



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 82 OF 2010

SUBAZHU OYPLAINTIFF
VERSUS

SUBAZHU (K) LTD1ST DEFENDANT

ALI HUSSEIN MOHAMMED OSMAN2ND DEFENDANT

AND

MOHAMMED AHMED ABDALLA BAKTHIR1ST APPLICANT/NECESSARY PARTY

GHEBREMARIAM AMANUEL AKALE2ND APPLICANT/NECESSARY PARTY

R U L I N G

This is an application inter alia under the provisions of Order 1 Rule 10 (2) and Order 44, Rule 1 of the Civil Procedure Rules and Section 1A (1), and 3A of the Civil Procedure Act. The 2 Applicants who refer to themselves as who “necessary parties” seek the following orders:-

- *That the applicants be joined in this suit as Necessary Parties and be at liberty to file such pleadings as necessary.*
- *The Honourable court be pleased to review the orders of 31.05.2010 to the effect of clarifying that Applicants herein are not bound by the orders.*
- *There be a stay of execution of the mandatory injunction obtained on 31.05.2010 as against the Applicants pending the hearing and determination of this application and/ or suit.*

The application is supported by an affidavit sworn by the 1st Applicant, Mohammed Ahmed Abdalla Bakhtir, The grounds on which the application are based are that:-

1. The applicants are not yet parties to this suit.
2. The plaintiff/Respondent has obtained a mandatory injunction that is being enforced against the Applicants who are not parties to this suit to the effect of dispossessing the Applicants of a lorry truck that the 1st Applicant bought for full value from the 2nd Defendant herein,

3. The Applicants are bonafide purchasers for the full value in the ordinary market transaction and without notice of the plaintiff's claims as against the Defendants on the motor vehicle.
4. The Log Book of the Vehicle's registration in Kenya, and the Bill of Lading and all Importation documents were in 1st Defendant's name when the Applicants bought the vehicle from the 1st Defendant and there was nothing to give any notice of any kind of adverse claim to a bonafide purchaser.
5. There is an apparent error on the face of the record because the mandatory injunction is prima facie capable of being enforced against the Applicants who are not parties to the suit in any way and who have not been heard.
6. The Plaintiff/Respondent obtained the order by failing to disclose to the court that the suit vehicle was long legitimately sold to the 1st Applicant who had in turn sold the same to 2nd Applicant and was in possession of the 2nd Applicant (sic).
7. There is evidence that the Defendants who sold the vehicle to the 1st Applicant are agents of the plaintiff while the plaintiff could be an undisclosed principal for the defendant.
8. The plaintiff would be bound by the acts of the defendant in the event of an undisclosed principal/Agent relationship between the plaintiff and the Defendants but the applicants being 3rd parties would not be liable in any way to the undisclosed principal of the Defendant.
9. Unless the mandatory order being enforced against the Applicants is forthwith stayed the applicant's will be disposed of their private property without a hearing.
10. The plaintiff/Respondent is using the police to harass the Applicants' who are not party to the suit and are not bound by the Orders granted to the Plaintiffs/Respondents.

The application is opposed by the plaintiff which filed a Replying Affidavit sworn by one Niskanen Seppo Veikko, a director of the plaintiff Company on 26th October 2010. He depones as follows:-

“

1. ____
2. ____
3. **That the 1st and 2nd Defendant fraudulently attempted, to sell motor vehicle KBH 256Z, while masquerading as the plaintiff.**
4. **That the plaintiff has not in any way used the police to wrestle the vehicle from the 2nd Applicant's possession.**
5. **That the plaintiffs have only made attempts to ensure that the court order dated 3rd June 2010 is adhered to.**
6. **That the Principal was never a principal of the Defendants except that the Defendants are masquerading as the plaintiff by operating under name, Subazhu OY and they have no nexus with the plaintiff.**
7. **That the plaintiff has not in any way used the police to harass the applicant/necessary parties been.**
8. **That the Applicants are busy bodies and have not obtained any title over the said motor vehicle registration Number KBH 256Z; ...**

