



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**Civil Suit 614 of 2008**

**SYMBION EAST AFRICA PRINTERS LIMITED.....PLAINTIFF**

**VERSUS**

**CASEY J. K. MBUGUA.....1<sup>ST</sup> DEFENDANT**

**NGOMONGE T/A DOLLAR AUCTIONS.....2<sup>ND</sup> DEFENDANT**

**RULING**

The Plaintiff in this case entered into a Sale Agreement dated 17<sup>th</sup> November, 2007 with one JOHN NGURU GITAGIA for the purchase of a colour printing machine hereinafter the machine. It is the Plaintiff's case that the 2<sup>nd</sup> Defendant Auctioneer on instructions from the 1<sup>st</sup> Defendant, on 9<sup>th</sup> October, 2008 proclaimed the machine and has threatened to seize it. The Plaintiff then filed this case on 21<sup>st</sup> October, 2008 and simultaneously filed the Chamber Summons application seeking two orders as follows:

2. THAT the defendants be restrained by themselves, their agents and/or employees by way of an injunction from interfering, repossessing and/or seizing the plaintiff's KOR HEIDELBURG (COLOUR PRINTING) MACHINE serial number 340548 until the final determination of this suit or until further orders of this Honourable Court.
3. An order of declaration that the Plaintiff is the legal and rightful owner of KOR HEIDELBURG printing machine serial number 340548.
5. Any other or further relief that this Honourable Court may deem fit to grant.

Three grounds are cited on the face of the application which are:

1. THAT the plaintiff/applicant vide a Sale Agreement date 17<sup>th</sup> November, 2007 purchased a KOR HEIDELBURG printing machine serial number 340548 from JOHN NJUNU GITAGIA.
2. THAT the plaintiff paid the said vendor in full and took possession of the machine.
3. THAT the defendants who are strangers to the agreement between the applicant and the vendor have without any justifiable cause purported to proclaim the said machine and have threatened to seize the same.

The application is further supported by the affidavit of Robert Murathi Mbugua, a director of the Plaintiff of even date. There are several annexures to the affidavit. I have considered its contents. In summary the Plaintiff avers that it bought the machine from John Njunu Gitagia and fully paid for it through funds borrowed from a bank, K-Rep. It is deponed further that there is a debenture over the said machine in favour of K-Rep Bank as security for the loan advanced to the Plaintiff. The deponent seeks court protection on grounds he was a bona fide third party purchaser for value without notice.

The application is opposed. The 1<sup>st</sup> Defendant has sworn a replying affidavit dated 5<sup>th</sup> November, 2008. It is the 1<sup>st</sup> Defendant's contention that it entered into a Sale Agreement over the suit machine with John Njunu Gitagia, hereinafter the vendor, on the 13<sup>th</sup> October, 2006. The 1<sup>st</sup> Defendant depones that clause 1 of the said agreement provided that the

1<sup>st</sup> Defendant was at liberty to repossess the suit machine in the event of default. The said agreement is annexure 1. The 1<sup>st</sup> Defendant depones further that the Applicant did not have a good title to the machine since the representation made by the vendor to the Plaintiff were fraudulent and misleading. The 1<sup>st</sup> Defendant depones further that the vendor was still indebted to him in the sum of Kshs.400,000/-.

Mr. Goa argued the application on behalf of the Plaintiff. Both Counsel had filed written submissions. Mr. Goa relied on his submissions in support of this application. Learned counsel for the Plaintiff relies on two cases. One of them, an English case, for the proposition that an innocent buyer for value without notice should get a better title to the property than the one who sold the goods. The two cases are Bishopsgate Motor Finance Corporation vs. Transport Brakes Limited [1949] 1 KB 332 where Lord Denning stated:

*“In the development of our law, two principles have striven for mastery. The first is the protection of property; no one can give a better title than he himself possesses. The second is for the protection of commercial transactions; the person who take in good faith and for value without notice should get a better title. The first principles had held sway for a long time but it has been modified by the common law itself and by statute so as to meet the needs of our times.”*

The second is a Kenyan case, Adolf Wiengut v. Leslie [1967] EA 480 where Chanan Singh J. held:

*“This case is an example of a classical conflict between two principles of law... the so called second principle is likely on scrutiny to turn out a group of exceptions. I wish it were possible to say that in every case where a person takes in good faith and for value without notice he gets a good title for that property. In some cases he certainly does...”*

Mr. Goa urged the court to be guided by both cases and find in favour of granting the prayers sought. Mr. Goa also argued that if there was default in the Sale Agreement between the 1<sup>st</sup> Defendant and the vendor, it took place on 15<sup>th</sup> December, 2006 which means the 1<sup>st</sup> Defendant waited two years before making any remedial action and that by his conduct it must be inferred that the vendor had his authority to sell the machine.

