REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

(MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)

CIVIL CASE 513 OF 2005

INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION….. PLAINTIFF

VERSUS

KENYA BUS SERVICES LTD ……..…….. 1ST DEFENDANT

NYAMOGO & NYAMOGO, ADVOCATES ……..……. 2ND DEFENDANT

B. M. OUMA-AWITTI (T/a LEGGOS AUCTIONEERS)……. 3RD DEFENDANT

R U L I N G

There has been considerable delay in the preparation and delivery of this ruling. The same was occasioned by my serious illness in 2006 and the long attendant recuperation. The delay is regretted.

This is an application by the Plaintiff (by chamber summons dated 7th December, 2005) seeking the following main orders:-

"**1. …**

2. THAT the motor vehicles registration numbers KAQ 906 U, KAQ 923 U and KAQ 599 P be released unconditionally to the Plaintiff.

3. THAT (the 3rd Defendant) and his servants and agents be restrained from disposing of, selling and/or otherwise effecting transfer of the (said motor vehicles) pending hearing and determination of this suit.

4. THAT the Commissioner of Police be ordered to provide police assistance for tracing and supervising the release of the (said motor vehicles) to the Plaintiff.

5. THAT any party and/or person who disobeys any orders issued by this Honourable Court, herein be sentenced to six months imprisonment or to such sanction as this Honourable Court may deem just.

6. …

7. ….”

The application is said to be brought under section 3A of the Civil Procedure Act, Cap. 21 (the Act), and also under Order 39, rules 1 and 2 of the Civil Procedure Rules (the Rules).

The grounds for the application as they appear on the face thereof are:-

“**(a) THAT the motor vehicles registration numbers KAQ 906 U, KAQ 923 U and KAQ 599 P were towed away by (the 3rd Defendant) on the 6 December 2005 from the premises of the Kenatco Company Workshop yard, in Industrial Area, Nairobi.**

(b) THAT the Plaintiff is the rightful and legal owner of the said motor vehicles….

(c) THAT the Plaintiff is apprehensive that the (said motor vehicles) will be disposed off thus defeating the rights of ownership of the Plaintiff.

(d) THAT it is only fair and just that this Honourable Court be pleased to grant the Plaintiff’s application herein.

There is a supporting affidavit sworn by one **ISAAC B. MOGAKA** who says he is the corporation secretary of the Plaintiff as well as an advocate of this court. Various documents are annexed to the supporting affidavit.

The application is between the Plaintiff and the 3rd Defendant only; he has opposed the application. There is a replying affidavit sworn by him and filed on 17th February, 2006. Various documents are annexed thereto. There is what purports to be a further affidavit of the 3rd Defendant which was, however sworn on 18th December, 2005 and filed on 20th December, 2005, **before** the replying affidavit was filed. It was filed by the 3rd Defendant in person. It was improperly filed without leave of the court. It is best struck out in order to avoid confusion. It is so ordered.

The main grounds for opposing the application, as they emerge from the replying affidavit are:-

1. That the attachment of the subject motor vehicles was lawful and proper and was pursuant to lawful orders of courts of law issued in execution of decree.

2. That the application is misconceived as the Plaintiff ought to have instituted objections to attachment proceedings under Order 21, rule 53 of the Civil Procedure Rules in the suits where the execution processes were issued.

I have considered the submissions of the learned counsels appearing, including the cases cited. I have also read the pleadings herein, including the affidavits sworn in support of and in opposition to the application. I will first deal with the issue of jurisdiction raised in the second ground of opposition.

The Plaintiff could have raised objection to attachment under the relevant rules of Order 21 of the Rules before the various courts that issued the warrants of attachment. That was one avenue open to it. But it was also entitled to come, as it did, under Order 39, rules 1 for temporary prohibitory injunction. The Plaintiff has alleged herein that the properties in dispute in this suit are in danger of being wrongfully sold

in execution of various decrees issued by other (subordinate) courts. Rather than litigate before all those other courts, it is best that the matter be litigated once before the High Court. Regarding temporary mandatory injunction, the court can, in exercise of its inherent jurisdiction, grant the same where appropriate. The Plaintiff is therefore properly before this court.

