



NOOR ABDIKADIR ABDALLAPLAINTIFF

VERSUS

GROFIN EAST AFRICA FUND LLC.....1ST DEFENDANT

SOOD PETROLEUM LIMITED2ND DEFENDANT

RULING

The plaintiff filed this suit on 10th September 2009 seeking the following orders against the Defendants:-

- a) *A declaration order to the effect that trailer Registration No. ZC 7887 belongs to the plaintiff absolutely,*
- b) *An injunction to restrain the Defendants from interfering with the plaintiff's quiet and peaceful use of the said trailer.*
- c) *Costs of the suit*
- d) *Any other relief that the Honourable court may deem just and equitable to make.*

The plaintiff claims that on the 20th March 2009, it entered an

Agreement for the purchase of the said trailer from Kianjamba Transporters Company Ltd and one Githaiga Wachira for a sum of Kshs. 1,700,000/- of which he has paid Shs.1,330,000/-. That the said Kianjamba agreed to release the said trailer to the plaintiff and they executed the transfer of the said trailer to the plaintiff on 20.03.2009.

It is the plaintiff's case that the 1st Defendant has forcefully taken hold of the trailer and parked the same in the premises of one Awale Transport Ltd in Mombasa, the consequences whereof the plaintiff is unable to access the said trailer. The plaintiff stated that the 1st Defendant has absolutely no claim over the said trailer and the act of seizing the said vehicle is totally unjustified.

The plaintiff took out an application, inter alia, for the following orders:-

- **That pending the hearing of the suit the Respondents and their agents be restrained from interfering with the plaintiff's use and enjoyment of trailer Reg. No. ZC 7887**

The application was opposed by the 1st Defendant. The 2nd

Defendant did not enter appearance in the suit and appears unconcerned with the suit. The 1st Defendant contended inter alia; that:-

- Trailer registration No. ZC 7887 was purchased using finance facilities availed to Kianjamba Transporters Company Ltd in or about March 2008 by the 1st Defendant and the Commercial Bank of Africa.
- Upon purchasing of the trailer, an application was made for registration of the trailer at the Kenya Revenue Authority on 8th January, 2008 with the application for registration indicating that the vehicle registration was to be effected in the name of Grofin Kenya Limited, the Fund Manager of the 1st Defendant Company in Kenya, and Kianjamba Transporters Company Limited.
- Due to an unexplained error at the motor vehicles registry the Log Book for the trailer was issued in the name of Kianjamba and one Wachira Githaiga, the principal director of Kianjamba. This was completely contrary to the registration instruction given.
- That further despite the log book being dispatched by registered post to the Grofin Kenya Limited's Post Office Book Number, the said Kianjamba and/or Githaiga collected the same without any authorization from Grofin Kenya Limited.
- The 1st Defendant placed a caveat on the said trailer after it discovered the erroneous registration and after repeated attempts to get Kianjamba to return the original log book for rectification. The said caveat was filed at the motor vehicles Registry on 4th February, 2009, and not after the lodging of the purported transfer of the trailer to the plaintiff as is alleged in the Notice of Motion before this Honourable Court or at paragraph 8 of the supporting affidavit.
- As part of the security for financing Kianjamba issued an assets debenture to the 1st Defendant dated 15th February 2008 by which instruments the property undertaking and assets of Kianjamba were charged to the lenders. The said Debenture was registered at the company's Registry and a certificate of registration of the same issued on 20th February 2008.
- The sum of Kshs.18,500,000/- was disbursed on 14th March 2008 and was applied towards the purchase of three used trucks and trailers, with registration numbers ZC7887, KBA 870Z, ZC 8014, KBB 132F, ZC 7903 and KBB 236F.
- The first Defendant in an effort to mitigate its damage appointed a reposessor to repossess the said trucks and trailers but was informed on 16th April 2009, that the reposessor had only managed to recover one truck and one trailer.
- It was only upon receipt of the investigators report that it became apparent for the 1st Defendant that Kianjamba had purported to sell the trailer to the plaintiff herein, and suit was thereafter filed to prevent the said transfer from being completed.
- That Kianjamba had no right or title to pass on to the plaintiff herein given the fact that the original registration of the trailer was erroneous and steps were being taken to correct the error, the log book was fraudulently obtained by the said Mr. Githaiga, the security comprised over the vehicle had crystallized and Kianjamba had bound itself not to dispose of the assets covered by the Debenture without the authority of the Defendant.
- Their advocates on record wrote to the plaintiff herein to notify him of the nullity of the purported sale on 23rd April 2009. The plaintiff through its advocates responded on 27th April, 2009 denying the 1st Defendants title asserting that it would proceed to complete the transaction since it had not done so at the time.
- The 1st Respondent has filed suit before this Honourable court sitting in Nairobi, Milimani Commercial Courts, in HCCC No. 281 of 2009 for judgment for the outstanding balance of Kshs.21,501,260/- owed by Kianjamba and its directors and also in evidence before this court by virtue of

the provisions of the Stamp Duty Act.

