



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 652 of 2012

MERCY WANJIRU KIURA :::::::::::::::::::::::::::::::::::::: PETITIONER/APPLICANT

- VERSUS -

AUTO SELECTION (KENYA) LTD. :::::::::::::::::::::::::::::::::::::: RESPONDENT

R U L I N G

1. There Chamber Summons before the court dated **13th August 2012** was with leave amended to read the Notice of Motion and all references in the pleading referred to Chamber Summons were amended to read Notice of Motion.
2. The application commenced as a Petition in the Constitutional Division but was transferred to the Commercial Division as it raises more commercial issues than constitutional.
3. The application seeks many orders set out therein, the remaining relevant ones being that pending the hearing and determination of this application *inter-parties* a conservatory order be issued, restraining the Respondent by himself, his agents and or employees or any other person acting on the authority of the Respondent in whatsoever capacity from removing, re-locating, transferring, disposing, alienating, tampering with or in any way whatsoever interfering with motor vehicle make Toyota Corona Model Saloon with Chassis number AT2100033458 and Engine number 4AH761464 and blue in colour in presently in the Respondent's possession.

That pending the hearing and determination of the petition filed herewith a conservatory order do issue, restraining the Respondent by himself, his agents and or employees or any other person acting on the authority of the Respondent in whatsoever capacity from removing, re-locating, transferring, disposing, alienating, tampering with or in any way whatsoever interfering with motor-vehicle make TOYOTA CORONA model SALOON with chassis number AT2100033458 and engine number 4AH761464 and blue in colour, presently in the Respondent possession.

That this Honourable Court be pleased to make any other or further orders as it may deem fit in the circumstances of this case. That the cost of this application be borne by the Respondent.

4. The application is premised on the grounds et therein, among them that:-

(i) On or about **9th July 2007** the Petitioner lawfully purchased the suit motor vehicle from the Respondent herein in the lawful course of the Respondent's business of sale of motor vehicle for a consideration of Kenya Shillings Nine Hundred and Three Thousand only (Kshs.903,000) and the total agreed purchase price was paid by the Petitioner to the Respondent.

(ii) Subsequently the Respondent surrendered the log book of the motor vehicle to the Petitioner and the same is registered in the name of the Applicant.

(iii) On or about **3rd July 2012**, the Respondent through its agent and or servant and or employee invaded the petitioner residence, towed the Petitioner motor vehicle claiming that they had repossessed the car.

(iv) The Respondent did not give and or has any good reasons or grounds to repossess the motor vehicle.

5. The application is supported by affidavit sworn by the Applicant dated **13th August 2012** together with its annexures. The affidavit mainly expands on the grounds in support thereof.

6. The application is opposed vide a replying affidavit sworn by **S.K. SALYANI** dated **14th September 2012** with annexures.

7. When the matter came up before the court on **14th August 2012** interim orders were granted in terms of prayer number 3 of the application. The matter was scheduled for *inter-partes* hearing on **16th November 2012**. The Respondent's counsel did not attend the court despite the fact that the hearing date for the application was taken in court in the presence of all the parties. I did therefore allow the Applicant's counsel Mr. Nyangito to proceed with the application.

8. The brief history of the application is that the Applicant entered into an agreement of Hire Purchase with the Respondent on or about **9th July 2007** in respect of the suit property. Under the arrangement the Applicant was to purchase the suit motor vehicle at **Kshs.903,000/=** on Hire Purchase, and a deposit of **Kshs.100,000/=** was paid on **4th July 2007**, a further deposit of **Kshs.320,000/=** was and another of **Kshs.120,000/=**. It is not clear from the Hire Purchase Agreement, to determine the exact dates when these deposits were made. What is clear is that there is no evidence that any further deposit was made. Apparently due to the failure of the Plaintiff to complete the repayment under the Hire Purchase Agreement, the Defendant, on or about **3rd July 2012** exercised its rights under the Hire Purchase agreement and repossessed the suit motor vehicle, hence the current application by the Plaintiff to preserve the same.

9. I have carefully considered the application. Although the Defendant did not appear at the *inter-partes* hearing, the replying affidavit sworn by **S.K. SALYANI** on behalf of the Respondent raises very serious and in my view, convincing issues in defence of the application. Firstly, there is no evidence that the Plaintiff ever completed the payment of the required installments under the Hire Purchase agreement. However, the Plaintiff annexes a copy of a registered log book in her name. The Defendant states that the said log book is a forgery, as they have never transferred the suit motor vehicle to the Plaintiff.

I am satisfied that since the installments were not paid to complete the purchase, the Respondent company was entitled to a lien over the said motor vehicle. Secondly, it is unclear how the Plaintiff acquired the log book of the suit motor vehicle. The Respondent states that it still has the original log book and that they have not transferred it to the Plaintiff.

10. On the basis of the said replying affidavit by the Respondent, am satisfied that the Plaintiff/Applicant is not telling the whole truth to this court. I am also satisfied that the Plaintiff secured the suit motor vehicle log book in a manner which is not clear to this court. In other words, the rights of the Plaintiff over the suit property is not very clear, as it seems to me to be based on fraud.

11. I believe that the Defendant's action of repossessing the said motor vehicle was justified in so long as the Hire Purchase Agreement had not been complied with. The issue that I need to ask myself, and to determine, is whether or not the Plaintiff has established a case capable of succeeding. The answer to this is in the affirmative. That is, the Plaintiff had paid deposit for the suit property, and so the Plaintiff has

proprietary rights over the property.

The second issue is whether, if the orders sought in the application are not granted, the Plaintiff will suffer irreparable damages which cannot be compensated for by way of damages. To this, the answer is clearly no. If I do not grant the orders, and the Defendant interferes with the suit property the Plaintiff can still be compensated by way of damages. Further, the Defendant is in the business of selling motor vehicles. It can still compensate the Plaintiff with another motor vehicle.

12. I am, however clear in my mind that the Plaintiff is not truthful in the matter before the court and that the Plaintiff has come to court with unclean hands, which cannot successfully seek the justice of equity. The Plaintiff should show that she has completed the payment for the suit property and that the same was lawfully transferred to her in a transparent process. Until that is done the Plaintiff cannot lay any claim to the equitable justice of this court.

In the upshot I dismiss the Notice of Motion application dated **13th August 2012** and set aside and discharge the interim orders granted on **14th August 2012**.

Costs shall be for the Respondent.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 7TH DAY OF DECEMBER 2012

E. K. O. OGOLA
JUDGE

PRESENT:

Kibathi for the Petitioner/Applicant
Mwaniki H/B for Mwangi for the Respondent
Teresia – Court Clerk