



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
(MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)
CIVIL SUIT 140 OF 2012
CHINA PETROLEUM PIPELINE BUREAU LIMITED.....PLAINTIFF
VERSUS
ANDERSON NDWIGA NJERU
T/A BRAJAN ENTERPRISES.....1ST DEFENDANT
MARY WAMBUI2ND DEFENDANT
DUNCAN MUGAMBI MUTUNGI
T/A WRIGHT AUCTIONEERS.....3RD DEFENDANT

RULING

By a Motion on Notice brought under the provisions of section 1A & 1B, 3 and 3A of the Civil Procedure Act and Order 40 rule 2 of the Civil Procedure Rules dated 8th March 2012, the plaintiff applicant seeks the following orders:

- 1) That this application be certified urgent and be heard ex-parte in the first instance.**
- 2) That pending the hearing and determination of this Application a temporary injunction be and is hereby issued restraining the defendants either by themselves or through their agents, servants or employees from repossessing, selling, disposing off, transferring, using and/or in any other way dealing with the Motor vehicles known as KBL 525M and KBL 526M.**
- 3) That pending the hearing and determination of this suit a temporary injunction be and is hereby issued restraining the defendants either by themselves or through their agents, servants or employees from repossessing, selling, disposing off, transferring, using and/or dealing with the Motor vehicles known as KBL 525M and KBL 526M.**
- 4) That the costs of this Application be provided for.**

The application is supported by an affidavit sworn by **Leng Dongsheng** who states that he is the Financial Manager of the Plaintiff, on 8th March 2012. According to the deponent, on 12th May 2010 the plaintiff purchased two motor vehicles make Toyota Land Cruiser Prado from Toyota East Africa at the sum of Kshs. 6,132,890.39 each. According to him the total purchase price payable to the 1st defendant for the motor vehicles was Kshs. 12,265,780.00. I take this statement to be an inadvertent one since it is not clear why the said sum was payable to the 1st defendant. Upon payment of the said sum the plaintiff was duly issued with receipts and the said motor vehicles registered and the plaintiff issued with registration books (or log books as they are popularly known). The said vehicles were delivered to the Plaintiff on 26th May 2010.

However, on or about 5th March 2012, the 3rd defendant acting on behalf of the 1st defendant sought to repossess the said motor vehicles on the ground that the 1st defendant alleged to have offered a loan facility of Kshs. 3,000,000.00 to the 2nd defendant in exchange of the 2nd defendant offering both the Motor Vehicles as security for payment. In that process it was claimed that the 2nd defendant was the owner of the said vehicles. On retrieving the log books for the said vehicles to present to the OCS Kileleshwa Police Station, the deponents states that they were informed that the same were forgeries inspite of the fact that the plaintiff has at all material (sic) the only registered owner of all motor vehicles and has enjoyed quiet and continued possession of the same. It is the plaintiff's belief that the defendants have colluded in defrauding the plaintiff of ownership and possession of the said motor vehicles.

In opposition to the application the defendants swore two replying affidavits by **Duncan Mugambi Mutungi** and **Anderson Ndinga Njeru** on 16th March 2012. According to Anderson Ndinga Njeru, the 1st defendant herein, he was on 28th March 2011 approached by the 2nd defendant to assist her with a soft loan in the sums of Kshs. 3,600,000/- on security of two vehicles registration nos. KBL 525M and KBL 526M both Toyota Prado. After verifying the authenticity of the documents furnished by the 2nd defendant with the registrar of persons and the Kenya Revenue Authority, an agreement was drawn up in respect of the said lending with a provision for interest at the rate of 30% per month on reducing balance with default clause for repossession of the vehicles in event of a default of any one instalment. The repayment period according to the deponent was 6 months. Further the 2nd defendant executed the transfer forms granting the 1st defendant the right to transfer the same in event of default. Following constant default on the part of the 2nd defendant the accumulated sum due was Kshs. 12,240,000.00. The 1st defendant accordingly demanded the same and in default of settlement instructed the 3rd defendant to repossess the said vehicles vide a letter dated 21st February 2012 and a proclamation was duly levied on 22nd February 2012. Due to the resistance from the police the 1st defendant went to Kileleshwa police station where it was confirmed that the logbooks being held by the plaintiff were forgeries. He also confirmed from the records furnished by the Kenya Revenue Authority that the plaintiff is not the registered owner of the said vehicles. Since the plaintiff's case is premised on forged documents, the 1st defendant contends that no case has been made out to warrant the injunction sought.

The third defendant similarly swore an affidavit in which he averred that as an auctioneer, he was only instructed by the 1st defendant to repossess the said motor vehicles which action commenced before he was summoned to Kileleshwa Police Station on a report lodged by the plaintiff wherein the logbooks produced by the plaintiff were found to be forgeries. This information was also confirmed by the Kenya Revenue Authority. According to the deponent, the plaintiff is seeking by its application to sanitise its fraudulent activities and to obtain judgement thereon.

