



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
Civil Case 642 of 2009

TRANSCO TRADING CO. LTD..... PLAINTIFF
VERSUS
TWIN BUFFALLO SAFARIS LTD.....1ST DEFENDANT
CO-OPERATIVE BANK LTD.....2ND DEFENDANT

RULING

The plaintiff filed suit against the defendants seeking various orders from the court in respect of the ownership of motor truck registration No. KBD 952G and trailer No. ZC 9213 (*hereinafter referred to as the suit motor vehicle*). Contemporaneous with filing suit, the plaintiff filed an application pursuant to provisions of **Order XXXIX Rules 1 & 2** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act** seeking orders of temporary injunction to restrain the defendants, by themselves or their agents, including auctioneers or any person claiming under them from selling, repossessing or dealing with any manner whatsoever with the suit motor vehicle pending the hearing and determination of the suit. The plaintiff further sought the order of mandatory injunction to compel the 1st defendant by itself or its servants/agents to pay the sum of KShs.4.2 million to the 2nd defendant or in the alternative deposit the said amount in court pending the hearing and determination of the suit. The application is supported by the annexed affidavit of Samuel Ndung'u Gitau, a director of the Plaintiff Company and grounds stated on the face of the application. He swore an affidavit in further support of the application. The application is opposed. David Njane Ruiyi, a director of the 1st defendant,

swore a replying affidavit in opposition to the application. Margaret Wamaitha Ruiyi, another director of the 1st defendant swore another affidavit in further opposition to the application. The 2nd defendant filed grounds of opposition to the application.

Prior to the hearing of the application, counsel for the parties to this application filed written submission in support of their respective opposing positions. During the hearing of the application, I heard rival oral arguments made by Mr. Murungi for the plaintiff, Mr. Olunya for the 1st defendant and Mr. Liko for the 2nd defendant. I have carefully considered the said submissions. I have also read the pleadings filed by the parties herein in support of their respective opposing positions. The issue for determination by this court is whether, firstly, the plaintiff established a case for the grant of orders of interlocutory injunction and secondly, whether the case put forward by the plaintiff disclose sufficient grounds for the grant of mandatory injunction. In regard to interlocutory injunction, the principles to be considered by this court in determining whether or not to grant the order sought are well settled. The plaintiff must establish that it has a prima facie case that will likely succeed during the full hearing of the case. The plaintiff must further establish that it will suffer irreparable injury that cannot be compensated by an award of damages. If the court is in doubt, it shall determine the application on a balance of convenience (see **Giella vs. Cassman Brown [1973] EA 358**). Mandatory injunctions can only be issue by the court where there exist special circumstances. The Court of Appeal in **Kenya Breweries Limited vs. Washington Okeyo CA Civil Appeal No. 322 of 2000** cited with approval the English decision of **Locabail International Finance Ltd vs Agroexport and others [1986] 1 All ER 901** at page 901 where it was held that:

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances,

and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

In the present application, certain facts are not in dispute. It is not disputed that on 21st September 2008, the 1st defendant entered into an agreement with a company known as Transport and Lifting Services Limited for the purchase of motor truck registration No. KBD 952G. According to the said agreement, the cost of the truck was KShs.3.8 million. Also purchased was trailer No. ZC 9213. What is interesting in the said agreement is that Samuel Ndung’u Gitau, a director of the plaintiff company signed the agreement on behalf of the 1st defendant. It is further not disputed that the 1st defendant applied for, and was indeed granted asset finance by the 2nd defendant to pay for the balance of the purchase consideration. According to the asset finance agreement, the 1st defendant was required to pay to the 2nd defendant monthly installments of KShs.145,612/= until payment in full of the loan that was advanced by the 2nd defendant to enable the 1st defendant to purchase the suit motor vehicle.

It is not disputed that it was the plaintiff company that took possession of the suit motor vehicle from the time it was purchased. It is the plaintiff’s case that it sought the assistance of the 1st defendant to secure asset financing from the 2nd defendant on account of the fact that a majority shareholder of the plaintiff did not have the requisite bank statements that would have enabled him to secure the loan. The director of the plaintiff explained that having prior thereto arrived in the country from Britain, he did not have the bank statements that would have enabled him, and to that extent the plaintiff company, to

qualify to benefit from the asset finance from the 2nd defendant. It was in that regard that he sought assistance from the directors of the 1st defendant, whom he then considered as his friends, to assist him with the 1st defendant's bank statements to enable the plaintiff secure the asset finance from the 2nd defendant.

