



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO. 554 OF 2004

ALLOYS OBIEDI AKUMU..... PLAINTIFF

V E R S U S

THE OXFORD
NJAGAGUA CO. ADVOCATES)
LIMITED..... DEFENDANTS

1. UNIVERSITY OF OXFORD DEPARTMENT OF
UNIVERSITY PRESS
2. MURIUKI NJAGAGUA (T/A MURIUKI
3. ALEXANDER JAMES
4. OLDONYO LARO ESTATE

R U L I N G

The 4th Defendant herein (who was then Interested Party) filed **chamber summons dated 2nd April, 2007** seeking the following main orders:-

1. That the Interested Party be made a party in the suit.
2. That the order granted on 14th September (and issued on 6th October), 2006 (by which the suit motor vehicle registration number KAH 900E, make Range Rover, was restored to the possession of the Plaintiff) be set aside.
3. That the Plaintiff and his servants and/or agents be restrained from in any way interfering with the said motor vehicle.
4. That thereafter the said motor vehicle be released unconditionally to the Interested Party.

In a ruling dated 18th and delivered on 20th July, 2007 this court (Waweru, J) granted prayer 1, and the Interested Party was joined in the proceedings as the 4th Defendant. The court further directed that the plaint be amended as required by the Civil Procedure Rules, and that the Plaintiff do file such amended plaint within 14 days of delivery of the ruling.

Indeed an amended plaint was filed on 6th August, 2007 incorporating the 4th Defendant. The 4th Defendant filed defence on 31st August, 2007. No counter-claim in respect to the suit motor vehicle was included. The 1st and 3rd Defendants filed amended defence on 12th September, 2007. They did not put

forward any counter-claim in respect to the suit motor vehicle.

In regard to the other prayers in the chamber summons dated 2nd April, 2007 the court directed as follows in the ruling delivered on 20th July, 2007:-

“...there is need to preserve the motor vehicle in question pending hearing and disposal of the suit. But before I can make an appropriate order, it is necessary for the court to know the present status of the motor vehicle. In whose custody is it now? Where is it kept? Is it on or off the road? I require parties to address the court on these points. They may do so by filing further affidavits and by oral submissions.”

In this regard, the 4th Defendant filed what amounts to a further affidavit on 11th July, 2008. It is sworn by one **Peter Bonde Nielsen**, a director of the 4th Defendant. Mr. Nielsen has deponed that the motor vehicle was registered in the 4th Defendant's name; and that the 4th Defendant is a purchaser for value with good title, having bought the motor vehicle from a person who had bought it in a public auction.

The Plaintiff filed a further affidavit on 29th July, 2008. He deponed that the suit motor vehicle was in his possession, having repossessed it from a “stranger to these proceedings”, one Simon Ngatunyi, on 26th June, 2008, and pursuant to the order of the 14th September, 2006. It was his case that in the ruling of 14th September, 2006 Osiemo, J made a finding that the 1st Defendant had no authority or power to attach or sell the suit motor vehicle. Consequently, he argues, the 4th Defendant has no lawful claim to the motor vehicle as he did not acquire a good title to the same following “an initial transfer from the 1st Defendant.”

Regarding further oral submissions, only the 4th Defendant's learned counsel made them. I have considered them. I have also perused the ruling of Osiemo, J of 14th September, 2006.

Osiemo, J found that the suit motor vehicle was registered in the name of the Plaintiff; that the Plaintiff was not a party to, nor a beneficiary of, “the credit facility which led to the repossession of the motor vehicle”; and that the credit facility had been given to one J. K. Nzioka who had no authority or capacity to offer the Plaintiff's motor vehicle as security.

It was upon that basis that Osiemo, J on 14th September, 2006 granted the Plaintiff's application for temporary mandatory injunction to restore possession of the motor vehicle to him.

In the chamber summons dated 2nd April, 2007 the 4th Defendant has sought an order to set aside the said order of 14th September, 2006. He also seeks a temporary restraining order to restrain the Plaintiff from in any way interfering with the motor vehicle, and also a mandatory order for release of the motor vehicle to it. In my aforesaid ruling of 20th July, 2007 I granted the temporary restraining order, the only thing remaining being terms thereof, including the issue in whose custody the motor vehicle should be.

If I were hearing the application dated 2nd April now when the Interested Party is a fully-fledged party in the suit, the 4th Defendant would have to satisfy the well-known principles for grant of temporary injunctions. It would have to demonstrate a *prima facie* case with a probability of success, and that it otherwise stood to suffer irreparable loss. If the is unable to decide the matter upon those two principles, it would make a decision upon a balance of convenience.

Regarding *prima facie* case, I note that the 4th Defendant has not lodged any counter-claim for the motor vehicle. Without such a counter-claim, upon what claim would the application for temporary injunction be based? The averments contained in its various affidavits as to its title to the motor vehicle and how the same was acquired could only be in support of a formal counter-claim duly lodged.

Without such a counter-claim the court could not be satisfied that the 4th Defendant has demonstrated a *prima facie* case with a probability of success. Even on the second principle the 4th Defendant could not possibly succeed as the value of the motor vehicle is eminently quantifiable.

But I held in the ruling delivered on 20th July, 2007 (based upon the claim put forward by the then Interested Party) that there was need to preserve the motor vehicle pending hearing and disposal of the suit.

But nothing further has been placed before the court to persuade me that it is in the interests of justice that the order of Osiemo, J of 14th September, 2006 be set aside. The long and short of it all is that both the Plaintiff and the 4th Defendant have rival claims to the suit motor vehicle, and each party has papers to demonstrate its ownership. It should take a proper trial of the action (should the 4th Defendant file a counterclaim) to decide who has a better title.

In the meantime, I find no good reason to transfer possession of the motor vehicle from the Plaintiff to the 4th Defendant, especially when the latter has not counter-claimed for the same. I will therefore decline the prayers for setting aside the order of Osiemo, J and giving possession of the motor vehicle to the 4th Defendant in the chamber summons dated 2nd April, 2007.

Costs of the application shall be in the cause. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 22ND DAY OF AUGUST 2011.

H.P.G. WAWERU
JUDGE

DELIVERED THIS 26TH DAY OF AUGUST 2011