



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**CIVIL CASE 180 OF 2012**

**FESTUS MITHI WANJOHI ::: PLAINTIFF**

**- VERSUS -**

**CMC MOTORS GROUP LTD. ::: 1<sup>ST</sup> DEFENDANT**

**SABINA NYAMBURA GATHITU ::: 2<sup>ND</sup> DEFENDANT**

**R U L I N G**

The Plaintiff through a Notice of Motion application dated 28<sup>th</sup> March 2012 seeks orders of this court namely:-

1. That pending the hearing and determination of this suit the 1<sup>st</sup> Defendant whether by itself or agents be restrained from selling, disposing off, transferring or alienating motor vehicle registration number KBL 548D.
2. That the 1<sup>st</sup> Defendant be ordered to unconditionally release to the Plaintiff motor vehicle registration number KBL 548D and be prohibited from interfering with the Plaintiff's quiet possession of the said vehicle pending the hearing and determination of this suit.

The grounds in support of the application are stated in the application, but is mainly that the said motor vehicle KBL 548D is jointly owned by the Plaintiff and the 2<sup>nd</sup> Defendant, and it has been illegally seized and detained by the 1<sup>st</sup> Defendant for the debt allegedly owed to it by the 2<sup>nd</sup> Defendant. The Plaintiff is alleged never to have been a party to the said debt and was surprised to find that the 2<sup>nd</sup> Defendant had given the original log book to the 1<sup>st</sup> Defendant to secure the purchase of her own vehicle from the 1<sup>st</sup> Defendant. The Plaintiff states that he has never signed any legal documents offering the said vehicle as security to the 1<sup>st</sup> Defendant for the indebtedness of the 2<sup>nd</sup> Defendant or to anybody else. The Plaintiff and the 2<sup>nd</sup> Defendant are husband and wife respectively.

The application is supported by the affidavit of the Plaintiff dated 26<sup>th</sup> March 2012 and its annexures and a supplementary affidavit of the same person dated 17<sup>th</sup> April 2012.

The application is opposed through a statement of grounds of opposition dated 12<sup>th</sup> April 2012 and filed in court on the same day and through affidavit of JOSEPH WAMBUGU dated 12<sup>th</sup> April 2012 with its annexures.

Brief history of the application is as follows:-

The Plaintiff/Applicant herein is the husband to the 2<sup>nd</sup> Defendant. In the year 2009, the Plaintiff is alleged to have been involved in a serious road accident. This made him to be hospitalized due to the serious injuries he sustained. The Plaintiff besides being an accountant, operates a matatu business and he owns several buses which operate in Nairobi area. Due to his hospitalization, the wife stepped in and assisted in the management of the Plaintiff's business pending his recovery.

In the year 2010, the Plaintiff decided to purchase a new bus and since he could not personally attend to that transaction, the wife offered to assist. The bus was purchased in cash but a small amount was left. The balance was then cleared in full and the motor vehicle registration number KBL 548D (hereinafter referred to as the "1<sup>st</sup> vehicle") was registered in both names of the Plaintiff and his wife as shown in the Plaintiff's exhibit marked "FMW 1". The log book is dated 08/04/2010. This vehicle was purchased from the 1<sup>st</sup> Defendant.

The wife then decided to purchase her own bus from the 1<sup>st</sup> Defendant. She purchased motor vehicle registration number KBM 297V (hereinafter referred to as the "2<sup>nd</sup> vehicle"). According to the 1<sup>st</sup> Defendant, she allegedly offered the 1<sup>st</sup> vehicle as security for the balance of the purchase price. The Plaintiff was never informed of this and he never signed any document offering the 1<sup>st</sup> vehicle as security to the 1<sup>st</sup> Defendant for the purchase of the 2<sup>nd</sup> vehicle.

On 21<sup>st</sup> September 2011, the 1<sup>st</sup> Defendant sent its agents and/or servants who seized the 1<sup>st</sup> vehicle and detained it in their premises. The Plaintiff sought an explanation for this and he was told that his vehicle was being detained with the intention of being sold to realize the debt allegedly owed to it by the 2<sup>nd</sup> Defendant. The Plaintiff protested against the unlawful seizure since he was never a party to the alleged Debt. His vehicle was then released on 1<sup>st</sup> August 2011 and the Plaintiff thought the matter had been put to rest, but this was never to be as the said motor vehicle was later on seized and detained by the 1<sup>st</sup> Defendant, hence these proceedings.