9. That the plaintiff company is not bound by the Acts of the Defendants as the 2nd Defendant attempted to defraud the plaintiff company by purporting to sell the suit vehicle under the pretext that they were so doing as the plaintiff company when in fact they were trading under a registered name that appears similar to that of the plaintiff company.
10. That the plaintiff company has not used the police to harass the Applicants and is not aware of any harassment visited upon them by the police, except that the police were called in to provide security in the lawful execution of court orders.
11. That in view of the foregoing circumstances, it is also necessary that the suit vehicle now registered as No. KBH 257 Z , Mercedes Benz Truck formerly registered as O3D 71070 in the United Kingdom be and remain impounded and stored at Changamwe Police Station or placed in the auctioneers' yard pending hearing and determination of this suit.
12. That the applicant have no registrable interest over our motor vehicles registration No. KBH 257 Z formerly a registered as 03D71070 in the United Kingdom of England and Wales.
13. That the alleged purchase took place after the grant of the orders of 31/05/2010.
14. That the documents used and/or given are basically forgeries and not the original as annexed to the original application.
15. That from the copy of the records as at 8/1/2010 the Defendants had fraudulently registered themselves as owners of the said motor vehicle registration No. KBH 257 Z and have not transferred the same to the Applicant.
16. That the motor vehicle registration No. KBH 257 Z has been repossessed...
17. That we had the Order registered with the Registrar of Motor vehicles.
18. That in the circumstances the applicant are basically a conduit for committing fraud against the plaintiff and has no Superior claim over the plaintiff.
19. That the applicants are improperly before the court.”

The above rival affidavits contest the claims of the two applicants and their evidence in support of their respective claims.

The Plaintiff's suit was filed against the 1st and 2nd Defendants on 23rd May 2010. The prayers sought in the plaint dated 16th March 2010 are as follows:-

“

- (a) *An order setting aside the registration of Motor Vehicle Registration No. KBH 257 Z, as owned by the 1st Defendant and in view thereof the name of the plaintiff Subazhu Oy be registered thereto.*
- (b) *An injunction restraining the 1st and 2nd Defendant from parting with possession, Sale or wasting motor vehicle Registration No. KBH 257 Z, (formerly Motor Vehicle Registration No. 03D71070, Chasis No. WD 9440322 K878650, Engine No. 457937000 3569.*
- (c) *Alternatively an order be issued impounding Motor vehicle registration No. KBH 257 Z (formerly registered as 03D71070) imported by plaintiff from Dublin, United Kingdom of England and Wales and be placed in the custody of the plaintiff or its duly appointed agents.”*

From the said prayers it is certain that the claim is set up against the 1st Defendant and seeks the setting

aside of the registration of the Motor Vehicle into the name of the 1st Defendant. On the basis of this claim to ownership and/or title, the plaintiff seeks the injunctive orders as against the 1st and 2nd Defendants.

Simultaneous with the plaint herein the plaintiff filed an application under certificate of urgency praying for the injunctive orders and/or in the alternative the impounding order.

On the 23rd March, 2010 when the plaintiff presented the application ex parte before service thereof, the Honourable Justice Azangalala declined to grant ex parte orders and gave directions. The court upon being satisfied that the application for substituted service were sufficiently made out granted leave for the application to be served by substituted service.

On the 31st May 2010, the applicants satisfied this court that substituted service had been affected and in the absence of the 1st and 2nd Defendants granted both the injunction and impounding order.

The motor vehicle was subsequently impounded on 8th October 2010 giving rise to this application by the applicants filed on 12th October, 2010 under certificate of urgency.

It is my view that for the purposes of this application by the 1st and 2nd Applicants the questions to be determined are as follows:-

1. Who was the registered owner or party of the Motor Vehicle as on 31st May, 2010 when the orders challenged were granted? What does the log book the vehicle show as at 31st May 2010?
2. On a prima facie basis, did the Applicant purchase the motor vehicle in question before the suit was filed and the orders given by this court?
3. On a prima facie basis is there a valid sale Agreement between the 1st Defendant and any of the Applicants leading to a bona fide purchase with a capability of passing title to the Applicants?
4. Are the Applicants entitled to join into this suit?
5. Should the court review the orders of 31/05/2010 to the effect of clarifying that the Applicants herein are not bound by the orders?

The said questions and possible answers may be intertwined and some of the questions answered together.

In the plaintiff's application the plaintiff states that it carried out a search at the Registrar of Motor Vehicles officer in Kenya and noted that the motor Vehicles had been registered into the name of the 1st Defendant. I have perused the copy of Records from the Registrar of Motors dated 8.01.2010 (Ex.NSK 3a) and confirmed that as at 08/01/2010 indeed the vehicle was registered in the name of the 1st Defendant.

