



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO. 223 OF 2011

BRYAN YONGOPLAINTIFF/APPLICANT
- VERSUS -
KENYA REVENUE AUTHORITY.....1ST DEFENDANT/RESPONDENT
ASHRAF BAYUSUF.....2ND DEFENDANT/RESPONDENT
SALMA FERNANDES.....3RD DEFENDANT/RESPONDENT

RULING

The Applicant/Plaintiff brought an application through a Notice of Motion dated 9th June 2011 under Order 40 Rules 1, 2 and 4 of the Civil Procedure Rules, 2010 and Sections 1A, 1B, 3A, 63 (c) and (e) of the Civil Procedure Act Cap 21 Laws of Kenya and all other enabling provisions of the law.

The Notice of Motion sought orders namely:-

1. *That this application be certified urgent and be heard ex-parte in the first instance.*
2. *That this Honourable Court issue an injunction against the 1st Defendant/Respondent from auctioning the said motor vehicles and/or releasing the said motor vehicles to the 2nd and 3rd Defendants/Respondents, their proxies, servants, agents, employees and/or workers and any other person and/or forfeiting the same pending hearing and determination of this application.*
3. *That this Honourable Court issue an injunction against the 1st Defendant/Respondent from auctioning and/or releasing the said motor vehicles to the 2nd and 3rd Defendants/Respondents, their proxies, servants, agents, employees and/or workers and any other person howsoever pending hearing and determination of this suit.*
4. *That this Honourable Court be pleased to issue an order against the 2nd and 3rd Defendants/Respondents compelling them within 14 days to release the import documents to the 1st Defendant/Respondent to enable the Plaintiff/Applicant pay the requisite Customs Duty on the said cars BMW Chassis No. WBAWN32050JR92285 and BMW Chassis No. WBANC32060CP72932 to facilitate the necessary registration of the aforementioned motor vehicles.*
5. *That this Honourable Court be pleased to grant an order for the preservation of the said vehicles BMW Chassis No. WBAWN32050JR92285 and BMW Chassis No. WBANC32060CP72932, pending the hearing and determination of the suit.*

6. That this Honourable Court be pleased to grant an order for the preservation of the said vehicles BMW Chassis No. WBAWN32050JR92285 and BMW Chassis No. WBANC32060CP72932, pending the hearing and determination of the application.
7. That this Honourable Court be pleased to grant an order compelling the 1st Defendant/Respondent to produce to this Honourable Court documents that warranted it to arrive at its decision dated 1st March 2011.
8. In the alternative to prayers an order compelling the 2nd and 3rd Defendants to restate the purchase price being Kshs.4,700,000/= with interest to the Plaintiff.
9. That this Honourable Court be pleased to issue such other orders it may deem just and convenient to meet the ends of justice.
10. That the costs of the application be provided for.

The application was supported by the grounds on the face of the application, *inter-a-alia*,

- (a) That the Plaintiff/Applicant is the indefeasible owner of the said motor vehicles BMW Chassis No. WBAWN32050JR92285 and BMW Chassis No. WBANC32060CP72932, having bought them from the 2nd and 3rd Defendants/Respondents and fully paid the purchase price.
- (b) That upon the Plaintiff/Applicant paying for the said motor vehicle and taking possession thereof the 2nd and 3rd Defendants/Respondents have continually pledged to furnish the Plaintiff/Applicant with the import documents but to no avail and the 2nd and 3rd Defendants/Respondents in a bid to use coercion, intimidation and duress to force the Plaintiff/Applicant pay the balance of Kshs.1,000,000/= to the 2nd and 3rd Defendants/Respondents instigated the 1st Defendant/Respondent to seize the motor vehicles aforesaid ostensibly on grounds that the Plaintiff/Applicant should produce import documents which documents are being held by the 2nd and 3rd Defendants/Respondents.
- (c) That the Plaintiff/Applicant has good and sufficient reasons to warrant grant of the orders sought herein.
- (d) That the Plaintiff/Applicant is suffering and continues to suffer immense prejudice, loss and damage with the continued unlawful holding of his motor vehicle by the 1st Defendant/Respondent and stands the risk of losing the motor vehicles should the same be forfeited as threatened by the 1st Defendant/Respondent.
- (e) That it is in the larger interest of justice that this Honourable Court determines this matter conclusively and justifiably.

