



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Civil Suit 126 of 2008

MOSES KIRIMA PLAINTIFF

VERSUS

GLOBAL BUSINESS CO. LTD 1ST DEFENDANT

FORTUNES BUSINESS CO. LTD 2ND DEFENDANT

VIMAL HARIA 3RD DEFENDANT

VIPUL HARIA 4TH DEFENDANT

RULING

The applicant has sued the respondent by a plaint dated 26th September, 2008, in which he seeks to be declared the lawful purchaser of two motor vehicles KAX 748Z Toyota Corolla and KBB 474P Toyota Land Cruiser, VX. He further seeks an order to compel the respondent (without specifying which one of the four respondents) to supply him with the log books of the two motor vehicles for registration proposes.

Simultaneously with the plaint, he has also brought the instant application in which he seeks an order of temporary injunction to restrain the respondents or their agents from repossessing the said vehicles. I can only assume, because it is not averred, that the order sought are to be in force pending the hearing and determination of the suit herein.

It is contended by the applicant that he purchased the vehicles from the 1st respondent for a valuable consideration of Kshs. 4,920,000 which consideration is fully settled. That he was given possession of the vehicles but not their log books as the 1st respondent undertook to do so after obtaining them from the 3rd and 4th respondents. The applicant has averred that he is apprehensive the 3rd and 4th respondents intend to repossess the vehicles. That should that happen, he stands to suffer irreparable loss. The 1st respondent did not enter appearance or file a defence. The 2nd respondent filed grounds of opposition and a notice of preliminary objection, the latter was subsequently withdrawn. In the grounds of opposition, the 2nd respondent avers that the application is defective so is the affidavit in support. That it is speculative, frivolous, vexatious and an abuse of the court process. That there is no cause of action as against the 2nd respondent.

That the court lacks jurisdiction as the contract in question was entered into in Nairobi. The 3rd respondent has sworn a replying affidavit for himself and for the 4th respondent in which they have deposed that the 3rd respondent is engaged in the business of selling cars on commission basis; that in the months of April/May 2008 he procured eight (8) motor vehicles for the 2nd respondent, including the two vehicles in dispute in this matter.

They entered into a written contract in which they mutually agreed that the purchase price of all the eight (8) vehicles was to be paid in installment and the transfer to be effect upon settlement in full. Pursuant to this arrangement, the 1st respondent issued to the 3rd respondent four (4) cheques. When two of the four cheques were presented for payment both were dishonoured.

The result is that the 3rd respondent still has the log books of all the eight (8) vehicles including those of the two vehicles in this matter. The 3rd respondent further maintains that he was merely an agent of the true owners of those vehicles, namely, Infinity Autos Ltd and a Mr. James Kisila, who have threatened to sue him to recover the value of the vehicles. It is also averred that the 1st respondent has filed Nbi HCC No. 480 of 2008 in which the two vehicles in this matter, among others, are the subject.

That matter has subsequently been withdrawn. The 2nd respondent has also filed Nbi CMCC No. 6091 of 2008 where parties have been ordered to maintain the *status quo*. There is yet another suit being Nkr CMCC No. 950 of 2008 (does not relate the two vehicles herein).

I have carefully considered the foregoing averments. What is clear to me is that the two motor vehicles are registered in the names of the original owners, Infinity Autos Ltd (KAX 748Z) and James Kisila (KBB 474P). This is demonstrated by copies of the Registration Book for Motor Vehicle (log books) annexed to the 3rd and 4th respondent's replying affidavit as well as the copy of records annexed to the applicant's affidavit in support of this application.

From the two owners, the vehicles moved to the 3rd respondent as their agent, who had the authority of the two principals to sell the same. The 3rd respondent entered into an agreement for the sale of seven (7) of the eight (8) vehicles with the 1st respondent on 20th June 2008 at a cost of Kshs. 11,810,000/=. It was a term of that agreement that the cost be liquidated by installments. The transfer of title was to be effected only on full settlement of the purchase price. A schedule attached to the agreement is clear that seven cheques for different amounts were issued for various dates in July, August and September 2008.

Also attached to the agreement is a schedule of daily hire rates for each motor vehicle. There is evidence also that the 2nd respondent sold the two vehicles the subject of this case to the 2nd respondent who in turn sold the same to the applicant.

The relief sought by the applicant is an order of temporary injunction. A temporary injunction will issue where the applicant has a *prima facie* case with a probability of success. It will not normally issue unless the applicant may suffer irreparable injury not capable of being compensated by an award of damages. However, should the court be in doubt, it will decide the application on the balance of convenience.

Giella V. Cassman Brown and Company Ltd (1973) EA 358.

In considering whether the applicant has a *prima facie* case, it is not the duty or indeed the role of this court at this stage to delve into the merits of the case. The court at this stage is only expected to investigate whether the applicant's right appear to have been violated by the respondent to call for rebuttal by the latter. See **Mrao Ltd V. First American Bank of Kenya Ltd** (2003) KLR 125. The applicant's case at the trial will be that he has purchased the two motor vehicles and is entitled to their ownership and that the party with the documents of title ought to be ordered to surrender the same for transfer purpose. Does the applicant's case disclose a *prima facie* case that can succeed at the trial?

The two motor vehicles in this matter, among others, were sold to the 2nd respondent subject to the latter paying for the full purchase price. Two of the four cheques issued to the 3rd respondent by the 2nd

respondent were dishonoured. There is no evidence of subsequent payment of the other two cheques. It follows from this that there was failure of consideration on that part of the 2nd respondent.

For that reason, I find that the 2nd respondent could not pass on any title to the motor vehicles. The subsequent purchasers were aware from the annexed documents that he (2nd respondent) was not the true owner of the vehicles.

I come to the conclusion that the applicant has not demonstrated a *prima facie case*. Secondly, the applicant claims to have purchased and paid Kshs. 4.9m for the vehicles. His injury is not irreparable and can indeed be compensated by an award of damages.

The balance of convenience is in favour of the 3rd respondent, who has not received a single cent from the motor vehicles and runs the risk of a law suit by his principals.

For these reasons, the application must fail and is dismissed with costs to the 2nd, 3rd and 4th respondents. Interim orders discharged.

Dated and delivered at Meru this 11th day of June 2009.

W. OUKO

JUDGE