



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY COURTS**

**CIVIL CASE NO. 562 OF 2011**

**GEORGE MUHORO WAINAINA .....PLAINTIFF**  
**- VERSUS -**

**KENYA REVENUE AUTHORITY..... 1<sup>ST</sup> DEFENDANT**

**ROSE GICHIRA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

Before the court is a Notice of Motion dated 14<sup>th</sup> December 2011 seeking many orders stated therein among them that an order restraining the Defendants and or its agents from removing, vandalizing, releasing to any other person other than the Plaintiff or his agent or in any way dealing and interfering with the motor vehicle registration number KBP 501T. The matter was heard *ex-parte* on 14<sup>th</sup> December 2011 and the court granted in the interim prayers 1, 2, 3, 4 and 5 of the application pending the *inter-partes* hearing of the same. Pursuant to the grant of the above orders the Defendants/Respondents also filed a Notice of Motion dated 16<sup>th</sup> January 2012 seeking the discharge of interim orders 4 and 5 and leave of the court to issue a Third Party Notice against Homenet Limited. On 13<sup>th</sup> February 2012 parties entered into a consent and Homenet Clearing & Forwarding Logistics Limited was joined to these proceedings as a Defendant. The two Notice of Motion applications dated 14<sup>th</sup> December 2011 and 16<sup>th</sup> January 2012 were heard together and form the basis of this Ruling.

The brief history of the application is that by a Plaint filed in court on 14<sup>th</sup> December 2011 the Plaintiff alleged that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had conspired to fraudulently detain and finally auction motor vehicle make Land Rover Model Range Rover TD 6 later registered as KBP 501T despite the fact that all assessed Government duty and other charges had been paid to enable clearance and registration of the same. The Plaintiff had read bad faith and ill motive on the part of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants for the continued detention of the said motor vehicle and the intended sale of the same at a public auction then scheduled for 20<sup>th</sup> December 2011. That is what led the Plaintiff to file the suit and the Notice of Motion dated 14<sup>th</sup> December 2011 seeking various injunctive orders named in the said application.

The Defendants responded by filing a Defence on 13<sup>th</sup> January 2012 in which all the allegations contained in the Plaint were denied. The main Defence is that the Defendants cannot release the said motor vehicle to the Plaintiff since there is a dispute as to who is the real owner as two different entities both with ostensible authority and documentations have claimed ownership. Unless this issue is resolved the Defendant would not release the said motor vehicle to the Plaintiff.

The Notice of Motion applications and affidavits in support or opposition of the same are largely based on

the contents of the Plaint and Defence. The application is supported by affidavit sworn by the Applicant on 14<sup>th</sup> December 2011 together with its annexures. It is opposed by an affidavit sworn by Tabitha Shikanda dated 16<sup>th</sup> January 2012 together with its annexures.

Mr. Chelang'a for the Applicant submitted that the Plaintiff bought the said motor vehicle for purpose of selling the same to a third party based in the Democratic Republic of Congo (DRC). In due time, and for no apparent reasons the Defendants arrested and detained the vehicle and later threatened to sell it as an abandoned motor vehicle. He submitted that the Plaintiff had all documents of title including the Bill of Lading and annexed copy of Records from Kenya Revenue Authority (K.R.A.) and that the vehicle is already registered in the name of the Plaintiff. He submitted that under Section 8 of the Traffic Act, registration of a vehicle in somebody's name is a *prima-facie* indication of ownership. He submitted that K.R.A's detention of the said motor vehicle is unreasonable. The said motor vehicle had never been abandoned as alleged by the Defendant and that injunctive orders sought should issue.

The Applicant on 15<sup>th</sup> January 2012 filed an undertaking as to damages and pledged to indemnify and hold harmless the Defendants in the event of any successful claim by third parties of motor vehicle registration number KBP 501T.

M/s Lavuna for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents opposed the application and also sought to dislodge the *ex-parte* orders granted on 14<sup>th</sup> December 2011. The counsel submitted that the Plaintiff's entire suit has come about due to the Plaintiff's own negligence. The Plaintiff has not proved ownership. There are conflicting information. Annexure "TS 1" shows that a Seizer Notice was issued by K.R.A. to the Plaintiff. "TS 2" are import entries which show different consignees. "TS 3" is an affidavit by the Plaintiff stating that the Plaintiff had since sold the said motor vehicle to a Mr. Brian Kasozi of DRC and that the vehicle is on transit. The counsel submitted that the Respondents cannot release the said motor vehicle since procedures for release of domestic motor vehicles differ with those for release of vehicles on transit. Further, two different consignees with two different bills of lading had laid claims to the said motor vehicle. So the said motor vehicle cannot be released until the lawful owner was established. Homenet Clearing & Forwarding, which was joined to this suit as an interested party, was the clearing agent on behalf of the Plaintiff. It has all the documents to clear the said vehicle. However, the Plaintiff has now disowned the said agent who also now, on the basis of the documentation claims ownership thereof.

