



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 293 of 2012

KILIMANI MOTORS LIMITED.....PLAINTIFF

VERSUS

YUASA MOTORS LIMITED.....1ST DEFENDANT

MARTIN MWANIKI T/A KIMAIGA ENTERPRISES.....2ND DEFENDANT

RULING

By a Motion on Notice brought under the provisions of Order XL Rule 1, 4 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act and all other enabling provisions of the law, the plaintiff applicant seeks the following orders:

1. That this matter be certified as urgent and service thereof be dispensed with in the first instance.

2. That pending the inter partes hearing of this Application, this Honourable Court be pleased to grant an interim order restraining, barring and/or stopping the Defendant/Respondent whether by themselves, their servants agents and/or employees from attaching any vehicles belonging to and/or in possession of the Applicant and/or sold to 3rd parties being motor vehicle registration number

a) KBM 710S Chasis Number KDH 200-0013905 Toyota Hiace

b)KBL 335Z Chasis Number M100A-081434 Toyota Duet

c) KBL 337Z Chasis Number NCP12-0290491 Toyota Platz

d)KBM 836F Chasis Number WFY11-360723 Nissan Wingroad

e) KBM 401 A Chasis Number WFY11-368625 Nissan Wingroad

3. That at the inter partes hearing this Honourable Court be pleased to grant an interim restraining, barring and/or stopping the Defendant/Respondent whether by themselves, their servants agents and/or employees from attaching any vehicles belonging to and/or in possession of the Applicant and/or sold to 3rd parties being motor vehicle registration number

a) KBM 710S Chasis Number KDH 200-0013905 Toyota Hiace

b)KBL 335Z Chasis Number M100A-081434 Toyota Duet

c) KBL 337Z Chasis Number NCP12-0290491 Toyota Platz

d)KBM 836F Chasis Number WFY11-360723 Nissan Wingroad

e) KBM 401 A Chasis Number WFY11-368625 Nissan Wingroad

4. That pending the inter partes hearing of this Application, this Honourable Court be pleased to order the Defendant/Respondent whether by themselves, their servants agents and/or employees to forthwith release Motor Vehicle registration Number KBM 776N Chasis Number WFY11-300796 Nissan Wingroad.

5. That at the inter partes hearing of this Application, this Honourable Court be pleased to order the Defendant/Respondent whether by themselves, their servants agents and/or employees to forthwith release Motor Vehicle Registration Number KBM 776N Chasis Number WFY11-300796 Nissan Wingroad

6. That this Honourable court order the immediate release and delivery to the Applicant of the log books of motor vehicle registration numbers:-

a) KBM 710S Chasis Number KDH 200-0013905 Toyota Hiace

b) KBL 335Z Chasis Number M100A-081434 Toyota Duet

c) KBL 337Z Chasis Number NCP12-0290491 Toyota Platz

d) KBM 836F Chasis Number WFY11-360723 Nissan Wingroad

e) KBM 401 A Chasis Number WFY11-368625 Nissan Wingroad

f) KBM 776N Chasis Number WFY 11-300796 Nissan Wingroad

7. That the Officer Commanding Kilimani Police Station do ensure the compliance of the said Order.

8. That the costs of this application be borne by the defendants.

9. That this Honourable Court be pleased to make such other orders as it deems fit and just in the circumstances.

The application is based on the following grounds:

1. That the Defendants herein have threatened to illegally and unlawfully repossess vehicles in the Applicants car yard in Kilimani with no colour of right and/or claim of ownership in the aforementioned vehicles.

2. That the Defendant have proceeded to illegally and unlawfully demand in excess of Kshs. 7,560,000.00 allegedly owed to them by the Applicant herein and have further threatened to cripple the applicants business.

3. That the defendants have in the process illegally and unlawfully executed in the form of repossession, motor vehicle registration number KBM 776N which was sold to a 3rd party, not party to these proceedings.

4. That as a result of the brazen and callous acts of the defendant the plaintiff continues to incur substantial losses arising out of loss of business and reputation.

5. That the Applicant stands to suffer substantial loss as the respondents have moved to unlawfully repossess the vehicles from the applicant from his premises without any legal and/or any known justification whatsoever rendering him susceptible to criminal action instituted by 3rd party purchasers.

6. That as a result of the brazen and callous acts of the defendants the plaintiff continues to incur substantial losses arising out of loss of business.

7. That if this court does not determine this matter on a priority, then indeed the loss to be visited on the Applicant will have defeated all ends of justice herein.