The Plaintiff is seeking both temporary prohibitory and mandatory injunctions pending hearing of the suit. These are equitable reliefs at the discretion of the court. Under paragraph (a) of rule 1 of Order 39 of the Rules, interlocutory prohibitory injunction may be issued where the suit property is proved by affidavit or otherwise to be in danger of being wrongfully sold in execution of a decree. The court can issue temporary mandatory injunction in exercise of its inherent power. The principles to guide the court in exercise of its discretion are well established, and are as laid down in the case of **GIELLA –VS-CASSMAN BROWN & CO. LTD., [1973] EA 358.** They are:-

1. **An applicant must show a *prima facie* case with a probability of success.**

2. An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injuries which would not adequately be compensated by an award of damages.

3. If the court is in doubt, it will decide the application on a balance of convenience.

These principles apply equally to both temporary prohibitory and mandatory injunctions. With regard to mandatory injunction, however, there is a further requirement; it ought not be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases, either where the court thinks that the matter ought to be decided at once, or where the injunction is directed at a simple and summary act which can be remedied, or where the defendant has attempted to steal a match on the plaintiff. It was so restated by the Court of Appeal in the case **of KENYA BREWERIES LIMITED VS. OKEYO, [2002] 1 EA 109.**

Let us now see if the Plaintiff has satisfied all the above requirements. Has it shown a *prima facie* case with a probability of success? The Plaintiff's case is that it is the owner of the motor vehicles in question, which vehicles it hired out to the 1st Defendant under hire-purchase agreements. Those agreements had been earlier exhibited in these proceedings. See the affidavit of **Isaac B. Mogaka** sworn on 6th September 2005 in support of the **chamber summons dated 20th September 2005**. The vehicles were registered in the joint names of the Plaintiff and the 1st Defendant pursuant to clause 3 of the hire-purchase agreements. All the hire-purchase agreements are identical in their provisions. Copies of the registration (log) books have been exhibited. The hire-purchase agreements between Plaintiff and 1st Defendant and their joint registration as owners of the motor vehicles appear not to be disputed by the 3rd Defendant. Clause 6.5 of the hire-purchase agreements provides that the motor vehicles are, and shall remain, the property of the Plaintiff, unless and until the 1st Defendant exercises the option to purchase as contained in the agreements. It has been sworn on behalf of the Plaintiff that the 1st Defendant has been in default of payment of the hire-purchase charges and has not exercised its option to purchase the motor vehicles. No material has been placed before the court at this stage to cast any serious doubt that this is so.

Clause 12.1(f) of the hire-purchase agreements provides that the Plaintiff may, forthwith and without any notice, terminate the hiring of the motor vehicles, in consequence of which the 1st Defendant shall no longer be in possession of the vehicles with the consent of the Plaintiff, if, *inter alia*, the 1st Defendant is wound up, or liquidated, or placed under receivership, or any of its assets or any part thereof shall be under any execution or legal process issued against it….

The present application was provoked by the attachment of the motor vehicles in question in execution of decrees issued by other courts against the 1st Defendant. No doubt the 3rd Defendant and the decree-

holders thought that the motor vehicles belonged to the 1st Defendant. The 1st Defendant was in breach of clause 12.1(f) of the hire-purchase agreements. What was the effect of this breach under the law? The Plaintiff, who in reality is the owner of the motor vehicles, was thereby entitled to immediate possession of the motor vehicles. On the other hand, the 1st Defendant was not entitled to possession of the motor vehicles for being in breach of the said clause. All this is provided for in that clause of the hire-purchase agreements.