The 1st Defendant has resolved to seek relief from this Honourable court to have it determine the issue in question and resolve the issue of the said trailer as is stated in the Defence and counterclaim to be filed in this Honourable court by the 1st Defendant.

- The plaintiff is not entitled to the mandatory injunction sought in this matter and it has come to equity with unclean hands sought an injunction to prevent the plaintiff's from transferring any of the secured vehicles which vehicles include the trailer ZC 7887.
- That the judge had issued interim orders directing the parties to those suits to maintain the status quo in regard to the suit properties which were the financed vehicles pending delivery of her ruling.
- The plaintiff's remedy is to seek orders as against the said Kianjamba and Mr. Githaiga given the fact that the agreement as between the parties was null and void given the lack of capacity of the said parties to pass title in the trailer to the plaintiff herein. Indeed, I note that the agreement exhibited is exhibit B to the supporting affidavit is not stamped and same is not admissible before this honourable court by virtue of the Stamp Duty Act.
- The 1st Defendant has resolved to seek relief from this Honourable Court to have it determine the issues in question and resolve the issue of ownership of the said trailer as is stated in the Defence and counterclaim to be filed in this honourable court by the 1st Defendant.
- The plaintiff is not entitled to the mandatory injunction sought in this matter and has come to equity with unclean hands due to material non-disclosure of relevant facts.
- The trailer has been stored at Awale Transporters yard since April 2009 and is secure. The plaintiff has never been in possession of the same and its application would appear to be aimed at obtaining the release of the trailer to it without establishing its title to the same.

I have considered the application, the supporting affidavit,

the Replying Affidavit, the submissions by counsel and the authorities.

It is pertinent to begin with undisputed matters of fact in

these proceedings. First and foremost, as at the time of the hearing of the application;

- The subject matter of the suit is Trailer Registration No. ZC 7887
- It is registered in the name of Kianjamba Transporters Company Limited.
- The registered owner of the vehicle, Kianjamba Transporters Company Limited is not a party in this suit.

Section 8 of the Traffic Act, chapter 403, Laws of Kenya

provides that:-

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

The owner of the vehicle herein is Kianjamba Transporters Company Limited which is neither a party or enjoined in the suit in any manner.

This means that strictly on the question of who is the owner or true owner of the vehicle, the same question cannot be determined in this suit in the absence of the said company. The substantive relief sought by the plaintiff is that:

- “(a) A declaration order to the effect that the said trailer No. ZC 7887 belongs to the plaintiff absolutely
- (b)
- (c).....
- (d)”

This issue cannot in law be litigated without the joinder of the registered owner of the motor vehicle. Be that as it may this does not mean that the suit cannot ultimately proceed to trial. Any of the three parties has a right to apply to enjoin the said company as a Defendant in the suit or take out Third party Notice. On the other hand, the court in exercise of its power and discretion under order 1 rule 10 may add the said company as a necessary party.

For the purposes of this application before me, the plaintiff as stated above claims to be the owner of the vehicle having purchased the same from the registered owner in an agreement dated 20.03.09 for a sum of Kshs.1,700,000/-. The company executed a transfer to the plaintiff on 20.3.07. The plaintiff produced a copy of the Sale Agreement and the transfer of ownership.

The 1st Defendant claims that the vehicle was purchased by the registered owner through financing by the 1st Defendant on or about March 2009, a year earlier than the purported sale to the plaintiff.

The 1st Defendant pleaded that, as party of the security for the financing the company issued an asset debenture under the Companies Act and is dated 15th February 2008. The 1st Defendant produced a copy of the Debenture and a copy of the certificate of the Registration of a mortgage i.e. the debenture dated 20th February 2008. What is the effect of this? Assuming the sale of the motor vehicle to this plaintiff indeed took place, was it illegal or valid? And if it was legal or valid as between the plaintiff and the registered owner, what is the effect of the registration of the Debenture before the purported sale herein?

Section 99 of the Companies Act provides that:-

:99 The registrar shall give a certificate under his hand of the registration of any charge registered in pursuance of and within any period allowed under this part, stating the amount thereby secured and the certificate shall be conclusive evidence that the requirements of this part as to registration have been complied with.”

I therefore do hold that on evidence produced before this court, the debenture dated 20.3.08 was duly issued and it was registered on the same day. The certificate is proof that the same is valid and enforceable.

