Rules, 2010** (the **Rules**). Clearly then, what the Plaintiff meant to seek is a **temporary** not permanent injunction. I will proceed upon that basis.

5. There are only two grounds for the application stated on the face thereof –

- (i) That the order sought will not prejudice the Defendants.
- (ii) That the order will be in the interests of justice.

The application is supported by the Plaintiff’s affidavit in which she restated her case as pleaded in the plaint. A number of documents are annexed.

6. The Defendants opposed the application by replying affidavits. The **1<sup>st</sup> defendant’s replying affidavit was filed on 27<sup>th</sup> September 2012** and is sworn by one *Lydia Mwangi*, a legal officer working with the 1<sup>st</sup> Defendant. The **2<sup>nd</sup> Defendants’ replying affidavit was filed on 3<sup>rd</sup> August 2012** by one Thomas Kimandu, its managing director. The replying affidavits reproduce the Defendants’ cases as pleaded in their respective statements of defence.

7. The application was canvassed by way of written submissions. Those of the Plaintiff were filed on 11<sup>th</sup> December 2012. The 1<sup>st</sup> Defendant’s submissions were filed on 18<sup>th</sup> January 2013 while those of the 2<sup>nd</sup> Defendant had been filed on 18<sup>th</sup> December 2012. I have considered those submissions together with the cases cited.

8. From the wording of the temporary injunction sought, it is clear that what the Plaintiff is seeking is actually a mandatory injunction to restore possession of the suit motor vehicle to her. That is why the first thing she wants the Defendants restrained from doing is **“holding”** the motor vehicle!

9. It will be recalled that one of the two main reliefs sought in the plaint is a permanent injunction restraining the Defendants first, from “holding” the motor vehicle.... An interlocutory order whose effect would be to dispose of a large portion of the suit upon untested affidavit evidence would not be lightly granted. But in this case the Plaintiff’s ownership of the suit motor vehicle is not in dispute. So, everything else being equal, there should be no impediment to granting the order sought.

10. However, everything else is not equal here. The main defence raised by the 2<sup>nd</sup> Defendant is that it duly disposed of the motor vehicle to defray its repair and storage costs. In other words, its plea is that the motor vehicle no longer exists in its possession.

11. I cannot see on the record any reply to defence by the Plaintiff denying the fact that the motor vehicle was sold, or asserting that it is still in the 2<sup>nd</sup> Defendant’s possession. There is also no supplementary affidavit to the same effect in answer to the 2<sup>nd</sup> Defendant’s replying affidavit.

12. The court does not act in vain. If the 2<sup>nd</sup> Defendant disposed of the suit motor vehicle as pleaded (and as seen that claim of disposal has not been denied by the Plaintiff) the order sought would be in vain, and the court will not grant it.

13. In the circumstances I need not examine whether the application meets the legal requirements for the grant of a temporary injunction. The application clearly has no merit and is dismissed with costs to the Defendants. It is so ordered.

**DATED AND SIGNED AT NAIROBI THIS 16<sup>TH</sup> DAY OF AUGUST 2013**

**H. P. G. WAWERU**

**JUDGE**

**DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF AUGUST 2013**