



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT KITALE.**

**CIVIL SUIT NO. 15 OF 2013.**

**ALI ABDI SABRE ::: PLAINTIFF.**

**VERSUS**

**CMC MOTORS GROUP LTD.)**

**PAUL KAGAI THUMBI) :::DEFENDANT.**

**T/A SUPERVIEW INVESTMENTS)**

**R U L I N G.**

This suit was filed in this court on the 6th June, 2013 and the prayers sought are that a permanent injunction be issued against the defendants restraining them from attaching, repossessing, selling, advertising for sale, transferring, detaining, sharing and keeping or dealing in any way with the plaintiff's motor vehicles subject of the case.

Alternatively, the plaintiff prays for a rescission of the subject contract and an order for the return of the amount already paid to the defendants.

The plaint was filed alongside a notice of motion dated the 5th June, 2013 in which the plaintiff sought a temporary injunction order against the defendants.

The application was in the first instance presented ex-parte on the 10th June, 2013 on which date the court granted interim injunction order on the basis of the supporting grounds as fortified by the averments contained in the plaintiff's supporting affidavit dated 5th June, 2013.

the application is yet to be heard inter-parties.

In the meantime, the defendants vide a Notice of motion dated 30th August, 2013 have applied for the discharge and/or setting aside of ex-parte temporary injunction order issued by this court on 10th June, 2013 for the main reason that the order was obtained by deception, non-disclosure and/or concealment of material facts and in particular that the plaintiff failed to disclose the existence of another suit against the first defendant being NBI HCCC No. 1 of 2012 in which orders similar to those in the present suit were sought by the plaintiff. That, the plaintiff failed to disclose to the court the existence of a consent order made on 11th January, 2013 in the said NBI HCCC No. 1 of 2012 and that he (the plaintiff) had failed to comply with the terms of the said consent order.

The application is opposed by the plaintiff on the basis of the facts contained in his replying affidavit

dated 17th October, 2013.

Having carefully considered the application in the light of the plaintiff's opposition thereto it is apparent to this court that there is no denial by the plaintiff that indeed there exists another case being NBI HCCC 1 of 2012 pitting him and the defendants revolving around the same subject matter. This was a very material fact which ought to have been disclosed herein to enable the court exercise discretion in a proper and just manner prior to the issuance of an order for temporary injunction against the defendants more so, considering that the prayers sought in the first suit are more or less similar to the prayers sought herein.

The non-disclosure of this material fact was a clear demonstration of the plaintiff's intent to abuse the court process and his lack of good faith in filing this suit in this court. This lack of good faith is further demonstrated by the averment in the plaint that there was no other suit pending between the plaintiff and the defendants pending in any other court on the same subject matter.

Most important, the existence of a consent order made between the plaintiff and the first defendant in the Nairobi case is not disputed. The order in effect settled the case there being no indication that it was at a later stage set aside or that the plaintiff has since moved the court to have it set aside. This therefore meant that the plaintiff could not prosecute or was not allowed to prosecute a subsequent case based on the same facts, and subject matter. Yet, the plaintiff did exactly that by filing this present suit and obtaining interim orders against the defendants. It is doubtful whether this court had the necessary jurisdiction to re-open the matter after it had been finalized by dint of the aforementioned consent order. Rather than prosecute a fresh suit, there would have been nothing easier than the plaintiff moving the court in the first suit to have the consent order set aside and pave way for a hearing of the suit on the merits.

It is instructive to note that the consent order came out of a hire purchase agreement that had been re-negotiated between the parties therein. In breaking the terms of the consent, the plaintiff was in effect attempting by this suit to have the court re-write the hire purchase agreement to his advantage. Such a scenario is not permissible since a court cannot re-write a contract or agreement for the parties.

In sum, the failure by the plaintiff to disclose to this court the existence of the Nairobi case and the consent order which came with it amounted to deliberate non-disclosure of material fact thereby rendering the present application unsustainable.

Consequently, the application is allowed to the extent that the ex-parte interim injunction order issued by this court on 10th June, 2013 be and is hereby discharged and/or set aside. Either party is at liberty to apply with regard to the main suit.

The costs of this application be borne by the plaintiff.

Ordered accordingly.

**[Read and signed this 20th day of November, 2013.]**

**J.R. KARANJA.**

**JUDGE.**