The 1st defendant does not agree with this aspect of the plaintiff's case. It is the 1st defendant's case that it entered into a partnership with the plaintiff by which the 1st defendant gave possession of the suit motor vehicle to the plaintiff for the purpose of trade. It is the 1st defendant's case that it gave possession of the suit motor vehicle to the plaintiff because of its experience in the transport business. According to the 1st defendant, the partnership agreement was oral. The 1st defendant did not however provide any evidence to support its assertion that there indeed existed a partnership between itself and the plaintiff. There is no evidence to suggest that the plaintiff paid the 1st defendant any dividends or proceeds from the said transport business. What is clear is that the amounts paid to the 1st defendant by the plaintiff between the months of September 2008 and May 2009 was transmitted by the 1st defendant to the 2nd defendant.

The 1st defendant insists that the suit motor vehicle is its property. As proof of its ownership, the 1st defendant produced a copy of the logbook of the suit motor vehicle. It is the 1st defendant's case that after about a year, the plaintiff sought to purchase the suit motor vehicle, and to that effect paid to the 1st defendant a deposit of KShs. 3,421,995/=. The 1st defendant alleged that it had agreed to sell to the plaintiff the suit motor vehicle for the purchase consideration of KShs.6.3 million. To that effect, the 1st defendant is claiming

the sum of KShs.2,878,005/=. The plaintiff counters the argument advanced by the 1st defendant by stating that it agreed to repay the asset finance advanced by the 2nd defendant through the bank account of the 1st defendant. That was the reason why the monthly installments of KShs.145,612/= was paid by the plaintiff to the 1st defendant and thereafter the 1st defendant paid the same amount to the 2nd defendant. It was the plaintiff's argument that the sum of KShs.3,421,995/= that was paid to the 1st defendant was meant to be transmitted to the 2nd defendant as the final payment in respect of the asset finance. On its part, the 2nd defendant's position is that having advanced the loan to the 1st defendant on security of the suit motor vehicle, it was not available for the 1st defendant to have any dealings with any person; including the plaintiff, in regard to the said motor vehicle without the 2nd defendant's consent. It is therefore the 2nd defendant's case that any agreement between the plaintiff and the 1st defendant was illegal.

Having carefully evaluated the facts of this application as disclosed in the affidavits filed in this suit, it was evident that the matter in dispute is essentially between the plaintiff and the 1st defendant in regard to who is the legal owner of the suit motor vehicle. The 2nd defendant was drawn into these proceedings on account of the fact that it had financed the purchase of the suit motor vehicle. The 2nd defendant's interest in the suit motor vehicle is limited to the repayment of the amount that is due and owing in respect of the asset finance agreement. The court has to decide between the competing claim of the plaintiff and that of the 1st defendant in respect to who is entitled to the suit motor vehicle. There is evidence that although the 1st defendant is the registered owner of the suit motor vehicle, the plaintiff has an interest in the

same motor vehicle. The extent of the plaintiff's interest in the suit motor vehicle cannot be determined at this interlocutory stage.

Suffice for this court to state at this stage is that it has been persuaded by the argument advanced by the plaintiff that it prima facie has an interest in the suit motor vehicle that is capable of recognition by the law. The issue as to who is entitled to the suit motor vehicle cannot be determined at this stage of the proceedings. It is apparent that the competing parties herein will be required to adduce *viva voce* evidence to determine the ownership of the suit motor vehicle. The issue for determination by this court at this stage of the proceedings is who between the plaintiff and the 1st defendant should have possession of the suit motor vehicle pending the hearing and determination of the suit. As stated earlier in this ruling, it is evident that a substantial amount in respect of the asset finance advanced for the purchase of the suit motor vehicle was re-paid by the plaintiff through the bank account of the 1st defendant. Although the 1st defendant alleged that it was paid the sum of KShs.3,421,995/= by the plaintiff as part payment for the purchase of the suit motor vehicle, having evaluated the facts of this case, it was apparent that the said amount was deposited with the 1st defendant for onward transmission to the 2nd defendant. The plaintiff has always had possession of the suit motor vehicle.

In the premises therefore, the plaintiff shall continue having possession of the motor vehicle pending the hearing and determination of the suit. It is trite law that in granting an order of interlocutory injunction, the court should strive to maintain the *status quo* so that the subject of the suit is not wasted or interfered with pending the hearing and determination of the suit. As stated earlier in this ruling, the plaintiff has established a prima facie case that it has an interest in the suit motor vehicle. It has been in possession of the said motor

vehicle since the same was purchased. I will in the circumstances grant the temporary injunction sought by the plaintiff in terms of prayer 3 of its application dated 1st September 2009 pending the hearing and determination of the suit.

