



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

Civil Suit 473 of 2007

SAM WANJAMA WAWERU.....PLAINTIFF

VERSUS

TRANS ENTERPRISES LIMITED.....1ST DEFENDANT

DIAMOND TRUST BANK KENYA LIMITED.....2ND DEFENDANT

R U L I N G

Sam Wanjama Waweru, (hereinafter referred to as the plaintiff), has come to this court by way of a chamber summons dated 12th September 2007, seeking orders that the 2nd defendant, (Diamond Trust Bank of Kenya Limited), its servants and or agents be ordered to release to the plaintiff motor-vehicle Registration Number KAU 462F (hereinafter referred to as the motor-vehicle), unconditionally pending the hearing and final determination of this suit.

The application is premised on the grounds which are indicated on the body of the application as follows: -

- a) The defendants jointly and severally induced and or coerced the plaintiff into executing documents assigning and transferring the first defendant's debts to the plaintiff.
- b) The plaintiff has purchased and fully paid for the said motor-vehicle without knowledge or notice of the second defendant's interest thereon.
- c) The first defendant's cheques issued to the plaintiff to cover the first defendant's debt to the second defendant have been dishonoured by the bank.
- d) The second defendant has no re-possessed the motor-vehicle from the plaintiff.
- e) That having represented that it had fixed deposit amount to secure the first defendant's debt, the second defendant is estopped from renegeing on that representation.

The application is also supported by an affidavit sworn by the plaintiff on the 13th September 2007, and a further affidavit sworn by the plaintiff on 22nd October 2007.

In the affidavits, the plaintiff explains that he purchased the motor-vehicle from the 1st defendant, Trans

Enterprises Limited, for a sum of Kshs.3,125,000/=, which consideration was paid to the 1st defendant through a down-payment of Kshs.500,000/=, and 5 other installments in respect of which the plaintiff issued cheques. The plaintiff got possession of the motor-vehicle plus a copy of the Log-Book, and a duly executed transfer form, pending payment of the balance of the purchase price, to facilitate release of the original Log-Book. From a copy of the Log-Book given to the plaintiff, he noticed that the motor-vehicle was registered in the name of the 1st defendant.

On 9th March 2007, the motor-vehicle was repossessed by the 2nd defendant, contending that the 1st defendant had defaulted in payment of a loan to the 2nd defendant which was secured by deposit of the original Log-Book for the motor-vehicle. The 2nd defendant threatened to sell the motor-vehicle unless the plaintiff agreed to enter into an agreement which had already been discussed and agreed upon by the two defendants.

The plaintiff was thereby made to sign documents which he later learnt were assigning the Debt/Loan of the 1st defendant to the plaintiff so that plaintiff became a Debtor of the 2nd defendant on the security of the motor-vehicle. It was further agreed between 1st defendant and 2nd defendant that the Loan/Debt was actually to be repaid by the 1st defendant, who issued cheques in favour of the plaintiff totaling Kshs.2,375,000/=. The cheques were in respect of Kshs. Two Million for the principle loan outstanding, Kshs.75,000/=, for the interest due to the 2nd defendant for the duration of the loan, and Kshs.300,000/=, being the loss incurred by the plaintiff when the motor-vehicle was repossessed by the 2nd defendant.

The plaintiff was made to believe that the 1st defendant had a fixed deposit upon which the overdraft forced on the plaintiff was secured. Upon the plaintiff signing the documents, the 2nd defendant instructed their agents to release the motor-vehicle to the plaintiff, the agent's charges having been paid by the 1st defendant.

The banking facility given to the plaintiff, on the above arrangement remained unpaid as the cheques issued to the plaintiff by 1st defendant were dishonoured. Consequently, the 2nd defendant impounded the motor-vehicle again and instructed its agents to sell the motor-vehicle. The agents advertised the motor-vehicle for sale on 14th September 2007. The plaintiff maintains that he never purchased the motor-vehicle through a Hire-Purchase agreement, but that the purchase scheme was planned by the two defendants. The plaintiff swore that he was threatened, intimidated and coerced into executing the agreement after the 2nd defendant impounded the motor-vehicle. He explained that the Bank charges were all paid by the 1st defendant and that the cheques issued by the 1st defendant to the plaintiff were all to cover the facility which plaintiff was coerced into signing.