The 1<sup>st</sup> Defendant has opposed the application stating *inter-a-alia* that the Plaintiff and the 2<sup>nd</sup> Defendant, at the time of placing the order for the supply of the 1<sup>st</sup> motor vehicle, represented to the 1<sup>st</sup> Defendant that the Plaintiff and the 2<sup>nd</sup> Defendant were jointly operating the business of public service transport and that the 2<sup>nd</sup> Defendant was purchasing the 1<sup>st</sup> motor vehicle for the said business in the name of herself and the Plaintiff. The 1<sup>st</sup> Defendant submitted that the Plaintiff by his conduct represented to the 1<sup>st</sup> Defendant that the 2<sup>nd</sup> Defendant had authority as a partner in the said business to do all acts necessary and proper to carry out that business including signing the motor vehicle purchase documents and making payments to the 1<sup>st</sup> Defendant.

The parties have filed elaborate affidavits in support of their positions. The parties also filed elaborate submissions in support of their positions.

I have considered the application and the submissions of the parties in this matter. For me the issues to determine are as follows:-

1. Was the 2<sup>nd</sup> Defendant an agent of the Plaintiff in the purchase of the 1<sup>st</sup> motor vehicle KBL 548D?
2. If so, is the 1<sup>st</sup> Defendant entitled to seize the said motor vehicle due to the default by the

Plaintiff and the 2<sup>nd</sup> Defendant to perform their part of the contract?

**3. Does this case meet the threshold, of granting an interim injunction as established under the GIELLA - VS - CASMAN BROWN & CO. LTD. 1973 E.A. 358?**

To address issue number 1, it is not disputed that the Plaintiff and the 2<sup>nd</sup> Defendant are husband and wife respectively. That they bought the motor vehicle KBL 548 D together is also not disputed. The motor vehicle was finally registered in their joint names and that of the 1<sup>st</sup> Defendant as per the log book annexed as annexure **JW 17**. The transactions leading to that registration also clearly show that they worked as a team in this venture. Defendant's annexures **JW 1**, shows Retail Vehicle Order No. 28881. It was signed by the 2<sup>nd</sup> Defendant alone. Annexure **JW 2** is an application for deferred payment. It is dated 29<sup>th</sup> March 2010. It is in the joint names of the Plaintiff and the 2<sup>nd</sup> Defendant. It is signed by the 2<sup>nd</sup> Defendant alone. Annexure **JW 4** which is a declaration of Lien – Deferred Payment is also in the joint names of the Plaintiff and the 2<sup>nd</sup> Defendant but it is executed by the 2<sup>nd</sup> Defendant only.

Annexure **JW 5** is a guarantee for the supply of vehicles also in the joint names of the Plaintiff and the 2<sup>nd</sup> Defendant but again only executed by the 2<sup>nd</sup> Defendant and not the Plaintiff. The same position is with annexure **JW 2** being the guarantee and indemnity also in the joint names of the Plaintiff and the 2<sup>nd</sup> Defendant but only executed by the 2<sup>nd</sup> Defendant. The same position is tenable in annexures **JW 7** and **JW 8** and in virtually all the annexures by the 1<sup>st</sup> Defendant.

However, it is worth noting that when it came to the payment for the said vehicle the money came from the joint account of the Plaintiff and 2<sup>nd</sup> Defendant's account number 075-8612163 of Kshs.1,000,000.00 as per annexure **JW 9**. What this shows clearly is that although the Plaintiff never executed any of the documents towards the purchase of the 1<sup>st</sup> motor vehicle, he acknowledged that he was part of the transaction when he signed a cheque in part payment of the same. This, in my view, is evidence that the Plaintiff delegated all the execution process to his wife. He thereby made the 1<sup>st</sup> Defendant to believe that the 2<sup>nd</sup> Defendant was the Plaintiff's agent. This is more so because the Plaintiff never raised any complaints in relation to the purchase of the 1<sup>st</sup> motor vehicle in which it is his wife who took the leading role. With this ostensible authority, the 2<sup>nd</sup> Defendant approached the 1<sup>st</sup> Defendant for the purchase of the 2<sup>nd</sup> motor vehicle registration number KBM 297 V and offered the 1<sup>st</sup> motor vehicle KBL 548D as security. With the ostensible authority the 2<sup>nd</sup> Defendant exercised in the purchase of the 1<sup>st</sup> motor vehicle, the 1<sup>st</sup> Defendant had no reason to believe that she had no authority to offer the same as security for the 2<sup>nd</sup> motor vehicle. The Plaintiff had all along created the impression that his wife the 2<sup>nd</sup> Defendant had the authority to transact any business with regard to the 1<sup>st</sup> motor vehicle. The 1<sup>st</sup> Defendant had a right to rely on the ostensible authority of the 2<sup>nd</sup> Defendant. That being so the 1<sup>st</sup> Defendant had the right to seize and detain the said motor vehicle KBL 548 D upon the default by the 2<sup>nd</sup> Defendant to make payments as they fell due. The retail vehicle order signed by the 2<sup>nd</sup> Defendant had the following material terms:-

