



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 66 of 2010

SIMON CHEGE KAMANGUPLAINTIFF/APPLICANT

VERSUS

JOSEPH D.K. KIMANI t/a

PYRAMID AUCTIONEERS.....1ST DEFENDANT/RESPONDENT

DR. LUKE MUSYIMI MUSAU.....2ND DEFENDANT/RESPONDENT

R U L I N G

1. There are two applications in this matter. This ruling is on both of them. The first application is the Defendant's Notice of Motion dated 19/03/2010 by which the Defendants seek two orders. First, the Defendants want this court to interpret its order given on 10/03/2010 and in particular order number 7 thereof which reads:- "THAT interim orders be and are hereby extended until the next hearing date." Secondly the Defendants are praying for an order to consolidate Nairobi HCCC No. 47 of 2010 with this suit. The Defendants also pray for costs of the application.
2. The application is supported by the sworn affidavit of Moses Chege Kibathi, an advocate who is in conduct of this matter on behalf of the Defendants. The deponent says that this honourable court's order made on 10/03/2010 is not clear and that because each party has given its own interpretation of the order, an interpretation by the court is required. The basis of this contention is that on the 13/02/2010, the subject motor vehicle was released to the Plaintiff under what the Defendants allege was coercion by the police, and secondly that it is not clear whether the status quo referred to by the court is as at 11/02/2010 or as at 24/02/2010 when the Plaintiff obtained a second ex parte order in this matter.
3. The application is opposed. There is a Replying Affidavit sworn by Leo Masore Nyangau, advocate for the Plaintiff. The deponent avers that this honourable court's order of 10/03/2010 is clear and needs no interpretation. The deponent also opposes the prayer for consolidation of this suit and HCCC No. 47 of 2010 on

grounds that the Defendants have not settled costs that are payable to the Plaintiff by the Defendants and as ordered by the court.

4. The second application is the Plaintiff's amended chamber summons dated 24/02/2010. This chamber summons was an amendment of the Plaintiffs chamber summons dated 11/02/2010 and filed in court on the same day contemporaneously with the plaint dated 11/02/2010. The Plaintiff's amended chamber summons seeks the following prayers:-
 1. *THAT this Honourable Court be pleased to certify this application urgent and be further pleased to hear the same exparte in the first instance due to the said urgency.*
 2. *THAT the Honourable Court be pleased to restrain the 1st and 2nd Defendants, by themselves or through their agents or servants of howsoever, from seizing, repossessing, taking into their possession, interfering with the plaintiff's operations of, or the plaintiff's trading with, or the plaintiff's possession of motor vehicle KBB 184X selling, disposing of, vandalizing, parting with possession of – except to the plaintiff – or in any other way dealing with motor vehicle KBB 184X pending the hearing and determination of this suit.*
 3. *THAT in view of the illegal, irregular, uncivil, criminal and unconscionable manner of seizing motor vehicle registration number KBB 184X, which they released on 13th February 2010 but which they want to seize or repossess again the Honourable Court be pleased to issue a mandatory injunction directed against the 1st and 2nd defendant requiring each or both of them to forthwith release keep off motor vehicle KBB 184X to the plaintiff, pending the hearing and determination of this application suit.*
 4. *THAT the Honourable Court be pleased to direct OCS of to supervise the release of the said motor vehicle to the plaintiff.*
5. The application is supported by the affidavit sworn by Simon Chege Kamangu dated 24/02/2010. The deponent avers that he is the owner of motor vehicle registration number KBB 184X which he bought at an auction on 12/10/2009. That soon after purchase, he took possession of the motor vehicle together with all necessary documents which he then lodged with the Kenya Revenue Authority (KRA).
6. The deponent further says that on 10/02/2010, the 1st Defendant unlawfully seized the Plaintiff's motor vehicle, necessitating the filing of this suit and the attendant application on 11/02/2010. The deponent concedes that he reported the unlawful seizure of the motor vehicle to the Flying Squad on 11/02/2010. He also concedes that he did not serve the exparte court order granted to him on 11/02/2010 upon the Defendants.
7. A brief genesis of this case will throw some light on the two applications. On 11/02/2010, the Plaintiff herein filed the plaint of the same date in which he averred that he bought the subject motor vehicle at a public auction. He also avers that after taking possession of the motor vehicle, the 2nd Defendant filed objection proceedings in Bungoma **CMCC No. 54 of 2004 – Moses Wekesa Buyayi –vs- Kenya Bus Service Ltd. & Another**. The Plaintiff also avers that after the 2nd Defendant lost the objection proceedings, he (2nd Defendant) filed **HCCC No. 481 of 2009 – Dr. Luke Musyimi Musau –vs- Zacharia Baraza t/a Siuma Traders**. The said suit has since been withdrawn by the 2nd Defendant.
8. It is the Plaintiff's case that on or about 10/02/2010, the 1st Defendant unlawfully maliciously and fraudulently impounded the subject motor vehicle on instructions received from M/s Njoroge Wachira & Co. Advocates for and on behalf of the 2nd Defendant. By reason of the matters aforesaid the Plaintiff prays for judgment against the 1st and 2nd Defendants jointly and severally for:-