In a replying affidavit sworn by Sajid Rahemtulla, the General Manager of the 1st defendant Company, it is deposed that the plaintiff bought the motor-vehicle through a Hire-Purchase Scheme provided by the 2nd defendant after paying an initial deposit of Kshs.1,150,000/=, the balance being Kshs.2,000,000/=, in respect of which 1st defendant provided the plaintiff with an invoice. Sajid Rahemtulla, maintained that the plaintiff was given possession of the motor-vehicle together with all instruments of title, including the Log-Book and a duly executed transfer form. He denied that the 1st defendant assigned any loan to the plaintiff or that it exercised any undue influence, threats or intimidation. He explained that the cheques issued by the 1st defendant to the plaintiff were in respect of some other transactions in which the plaintiff sought financial assistance from the 1st defendant.

The 2nd defendant objected to the application through a replying affidavit sworn by the Head of its Debt Recovery Unit, Elizabeth Hinga. In the affidavit, it was deposed that the plaintiff applied for and obtained financial facility from the 2nd defendant to purchase the motor-vehicle on Hire-Purchase terms. The plaintiff freely executed the letter of offer given to him in the presence of his (i.e. plaintiff's) advocate. The plaintiff thereafter entered into a Hire-Purchase Agreement with the 2nd defendant for the Hire-Purchase price of Kshs.2,000,000/=, payable in 24 monthly installments of Kshs.97,500/=, with

effect from 10th May 2007.

The plaintiff took possession of the motor-vehicle on 10th April 2007. The plaintiff however, failed or neglected to pay any hire rentals as agreed, as a result of which the 2nd defendant instructed its agents who repossessed the motor-vehicle and subsequently advertised it for sale. It was contended that the 2nd defendant was not privy or party to any arrangement entered into between plaintiff and 1st defendant, distinct from the Hire-Purchase transaction. It was maintained that the allegations of fraud, misrepresentation and coercion were all untrue and only intended to deceive the court into granting the orders sought by the plaintiff.

Mr. Mwenda who appeared for the plaintiff urged the court to note from the annexures to the plaintiff's two affidavits, that, at the time the plaintiff purchased the motor-vehicle from 1st defendant, the Log-Book was in the name of the 1st defendant only and that the interest of the 2nd defendant was not noted on the Log-Book even as at 19th February 2007, when the 2nd defendant repossessed the motor-vehicle and stored it. Mr. Mwenda further urged the court to note that as at March 2007, when the plaintiff was alleged to have entered into the Hire-Purchase agreement the 2nd defendant had already repossessed the motor-vehicle. He urged the court to find that plaintiff was coerced and intimidated into signing the Hire-Purchase document out of desperation in a bid to get the motor-vehicle released to him.

Mr. Mwenda referred the court to HCCC (Milimani) No.516 of 2004, Meyer Enterprises Limited vs Anthony Athanas Ngotho, where the circumstances in which a mandatory injunction can be granted at interlocutory stage were considered. The case of Bullock vs Lloyds Bank LD & Another 1955 1 CH 317, was also referred to, the court's attention being drawn to the holding that the doctrine of undue influence is not confined to those cases in which the influence is exerted to secure a benefit for the person exerting it, but extends also to cases in which a person of imperfect judgment is placed or places himself under the direction of one possessing greater experience and also such force as that which is inherent in such a relation as that between a father and his own child.

The case of Lloyds Bank Limited vs Bundy 1974 WLR 501, was also cited to re-enforce the counsel's argument that the court could intervene to give relief where a contract has been entered into without independent advice and where one's bargaining power is impaired because of undue influence.