The application is supported by an affidavit sworn by **Safdar Khan**, in his capacity as a Director of the Plaintiff. According to the deponent, the Plaintiff runs mainly a second hand motor vehicle dealership along Argwings Kodhek Road in Kilimani Area of Nairobi imported from Japan and elsewhere. The Plaintiff entered into an agency agreement with the defendant in which it was agreed that the defendant would supply vehicles to the plaintiff who would sell the same and remit the proceeds therefrom to the defendant. The said agreement, which has been in existence for a decade, is based on mutual trust between the parties. Pursuant to the said arrangement the defendant supplied the plaintiff with vehicles worth Kshs. 13,610,000.00 on the said terms that the plaintiff would sell the same and remit the proceeds therefrom to the defendant vide cheques, direct electronic transfers or cash. On receipt of the said vehicles the plaintiff embarked on the rigorous process of selling the same and remitted a total of Kshs. 10,400,000.00 to the defendant as per the aforesaid mode of remission. It is further deposed that the defendant instructed the deponent to remit Kshs. 4,000,000.00 to a third party on the defendant's behalf which the deponent did on the understanding that the same would be deducted from the outstanding amount. Upon the said payment and on confirmation of all the sales the plaintiff sought confirmation of the last consignment and called for their logbooks. However, the defendant responded by instructing Messrs Kimaiga Auctioneers to serve the plaintiff with a notification of sale on 11th June 2012 in which it was advised that motor vehicle registration number KBM 776 had been repossessed and would be sold on the defendant's instructions. A further notification of sale dated 30th November 2011 was served seeking to repossess 12 vehicles over an alleged debt of Kshs. 7,560,000.00, interests and auctioneers fees. The defendant has further threatened to repossess and sale the suit motor vehicles by an action which the deponent contends is without colour of right, preposterous and farcical as the plaintiff owes the defendant no money. In fact it is the defendant who owes the plaintiff the sum of Kshs 830,000.00. Despite the plaintiff seeking audience the same has been denied. The said action, it is deposed, exposes the plaintiff to the perils of criminal litigation since some of the vehicles threatened with repossession have been sold to third parties. In the deponent's view any action may only be taken against the plaintiff in a civil action and not through barbaric and unlawful acts. Unless the court grants the prayers sought the plaintiff who has invested heavily in the said business stands to suffer irreparably in terms of reputation.

The defendants have, in opposition to the said application, filed a replying affidavit on 28th June 2012 through **Arshad Mahmood** who describes himself as a director of defendant's company. According to the deponent, the plaintiff's move is mischievous, frivolous, without merit and an abuse of the court's process. While admitting paragraphs 3, 4, 5, 6 and 7 (which deal with the existence of the arrangement between the parties and remission of Kshs 10,400,000.00), and paragraph 8 (with respect to the mode of transmission of the said sum), it is contended that the applicant negated the terms of the agreement by not making regular payments as agreed. The deponent, however, denies the existence of the arrangement relating to payments made to the third party and the plaintiff is challenged to furnish evidence thereof. It is further the defendant's contention that the cheques referred to in paragraph 12 of the supporting affidavit were returned unpaid. The deponent, however, admits that the plaintiff had sold the vehicle to a third party but contends that the same was not paid for as it formed part of the unpaid cheques. With respect to the intended attachment it is deposed that the same is a result of non-payment by the plaintiff and that the intended repossession is based on a valid claim against the plaintiff who sold the said vehicles and refused to remit the proceeds therefrom to the 1st defendant as agreed. Accordingly the plaintiff's alleged settlement is denied as misleading as the defendant has not received payment in respect of the alleged sales to the third parties. According to the deponent, it was part of the said agreement that

even vehicles sold to third parties would be repossessed in the event of default by the plaintiff. Since the plaintiff has approached the court with unclean hands it is deposed the plaintiff does not deserve the equitable orders sought and the plaintiff is bound by the terms of the contract voluntarily entered into by the parties.

The plaintiff filed a further affidavit sworn by **Sadfar Khan** on 10th October 2012 in which it is deposed that the defendant has on numerous occasions demanded unrealistic amounts which amounts the plaintiff has denied owing. According to the deponent, the agreements/consents were entered into through duress when the defendant threatened to render the plaintiff impotent in the industry by sending the media to the plaintiff. It is deposed that the plaintiff remitted Kshs. 500,000.00 by cash to the defendant and supplied the defendant with a Toyota Harrier KBQ 030W as collateral. It is further deposed that the defendant's agents Kimaiga Enterprises took vehicle no. KBM 776N which has not been accounted for. As at 30th November 2011, it is deposed the total sum remitted was 3,400,000.00 out of Kshs. 7,560,000.00 and therefore if any sum is owed at all then it would be Kshs. 3,160,000.00 which is taken care of by the said sum of Kshs 4,000,000.00 paid to the third party. However, the plaintiff is willing to call for an audit of both accounts to determine the exact amounts owing if at all.

On 26th September 2012, directions were given with respect to the filing and exchange of submissions and the matter was fixed for 18th October 2012 for further orders. On the said date only **Mr Gichamba**, learned counsel for the plaintiff appeared and informed the Court that the plaintiff had complied with the court orders. Accordingly, the only submissions on record are the plaintiff's submissions. According to the plaintiff, there is no evidence that the chequers were dishonoured since the alleged bank statements are unauthenticated printouts. It is further submitted that if there was dishonour of the said cheques, under section 48 of the Bills of Exchange Act, Cap 27 without notice of dishonour the drawer is discharged. It is further submitted that the defendant's case is riddled with inconsistencies and half truths. It is the plaintiff's submission that if there is any amount owing to the 1st defendant the sum due to the plaintiff must be deducted from the said sum.