- (a) *A temporary injunction restraining the 1st and 2nd Defendants either by themselves, or through any of their servants or agents or howsoever from selling, disposing of, parting with possession except to the Plaintiff, operating or in any other way dealing with motor vehicle registration number KBB 184X pending the hearing and determination of this suit.*
- (b) *A mandatory injunction do issue against the 1st and 2nd Defendants requiring both the Defendant or any one of them to forthwith release motor vehicle registration number KBB 184X to the Plaintiff pending the hearing and determination of this suit.*
- (c) *Damages for unlawful seizure of motor vehicle.*
- (d) *Costs of the suit.*
- (e) *Such other or further relief the court may grant.*

9. Together with the plaint, the Plaintiff filed a chamber summons application dated 11/02/2010 seeking orders of injunction to restrain the 1st and 2nd Defendants by themselves or through their agents or servants or howsoever from selling, disposing of, vandalizing, parting with possession of except to the Plaintiff – or in any other way dealing with motor vehicle KBB 184X pending the hearing and determination of the suit. The Plaintiff also asked for an order directing the OCS of some unnamed police station to supervise the release of the subject motor vehicle to the Plaintiff.
10. On the 11/02/2010, the Plaintiff was heard *ex parte* and granted an interim order of injunction restraining the Defendants from taking any further action in respect of motor vehicle No. KBB 184X pending *inter partes* hearing of the application on 18/02/2010. The Plaintiff was also ordered to serve the Defendants.
11. Earlier on 4/02/2010, the 2nd Defendant herein as Plaintiff filed a Notice of Withdrawal of Nairobi HCCC No. 481 of 2009 against the Defendant namely Zacharia W. Baraza t/a Siumia Traders. That suit had been filed together with a chamber summons application for **ORDERS:-**
 - (4) *THAT pending the hearing and determination of this application inter partes, the Honourable Court do issue a mandatory injunction to compel the Defendant whether by himself or by his servants or agents or otherwise howsoever to surrender and deliver possession of the Plaintiff's motor vehicle Isuzu FRR 33 Registration No. KBB 184X.*
 - (5) *THAT in the alternative to prayer 1 above, an order of injunction do issue to restrain the Defendant whether by himself or through his servants and/or agents or otherwise howsoever from advertising for sale, selling, offering for sale, alienating transforming or in any other way dealing with motor vehicle Isuzu FRR 33 registration No. KBB 184X or in any way that that may be prejudicial to the Plaintiff's ownership of the same.*
 - (6) *THAT pending the hearing and determination of this suit, an order of mandatory injunction do issue to compel the defendant whether by himself or servants and or agents to surrender and deliver possession of motor vehicle Isuzu FRR 33 registration No. KBB 184X to the Plaintiff and/or be restrained from proclaiming, attaching or in any other way interfering with the Plaintiff's peaceful possession of said motor vehicle.*
 - (7) *The cost of this application be borne by the defendant in any event.*
12. Nairobi HCC 481 of 2009 was premised on grounds that the Defendant therein had unlawfully and illegally attached the subject motor vehicle which was used for commercial purposes. The Plaintiff therein sought, among others, declaratory orders to the effect that the attachment was wrongful and that the motor vehicle should be returned to the Plaintiff therein.
13. On the 24/02/2010, the Plaintiff in this suit amended the original chamber summons application saying that on the 13/02/2010 when the Defendants were about to be served with the *ex parte* order obtained on 11/02/2010, they

(Defendants) released the motor vehicle to the Plaintiff, and that this led the Plaintiff to apply to have his application dated 11/02/2010 stood over generally when the matter came up on 18/02/2010 for interpartes hearing. The Plaintiff also averred that on 23/02/2010, the Plaintiff was ordered to take the motor vehicle to Pangani Police Station on the 24/02/2010 at 3.30 a.m. so as to release the vehicle to the Defendants. It was on the basis of this requirement upon the Plaintiff that the amended chamber summons dated 24/02/2010.