I will also grant prayer 4 of the plaintiff's application that seeks to compel the 1st defendant to pay to the 2nd defendant the amount deposited by the plaintiff to the said 1st defendant. I order the 1st defendant to pay to the 2nd defendant the said sum of KShs.3,421,995/= that was deposited to it by the plaintiff. The said amount shall be by the 1st defendant to the 2nd defendant within thirty (30) days of today's date. If there is any sum owing to the 2nd defendant after payment of the above sum, the same shall be paid by the plaintiff. Either party shall be at liberty to apply. The plaintiff shall have the costs of the application which shall be paid by the 1st defendant.

It is so ordered.

DATED AT NAIROBI THIS 10TH DAY OF DECEMBER 2009

**L. KIMARU
JUDGE**

TRANSCO TRADING CO. LTD..... PLAINTIFF

VERSUS

TWIN BUFFALLO SAFARIS LTD.....1ST DEFENDANT

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pursuant to provisions of **Order XXXIX Rules 1 & 2** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act** seeking orders of temporary injunction to restrain the defendants, by themselves or their agents, including auctioneers or any person claiming under them from selling, repossessing or dealing with any manner whatsoever with the suit motor vehicle pending the hearing and determination of the suit. The plaintiff further sought the order of mandatory injunction to compel the 1st defendant by itself or its servants/agents to pay the sum of KShs.4.2 million to the 2nd defendant or in the alternative deposit the said amount in court pending the hearing and determination of the suit. The application is supported by the annexed affidavit of Samuel Ndung'u Gitau, a director of the Plaintiff Company and grounds stated on the face of the application. He swore an affidavit in further support of the application. The application is opposed. David Njane Ruiyi, a director of the 1st defendant, swore a replying affidavit in opposition to the application. Margaret Wamaitha Ruiyi, another director of the 1st defendant swore another affidavit in further opposition to the application. The 2nd defendant filed grounds of opposition to the application.

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The 1st defendant does not agree with this aspect of the plaintiff's case. It is the 1st defendant's case that it entered into a partnership with the plaintiff by which the 1st defendant gave possession of the suit motor vehicle to the plaintiff for the purpose of trade. It is the 1st defendant's case that it gave possession of the suit motor vehicle to the plaintiff because of its experience in the transport business. According to the 1st defendant, the partnership agreement was oral. The 1st defendant did not however provide any evidence to support its assertion that there indeed existed a partnership between itself and

the plaintiff. There is no evidence to suggest that the plaintiff paid the 1st defendant any dividends or proceeds from the said transport business. What is clear is that the amounts paid to the 1st defendant by the plaintiff between the months of September 2008 and May 2009 was transmitted by the 1st defendant to the 2nd defendant.

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plaintiff and the 1st defendant was illegal.

Having carefully evaluated the facts of this application as disclosed in the affidavits filed in this suit, it was evident that the matter in dispute is essentially between the plaintiff and the 1st defendant in regard to who is the legal owner of the suit motor vehicle. The 2nd defendant was drawn into these proceedings on account of the fact that it had financed the purchase of the suit motor vehicle. The 2nd defendant's interest in the suit motor vehicle is limited to the repayment of the amount that is due and owing in respect of the asset finance agreement. The court has to decide between the competing claim of the plaintiff and that of the 1st defendant in respect to who is entitled to the suit motor vehicle. There is evidence that although the 1st defendant is the registered owner of the suit motor vehicle, the plaintiff has an interest in the same motor vehicle. The extent of the plaintiff's interest in the suit motor vehicle cannot be determined at this interlocutory stage.

Suffice for this court to state at this stage is that it has been persuaded by the argument advanced by the plaintiff that it prima facie has an interest in the suit motor vehicle that is capable of recognition by the law. The issue as to who is entitled to the suit motor vehicle cannot be determined at this stage of the proceedings. It is apparent that the competing parties herein will be required to adduce *viva voce* evidence to determine the ownership of the suit motor vehicle. The issue for determination by this court at this stage of the proceedings is who between the plaintiff and the 1st defendant should have possession of the suit motor vehicle pending the hearing and determination of the suit. As stated earlier in this ruling, it is evident that a substantial amount in respect of the asset finance advanced for the purchase of the suit motor vehicle was re-paid by the plaintiff through the bank account of the 1st defendant. Although the 1st defendant alleged that it was paid the sum of

KShs.3,421,995/= by the plaintiff as part payment for the purchase of the suit motor vehicle, having evaluated the facts of this case, it was apparent that the said amount was deposited with the 1st defendant for onward transmission to the 2nd defendant. The plaintiff has always had possession of the suit motor vehicle.