It must be stated that it was on this basis that the plaintiff obtained the orders against the 1st and 2nd Defendants on 31.05.2010.

From a certificate of incorporation the 1st Defendant was registered as a limited liability company on 1st August 2009, to carry inter alia the business of importers; exporters and sellers on a commercial basis of new and used motor vehicles both Republic of Kenya.

These facts are not challenged by the Applicants who claim to be purchasers. The 1st Applicant has deponed in his affidavit that he bought the vehicle on 7/07/2009 for Shs.2,128,000 from the 1st

Defendant. Subsequently he sold the vehicle to the 2nd Applicant on 16.9.2009 at the price of Kshs.2,500,000/-.

It may well be true that the Applicants may have truly and genuinely bought the vehicle in the manner stated and that the 2nd Applicant is now the beneficial owner of the motor vehicle. However, this could only be the subject-matter of the claim by the applicants if they joined into this suit or filed their own. For the purposes of this application, I do find that neither of the Applicants became registered with the Registrar of Motor Vehicles as the applicants of the motor vehicle after the respective alleged purchases. The applicants did not produce copies of the Transfer of Ownership and Log Book to prove that either of them became registered as owner of the motor vehicle at any time whatsoever.

The Applicants in their affidavit produced a copy of the Log Book to the vehicle (Ex. MAAB3"). It shows that the vehicle was registered in Kenya on 14th July 2009. The previous registration was done in United Kingdom as O3-D-71070. It was registered in Kenya as KBH 257Z. The registered owner as at the said date was SUBAZHU KENYA LIMITED of P.O. Box 87387, Mombasa. This is the 1st Defendant herein. As stated earlier the last search done and contained in the plaintiff's application is dated 8/01/2010. The said registration and ownership had not changed. The Applicants do not claim that the registration had changed in their favour by the time the suit was filed on 23.03.2010 or when the injunction and impounding orders were granted against the 1st and 2nd Defendant's on 31 May, 2010.

In the absence of any other evidence to the contrary and applying the presumption of continuity, I do hold that as at the time the suit was filed on 23.03.2010 and more importantly when the orders complained were granted on 31.05.2010 the registered owners in law was the 1st Defendant.

Under the Provisions of Section 6(5) of the Traffic Act Cap 403, it is provided that:-

“The person in whose name a vehicle is registered shall unless the contrary be proved be deemed to be the owner of the vehicle.”

The provision when applied tilts the application herein against the Applicant as the plaintiff properly and lawfully obtained orders against the 1st Defendant which is to date deemed to be the legal owner of the vehicle. The orders having been given and the subject matter being the vehicle, it had to be enforced upon the said vehicle and it did not matter who had the physical possession of the vehicle when the order was enforced. The law deems that the vehicle was also in the care, control and/or custody of the 1st Defendant which in law include its agents, servants or any person claiming under their title. The Applicants cannot in law at this stage make any superior and prior or subsequent claims to the 1st Defendant.

The Defendant were duly served with the summons and the application by the plaintiff and it was their duty to have come to court and disclose any sale to the 1st Defendant or the interest of any other person including the 2nd Applicant so without the aforesaid information and rebuttal by the Defendants the court was entitled to grant the order given. Even with this development and the Applicants coming to court, the defendants have not deemed it fit to come to court.

In view of the foregoing I do find that there was no non-disclosure of material facts by the plaintiff and the court order here are not vague as alleged.

The order is still valid, lawful and enforceable to the hilt until it is properly set aside, varied or otherwise.

In the light of the foregoing, I do find that on the basis of the alleged sale agreement, by the Applicants and the alleged purchases and the fact that the vehicle appears to have been in their possession on the basis of the alleged acquisition, they are entitled to join in this suit as necessary parties, so that they

may present and articulate their cause of action if any argument the plaintiff or for indemnity and/or contribution against the defendants. The Applicants are hereby joined as the 3rd and 4th Defendants respectively and are granted leave to file such pleadings as they may deem necessary and upon directions by the court.

In respect of the prayers for review so that the orders of 31.05.2010 does not apply to the Applicants and stay of execution of order, the same are disallowed and rejected for the reasons given hereinabove.

The Applicants shall pay the costs of this application to the plaintiff. Orders accordingly.

Dated and delivered at Mombasa this 11th day of February, 2011.

M. K. IBRAHIM
J U D G E