



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & TAX DIVISION, MILIMANI**

**CIVIL SUIT NO. 406 OF 2009**

**GOER ENTERPRISES LIMITED.....PLAINTIFF**

**VERSUS**

**DIAMOND TRUST BANK KENYA LTD.....DEFENDANT**

**RULING**

This Ruling is made in two applications filed by the plaintiff as follows:

- 1. Chamber Summons dated 2<sup>nd</sup> June 2009 filed on 4<sup>th</sup> June 2009.**
- 2. Chamber Summons dated 27<sup>th</sup> October 2009 filed on 28<sup>th</sup> October 2009.**

In the first application, which is stated to have been brought under Sections 3, 3A and 63(e) of the Civil Procedure Act and Order XXXIX Rules 1, 2, 3, 5 and 7(1) and Order L of the Civil Procedure Rules (Cap 21 of the Laws of Kenya), the plaintiff/applicant seeks orders, *inter alia*, as follows:

**1. That pending the hearing and determination of the application and the suit, the Defendant/Respondent be ordered to reinstate to the applicant 5 motor vehicles namely:**

**(a) KAR 648 J – Renault Prime Mover**

- (b) ZC 1711 -40 Foot Trailer bearing LPG Tanker**
- (c) KAY 661Q – ISUZU FVZ Tanker (LPG Tanker)**
  
- (d) KBB 681B – Mercedes Benz Actros Prime Mover**
- (e) ZC 8548 – 40 Foot Trailer bearing LPG Tanker**

**2. That the Respondent ordered to stop debiting the applicant's Account Number 0807516016 at the Respondents Capital Centre Branch in respect of motor vehicles registration Nos.:-**

- (a) KAU 028 N Scania Prime Mover**
  
- (b) ZC 2735 – 40 Foot Petrol Tranker**
  
- (c) KBC 806F Toyota Land Cruiser Prado and to remove the said three vehicles from the plaintiff's accounts.**

**3. That the defendant/respondent be ordered to give true and fair statement of account for the plaintiff/applicant's account No.0807516016.**

**4. That the respondent be ordered to nullify the Hire Purchase Accounts for the above noted Motor Vehicles Registration Numbers.**

- (a) KAU 028N**
  
- (b) ZC 2735**
  
- (c) KBC 806F and to rectify the Plaintiff/Applicant's account accordingly.**

**5. That the Respondent be ordered to reinstate the sum of KShs.3,900,616.97 siphoned out of the Plaintiff/Applicant's bank account above stated.**

The second application of 27<sup>th</sup> October 2009 seeks injunctive orders to restrain the Respondent, its agents, and/or auctioneers, (Dalali Merchants) from selling, disposing off, transferring or otherwise dealing with the applicant's 5 motor vehicles stated hereabove and that orders be made for the seizure, detention and preservation of the said motor vehicles pending the hearing and determination of the applicant's applications dated 6<sup>th</sup> August 2009 and 13<sup>th</sup> October 2009.

The application dated 6<sup>th</sup> August 2009 sought the same orders as are sought herein, while the application of 13<sup>th</sup> October 2009 sought the reinstatement and extension of interim orders of 7<sup>th</sup> August 2009 which

had lapsed. The record shows that the application of 13<sup>th</sup> October was heard ex parte before the Hon. Mr. Justice Apondi who, not being satisfied that the suit properties were under any threat of disposal declined to grant any injunctive orders, directing that the application be served for inter partes hearing on 29<sup>th</sup> October 2009.

The applicants claim arises out of a contractual relationship between the plaintiff and the defendant founded on Hire Purchase Agreements under which the Defendant financed the purchase of the motor vehicles listed as “a” to “e” of paragraph 5 of the plaint and in prayers 3 and 4 of the application dated 2<sup>nd</sup> June 2009. The financial accommodation was rendered to the plaintiff vide its above stated account No. 0807516016 with the defendants, at its capital centre branch, which was also charged with the repayment of the loan facility by way of regular debits. Sometime in April 2009 the plaintiff’s account was overdrawn to accommodate three additional hire purchase agreements under which the motor vehicles listed as “a”, “b” and “c” in paragraph 10 of the plaint and paragraphs 5 and 7 of the application were bought but not in the name of the plaintiff.