What is the nature of the debenture herein and the effect of registration? Does its creation before and registration before the purported sale herein give the 1st Defendant priority, right or interest in the vehicle vis- a- vis the plaintiff?

In Black’s Law Dictionary, “Debenture” is inter alia defined as:-

“1. A debt secured only by the debtor’s earning power, not by a lien on any specific asset. ... (2) an instrument acknowledging such a debt.”

In the book “The Practice Relating to Debentures 1 1935 by Thomas Froude & Eric V.E. white and referred to in Black’s Law Dictionary, it was said of the word “debenture” follows:-

“

The word is now, however generally used to indicate an acknowledgement of indebtedness given under seal by an incorporated company, containing a charge on assets of the company and carrying an agreed rate of interest until payment. But the variety of the forms which a debenture may take makes it difficult to find a good general definition in any reported case.”

In the court of Appeal case, LOCHAB BROTHERS –V- KENYA FURFURAL CO. LTD (1983) KLR. 257, it was held that:-

- A debenture usually created a floating charge on a company’s assets, and only where the charge has been crystallized e.g. by appointment of receivers by seizure and sale, do the right of the debenture holder have priority over those of the execution creditor. When a debenture creates a floating charge over the whole movable property of a company where is a going concern it attaches to the property as it varies from time to time....”

To my mind this means that the company despite the issuance and registration of a debenture in a going concern and as a right to trace and even dispose of its charged assets provided the “floating charge” has not crystallized or put into operation or effect. The debenture is said to be a general charge over the asset of the company.

The debenture as a floating charge and type of security is peculiar to companies as borrower. It is said that the best description of a floating charge is contained in the observations of Lord Macnaghten in ILLINGWORTH –V- HOULDSWORTH, (1904) A.C.. 355, 358:-

“I should have thought that there was not much difficulty in defining what a floating charge is in contrast to what is called a specific charge. A specific, I think is one that without more fastens on ascertained and definite property or property capable of being ascertained and defined a floating charge on the other hand is ambulatory and shifting in its nature, hovering over and so to speak floating with the property which is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp.”

In “Government stock Co. T – Manila Ry (1897) A.C. 81, 86 the same Learned Judge, Lord Macnaghten observed:-

“A floating charge is an equitable charge on the assets for the time being of a going concern. It attaches to the subject charged in the varying condition in which it happens from time to time. It is of essence of such a charge that it remains dormant until the undertaking charged ceases to be a going concern or until the person in whose favour the charge is created intervenes. His right to intervene may of course be suspended by agreement. But if there is no agreement for suspension, he may exercise his right whenever he pleases after default.” (Emphasis mine)

The foregoing definition clearly suggests or confirms that a going concern or company is entitled to continue to trade and carry on business as usual until the “floating charge” crystallizes by an occurrence of an event or the taking of some action by the debenture-holder.

The company until such a time may dispose of its assets under the charge in the course of carrying on business. It is for the debenture holder to intervene when any disposal is violation or breach of the debenture or if not done in the ordinary course of the company’s business. Otherwise the company can dispose and pass title in property to a third property.

The operation of the floating charge remains otherwise “dormant” until an act contemplated in the debenture takes place leading to its crystallization or fixation and triggered into operation.

In Clause 8 of the debenture herein, provided as follows:-

“8. COMPANY POWERS. Except as otherwise specifically provided herein, particularly with respect to the fixed charge on the assets, and so long as the company carries on business is a going concern this Debenture operates as a floating charge and the company may make appropriations of, assign, dispose of and generally deal with its capital and other moneys, its stock-in-trade including items of stock in the course of manufacture or construction and its other property and used for the purpose of and in the ordinary course of carrying on such business without the need of any consent of the lenders; but may not dispose of its stock-in-trade, property and assets otherwise there is the course of such business.” (Emphasis mine)

This court was not told by any of the parties what the business that Kianjamba Transporters Company Limited carries on. Its name suggests that it is a transporter and/or involved in transport. It is well established and the court takes Judicial Notice that Limited Liability Companies may carry many types of business at the same time as permitted by its articles of incorporation. The court may have not shown a copy of the articles of the company or told or given evidence that the company could not dispose of a vehicle or trailer in for the purpose of the company and/or in the ordinary course of carrying its business.

What is certain is that by the time the sale agreement was entered into between the plaintiff and Kianjamba Transporters Co. Ltd on 20.3.09 and the transfer was executed, the debenture or floating charge had not crystallized.

