



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 438 of 2006

MOHIDEEN GILANI.....APPLICANT

VERSUS

NADEEM SHAKOOR KHAN.....1ST RESPONDENT

SADASIVAM VENTKATESAN.....2ND RESPONDENT

R U L I N G

On 3rd of August 2006 Mohideen Gilani (hereinafter referred to as the Applicant) brought this suit against Nadeem Shakoor Khan and Sadasivam Ventkatesan (the 1st and 2nd Respondents herein) seeking judgment: -

- a) For Kshs.3,220,000/=.
- b) An order for injunction to restrain the Defendants, their agents, servants, employees e.t.c. from attaching, selling, transferring, or in any other manner interfering with motor-vehicles supposed to be in the possession of the Plaintiff.
- c) General damages.
- d) Cost of the suit.

The Applicant's claim as is evident from the plaint is in respect of an amount outstanding on a loan advanced to the Respondents which loan was secured on several motor-vehicles. The Respondents are now alleged to have breached the agreement and taken away the motor-vehicles offered to the Applicant as security. The Respondents are also alleged to be about to leave the jurisdiction of the court.

Filed contemporaneously with the suit is a Chamber Summons brought under Order 39 Rules 1, 2, 3 and 9 of the Civil Procedure Rules and Section 3 A of the Civil Procedure Act. In the Chamber Summons, the Applicant seeks *inter-alia* an order of temporary injunction restraining the Respondents, their agents, servants and employees from attaching, transferring or in any manner interfering with motor-vehicles supposed to be in the possession of the Applicant, and directing the return to the Applicant of motor-vehicles: -

- (a) Nissan Homy Chassis No.E24 – 716662.
- (b) Subaru Impreza Chassis No.GF8 – 005746.

- (c) Mitsubishi FTO Chassis No.DE2A – 0000734.
- (d) Mitsubishi FTO Registration No.KAT 956 N.
- (e) Toyota Mark II Registration No.KAT 208 L.
- (f) Toyota Corolla AE 110 Registration No. KAU 793 P.
- (g) Toyota Corolla EE 102 – 0053482.
- (h) Mitsubishi Pajero – V24.
- (i) Nissan Prierie.

The Applicant also seeks an order for the Respondents to be ordered to deposit in court security sufficient to cover Kshs.4.5 Million and costs in any event.

The grounds upon which the application is grounded are that the Respondents borrowed Kshs.4.5 Million from the Applicant and gave the Applicant several motor-vehicles as security for the loan. The Respondent have now reposed the motor-vehicles and the Applicant fears that since the Respondents are not Kenyan citizens they can run away from the jurisdiction of the court. In the supporting affidavit sworn by the Applicant, He reiterates that pursuant to the loan agreement duly signed between him and the Respondents, the Respondents borrowed Kshs.4.5 Million from him leaving him several motor-vehicles to keep as security. The Applicant was also given duly signed transfer forms and log books for the vehicles. The Applicant was allowed to sell some of the vehicles to recover part of his money and he recovered Kshs.1,280,000/= leaving a balance of Kshs.3,220,000/=. The 1st Respondent issued cheques as part payment of the borrowed amount but the cheques were dishonoured.

The Respondents have now sent Auctioneers who have proclaimed and taken possession of the motor-vehicles which were offered to the Applicant as security. The Auctioneers are threatening to sell the motor vehicles. The Applicant further depones that the Respondents who are not Kenyan Citizens are involved in illegal activities including tax evasion and are likely to run away from the jurisdiction of the court, thereby exposing the Applicant to irreparable loss and damage. The Applicant has annexed to his affidavit a copy of a friendly loan agreement signed between him and the 1st Respondent as well as copies of transfer of ownership of motor-vehicles signed by the 2nd Respondent. Also annexed are correspondence from the 1st Respondent's Advocate, copies of the dishonoured cheques, and the proclamation duly signed by the Auctioneers.

In response to the Chamber Summons, both the 1st Respondent and 2nd

Respondent have filed replying affidavits. The 1st Respondent has also filed a supplementary affidavit. The purport of these affidavits is that the 2nd Respondent was not party to the agreement signed between the Applicant and the 1st Respondent and that he has therefore been wrongly enjoined in the suit. That the Applicant has concealed several facts materials to their agreement, for instance, the Applicant has failed to attach a supplementary agreement signed on the 3rd of May 2006. The Applicant has also included a motor-vehicle which was not part of the agreement of March 2006. The 1st Respondent maintains that the Applicant was not allowed to sell the cars given as security to recover the loan advanced to the 1st Respondent. That according to an internal memo which was part of the agreement the Applicant was to sell motor-vehicle KAU 793 P, and motor-vehicle KAU 481 S, and then give the proceeds of the sale to the 1st Respondent to use for payment of duty for other vehicles. The Applicant sold the two vehicles but failed to give the 1st Respondent the amount of Kshs.1,250,000/= for payment of duty as agreed.

The 1st Respondent explained that he did not receive the full amount of the loan he signed for as part

of the loan was to come from the sale of the afore-mentioned motor-vehicles. Since the Applicant did not give him the money to enable him pay duty for other vehicles, he was unable to have the motor-vehicles registered or sold and therefore his business has suffered immensely and he therefore sought the intervention of his advocate, who wrote to the Applicant.