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.

However, 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.

Apart from the foregoing the Court is now enjoined by the provisions of sections 1A and 1B of the Civil Procedure Act to give effect to the overriding objective in the exercise of its powers under the Act or in the interpretation of any of its provisions. Some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all

other proceedings in the Court, at a cost affordable by the respective parties.

What this means is that all the pre-Overriding Objective decisions must now be looked at in the light of the said provisions. This does not mean that all precedents are ignored but must be interpreted in a manner that gives effect to the said objective and 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. Further, the court is enjoined to look at the conduct of the supplicant for the injunctive orders, the surrounding circumstances whether the orders sought are likely to affect the interests of non-parties to the suit, the issue whether an undertaking as to damages has been given as well as the conduct of the Respondent whether or not he has acted with impunity. One of the aims of the said objective as interpreted by the Court of Appeal is the need to ensure equality of arms, the principle of proportionality and the need to treat all the parties coming to court on equal footing.

In this case the plaintiff's case is that the defendant has threatened to repossess the vehicles sold to third parties an action which according to the plaintiff will expose it to criminal litigation yet it has fully repaid the defendants. On the part of the defendants it is contended that the plaintiff has not fully repaid the sum due hence the defendants are entitled to repossess the vehicles sold to third parties as that was the term of the contract. Section 19 of the Sale of Goods Act provides:

(1) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

Section 20 of the said Act on the other hand provides:

Unless a different intention appears, the following rules apply for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer—

(a) where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery or both be postponed;

It follows that property in goods where the contract falls under the foregoing provisions passes when the contract is made unless the contract is conditional or unless a contrary intention is manifested by the parties to the contract. See Anwar vs. Kenya Bearing Co. [1973] EA 352 and Osumo Apima Nyaundi vs. Charles Isaboke Onyancha Kibondori & 3 Others Civil Appeal No. 46 of 1996.

Therefore whether or not the defendant is entitled to repossess the goods properly sold by its agent, the plaintiff, to third parties due to default or breach of the agreement between the plaintiff and the defendant is moot issue. However, it is clear that the plaintiff having sold the said vehicles to third parties no longer has any legal interests therein and if the plaintiff has settled all the obligations between the plaintiff and the defendants, one cannot see what interest in the said vehicles the plaintiff wants to protect. It was held by the Court of Appeal in Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125 that:

“In civil cases a prima facie case is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case”.

However, that is not the end of the matter since the Court is enjoined to consider the principal of proportionality. That the plaintiff has paid the defendant the sum of Kshs. 10,400,000.00 out of Kshs

13,610,000.00 is admitted in the replying affidavit. Therefore going by the defendants' own version the only sum due from the principal sum would be Kshs. 3,210,000.00. It would therefore be unreasonable for the defendants to be permitted to attach and repossess the said vehicles taking into account the said admission.

Accordingly, I am in doubt as to whether the plaintiff has fulfilled the first two conditions under the *Giella vs. Cassman Brown* principle. However, the Court is now enjoined to give effect to the overriding objective in the exercise of its powers under the Act or in the interpretation of any of its provisions. I am therefore amenable to the grant of prayer 3 in the said Notice of Motion on condition that the plaintiff deposits the sum of Kshs. 3,210,000.00 in court within the next 14 days.

However, with respect to prayers 4, 5 and 6 it is clear that what the plaintiff seeks are mandatory injunctive orders. In the case of *Kenya Breweries Limited & Another vs. Washington O. Okeyo* Civil Appeal No. 332 of 2000 [2002] 1 EA 109 the Court of Appeal stated as follows:

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However if the case is clear and one which the Court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff, a mandatory injunction will be granted on an interlocutory application...Moreover, before granting a mandatory injunction the Court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction”.

I am not convinced that the plaintiff has made out a case which would entitle me to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted.

Accordingly the applicant's Notice of Motion dated 2nd May 2012 succeeds and is allowed in the following terms:

1. Subject to order (2) herein below, it is hereby ordered that pending hearing of this suit an interim order of injunction is hereby granted restraining, barring and/or stopping the Defendant/Respondent whether by themselves, their servants agents and/or employees from attaching any vehicles belonging to and/or in possession of the Applicant and/or sold to 3rd parties being motor vehicle registration numbers:

a) KBM 701S Chasis Number KDH200-0013905 Toyota Hiace.

b) KBL 335Z Chasis Number M100A-081434 Toyota Duet.

c) KBL 337Z Chasis Number NCP12-029491 Toyota Platz.

d) KBM 836F Chasis Number WFY11 – 360723 Nissan Wingroad.

e) KBM 401A Chasis Number WFY11 – 368625 Nissan Wingroad.

2. That the Plaintiff deposits the sum of Kshs. 3,210,000.00 in court within the next 14 days.

3. That the costs of this application be in cause.

4. That there be liberty to apply.

Dated at Nairobi this 15th day of November 2012

G V ODUNGA
JUDGE

Delivered in the presence of Ms Leila Latif for Mr. Gichamba the Plaintiff