In the premises therefore, the plaintiff shall continue having possession of the motor vehicle pending the hearing and determination of the suit. It is trite law that in granting an order of interlocutory injunction, the court should strive to maintain the *status quo* so that the subject of the suit is not wasted or interfered with pending the hearing and determination of the suit. As stated earlier in this ruling, the plaintiff has established a prima facie case that it has an interest in the suit motor vehicle. It has been in possession of the said motor vehicle since the same was purchased. I will in the circumstances grant the temporary injunction sought by the plaintiff in terms of prayer 3 of its application dated 1st September 2009 pending the hearing and determination of the suit.

I will also grant prayer 4 of the plaintiff's application that seeks to compel the 1st defendant to pay to the 2nd defendant the amount deposited by the plaintiff to the said 1st defendant. I order the 1st defendant to pay to the 2nd defendant the said sum of KShs.3,421,995/= that was deposited to it by the plaintiff. The said amount shall be by the 1st defendant to the 2nd defendant within thirty (30) days of today's date. If there is any sum owing to the 2nd defendant after payment of the above sum, the same shall be paid by the plaintiff. Either party shall be at liberty to apply. The plaintiff shall have the costs of the application which shall be paid by the 1st defendant.

It is so ordered.

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RULING

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Prior to the hearing of the application, counsel for the parties to this application filed written submission in support of their respective opposing positions. During the hearing of the application, I heard rival oral arguments made by Mr. Murungi for the plaintiff, Mr. Olunya for the 1st defendant and Mr. Liko for the 2nd defendant. I have carefully considered the said submissions. I have also read the pleadings filed by the parties herein in support of their respective opposing positions. The issue for determination by this court is whether, firstly, the plaintiff established a case for the grant of orders of interlocutory injunction and secondly, whether the case put forward by the plaintiff disclose sufficient grounds for the grant of mandatory injunction. In regard to interlocutory injunction, the principles to be considered by this court in determining whether or not to grant the order sought are well settled. The plaintiff must establish that it has a prima facie case that will likely succeed during the full hearing of the case. The plaintiff must further establish that it will suffer irreparable injury that cannot be compensated by an award of damages. If the court is in doubt, it shall determine the application on a balance of convenience (see **Giella vs. Cassman Brown [1973] EA 358**). Mandatory injunctions can only be issue by the court where there exist special circumstances. The Court of Appeal in **Kenya Breweries Limited vs. Washington Okeyo CA Civil Appeal No. 322 of 2000** cited with approval the English decision of **Locabail International Finance Ltd vs Agroexport and others [1986] 1 All ER 901** at page 901 where it was held that:

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Having carefully evaluated the facts of this application as disclosed in the affidavits filed in this suit, it was evident that the matter in dispute is essentially between the plaintiff and the 1st defendant in regard to who is the legal owner of the suit motor vehicle. The 2nd defendant was drawn into these proceedings on account of the fact that it had financed the purchase of the suit motor vehicle. The 2nd defendant's interest in the suit motor vehicle is limited to the repayment of the amount that is due and owing in respect of the asset finance agreement. The court has to decide between the competing claim of the plaintiff and that of the 1st defendant in respect to who is entitled to the suit motor vehicle. There is evidence that although the 1st defendant is the registered owner of the suit motor vehicle, the plaintiff has an interest in the same motor vehicle. The extent of the plaintiff's interest in the suit motor vehicle cannot be determined at this interlocutory stage.

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RULING

The plaintiff filed suit against the defendants seeking various orders from the court in respect of the ownership of motor truck registration No. KBD 952G and trailer No. ZC 9213 (*hereinafter referred to as the suit motor vehicle*). Contemporaneous with filing suit, the plaintiff filed an application pursuant to provisions of **Order XXXIX Rules 1 & 2** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act** seeking orders of temporary injunction to restrain the defendants, by themselves or their agents, including auctioneers or any person claiming under them from selling, repossessing or dealing with any manner whatsoever with the suit motor vehicle pending the

hearing and determination of the suit. The plaintiff further sought the order of mandatory injunction to compel the 1st defendant by itself or its servants/agents to pay the sum of KShs.4.2 million to the 2nd defendant or in the alternative deposit the said amount in court pending the hearing and determination of the suit. The application is supported by the annexed affidavit of Samuel Ndung'u Gitau, a director of the Plaintiff Company and grounds stated on the face of the application. He swore an affidavit in further support of the application. The application is opposed. David Njane Ruiyi, a director of the 1st defendant, swore a replying affidavit in opposition to the application. Margaret Wamaitha Ruiyi, another director of the 1st defendant swore another affidavit in further opposition to the application. The 2nd defendant filed grounds of opposition to the application.