14. On the 24/02/2010 the court ordered, inter alia, that the status quo up to 10/03/2010 be maintained that is to say the Defendants would not take any action to get the possession of the motor vehicle in question. The learned Duty Judge then fixed the Plaintiff's amended chamber summons for interpartes hearing on 10/03./2010.
15. The parties appeared before me on 10/03/2010. The parties were diametrically opposed to each other with regard to the earlier orders made on 11/02/2010 and 24/02/2010. While counsel for the Defendants contended that there were two orders subsisting side by side as of 10/03/2010, counsel for the Plaintiff submitted that there was only one order dated 24/02/2010 since the order issued on 11/02/2010 had lapsed.
16. Upon hearing counsel on their submissions and without having had the benefit of perusing the entire file, I made an order extending the interim orders until the next hearing date for the Plaintiff's amended chamber summons dated 24/02/2010.
17. Counsel made submissions on their respective positions. The Defendant's submissions are hinged on a number of issues namely:-
 - (a) *Whether a mandatory injunction can be sustained.* Counsel submitted that the Plaintiff had not demonstrated that there were any special circumstances to warrant the granting of such an injunction. See **Kenya Breweries Ltd. & Another –vs- Washington O. Okeyo Civil Appeal No. 332 of 2000 and Stephen Kipkebut t/a Riverside Lodge & Rooms –vs- Naftali Ogola Civil Appeal No. 146 of 2008.**
 - (b) *Whether the Plaintiff has satisfied the conditions for the granting of an injunction as set out in **Giella –vs- Cassman Brown & Co. Ltd. [1973] EA 358.*** Counsel for the Defendants submitted that the Plaintiff has failed to demonstrate that he has a prima facie case with a probability of success and that the loss which might be suffered by the Plaintiff cannot be compensated in damages.
 - (c) *Who is the registered owner of the bus registration No. KBB 184X.* Counsel for the Defendants submitted that it is clear from the records at the Registrar of Motor Vehicles that the bus belongs to the 1st Defendant especially so because of the provisions of sections 8 and 9 of the Traffic Act and the cases of **Francis Nzioka Ngao –vs- Silas Thiani Nkunga – Civil Appeal No. 92 of 1998. Atogo vs Agricultural Finances Corporation & Another [1991] KLR 521 and HCCC No. 79 of 2003 – National Bank of Kenya Ltd. –vs- Innovation Advertising Ltd. & 3 Others.**
18. Counsel for the Defendants also submitted that the release of the subject motor vehicle to the Plaintiff on 13/03/2010 was in contempt of the court orders made on 11/02/2010. Further the Defendants read much mischief in the public auction which gave the subject motor vehicle to the Plaintiff. On the basis of the foregoing, the Defendants argue that the Plaintiff's suit against the Defendants has no chance of succeeding.
19. The Defendants also argue that the Plaintiff and the auctioneer conspired to attach the Defendant's motor vehicle without any justifiable cause and that the orders sought by the Plaintiff should not be granted.
20. The principles governing the granting of mandatory injunctions were echoed in a number of authorities and in

particular **East African Fine Spinners Ltd. (In Receivership) & 3 Others –vs- Bedi Investments Ltd. Civil Application NAI 72/94 (Ur) and Shepherd Homes Ltd. –vs- Sandahm [1971]1 Ch. 34** in the following words:-

“---- it is plain that in most circumstances a mandatory injunction is likely, other things being equal to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will, of course grant such injunctions as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation. If, of course, the Defendant has rushed on with his work in order to defeat the Plaintiff’s attempts to stop him, then upon the Plaintiff promptly resorting to the court for assistance, that assistance is likely to be available; for this will in substance, be restoring the status quo and the Plaintiff’s promptitude is a badge of the seriousness of his complaint.”

21. In Halisbury’s Laws of England Volume 24 Paragraph 248, the authors state the following:-

“A mandatory injunction can be granted on an interlocutory application, as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the Defendant attempts to steal a march on the Plaintiff, such as where, on receipt of notices that an injunction is about to be applied for, the Defendant hurries on the work in respect of which complaint is made, so that when he receives notice of an interim injunction, it is completed, a mandatory injunction will be granted on an interlocutory application.”

