



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL & TAX DIVISION – MILIMANI**

**CIVIL CASE NO.693 OF 2010**

**NAZISH MOTORS LIMITED.....PLAINTIFF**

**VERSUS**

**BELLUR KRISHNASWAMY SPRINIVAS  
(ALIAS SUDHARSHAN BELLUR)..... 1<sup>ST</sup> DEFENDANT**

**BELLUR ENGINEERING LIMITED..... 2<sup>ND</sup> DEFENDANT**

**R U L I N G**

The Applicant in the Chamber Summons dated 15<sup>th</sup> October, 2010, has moved the court under **Order XXXIX Rules 1 and 9** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act** seeking interim orders with costs of the application as follows:-

- 1. THAT the Respondents be compelled by a mandatory injunction to release the motor vehicle Registration Number KBL 232 L Toyota Prado (the motor vehicle) to the Applicant herein pending the hearing and final determination of this Application.**
- 2. THAT the Respondents be compelled by a mandatory injunction to release the motor vehicle to the Applicant herein pending the hearing and final determination of this suit.**
- 3. THAT the costs of this application be borne by the said Respondents in any event.**

The application is premised on 9 grounds as set out in the body thereof and is supported by the affidavit of a director of the Applicant JAMIL DESAI to which is annexed several copies of documents in support.

The Applicant claims to have imported the subject motor vehicle in about April 2010, and caused the same to be registered in its name on 5<sup>th</sup> May, 2010. A copy of the registration book is annexed as the 4<sup>th</sup> document of annexure “JD1”. By a sale agreement dated 12<sup>th</sup> July 2010, between one DESERT TREK an agent of the Applicant, the Applicant agreed to sell the motor vehicle to the 2<sup>nd</sup> Defendant/Respondent who was represented by the 1<sup>st</sup> Defendant, representing himself as the managing director of the 2<sup>nd</sup>.

It was agreed that the 2<sup>nd</sup> Respondent would pay the Applicant Kshs. 2,800,000/= as consideration, to be paid by four instalments of Kshs. 700,000/= in respect of which post-dated cheques would be drawn in favour of either M/S DESERT TREK or the contact person JAMIL UMANBHAI DESAI. Upon receipt of the post dated cheques, copies of which are annexed to the Supporting Affidavit as "JD3", the Applicant released the motor vehicle and its registration documents to the 1<sup>st</sup> Respondent, who received the same on behalf of the 2<sup>nd</sup> Respondent.

The first cheque was dishonoured upon presentation for payment, on the grounds that the 2<sup>nd</sup> Respondent's account did not have sufficient funds. The dishonoured cheque, No. 000001 forms part of the annexures "JD3". The 2<sup>nd</sup> Defendant then asked the Applicant not to present the remaining cheques, promising to pay the balance of the purchase price by direct credits into the Applicant's bank account. This did not happen and the Applicant demanded the return of the motor vehicle, which the 2<sup>nd</sup> Defendant failed to do, hence the filing of the suit.

It is deponed in the Affidavit in support of the application that in the course of things the 1<sup>st</sup> Respondent was arrested by the police for certain offences and the subject motor vehicle impounded. It is the Applicants' position that the sale of the motor vehicle to the 2<sup>nd</sup> Respondent failed for want of consideration and that it is obvious that the Respondents obtained the Applicants' vehicle fraudulently, in which case, the circumstances of the case warrant the issuance of the mandatory injunction, ordering the delivery of the motor vehicle to the Applicant.

The 1<sup>st</sup> Respondent was served with the Chamber Summons at the Industrial Area Remand Prison as is evidenced by the annexures to the Affidavit of Service filed herein on 1<sup>st</sup> November, 2010. No Replying Affidavit or Grounds of Opposition were filed to challenge the application and no-one from the Respondents' side attended court for the hearing.

I am persuaded by the submissions by counsel for the Applicant that consideration having totally failed, then, the Applicant's rescission of the contract is justified and the same stands vitiated. The Respondents have no right whatsoever to continue being in possession of the vehicle. To allow the status quo to remain, pending the hearing of the suit would be to condone an obvious injustice committed against the Applicant with the result that he would no doubt suffer irreparable loss without any likelihood of compensation in damages.

I find that the Applicant has established a prima facie case against the Defendant/Respondents and that special circumstances do exist for the issuance of the mandatory orders sought for reasons that:-

- 1. The Applicant has demonstrated that there was total failure of consideration in respect of the agreement for sale dated 12<sup>th</sup> July, 2010.**
- 2. The 1<sup>st</sup> of the cheques exhibited herein having been dishonoured and not replaced by cash as promised evidence of misrepresentation does exist.**
- 3. Title to the subject motor vehicle having not passed to the 2<sup>nd</sup> Respondent it cannot in my view maintain a claim in respect thereof and is not entitled to hold on the same.**
- 4. A danger of the motor vehicle being wasted whilst in the custody of the police is clearly evident.**
- 5. The application has not been contested and the depositions in the Supporting Affidavit remain unchallenged.**

In view of the above, I allow the application and order that the motor vehicle Registration NO. KBL 232 L, Toyota Prado, be released and delivered to the Applicant forthwith.

**DATED SIGNED and DELIVERED at NAIROBI this 9<sup>TH</sup> day of FEBRUARY, 2011.**

**M. G. MUGO**  
**JUDGE**

In the presence of:

Ms Ongeti holding brief for Mr Simiyu

For the Applicant

Mr Mukele

For the Respondents