Prior to the hearing of the application, counsel for the parties to this application filed written submission in support of their respective opposing positions. During the hearing of the application, I heard rival oral arguments made by Mr. Murungi for the plaintiff, Mr. Olunya for the 1st defendant and Mr. Liko for the 2nd defendant. I have carefully considered the said submissions. I have also read the pleadings filed by the parties herein in support of their respective opposing positions. The issue for determination by this court is whether, firstly, the plaintiff established a case for the grant of orders of interlocutory injunction and secondly, whether the case put forward by the plaintiff disclose sufficient grounds for the grant of mandatory injunction. In regard to interlocutory injunction, the principles to be considered by this court in determining whether or not to grant the order sought are well settled. The plaintiff must establish that it has a prima facie case that will likely succeed during the full hearing of the case. The plaintiff must further establish that it will suffer irreparable injury that cannot be compensated by an award of

damages. If the court is in doubt, it shall determine the application on a balance of convenience (see **Giella vs. Cassman Brown [1973] EA 358**). Mandatory injunctions can only be issued by the court where there exist special circumstances. The Court of Appeal in **Kenya Breweries Limited vs. Washington Okeyo CA Civil Appeal No. 322 of 2000** cited with approval the English decision of **Locabail International Finance Ltd vs Agroexport and others [1986] 1 All ER 901** at page 901 where it was held that:

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

In the present application, certain facts are not in dispute. It is not disputed that on 21st September 2008, the 1st defendant entered into an agreement with a company known as Transport and Lifting Services Limited for the purchase of motor truck registration No. KBD 952G. According to the said agreement, the cost of the truck was KShs.3.8 million. Also purchased was trailer No. ZC 9213. What is interesting in the said agreement is that Samuel Ndung’u Gitau, a director of the plaintiff company signed the agreement on behalf of the 1st defendant. It is further not disputed that the 1st defendant applied for, and was indeed granted asset finance by the 2nd defendant to pay for the balance of the purchase consideration. According to the asset finance agreement, the 1st defendant was required to pay to the 2nd defendant monthly installments of KShs.145,612/= until payment in full of the loan that was advanced by the 2nd defendant to enable the 1st defendant to purchase the suit motor vehicle.

It is not disputed that it was the plaintiff company that took possession of the suit motor vehicle from the time it was purchased. It is the plaintiff's case that it sought the assistance of the 1st defendant to secure asset financing from the 2nd defendant on account of the fact that a majority shareholder of the plaintiff did not have the requisite bank statements that would have enabled him to secure the loan. The director of the plaintiff explained that having prior thereto arrived in the country from Britain, he did not have the bank statements that would have enabled him, and to that extent the plaintiff company, to qualify to benefit from the asset finance from the 2nd defendant. It was in that regard that he sought assistance from the directors of the 1st defendant, whom he then considered as his friends, to assist him with the 1st defendant's bank statements to enable the plaintiff secure the asset finance from the 2nd defendant.

The 1st defendant does not agree with this aspect of the plaintiff's case. It is the 1st defendant's case that it entered into a partnership with the plaintiff by which the 1st defendant gave possession of the suit motor vehicle to the plaintiff for the purpose of trade. It is the 1st defendant's case that it gave possession of the suit motor vehicle to the plaintiff because of its experience in the transport business. According to the 1st defendant, the partnership agreement was oral. The 1st defendant did not however provide any evidence to support its assertion that there indeed existed a partnership between itself and the plaintiff. There is no evidence to suggest that the plaintiff paid the 1st defendant any dividends or proceeds from the said transport business. What is clear is that the amounts paid to the 1st defendant by the plaintiff between the months of September 2008 and May 2009 was transmitted by the 1st defendant to the 2nd defendant.