22. The case of **Francis Nzioka Ngao** (above) deals with the provisions of sections 8 and 9 of the Traffic Act. Section 8 is to the effect that

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

23. On the other hand, section 9 of the Act provides that where a vehicle is transferred from a registered owner, it cannot be on the road for more than fourteen days after the transfer unless the new owner is registered as the owner thereof. My considered view is that though this is the law, the relevance of this law to the Defendant’s case at this stage is not appreciated.

24. The final argument put forward by the Defendant is that the Plaintiff committed the tort of conversion by wrongfully taking the 2nd Defendants motor vehicle. See **Atogo –vs- Agricultural Finance Corporation & Another** (above) where the Court of Appeal held inter alia, that –

(a) The wrongful taking of another person’s goods constitutes the tort of conversion

(b) It is actionable trespass to wrongfully set in motion the law so that the wrong goods are seized or the wrong person is arrested

(c) It is actionable to set in motion a process of attachment without observing rules of ordinary prudence by ascertaining the true identity and ownership of the property to be seized without the necessity for proof of express malice.

25. It is the Defendant’s case that the Plaintiff in this case did not do due diligence to establish the ownership of the subject motor vehicle and that the Plaintiff also failed to give the 2nd Defendant reasonable time to prove that he (2nd Defendant) was the owner of the subject motor vehicle.

26. Parties filed written submissions in this matter. It was argued on behalf of the Plaintiff that the Plaintiff purchased the subject motor vehicle at a properly conducted auction necessitated by the judgment in Bungoma **CMCC No. 54 of 2004 (the Bungoma case)**. Counsel for the Plaintiff also submitted that it was wrong for the firm of Njoroge Wachira Advocates to issue instructions to seize the motor vehicle on 10/02/2010 without a valid court order and more so in view of the fact that the 2nd Defendant had lost the objection proceedings in which he sought to prove ownership of the motor vehicle. Counsel for the Plaintiff further submitted that such an action on the part of the 2nd Defendant was “*illegal irregular, uncivil, criminal and unconscionable.*”
27. Regarding the order given on 11/02/2010, counsel for the Plaintiff submitted that the said order expired on 18/02/2010 when the application from which the order arose was amended. Counsel also pointed out that nowhere in the 2nd Defendant’s Replying Affidavit has the 2nd Defendant denied that there were valid warrants of attachment for sale issued in the Bungoma case, as a result of which the subject motor vehicle was attached. The Plaintiff says that unless restrained, the 2nd Defendant is likely to seize the motor vehicle a second time.
28. As to whether the Plaintiff is entitled to the orders of injunction, counsel for the Plaintiff submitted that the Plaintiff has satisfied all the three conditions set out in the case of **Giella –vs- Cassman Brown & Co. Ltd. [1973] EA 358**. First, that the Plaintiff has demonstrated that he has a prima facie case with probability of success since there is no doubt that he (Plaintiff) bought the motor vehicle at a properly conducted public auction which auction has not been challenged in any way.
29. It is also argued on behalf of the Plaintiff that the 2nd Defendant is confusing issues by filing separate suits, that is to say Nairobi HCCC Nos 481 of 2009 and Nairobi HCCC No. 477 of 2010 instead of pursuing his interests under the Bungoma case in which he became a party when he (2nd Defendant) filed the objection proceedings which were lost. Referring to section 34(1) of the Civil Procedure Act, counsel for the Plaintiff submitted that the 2nd Defendant was barred from instituting a fresh suit in respect of “*all questions arising between the parties*” in the Bungoma case.
30. Counsel for the Plaintiff further argued that in the absence of an appeal against the judgment in the Bungoma case and/or setting aside of the dismissal order of the objection proceedings this court cannot hear the 2nd Defendant on his Nairobi HCCC No. 47 of 2010; and that this court should lean back on the provisions of Order 21 of the Civil Procedure Rules and to find that the public auction of which the Plaintiff bought the subject motor vehicle was valid. Rule 69 of Order 21 of the Civil Procedure Rules provides:-
- “69. No irregularity in publishing or conducting the sale of movable property shall vitiate the sale; but any person sustaining any injury by reason of such irregularity at the hand of any other person may institute a suit against him for compensation, or (if such person is the purchaser) for the recovery of the specific property and for compensation in default of such recovery.”*
31. The Plaintiff contends that if the 2nd Defendant’s objection proceedings had succeeded after the vehicle had been sold, the 2nd Defendant would have sued the Plaintiff for the loss. On these grounds, Plaintiff’s counsel submits that the Plaintiff has satisfied the first condition of the **Giella case** (above).
32. Counsel for the Plaintiff has also argued that the Plaintiff will suffer irreparable loss unless the injunction is granted on grounds that the Defendants have tried to irregularly, illegally and in a criminal and unconscionable manner to seize the Plaintiff’s motor vehicle. Counsel also argues that if the court is in doubt in this case, it