On a prima facie basis, I do find that the plaintiff and the registered owner of the trailer entered into a valid and lawful agreement for the sale of the vehicle for consideration i.e. Kshs.1,700,000/- of which Shs.1,330,000/- was duly paid by the plaintiff to the registered owner. The owner executed the transfer of the vehicle in favour of the plaintiff and handed possession thereof to the plaintiff. While a debenture as a floating charge existed, If the 1st Defendant as the debenture-holder did not intervene or take action for the crystallization of the floating charge over the trailer. It only intervened positively by repossessions after 16th April 2009 by which time the sale was complete and only pending issue was the registration of the transfer.

The question for determination will be whether property in the vehicles had passed to the plaintiff by the time the repossession exercise started and actually implemented.

Since the sale transaction was completed before the crystallization of the debenture, I do hold that on a prima facie basis the property in the trailer may well have passed to the plaintiff by time of purported repossession.

I do hold that the plaintiff has disclosed or proved a prima facie case with a probability of success in respect of the relief for a declaratory order. The 1st Defendant as a debenture-holder may now only have recourse after crystallization of the charge on the disbursed sale proceeds if it can be traced and the unpaid balance.

Who was in possession when the application came before the court at the first instance on 11.09.09 and what is the type of injunctive order to be granted, restraining injunction or mandatory injunction?

I have considered the said affidavits and the report of the Repossessors made on 16th April 2009 to the 1st Defendant. The Repossessor wrote as follows in respect of the trailer.

“.....

We received your instructions dated 18th March 2009 with express order to repossess and as such initially effected service of 7 days proclamation order upon the hirer as we awaited the response within the stipulated time.

Upon expiry of the 7 days we embarked on repossession and have detailed as below:-

ZC 7887 SEMI TRAILER AXLES

We conducted investigations in Nairobi and learnt that the trailer is operated by a certain Somali in Kisumu city. We proceeded to Kisumu and made further inquiries from our offices on sight, who gave us information that the trailer had indeed been operating in Kisumu for a while but had been seconded to operators in Mombasa town. Immediately we went to Mombasa and conducted thorough investigations searching godowns and loading bays for five days until we managed to get more information that the trailer is frequently sighted at Jomvu area at night. It took us another 4 days to stake out in the night to trace the truck until we

located it one night parked at AWALE TRANSPORTERS LTD parking yard. The following day we approached the said yard in a bid to repossess the trailer but the proprietor of the yard informed us that the trailer belonged to someone else according to the relevant paperwork he had.

After resisting our attempt to take possession of the trailer we agreed with the yard proprietor to book the trailer in his yard on belief of Grofin Kenya Ltd as we sought the authenticity of the ownership documentation. It was therefore booked as per the attached acceptance forms, duly signed and evidenced too by the enclosed still photographs of the same”

I perused the exhibits and did not find any copies of the said acceptance forms by Awale Transporters Limited.

From the evidence before this court and considering the contents of the aforesaid report, I do find that the plaintiff acquired possession of the trailer upon the execution of the sale agreement on or about 20th March 2009.

After the reposessor was instructed to reposses the vehicles including the trailer, he took quite some time to finally trace the vehicle at Awale Transporters Ltd yard where it was parked at night. The facts suggest that it was the plaintiff who parked the vehicle at the yard. There is no claim or suggestion by any person that it was Kianjamba Transporters who took it there.

The proprietor of the yard refused the reposessor to take away and reposses the vehicle. The proprietor stated that according to the documentation the vehicle belonged to some other party which I find to be the plaintiff.

I do hold that the trailer was parked at the yard by the plaintiff. The proprietor never surrendered the trailer to the repossessors and the repossessors never took possession of the same. The alleged forms of acceptance were not attached to the report and the reposessor did not make any affidavit to prove that he had actual possession. In the premises it is deemed that the plaintiff in fact was in possession of the trailer on the day it was traced and it was parked at the yard for the plaintiff.

As a result, there is no need to grant any mandatory injunction as the trailer is and remains in the possession of the plaintiff. What happened is that the plaintiff was obstructed from removing the vehicle form the Awale premises due to the repossessors attempts. The Reposessor and therefore 1st Defendant never acquired possession. The type injunction to be granted therefore shall be of a restraining nature.

The end result is that I do hereby grant prayer 3 of the application dated 10th September 2009 with costs to the plaintiff.

Dated and delivered at Mombasa this 29th day of October 2009.

M. K. IBRAHIM

IBRAHIM

29/10/09

Ibrahim, J

Court clerk – Kazungu

Mr. Gikandi for the Plaintiff/Applicant

No appearance for the defendant.

Mr. Gikandi

I called A. Njogu yesterday and told him of the ruling being delivered today. I was served.

Court:

This court sent the ruling notice by fax and Mr. Gikandi informed Mr. Njogu of the same. Mr. Njogu did not appear on 23.10.09 when the ruling was to be delivered. This court shall proceed to deliver the ruling.

Ruling delivered and signed.

IBRAHIM, J