In paragraph 130 of **Halsbury's Laws of England, 4th Edition, Volume 22,** it is stated:

"**130. Execution.** *The property of a judgement debtor in a chattel which he has bailed under a hire or hire purchase agreement, or agreed to sell under a conditional sale agreement, and of which he is not entitled to the possession, cannot be seized under an execution. However, if the judgement debtor is the bailee, his interest in the chattel may be seized and sold if the chattel is in his possession and the interest is saleable…."*

I accept this as a correct statement of the law. In the present case, as we have already seen, the 1st Defendant was not entitled to possession of the motor vehicles for being in breach of clause 12.1(f) of the hire-purchase agreements. The vehicles could thus not be, and should not have been, seized in execution of decree against the 1st Defendant. Secondly, the 1st Defendant did not exercise its option to purchase; it therefore had no interest in the motor vehicles that could be seized and sold in execution of decree against it. Thirdly, the motor vehicles were not even in its possession. They had already been repossessed by the Plaintiff and were in its constructive possession when they were attached.

The Plaintiff's case as set out in the plaint is that the subject motor vehicles, among others, belong to it. It seeks a declaration to that effect. Its further case is that the motor vehicles cannot be the subject of execution proceedings in respect of any claims that the 2nd Defendant or any other person might have against the 1st Defendant, and that therefore the 3rd Defendant, who is an auctioneer, cannot attach the motor vehicles. It seeks also a declaration to that effect. In the circumstances outlined above I am satisfied that the Plaintiff has shown a ***prima facie*** case with a probability of success.

The second principle that the Plaintiff must satisfy is that it must show that it might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages unless the orders sought are granted. In this regard the Plaintiff's case is that if the subject motor vehicles are sold by the 3rd Defendant, they will in all likelihood be sold at throw-away prices. It is owed a lot of money by the 1st Defendant upon the hire-purchase agreements. It has further pleaded that other motor vehicles belonging to it and hired out to the 1st Defendant were unlawfully sold by the 3rd Defendant in execution of decrees despite court orders being in place prohibiting such sales.

In essence, what the attachments of the motor vehicles concerned have done is to challenge the Plaintiff's title to those motor vehicles. Furthermore, the titles are also the Plaintiff's security for the monies advanced to the 1st Defendant. If they are sold, the Plaintiff will not only have lost the security but also the monies or portions thereof advanced to the 1st Defendant and accrued interest. In the circumstances of this case, if that happens, the Plaintiff would have great difficulty recovering its money. I am therefore satisfied that the Plaintiff stands to suffer irreparable loss unless the temporary prohibitory injunction sought is granted.

Regarding temporary mandatory injunction, as already seen, the same will be granted only where there are special circumstances, and then only in clear cases, either where the court thinks that the matter ought to be decided at once, or where the injunction is directed at a simple and summary act which can be remedied, or where the Defendant has attempted to steal a match on the Plaintiff. What is the situation in the present case? The attached motor vehicles were removed from the Plaintiff's custody. The motor vehicles are registered in the joint names of the Plaintiff and the 1st Defendant; they are securities for monies advanced by the Plaintiff to the 1st Defendant. As we have already seen, the motor vehicles are not under the law available for attachment in execution of decree. All these are special circumstances that

make it clear that the Plaintiff is entitled to the temporary mandatory injunction sought.

In the event I will allow the application by chamber summons dated 7th December, 2005. I will grant the orders sought in prayers 2, 3 and 4 of the application. However prayer 2 is not granted unconditionally; motor vehicles registration numbers KAQ 906U, KAQ 923U and KAQ 599P will be released to the Plaintiff upon the condition that it shall not dispose of them without the order of this court. Prayer No. 5 of the application is refused; there must be appropriate proceedings for contempt of court in the event that the above orders are disobeyed by any party. The costs of the application shall be in the cause. Those shall be the orders of the court.

DATED AT NAIROBI THIS 12TH DAY OF SEPTEMBER, 2007

H. P. G. WAWERU

J U D G E

DELIVERED THIS 14TH DAY OF SEPTEMBER, 2007