



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**Civil Suit 414 of 2009**

**JOHN MWAGEFWA MWANGEMI.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**LECH ALEKSANDROWICZ.....DEFENDANT/RESPONDENT**

**RULING**

The plaintiff has come before the Court by way of Chamber Summons dated 17<sup>th</sup> November, 2009 and brought under Order *XXXIX*, rules 1,2,3,5 and 9 of the Civil Procedure Rules, and s. 3A of the Civil Procedure Act (Cap. 21, Laws of Kenya). The main prayer is thus set out:

***“THAT the defendant by himself, his servants and/or agents or otherwise howsoever be restrained by temporary injunction from repossessing, attaching, disposing of, selling or in any other way alienating and/or interfering with the plaintiff’s possession of the motor vehicles registration numbers KAY 630G and KAY 640G pending the hearing and final determination of the suit filed herein.”***

In the grounds supporting the application, it is stated that the plaintiff is the beneficial owner of the said motor vehicles which are prime mover trucks, and that he has the original log books as well as duly-signed transfer forms in his favour; that the plaintiff purchased the two motor vehicles from third parties, to whom he paid the full purchase price, in the sum of Kshs. 5.3 million, pursuant to agreements made in March 2008 and March 2009; that the defendant, on 3<sup>rd</sup> September, 2009 and acting through auctioneers, attached and repossessed the said prime move trucks; that the defendant had, in that regard, acted by virtue of *ex parte* orders of the Magistrate’s Court at Nairobi’s Milimani Commercial Courts (in C.M. Civil Case No. 1963 of 2009, *Lech Alexandrowicz v. Amina Fundi, Chidzuga Mariam and Lucas M. Dindi*); that the defendant who was plaintiff in CMCC No. 1963 of 2009 had obtained orders to have the plaintiff’s trucks and two others all valued at Kshs. 10 million held in the defendant’s name, even though the said Court lacked both pecuniary and geographical jurisdiction; that the plaintiff’s application to be joined as a party in CMCC No. 1963 of 2009 and for the release of his prime mover trucks was dismissed with costs on 2<sup>nd</sup> November, 2009: but the *ex parte* judgment and all the orders in the said case were set aside on application by 1<sup>st</sup> and 2<sup>nd</sup> defendants in the said case, on grounds that the Court had no jurisdiction – but no order was given for the cancellation of registration of the plaintiff’s motor vehicles from the defendant’s name and transfer of the same to the plaintiff’s; that the plaintiff, to mitigate his losses, has taken possession of the said prime mover trucks and brought them from Nairobi to Mombasa, but the defendant and his agents are now seeking the said prime mover trucks with the intention of attaching or repossessing; that the defendant and his agents have advertised the plaintiff’s prime mover trucks for sale in The *Daily Nation* of 14<sup>th</sup> October, 2009 in the classified advertisements pages; that the plaintiff is

apprehensive that once attached and repossessed, the said prime mover trucks will be disposed of by the defendant who is a Polish national with a German passport and is ordinarily resident in Poland and Germany; that the plaintiff will then lose the said motor vehicles and will have no remedy in law as the defendant will have left the country; that the plaintiff is entitled to ownership and possession of the said motor vehicles which he purchased and in respect of which he has never been sued or served with any court process relating to the same, and has never had any contractual or other relationship with the defendant; that the defendant has no right in law to attach, repossess, hold or dispose or in any other way alienate the said motor vehicles, as the plaintiff has a beneficial interest in the same and holds duly-executed transfer forms in his favour and, furthermore, he is an innocent purchaser for value of the said motor vehicles without notice of any claim that the defendant may have against their previous owners; that at the time the said motor vehicles were attached or repossessed, they were operational and in good working condition, but while repossessed, they were vandalized, and their gear-boxes tampered with and one of them had been involved in an accident; that the plaintiff is ready to give an undertaking that he will not sell or dispose of the said motor vehicles until this matter is concluded; that the plaintiff has lost income from the time the said motor vehicles were repossessed and he continues to suffer loss at the rate of Kshs. 250,000/= per week; that it is fair and just that the orders sought herein be granted, so as to preserve the motor vehicles the subject - matter of the suit.