Further, the Respondent's counsel submitted that the Plaintiff did not disclose the existence of suit number MOMBASA CMCC NO. 1394 OF 2011 **HOMENET CLEARING & FORWARDING LOGISTICS LIMITED – VS – DIAMOND SHIPPING SERVICES LIMITED AND GEORGE MUHORO WAINAINA** (the current Plaintiff). When the Plaintiff filed this case here in Nairobi the Plaintiff did not disclose the existence of the above suit in Mombasa thereby failing to disclose all material information for a fair hearing of this suit. It is submitted that this suit can only be properly determined not only as between the Plaintiff and Kenya Revenue Authority but also as between the Plaintiff and Homenet Clearing & Forwarding Logistics Limited who filed the Mombasa suit and is now a Defendant herein.

Mr. Mutiso for the Interested Party associated himself with the submissions of M/s Lavuna. He submitted that the Plaintiff has failed to disclose material information and has come to this court with unclean hands. He also submitted that the Plaintiff's undertaking is a paper undertaking which should not be relied upon.

On the basis of the submissions the Respondents have urged this court to dismiss the application with costs.

I have considered the application in its entirety.

It is true that the Plaintiff when he came to court at *ex-parte* stage did not disclose the fact that there existed an interested party in the name of Homenet Clearing & Forwarding Logistics Limited which had,

to the Plaintiff knowledge also lodged claim to the subject motor vehicle. Further the Applicant did not disclose the existence of the said case number 1394 of 2011 Mombasa. Although that case does not involve issues of ownership, yet disclosure of the existence of the same would help the court in arriving at an informed decision.

More fundamentally, however, this court is persuaded by the Respondent's submissions that the Defendants could not and cannot release the subject vehicle to one contesting claimant, and risk a claim or suit for the value of the same by the other claimant, without first investigating and requiring proof to be provided by the parties to establish the rightful owner. As it is there are three possible claimants, all who on the face of it have genuine claim. They include firstly the Applicant, secondly Brian Kasozi (pursuant to the Plaintiff's letter dated 24<sup>th</sup> June 2011 to the Commissioner of Customs where he indicated that the subject vehicles' consignee is one Brian Kasozi and not the Plaintiff) and, thirdly, Homenet Clearing and Forwarding Logistics Limited.

There are also two other clearing agents namely Easy Transporters and Diamond Shipping.

Pursuant to Section 147 of the East African Customs Community Management Act (2004), a duly authorized agent who performs any act on behalf of the owner of any goods shall accordingly be personally liable for payment of any duties to which the goods are liable. In this regard Homenet Clearing & Forwarding Logistics Limited having duly cleared the subject vehicle, are deemed in law to be the owner of the said vehicle while acting as agents for the consignee as defined under Customs Law.

It is clearly evident that the Applicant's claim to ownership is not open and clear. This court cannot issue a declaration that the Plaintiff is the lawful owner of the subject motor vehicle registration number KBP 501T when the Plaintiff himself has sworn affidavit stating that the vehicle allegedly now belongs to one Mr. Brian Kasozi.

In the upshot I herewith dismiss the application dated 14<sup>th</sup> December 2011 in its entirety with costs to the Defendants/Respondents, and discharge and set aside all existing interim orders.

In the alternative, I herewith order the release of the subject motor vehicle KBP 501T to the Plaintiff/Applicant on the **condition** that the Applicant deposits its agreed value in monetary terms in an interest earning account in the joint names of the parties advocates pursuant to the Applicant's undertaking as to damages filed in court on 15<sup>th</sup> January 2012 pending the hearing and the determination of the suit. The deposit is to be secured at any time before the suit is heard and determined.

These are the orders of the court.

**DATED, READ AND DELIVERED AT NAIROBI**

**THIS 27<sup>TH</sup> DAY OF APRIL 2012.**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

*Chelanga for the Plaintiff*

*Lavuna for the 1<sup>st</sup> and 2<sup>nd</sup> Defendant*

*Teresia – Court clerk*