In his submissions **Mr. Kimathi**, learned counsel for the applicant, stated that the plaintiffs are the registered owners of the suit vehicles which they have been using since the time of purchase without interference. It is only when the 3rd defendant attempted to repossess the same that the plaintiff carried out due diligence and found that the vehicles were registered in the name of the 2nd defendant. It is counsel's submissions that the registration of the said vehicles into the names of the 2nd defendant was perpetrated by fraud which this court ought to investigate moreso in light of the fact that the alleged

transfer documents are blank documents. It is further submitted that the 1st defendant has no capacity to lend money and hence the allegation that money was lent on account of security of the said vehicles is untrue. Without the appearance of the 2nd defendant in these proceedings, it would not be possible to unravel the fraud. Since the matter is under investigation by the police and the plaintiff is in possession of the orders sought in the application, it is submitted, are merited.

On his part, **Mr. Onyango**, learned counsel for the 1st and the 3rd defendants submitted that the transaction between the 1st and the 2nd defendants was a friendly loan and that at no point did the 1st defendant represent itself as a bank hence there was no need for registration of Chattels Mortgage. In the logbook furnished to the 1st defendant by the 2nd defendant, the 2nd defendant was shown as the second owner. The 1st defendant was shown the vehicles which he assessed and took particulars thereof. Since the plaintiff admits that the logbooks held by it were found by police to be forgeries, there is no prima facie case made out. Accordingly, as the documents from Kenya Revenue Authority indicate that the vehicles belong to the 2nd defendant, the application should be dismissed.

I have considered the application, the affidavits both in support and in opposition to the same and the submissions of counsel. The law on the grant of injunction in this country is fairly well settled. Conditions for grant of interlocutory injunction as laid down in *Giella Vs. Cassman Brown & Co. Ltd [1973] EA 358* are as follows;

(i). prima facie case with a probability of success;

(ii). the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages;

(iii). if the Court is in doubt on the existence or otherwise of a prima facie case it will decide the application on the balance of convenience.

The foregoing conditions are, however, not exhaustive. At an interlocutory stage the Court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law and that in an application for injunction although the Court cannot find conclusively who is to be believed or not, the Court is not excluded from expressing a prima facie view of the matter. The remedy being an equitable one, the Court will decline to exercise its discretion if the supplicant to relief is shown to be guilty of conduct which does not meet the approval of the Court of equity. The court should also consider whether the supplicant for the injunction sought has offered any undertaking as to damages in the event that the suit fails.

In this case the plaintiff's case is that it is the registered proprietor of the suit vehicles. However this contention is shaken by the findings by the police and the records of the Kenya Revenue Authority. The 2nd defendant who it is alleged to be the registered proprietor's whereabouts are however, unknown since none of the parties seem to know how to trace her. Without the participation of the second defendant in these proceedings one cannot say with certainty who between the plaintiff and the 2nd defendant is the rightful claimant to the suit vehicles. Whereas, the official records indicate that the documents held by the plaintiff are forgeries, no one seems to have come out to claim that the said vehicles are his. On the other hand the plaintiff seems to have documents showing that the said vehicles were purchased from Toyota East Africa. The 2nd defendant is indicated according to the 1st defendant as the second owner of the said vehicles. There are no documents showing who were the first owners, according to the official records. It would have been helpful if the 1st defendant has obtained records showing who the previous owners of the said vehicles were. Whether or not the plaintiff has made out a prima facie case cannot be certain. This is a very much borderline case. The 1st defendant on the other hand's interest in the said vehicles is not as the owner but simply as a pledgee. His interest is limited to recovering his money lent to the 2nd defendant who has apparently gone underground.

In the foregoing premises, it is my considered view that this is a matter which should be decided on a

balance of convenience. Since the plaintiff is in possession and the 1st defendant does not claim ownership of the vehicles, the maintenance of the status quo which is the cornerstone of prohibitive injunctive orders would dictate that the possession of the vehicles remain with the plaintiff. Accordingly the injunction sought in prayer 3 of the said Motion is granted on condition that the plaintiff deposits the sum of Kshs. 3,600,000.00 in a joint interest earning account to be opened in the names of the advocates for the parties within 21 days. As mandated under the provisions of Order 40 rule 6 the lifespan of these orders is one year unless ordered otherwise.

Ruling read, signed and delivered in Court this 19th day of April 2012.

G.V. ODUNGA

JUDGE

In the presence of:

Mr. Kimathi for plaintiffs/applicants.

Mr. Biketi for Mr. Onyango for the 1st and 3rd defendant/respondents.