The application is further supported by the detailed affidavit of the plaintiff, sworn on 17<sup>th</sup> November, 2009 to which are annexed the vital authenticating documents: a sale agreement between the plaintiff and the seller, **Mariam Fundi Chidzuga** (dated 4<sup>th</sup> March, 2009); payment cheques (dated 20<sup>th</sup> January, 2009; 7<sup>th</sup> March, 2009; 7<sup>th</sup> April, 2009; 5<sup>th</sup> May, 2009); petty cash vouchers; separate agreement with seller **Amina Fundi Marder**; motor vehicle registration books; signed motor vehicle transfer forms.

Learned counsel **Mrs. Eunice Wanja Kibe** swore an affidavit of service on 28<sup>th</sup> April, 2010 stating that, on the basis of her client's Chamber Summons of 18<sup>th</sup> December, 2009 she had obtained leave to serve the defendant by substituted service "by sending all the Court process herein by UPS Courier to his addresses in Poland and Germany"; and she made all the requisite dispatches. **Mrs. Kibe** swore an affidavit of service dated 28<sup>th</sup> April, 2010, deponing that she duly dispatched hearing notice for the Chamber Summons of 17<sup>th</sup> November, 2009 to the defendant/respondent; and she "verily [believes] that the defendant was properly served with the Hearing Notice dated 18<sup>th</sup> March, 2010 for the hearing of the Chamber Summons dated 17<sup>th</sup> November, 2009 on 29<sup>th</sup> April, 2010".

The basis having been laid for hearing the Chamber Summons of 17<sup>th</sup> November, 2009 the Court proceeded with the hearing on 29<sup>th</sup> April, 2010 notwithstanding the defendant's non-appearance.

Learned counsel **Mrs. Kibe** submitted that the plaintiff had genuine interests to protect, as against the defendant: the supporting affidavit carried evidence in the form of exhibits showing that he had expended money purchasing the suit motor vehicles; that he was an innocent purchaser for value, without notice of any defect in the title of the vendors; that he did not know the defendant, and he had been involved in no dealings with the defendant, in relation to the suit motor vehicles; that in relation to these motor vehicles, nobody has ever filed suit against him or made any kind of claim against him. Counsel urged that the suit motor vehicles had gone to waste, and suffered damage when they were not in the plaintiff's custody; and so he was seeking orders securing these motor vehicles in his custody. Since the defendant had notified no claim against the plaintiff, counsel urged, there was no legal basis for the defendant's attempts to repossess the motor vehicles.

Upon reading the application on its face, considering the content of the supporting affidavit, and hearing the submissions of learned counsel, I have come to the conclusion that the **defendant**, even though he may be entertaining grievances in connexion with the ownership of, and/or the entitlement to use the two prime-mover trucks, is not attributing blame to the plaintiff herein. This must mean that the defendant, even though he may well be entitled to claim against somebody, that somebody is not the applicant herein; and besides, the applicant has produced evidence that he is a purchaser of the goods in question; he gave consideration; he is entitled to the prime-mover trucks.

In these circumstances, it is to be held that the plaintiff has a legal basis for the prayers he makes; and there being no contest to his position, it is held that the balance of probability stands in his favour.

I will therefore, order as follows:

- (1) ***The defendant by himself, his servants and/or agents or otherwise howsoever shall be restrained by temporary injunction from repossessing, attaching, disposing of, selling or in any other way alienating and/or interfering with the plaintiff's possession of the motor vehicles registration numbers KAY 630G and KAY 640G pending the hearing and final determination of the suit.***

(2) *The costs of this application shall be in the cause.*

*Orders accordingly.*

**DATED** and **DELIVERED** at **MOMBASA** this 25<sup>th</sup> day of June, 2010.

**J.B. OJWANG**

**JUDGE**

Coram: *Ojwang, J.*

Court Clerk: *Ibrahim*

For the Plaintiff/Applicant: *Mrs. Kibe*

Defendant/Respondent: Unrepresented