It emerged from the enquiries that followed that the said three vehicles were bought by two employees of the defendant using the plaintiff’s above stated account. The plaintiff blames the defendant for this eventuality, claiming that the defendant had breached the trust between itself and the plaintiff as its customer by allowing its employees to dishonestly and fraudulently misuse the plaintiff’s account and by concealing, protecting and/or sanctioning the fraudulent acts of such employees to the detriment of the plaintiff.

Subsequent upon default in the repayment of the sums advanced pursuant to the hire purchase arrangement, the defendant seized all but one of the motor vehicles, leading to the filing of these proceedings.

In the course of the hearing and as confirmed by the applicant’s supplementary affidavit sworn by Edward Mutilangi on 26<sup>th</sup> January 2010, it emerged that the seized motor vehicles were sold on 21<sup>st</sup> October 2009, while the interim orders issued by the Honourable Lady Justice Lesiit on 7<sup>th</sup> August 2009 had lapsed, the Hon. Mr. Justice Apondi having declined to renew the same on the basis that there was no proof tendered by the plaintiff/applicant that the vehicles were under any threat of disposal. That was on 14<sup>th</sup> October 2009 when the plaintiff’s application for interim orders was adjourned to the 29<sup>th</sup> October 2009 for inter partes hearing.

From the Supplementary Affidavit of 26<sup>th</sup> January 2010 it is clear that the sale itself is not in dispute. The plaintiff/applicant only challenges the same as having been irregularly conducted in a manner that suggested collusion and/or conspiracy between the auctioneers, valuers and the defendants to dispose of the motor vehicles at an undervaluation, thereby defeating the plaintiff/applicant’s interests.

The defendant’s/respondent’s position, as stated in the Replying Affidavit sworn by Elizabeth Hinga on 29<sup>th</sup> October 2009, is that the motor vehicles were properly seized following default in payment of the hire purchase rentals. They argue that no irreparable loss has been demonstrated herein since the defendant is able to compensate the plaintiff for the value of the said motor vehicles. Moreover, the defendant/respondents argue that the hire purchase agreement had terminated at the time of the auction and that the applicant’s account was then in arrears to the tune of KShs.5,933,277.71. The defendant/respondents contend also, that the applicant has concealed the whereabouts of motor vehicle registration number ZC 8548-40 which was not attached, a fact which disentitles it of a remedy in equity

as it has not come to court with clean hands.

From the facts, it is clear that the restraining orders sought under prayers 1 and 2 as spelt out in this Ruling have been overtaken by events and cannot issue. To grant any of the other prayers, which are in the nature of mandatory injunctions, would be tantamount to making final orders in the suit without taking evidence, in a case where fraud is pleaded. In any event I am not satisfied that the plaintiff has made out a case for mandatory orders of injunction. Additionally there is no doubt whatsoever that the applicant's loss if any, can be compensated by way of damages.

The issues as relate to the operation of the account, the servicing of the hire purchase facility, the inclusion of the three additional vehicles, said to have been bought by the defendant's employees, relate to the alleged fraud and I find it imperative that evidence be taken to assist the court in determining the same. Those are not issues capable of being disposed of on affidavit evidence.

In sum therefore, I find that the plaintiff's Chamber Summons dated 4<sup>th</sup> June 2009 and 27<sup>th</sup> October 2009 cannot succeed. The same are hereby dismissed with costs being in the cause.

**DELIVERED and SIGNED at NAIROBI this 28<sup>TH</sup> day of OCTOBER 2010.**

**M. G. MUGO**

**JUDGE**

In the presence of:

Mr. Muchiri

For the plaintiff/applicant

No appearance

For the Defendant/respondent