Mr. Muthee for the 1<sup>st</sup> Defendant urged the court to find that the Plaintiff did not acquire good title to the machine and that the subsequent sale was void *ab initio*. Learned counsel submitted that for there to be a valid contract, there must be two or more separate and definite parties, a promisor and a promisee, a consensus ad idem, supported by consideration. For this proposition counsel relied on Roberts V. J. and Stone Lighting and Radio Limited [1945] 172 LT 240 and Coulls v. Bagots' [1974] All ER 535. Both cases were not provided. Counsel relied on Heribert Maier vs. Eva Marie Kersten Moru Civil Appeal No. 251 of 2003 where the Court of Appeal drew from Rawland v. Dival [1923] 2 KB 500 at page 504 thus:

*“The essence of the contract of sale is the transfer of the property in the goods sold: consequently where the seller has no right to sell the goods, a fundamental condition has been broken and the buyer can recover the price from the seller because the consideration for its payment has totally failed.”*

I have considered this application and submissions by counsel. The facts of the case are not contested. It is also clear from both parties' submissions that section 23(1) of Sale of Goods Act applies to this case. This section provides:

*“Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.”*

This section is clear in regard to when title to goods do not pass from a seller to a buyer. It also provides an exception to the general rule that even where a seller is not the owner of the goods and had no authority or consent of the owner to sell, good title may pass to the buyer if in fact the owner of the goods is 'precluded' by his conduct from denying the seller's authority to sell. The Plaintiff relies on the 1<sup>st</sup> Defendants delay of two years in repossessing the machine from the date the vendor breached his sale agreement with him, to the date his agent, the 2<sup>nd</sup> Defendant, proclaimed the goods while they were in the custody of the Plaintiff. The Plaintiff contends that by delaying to take any action for two years, the Plaintiff had by conduct given authority to the vendor to sell the machine.

Mr. Muthee for the 1<sup>st</sup> Defendant has relied on the general principle of law that a buyer gets no better title to the goods than the seller. In Bishopsgate case, supra, Lord Denning refers to this principle as the first principle. In that case, Lord Denning discussed a second principle of law that an innocent buyer for value without notice in good faith should obtain a good title. These two principles were discussed in the Adolf Weingut case, supra, in our jurisdiction and recognized as apparently two conflicting principles.

At this stage, all I have to consider is whether the Plaintiff has a prima facie case with a probability of success. See Giella vs Cassman Brown & Co. Ltd. [1973] EA 358.

Having carefully considered this application, I do find that the Plaintiff has a *prima facie* case with a high probability of success. The trial court will have to determine which of the two, the 1<sup>st</sup> and 2<sup>nd</sup> principle of law as above applies to this case. The court will also decide whether the exception rule under section 23(1) of the Sale of Goods Act applies; the court has to determine whether the 1<sup>st</sup> Defendant by conduct can be said to have authorized the vendor to sell the machine. All these are weighty matters that dictate that the parties must have an opportunity to ventilate them fully in a trial. That conclusion dictates that the status quo as pertaining to the case must be preserved until the suit is determined. In addition the debenture held by K-Rep Bank over the suit machine brings in an added issue of which of the parties in this case has a priority over the suit machine.

In view of the multiplicity of parties who have interest in this matter, and consequently who stand to loose if the suit property is not preserved, it is my view that the second principle in Giella's case is taken care of on the same consideration. As for the third test in Giella's case, it is my view that the balance tilts in favour of the preservation of the status quo and the suit property.

Having come to the conclusion I have of this matter, I will allow the application in the following terms.

1. There be an interlocutory injunction in terms of prayer 2 of this application.
2. Prayer 3 is dismissed to await final judgment in this matter.
3. The Applicant do file within 14 days from date hereof an undertaking in favour of the 1<sup>st</sup> Defendant in the sum of Kshs.400,000/-.
4. The parties do consider enjoining John Njuru Gitagia either as a third party or as an interested party to this suit.
5. In view of the nature of this case, each party to bear their own costs.
6. In view of prayer 3 above, either party has leave to apply.

Dated at Nairobi this 6<sup>th</sup> day of February, 2009.

**LESIT, J.**

**JUDGE**

**Read, delivered and signed in presence of:**

N/A for Mr. Goa for the Applicant

Mr. Sausi holding brief Mr. Muthee for the 1<sup>st</sup> Defendant

**LESIT, J.**

**JUDGE**