The application was further supported by an affidavit dated 9th June 2011 by Mr. Bryan Yongo, the Plaintiff in this matter.

The application was first heard under a Certificate of Urgency on 10th June 2011 by Muga Apondi J. who certified the application urgent and granted temporary orders prayed at numbers 2 and 6 which injected the Respondent from auctioning the subject matter of the suit being motor vehicles BMW Chassis No. WBAWN32050JR92285 and BMW Chassis No. WBANC32060CP72932 and preserving the same pending the hearing and determination of the application. Since then the parties have not been able to proceed to inter-parte hearing until the 10th of October when they were able to do that.

Brief facts of the case as per the plaint are, *inter-a-alia* that on or about October 2010 the 2nd Respondent sold to the Plaintiff one unregistered motor vehicle BMW 520 Diesel for a consideration of Kshs.1,500,000/= which payment was done through the 2nd Respondent's agent Mr. Nuru Akasha who received the money and in turn delivered the vehicle to the Plaintiff and undertook to deliver to the Plaintiff the import documents to enable the Plaintiff pay the duty of the said motor vehicle and have the same registered and the Plaintiff took possession thereof and enjoyed quiet possession of the same till the 7th of January 2011.

On or about the 18th of October 2010 the 2nd Respondent approached the Plaintiff directly and offered to sell him a BMW Convertible, Chassis number WBAWN32050JR92285at a price of Kshs.2,000,000/=. The Plaintiff accepted the offer and the money was paid by cheque written in the 3rd Respondent's name as agreed and the Plaintiff took possession and enjoyed quiet possession thereof until 7th January 2011 when the 1st Respondent took possession of the said motor vehicles. It was agreed that the import documents would be given to the Plaintiff later.

On or about 4th November 2010 the 2nd Respondent again offered to sell to the Plaintiff another BMW M5 Sports Edition for Kshs.2,000,000/= and the Plaintiff accepted the offer and issued three cheques totaling Kshs.2,000,000/= to be banked only after import documents of all the three motor vehicles were availed.

It is alleged that the impression given to the Plaintiff at all times was that the vehicles were for local market use, and that upon payment of the duty due they would be locally registered.

The Plaintiff persistently requested for the said documents from the 2nd and 3rd Respondents, to enable payment of duty and registration to no avail and the 3rd Respondent in breach of the agreement banked the cheques meant for the third vehicle but the Plaintiff countermanded this. The Plaintiff states that the 2nd Respondent then engaged in acts of extortion and blackmail and made several attempts to use the Flying Squad Police Unit to repossess the said motor vehicles, an action the Plaintiff repulsed.

Further negotiation between the parties ended in the Plaintiff paying further sums of Kshs.500,000/= to the Respondents on two different occasions hence a total of Kshs.1,000,000/= which was meant to make the Plaintiff release the import documents. In total, the Plaintiff claims to have given out Kshs.4,700,000/= to the 2nd and 3rd Respondents.

The relationship between the Plaintiff and the 2nd and 3rd Respondent deteriorated to the extent that the Plaintiff alleges that the 2nd and 3rd Respondents maliciously informed the 1st Respondent, Kenya Revenue Authority (K.R.A), a body corporate mandated to receive and receipt taxes about the existence and status of the above motor vehicles. The 1st Respondent proceeded and seized the said motor vehicles.

The Plaintiff believes that the seizure of the said motor vehicles by the 1st Respondent is in bad taste and motivated by malice and is an abuse of the office of the 1st Respondent by all the Respondents acting with a common purpose to frustrate the Plaintiff.

The 2nd and 3rd Respondents deny the allegations through their replying affidavits. It appears that the Summons have not been served upon the Respondents, none of whom have filed their defences, if any.