should find that the balance of convenience tilts in favour of the Plaintiff.

33. I have now considered the contending views in this matter, and I am now in a position to determine the issues raised by the two applications. As regards the Defendants' application dated 19/03/2010, I have reached the conclusion that as at 10/03/2010, there was only one subsisting order, namely the court order given on 24/02/2010 that could have been extended by the court on 10/03/2010. It is not denied by the Defendants that the application dated 11/02/2010 in which the temporary order of 11/02/2010 was given, was amended on 24/02/2010. With that amendment and the issuance of a fresh order on 24/02/2010 the order of 11/02/2010 automatically lapsed. In any event, the order of 11/02/2010 was not served within the three days provided under Order 39 Rule 3(3) of the Civil Procedure Rules, it automatically lapsed after the three (3) days.
34. It flows from the above that the Defendants contention that the order of 11/02/2010 was still valid as at 10/03/2010 has no basis. That argument is therefore rejected.
35. The second issue on the Defendant's application is whether this suit can be consolidated with Nairobi HCCC No. 47 of 2010. The answer to this question is no. As provided under section 34 of the Civil Procedure Act, the 2nd Defendant was not entitled to file Nairobi HCCC No. 47 of 2010. The 2nd Defendant's remedy, if any, should have been pursued under the Bungoma case. The 2nd Defendant made an attempt but he lost. He has not appealed against the order dismissing his objection proceedings and that would suggest that he was satisfied with that outcome. In brief therefore, the Defendant's application dated 19/03/2010 lacks merit. The same is dismissed with costs to the Plaintiff.
36. I now turn to the Plaintiff's amended chamber summons dated 24/02/2010. The question for determination is whether the Plaintiff has satisfied the conditions for the granting of an injunction as set out in the **Giella case**, that is to say that -
- (a) *the Plaintiff must show a prima facie case with a probability of success.*
 - (b) *an injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury and*
 - (c) *when the court is in doubt, it will decide the application on the balance of convenience*
37. Whether or not the above conditions have been fulfilled depends very much on the whole process by which the Plaintiff came to be possessed of the subject motor vehicle. It is not in dispute that the subject motor vehicle was attached to satisfy the decree in the Bungoma case. It is also not in dispute that the public auction was conducted in accordance with the rules set out under Order 21 Rule 62 of the Civil Procedure Rules; namely that a notice and a publication of the intended sale was put out in the **Kenya Times Newspaper** showing that the motor vehicle would be sold.
38. Having thus purchased the subject motor vehicle at the auction, the Plaintiff has demonstrated that he has a prima facie case with probability of success. The Defendants might argue that any loss that may be suffered by the Plaintiff is compensable in damages. My considered view is that, it is not. Public auctions offer special opportunities to parties who are interested, with the promise that a sale which is forced might be concluded at less than the value of the specific item in the open market. This is an opportunity which is unlikely to be repeated in this case unless the Defendants are restrained from unlawfully and irregularly seizing or taking into their possession the subject motor vehicle or in any other way from dealing with the said motor vehicle until this

suit is heard and determined. I am also of the considered view that even if I were to consider this case on a balance of convenience, such convenience would tilt in favour of the Plaintiff who has lawful possession of the subject motor vehicle.

39. In the premises, I allow the Plaintiff's amended chamber summons dated 24/02/2010 in terms of prayers 2 and 3 thereof. I decline to grant prayer 4 of the application as the same is incomplete. The Plaintiff shall have costs of this application.

Orders accordingly.

Dated and delivered at Nairobi this 3rd day of May, 2010.

R.N. SITATI

JUDGE

Read and delivered in the presence of:-

Mr. Kithema for Nyangau (present) for Plaintiff

Mr. Kibathi (present) for Defendants

Weche - court clerk