**(a)** That property in the goods shall be vested in the seller until the buyer pay the purchase price in full and notwithstanding that the buyer may have the possession of or any documents of title to the goods.

**(b)** That the seller's title and lien upon the goods shall entitle the seller to at any time repossess the goods and offer the same for sale and thereat recover any loss on resale from the buyer.

I find that the 1<sup>st</sup> Defendant was perfectly within its rights when it seized and detained the said motor vehicle which was pledged to it as security by the 2<sup>nd</sup> Defendant as an agent of the Plaintiff.

Quite apart from the foregoing, I cannot but smell a kind of conspiracy between the Plaintiff and the 2<sup>nd</sup> Defendant. Firstly, the Plaintiff has alleged that the 2<sup>nd</sup> Defendant took advantage of his sickness when he

was hospitalized, and pledged the 1<sup>st</sup> motor vehicle as security. The Plaintiff has however not annexed any evidence that he was sick and hospitalized. There are no hospital records or hospital bills attached to show the veracity of the Plaintiffs' claim. Neither has the Plaintiff stated the period of this illness and when he recovered. This information if availed would show whether or not the Plaintiff was telling the truth.

Secondly, the 2<sup>nd</sup> Defendant is completely silent in these proceedings. It would have been better if she filed an affidavit to state her part of the story. Given that the Plaintiff and the 2<sup>nd</sup> Defendant have admitted to being husband and wife, it is difficult not to infer any kind of conspiracy between the two to avoid the end of justice. In a court of equity that this is, a party coming to it must be transparent. I find that there is absolutely no transparency in this matter on the part of the Plaintiff and his wife the 2<sup>nd</sup> Defendant. Joining the 2<sup>nd</sup> Defendant to this suit was meant merely to mislead this court. The orders being sought are equitable and no court of equity can grant orders where the Applicant does not appear honest and where the court cannot but smell a conspiracy between some of the parties to subvert justice.

The second issue I raised is whether this case meets the threshold established in **GIELLA – VS – CASSMAN BROWN CASE**. That case established three principles: -

(1) Whether the Applicant has established a *prima facie* case capable of succeeding at trial. To this, my, summary answer, arising from the foregoing, is that I am not convinced the Plaintiff has established a *prima facie* case that can succeed at the hearing. But if aim wrong, the second principle is still applicable.

(2) Will the Plaintiff suffer damages that cannot be compensated for by way of damages? My answer to this is obvious. The Plaintiff is in business for money. The vehicle KBL 548D which is attached has a monetary value. In fact the 1<sup>st</sup> Defendant's claim is slightly over Kshs.1,600,000/=.

This is clearly quantifiable. The Plaintiff has also stated what he has lost in terms of past business and future business. He has estimated his loss at Kshs.15,000/= per day. If his case is successful the 1<sup>st</sup> Defendant will have no difficulty paying the Plaintiff for his losses. The 1<sup>st</sup> Defendant may even compensate him with another motor vehicle. The seizer and sale of the Plaintiff's motor vehicle registration number KBL 548D cannot occasion irreparable loss to the Plaintiff that cannot be compensated for by damages.

The third principle is that when the court is in doubt, it will decide the application on the balance of convenience. However, I am not in doubt, so this third principle does not apply. But even if I was in doubt, the balance of convenience cannot lie in favour of the Plaintiff for the reasons I have already stated.

In the end, I herewith dismiss the Plaintiff's application dated 28<sup>th</sup> March 2012 with costs to the Defendant/Respondent.

It is so ordered.

**DATED, READ AND DELIVERED AT NAIROBI**

**THIS 29<sup>TH</sup> DAY OF MAY 2012.**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

*Peter Mwangi for the Plaintiff*

*Kepha Ombati for the Defendants*

*Teresia – Court clerk*