Mr. Wagara who appeared for the 1st defendant submitted that the 1st defendant was improperly joined in the suit, as it was not party to the Hire-Purchase agreement between the plaintiff and the 2nd defendant. It was contended that the 1st defendant had given possession of the motor-vehicle and the documents of title to the plaintiff, and that it was not in a position to execute any other documents to give the plaintiff title. The 1st defendant maintained that no loan was assigned by it to the plaintiff.

Mr. Rimui who appeared for the 2nd defendant submitted that the application was frivolous and an abuse of the court process. He maintained that the plaintiff was guilty of perjury, material non-disclosure and laches and was therefore undeserving of the equitable remedy sought.

C.A. (Application) No. Nai. 314 of 1999 (UR), John Kipkemboi Kilel vs Diamond Trust Bank Kenya Limited, was relied upon for the proposition that an applicant for equitable relief who was not candid was not deserving of the exercise of the court's discretion.

HCCC 1044 of 2001, Moses Ngenye Kahindo vs Agricultural Finance Corporation, where an applicant who alleged coercion, but failed to tender any evidence, and had made no complaint, unsuccessfully sought an order of injunction was cited. Mr. Rimui also relied on HCCC No.70 of Alloyce Rading Akoth vs Diamond Trust Bank Kenya Limited, in which the court rejected allegations of fraud in an application for injunction and held that it was a case of willing Buyer willing Seller, and the application was therefore an abuse of the court process.

HCCC 752 of 2000, Pauline Wayua Kaloki vs Diamond Trust Bank of Kenya, was also relied upon for the

proposition that one who is guilty of contravening a Hire-Purchase agreement does not deserve the protection of the court.

Finally, the case of *Diamond Trust Bank (K) Limited vs Jaswinder Singh Enterprises*, was relied upon on the conditions for granting a mandatory injunction.

Having carefully considered the application, the submissions of learned counsels and the authorities cited, I find that the main issue that has been raised is whether there is a binding Hire-Purchase agreement between the plaintiff and the 2nd defendant, which would justify the repossession of the motor-vehicle. This is obviously a matter for trial and I cannot at this interlocutory stage prejudice the trial by making any finding on that particular issue.

For the purposes of this application the question is whether the applicant has satisfied this court that he has a *prima facie* case with a probability of success.

The applicant does not deny signing the Hire-Purchase documents but claims that he did so under duress. The applicant did not however raise any complaints after signing the documents nor did he seek this court's intervention until after the motor-vehicle was repossessed. *Prima facie* there is a doubt regarding the alleged duress.

Further, the applicant has not exhibited any evidence of payment of the full purchase price to the 1st defendant to substantiate the allegations that he bought the motor-vehicle from the 1st defendant directly without the aid of any Hire-Purchase agreement. Indeed, if the applicant had fully paid for the motor-vehicle at the time he alleges that the 2nd defendant first repossessed the motor-vehicle, he could easily have come to the court for release of the motor-vehicle to him instead of signing Hire-Purchase agreement for a motor-vehicle which he had already bought. With the evidence that has been tendered before me, no *prima facie* case with a probability of success can be said to have been established.

Moreover, the applicant is seeking a mandatory interlocutory injunction in respect of which the law is clear that it can only be granted in special circumstances where the applicant has demonstrated a clear and incontrovertible case. The evidence put forward by the applicant so far does not reveal any special circumstances or clear and incontrovertible case as would justify the granting of a mandatory interlocutory injunction.

Finally, the applicant has not satisfied this court that damages will not be an adequate remedy. The value of the motor-vehicle can be easily ascertained and damages for loss of use can also be easily ascertained.

For all the aforesaid reasons, I come to the conclusion that the chamber summons dated 12th September 2007, cannot succeed. It is accordingly dismissed with costs.

Dated, signed and delivered this 26th day of November 2007.

H. M. OKWENGU

JUDGE