The 1st Respondent further maintained that according to his agreement with the Applicant, the Applicant was only allowed to hold the motor-vehicles as security and he had no authority to sell the motor-vehicles. The 1st Respondent therefore instructed the Auctioneer to repossess the motor-vehicle when he realised that the Applicant was selling the cars in breach of their agreement. The 1st Respondent subsequently sold two of the vehicles to mitigate the losses he was incurring in his business due to the Applicant's breach of the agreement. The 1st Respondent further intimated that he had a counter-claim for Kshs.1,200,000/= and a claim for general damages for loss of business which he intended to raise in his defence. The 1st Respondent denied an allegation that he was avoiding to pay duty or conducting any illegal business. He maintained that he was married to a Kenyan with whom they had two children, and that he had vast business interest in this country and was not intending to leave the jurisdiction of the court.

Mr. Njoroge who appeared for the Applicant submitted that there was no dispute that the loan was given to the 1st Respondent by the Applicant and that in accordance with the agreement the motor-vehicles were held by the Applicant as security for the loan. He explained that although the motor-vehicles were owned by 1st Respondent, they were in the name of the 2nd Respondent. He maintained that the instructions to the Auctioneer to repossess and sell the motor-vehicles was in breach of the agreement between the Applicant and the Respondents. Mr. Njoroge submitted that the Respondents were Pakistani Nationals who were engaged in illegal activities and therefore unless the order of interlocutory injunction was granted the Applicant was likely to suffer irreparable loss.

Mr. Ogutu who appeared for the Respondents pointed out that some of the motor-vehicles in respect of which the Applicant has sought the injunction were not part of the agreement. He maintained that the Applicant had deliberately withheld information regarding how the loan was to be repaid. He explained that the Applicant failed to comply with the provisions regarding the repayment of the loan hence the Respondents' action of repossessing the motor-vehicles was justified. Mr. Ogutu submitted that the Applicant has not come to this court with clean hands. He maintained the 1st Respondent has explained why he stopped the cheques. He urged the court to find that the allegation that the respondents were foreigners engaged in criminal activities has not been substantiated. Relying on the case of *Dismas Oduor Owuor vs Housing Finance Company Kenya Limited and another. HCCC Milimani Commercial Courts Number 630 of 2001 [unreported]*, Mr. Ogutu urged the court to dismiss the application contending that the Applicant's suit being a claim for damages, the Applicant can be sufficiently compensated by an award of damages if successful.

The principles upon which an order of an interlocutory injunction can be granted are well set out in the case of *Dismas Oduor Owuor vs Housing Finance Company of Kenya Limited (Supra)* in which Ringera J. (as He then was) applied the renowned case of *Giella vs Cassman Brown and Company Limited [1973] E A 358*. Applying the same principles, it behoves me to consider whether the Applicant has established a prima facie case with a probability of success and whether the Applicant has shown that if the interlocutory injunction is not granted He would suffer loss in respect of which damages will not be an adequate remedy.

The Applicant's claim as is evident from the plaint and the affidavits sworn in support of the Chamber Summons is a claim for Kshs.3,220,000/= being the balance of a loan advanced to the Respondents pursuant to an agreement entered into between the Applicant and the Respondents. The Applicant also claims damages arising from the breach of the agreement.

The Applicant's prayer for interlocutory injunction arises from the contention that the motor-vehicles listed in paragraph 4 of the plaint were offered to him as security for the loan. From the replying affidavits sworn by the Respondents it is evident that the 1st Respondent does not deny the loan

agreement.

There is however a dispute regarding the actual amount of the loan alleged to have been given to the 1st Respondent. There is also a dispute as to whether 2nd Respondent was party to this agreement. The Applicant has produced a copy of the agreement duly signed by the Applicant and the 1st Respondent which provides *prima facie* evidence that a sum of Kshs.4,500,000/= was lent to the 1st Respondent at the time of signing the agreement, and that the agreement provided for several motor-vehicles to be held by the Applicant as security for the loan.

Clause 7 of the agreement is a liquidated damages clause for loss of business in the event that the repayment of the loan is made late. Although the Applicant has established a *prima facie* case with a probability of success, it is clear that the Applicant's loss is quantifiable as it is partly a liquidated claim for the loan outstanding, and partly a claim for compensation in damages. Damages will therefore be an adequate remedy to the Applicant and an order of interlocutory injunction would not therefore be appropriate.

If I were to consider the balance of convenience, the same would tilt against an order of injunction given that the motor-vehicles are objects subject to fast depreciation particularly when not in use. To have the motor-vehicles which are intended for resale kept lying idle and not resold or used would expose the Respondents to irreparable loss as the vehicles will significantly depreciate. For these reasons I decline to grant the order of interlocutory injunction sought with regard to the motor-vehicles.

With regard to the prayer for the Respondents to be ordered to deposit security into court. It is not disputed that the Respondents are not Kenyan citizens. The 1st Respondent however contends that He is married to a Kenyan and lives with his family in Kenya, and does not intend to leave the jurisdiction of the court. Under Order XXXVIII Rule 1 of the Civil Procedure Rules a Defendant may be called upon to furnish security for appearance in court only if the court is satisfied that the Defendant with intent to delay the Plaintiff or avoid any process of the court or with intent to obstruct or delay the execution of a decree that may be passed against him has absconded or is about to abscond or leave the local limits of the jurisdiction of the court or has disposed of or removed from the local limits of the court his property or that the Defendant is about to leave Kenya under circumstances affording reasonable probability that the Plaintiff will be obstructed or delayed in the execution of any decree that may be passed. In this case other than the fact that the Respondents are Pakistani Nationals, there is no evidence at all that intends to leave the local limits of the court or that He has disposed of or removed his properties from Kenya. The Plaintiff/Applicant has not therefore laid out any basis for the order for Respondents to furnish security.

For these reasons I find no merit in this application and do dismiss it with costs.

Dated, signed and delivered this 22nd day of May 2007.

H. M. OKWENGU

JUDGE