The 1st defendant insists that the suit motor vehicle is its property. As proof of its ownership, the 1st defendant produced a copy of the logbook of the suit motor vehicle. It is the 1st defendant's case that after about a year, the plaintiff sought to purchase the suit motor vehicle, and to that effect paid to the 1st defendant a deposit of KShs. 3,421,995/=. The 1st defendant alleged that it had agreed to sell to the plaintiff the suit motor vehicle for the purchase consideration of KShs.6.3 million. To that effect, the 1st defendant is claiming the sum of KShs.2,878,005/=. The plaintiff counters the argument advanced by the 1st defendant by stating that it agreed to repay the asset finance advanced by the 2nd defendant through the bank account of the 1st defendant. That was the reason why the monthly installments of KShs.145,612/= was paid by the plaintiff to the 1st defendant and thereafter the 1st defendant paid the same amount to the 2nd defendant. It was the plaintiff's argument that the sum of KShs.3,421,995/= that was paid to the 1st defendant was meant to be transmitted to the 2nd defendant as the final payment in respect of the asset finance. On its part, the 2nd defendant's position is that having advanced the loan to the 1st defendant on security of the suit motor vehicle, it was not available for the 1st defendant to have any dealings with any person; including the plaintiff, in regard to the said motor vehicle without the 2nd defendant's consent. It is therefore the 2nd defendant's case that any agreement between the plaintiff and the 1st defendant was illegal.

Having carefully evaluated the facts of this application as disclosed in the affidavits filed in this suit, it was evident that the matter in dispute is essentially between the plaintiff and the 1st defendant in regard to who is the legal owner of the suit motor vehicle. The 2nd defendant was drawn into these

proceedings on account of the fact that it had financed the purchase of the suit motor vehicle. The 2nd defendant's interest in the suit motor vehicle is limited to the repayment of the amount that is due and owing in respect of the asset finance agreement. The court has to decide between the competing claim of the plaintiff and that of the 1st defendant in respect to who is entitled to the suit motor vehicle. There is evidence that although the 1st defendant is the registered owner of the suit motor vehicle, the plaintiff has an interest in the same motor vehicle. The extent of the plaintiff's interest in the suit motor vehicle cannot be determined at this interlocutory stage.

Suffice for this court to state at this stage is that it has been persuaded by the argument advanced by the plaintiff that it prima facie has an interest in the suit motor vehicle that is capable of recognition by the law. The issue as to who is entitled to the suit motor vehicle cannot be determined at this stage of the proceedings. It is apparent that the competing parties herein will be required to adduce *viva voce* evidence to determine the ownership of the suit motor vehicle. The issue for determination by this court at this stage of the proceedings is who between the plaintiff and the 1st defendant should have possession of the suit motor vehicle pending the hearing and determination of the suit. As stated earlier in this ruling, it is evident that a substantial amount in respect of the asset finance advanced for the purchase of the suit motor vehicle was re-paid by the plaintiff through the bank account of the 1st defendant. Although the 1st defendant alleged that it was paid the sum of KShs.3,421,995/= by the plaintiff as part payment for the purchase of the suit motor vehicle, having evaluated the facts of this case, it was apparent that the said amount was deposited with the 1st defendant for onward transmission to the 2nd defendant. The plaintiff has always had possession of the suit motor vehicle.

In the premises therefore, the plaintiff shall continue having possession of the motor vehicle pending the hearing and determination of the suit. It is trite law that in granting an order of interlocutory injunction, the court should strive to maintain the *status quo* so that the subject of the suit is not wasted or interfered with pending the hearing and determination of the suit. As stated earlier in this ruling, the plaintiff has established a prima facie case that it has an interest in the suit motor vehicle. It has been in possession of the said motor vehicle since the same was purchased. I will in the circumstances grant the temporary injunction sought by the plaintiff in terms of prayer 3 of its application dated 1st September 2009 pending the hearing and determination of the suit.

I will also grant prayer 4 of the plaintiff's application that seeks to compel the 1st defendant to pay to the 2nd defendant the amount deposited by the plaintiff to the said 1st defendant. I order the 1st defendant to pay to the 2nd defendant the said sum of KShs.3,421,995/= that was deposited to it by the plaintiff. The said amount shall be by the 1st defendant to the 2nd defendant within thirty (30) days of today's date. If there is any sum owing to the 2nd defendant after payment of the above sum, the same shall be paid by the plaintiff. Either party shall be at liberty to apply. The plaintiff shall have the costs of the application which shall be paid by the 1st defendant.

It is so ordered.

DATED AT NAIROBI THIS 10TH DAY OF DECEMBER 2009

**L. KIMARU
JUDGE**

