



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS) Civil Case 387 of 2009**

JORUTH ENTERPRISES LIMITED.....PLAINTIFF

VERSUS

**GROFIN KENYA LIMITED.....1ST DEFENDANT
GROFIN EAST AFRICA FUND.....2ND DEFENDANT
WESTMINISTER COMMERCIAL TRADERS.....3RD DEFENDANT**

R U L I N G

The application before the court is by a Chamber Summons dated 18th February, 2010, and taken out under Order XXXIX Rules 1, 2, 3 and 9 of the Civil Procedure Rules, and Sections 3A and 63 (e) of the Civil Procedure Act. By the application, the applicant seeks the following orders:-

1. *THAT the application be certified urgent.*
2. *THAT this Honourable Court be pleased to grant an order of a temporary injunction restraining the Defendants either by themselves, their agents or servants from alienating, vandalizing, advertising for sale, selling, transferring or presenting a transfer of the plaintiff's Prime Mover Registration No. KBD 891D and Trailer Registration No. ZC 9133 pending the hearing of this application inter partes.*
3. *THAT in the alternative and without prejudice to prayer 2 above the status quo be maintained pending the hearing and determination of this application inter partes.*
4. *THAT this Honourable Court be pleased to grant an order of temporary injunction restraining the Defendants either by themselves, their agents or servants from alienating, vandalizing, advertising for sale, selling, transferring or presenting a transfer of the Applicant's Prime Mover Registration No. KBD 891D and Trailer Registration No. ZC 9133 pending the hearing and final determination of this suit.*
5. *THAT the costs of this application be provided for.*

The application is supported by the annexed affidavit of Ruth Wangari

Wachira, a director of the Plaintiff/Applicant, and is premised on the grounds that:-

- (a) *The Applicant is the part registered owner (sic) of a Prime Mover Reg. No. KBD 891D and Trailer No. ZC 9133.*
- (b) *The defendants have no legal right to sell and/or transfer the Applicant's Commercial Vehicles.*
- (c) *On 8th February, 2010 the Plaintiff received a letter from the 1st and 2nd Defendants whereby the Defendants threatened to sell the Applicant's Commercial vehicles.*
- (d) *The Applicant is apprehensive that unless restrained by this Honourable Court, the Defendants will dispose off the Plaintiff's Commercial vehicles.*

- (e) *The Applicant stands to suffer irreparable loss and damage if the vehicles are disposed off.*
- (f) *The balance of convenience is in favour of the Applicant in this case.*
- (g) *The Applicant is ready and willing to give an undertaking as to damages should the injunction be found to have been granted improperly.*

When the application was called out for hearing, Ms. Dar for the

Respondents rose to raise a preliminary objection, and Mr. Kipng'eno for the Applicant retorted that no such objection had been raised. Ms. Dar then pointed out that it had been raised in paragraph 5 of the replying affidavit which she read out after which the court allowed her to argue it. In order to appreciate fully the tenor and import of that paragraph, I find it prudent to reproduce it along with paragraphs 3 and 4 in order to place it in a context. Those three paragraphs state as follows:-

“3. THAT on 27th May 2009, the Plaintiff/Applicant filed a Notice of Motion application seeking *inter alia* a temporary injunction restraining the Defendants/Respondents either by themselves, servants and/or agents from alienating, vandalizing, advertising for sale, selling, transferring or presenting a transfer of the Plaintiff/Applicant's Prime Mover Registration No. KBD 891D and Trailer Registration No. ZC 9133 pending the hearing and final determination of the suit.

4. THAT this Honourable Court on 5th February 2010, disallowed the Plaintiff/Applicant's said Application with costs to the Defendant/Respondents. (Annexed hereto and marked 'K002' is a copy of Honourable Lady Justice Koome's Ruling).

5. THAT this application dated 18th February 2010, is made on identical grounds as the said Notice of Motion Application dated 27th May 2009, which the Learned Judge in her said Ruling marked 'K002' accordingly dismissed.”

This takes us back to the application by Notice of Motion dated 27th May, 2009. The said application was made under Order XXXIX Rules 1, 2, 3 and 9 and Order LI of the Civil Procedure Rules; Sections 3, 3A and 63 (e) of the Civil Procedure Act and all enabling provisions of the law. The Applicant sought the following orders:-

1. THAT the application be certified urgent.
2. THAT a temporary injunction do issue restraining the Defendants either by themselves, servants and/or agents from alienating, vandalizing, advertising for sale, selling, transferring or presenting a transfer of the Plaintiff's Prime Mover Registration No. KBD 891D and Trailer Registration No. ZC 9133 pending the hearing and determination of this application.
3. THAT this Honourable Court be pleased to grant a mandatory injunction compelling the 1st and 3rd Defendants to release Prime Mover Registration No. KBD 891D and Trailer Registration No.ZC 9133 to the Plaintiff forthwith pending the hearing and final determination of this suit.
4. THAT costs of this application be provided for.

From these excerpts, it is evident that the parties to both the

application by Notice of Motion dated 27th May, 2009 and the application by Chamber Summons dated 18th February, 2010 are the same. Both applications are also made, *inter alia*, under Order XXXIX Rules 1, 2, 3 and 9 of the Civil Procedure Rules, as well as Sections 3A and 63 (e) of the Civil Procedure Act. Prayer 1 in each application seeks certification of the application as urgent while prayer 2 in both applications is a prayer for a temporary injunction against the defendants in respect of the same Prime Mover Registration No. KBD 891D, and the same Trailer Registration No.ZC 9133. The only logical conclusion to be drawn from these facts is that the matter directly and

substantially in issue in the present application was also directly and substantially in issue in the application by Notice of Motion dated 29th May, 2009, which was dismissed on 5th February, 2010. Therefore the present application cannot be sustained or entertained as it is not only caught up by the doctrine of *res judicata*, but is also an abuse of the process of the court.

By reason of the foregoing, I uphold the preliminary objection and direct that the application herein by Chamber Summons dated 18th February, 2010, be and is hereby dismissed with costs to the Respondents. It is so ordered.

DATED and DELIVERED at NAIROBI this 15th day of April, 2010.

L. NJAGI

JUDGE