The counsel for the Plaintiff/Applicant Mr. Muganda has submitted that there was a contract of sale of the three motor vehicles and a good consideration was given and accepted by the 2nd and 3rd Respondents. The counsel further submitted that the repossession of the said vehicles was as a result of a malicious conspiracy between the Respondents, where the 2nd and 3rd Respondents sought to compromise the 1st Respondent by using the 1st Respondent as a debt collection agency.

The Applicant's counsel submits that the vehicles were towed away specifically because it was alleged they lacked import documents. The applicant tried to explain the status of the motor vehicles vide his letter dated 8th January 2011. The letter, he submits establishes a contract between the Plaintiff and the 2nd and 3rd Respondent for past and current consideration. In the very letter the Plaintiff indicates his readiness to pay any duty which is payable, if any. The counsel submits that the existence of the contract is not in doubt as the same is supported by the statements of the 2nd Respondent in annexures **ANG 6**. The counsel submits that the 2nd Respondent is a person who has received good consideration yet makes allegations which are against the contract. He further submits that it is not the duty of the 1st Respondent, K.R.A. to interfere with individual contracts, and that K.R.A. is engaged in abuse of office. The Applicant submits that at all material time the 2nd and 3rd Respondents knew that the said motor vehicles were on transit and that relevant duties were not paid. The Applicant prays that the apparent conspiracy between the Respondents should not be allowed to cause loss to the Plaintiff.

The Plaintiff submit that there are clear instances of criminal acts on the part of the 2nd and 3rd Respondents but the 1st Respondent has closed its eye on those acts is further clear indication of the conspiracy aforesaid. The Applicant prays for the orders sought in the application and states that damages would, in the instant case, be inadequate and cites the case of **SAMSON KHASIANI AMUSIBUA – VS – ALPHOSE MUSOTSI AMBALI & 2 OTHERS (2005) e KLR**.

The counsel states that the Plaintiff is ready and willing to pay all or any duties payable upon assessment. The counsel further submits that the role of K.R.A. – the 1st Respondent is to receive and collect duty and it is obligated to assess the same for payment and take criminal action against the 2nd and 3rd Respondents.

The counsel for the 1st Respondent Mr. Twahir in his submissions opposed the application and relied on affidavit of Anthony Njoroge Gichia sworn and dated 22nd July 2011. The counsel submits that the 1st Respondent on 7th January 2011 received instructions that there were two unregistered motor vehicles at a residence in Kitusuru. He submits that as a public body they act on any information received regardless of its source provided the information will assist in arresting the commission of a crime. So it is irrelevant that it is alleged that the 2nd Respondent was the informer in this case. Acting on the information the 1st Respondent went to the Plaintiff's premises and found the two vehicles. They had no importation documents and no explanation was given as to why they were in the country or still unregistered. The 1st Respondent had to impound those vehicles and issue a document known as Notice of Goods Deposited in Custom Warehouse as per annexures **ANG 2A** and **ANG 2B**. This document notifies the addressed party that the motor vehicles are deposited pending production of import documents.

The counsel further argues that the order of injunction against the 1st Respondent is misplaced since the Plaintiff is praying for a mandatory injunction. The action taken by the 1st Respondent was neither illegal nor malicious but in respect of its statutory duties and was not instigated by any party or person. It is an admission that customs laws were breached.

On his part Mr. Muriuki the counsel for 2nd and 3rd Respondents has relied on replying affidavit sworn by 2nd Respondent dated 19th July 2011 and a further affidavit dated 29th July 2011. The counsel associated himself with the submissions of the 1st Respondent.

The counsel submits that instead of seeking injunction the Applicant should simply file a suit for his claim of Kshs.4.7 million. He further submits that no injunction should issue since the Attorney General was not served with notice of suit, and that no case has been established for an injunction and that damages if any, are adequate.

In order to reach a ruling I have framed issues to be resolved as follows:-

1. *Was there a contract between the Plaintiff and the 2nd and 3rd Respondents for the purchase of*

motor vehicles BMW 520, BMW Convertible, Chasis No. WBAWN32050JR92285, BMW M5 Sports Edition as alleged in the claim?

2. Was there good consideration given in the contract of sale?
3. Is there evidence that the 2nd and 3rd Respondents have attempted to commit fraud by misrepresenting facts relating to the import documentation status of the said vehicles?
4. Is the 1st Respondent's involvement in this matter honest?
5. Is the Plaintiffs apprehension justified to warrant an injunction to issue against the Respondents?
6. Have the principles laid out in **GIELLA – VS – CASSMAN BROWN** been satisfied.

To answer issues number 1 and 2 together, there is evidence on record, and an admission from the 2nd and 3rd Respondents that they entered into a contract for sale of the vehicles. Further they received good consideration for the same, the adequacy of which is irrelevant at this stage.

To answer issues numbers 3 and 4 together, it is clear the 2nd and 3rd Respondent did not give all the material facts to the Applicant. Those facts concerned the import status of the vehicles, duty payable, if any, and failure to disclose that some of the vehicles were destined for Uganda. Instead, the 2nd and 3rd Respondents used this information or lack of it as a bait to get the balance of the purchase price from the Plaintiff/Applicant. When this procedure failed, they tacitly solicited, and apparently secured the services of a willing ally in the name of the 1st Respondent. It is difficult to buy the story of the 1st Respondent that they are merely carrying out their duty. However, I give them the benefit of the doubt. Yet it is puzzling that they have not taken any criminal proceedings against a clear and blatant breach of laws by the 2nd and 3rd Respondents.

I am convinced that the 2nd and 3rd Respondents' intention is to frustrate efforts of the Plaintiff/Applicant to secure the subject matter of his contract.

To answer the 5th issue, the actions of the Respondents in this matter clearly show that the Plaintiff has a reason to be apprehensive. He has parted with good consideration yet he cannot enjoy the property in the goods he has purchased. Secondly, those goods are in the custody of a party that threatening to auction them. The same party appears to favour one party to the contract.

The apprehension of the Plaintiff is established. Further the Plaintiff has demonstrated that it has a case capable of succeeding and that balance of convenience is in his favour. The nature of the goods are also such that they are of a special nature and an award of general damages may not fully compensate the Applicant should the said motor vehicles be sold.

The 1st Respondent submits that it is its duty to receive and receipt taxes, yet it cannot explain why, despite repeated requests, it has failed to assess the taxes and let the same be paid by the Plaintiff? The 1st Respondent, however submits that being an administrative body an injunction cannot issue against it, and that the Plaintiff should instead be seeking orders under Judicial Review instead of an injunction. This argument has been adopted by the 2nd and 3rd Respondents.

Having reviewed all the arguments in this application I now make the following orders.

1. That the Plaintiff serves the summons of the suit on the Defendants within 15 days from the date of this Ruling.
2. That all the parties must exchange relevant documents, and file all the documents necessary within 15 days after the service of summons.

3. *That the suit will be heard on 7th December 2011.*
4. *That the 1st Respondent will assess the taxes/duty payable on the said two motor vehicles BMW Chassis No. WBANC32060C072932 and BMW Convertible Chassis No. WBAWN32050JR92285 and submit the report to the court within 15 days from the date of this Ruling.*
5. *That an order is hereby issued directed at the 1st Respondent, for the preservation of the said motor vehicles BMW Chassis No. WBAWN32050JR92285 and BMW Chassis No. WBANC3206072932 pending the hearing and determination of the suit.*
6. *That costs of this application shall be given to the Plaintiff/Applicant.*

It is so ordered.

**DATED, READ AND DELIVERED AT NAIROBI
THIS 25TH DAY OF OCTOBER 2011.**

**E. K. O. OGOLA
JUDGE**

PRESENT:

Mr. Muganda for the Plaintiff

Mr. Twahir for the 1st Respondent

Mr. Muriuki not present for 2nd and 3rd Respondent

Irene - Court Clerk