

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 325 OF 2004

ANTONY NG'ANG'A KARUGA.....PLAINTIFF

VERSUS

JOHN MAINA t/a JOGEDAH AGENCIES.....DEFENDANT

RULING

The Plaintiff has moved this court by Notice of Motion under the provisions of **Section 63(e) and Section 3A of the Civil Procedure Act** seeking the orders of this court to issue a mandatory injunction against the Defendant to compel the Defendant to forthwith release and hand over motor vehicle registration number KAB 328C to the Plaintiff free of any charges or costs and further that for effective compliance with the order the Nakuru Central Police Station OCS be directed to supervise and ensure that the said motor vehicle is handed over to the Plaintiff. The Application is based on the grounds that the Defendants act of attaching the Plaintiff's motor vehicle without a court order and detaining the same was wrongful, illegal and criminal. The Plaintiff has further stated that he is entitled to the exclusive use of his said motor vehicle and the Defendant has no right to deny him its use. The Plaintiff has further stated that he has established a prima facie case with high chances of success. The Application is supported by the annexed affidavit of Antony Nganga Karuga, the Plaintiff. The Application is opposed. The Defendant has sworn a lengthy replying affidavit in opposition to the application filed by the Plaintiff.

At the hearing of the Application, Mr Karanja, Learned Counsel for the Plaintiff submitted that the Defendant had taken the law into his own hands by purporting to attach the Plaintiff's motor vehicle registration number KAB 328C without any lawful authority. It was submitted on behalf of the Plaintiff that the Plaintiff owed Equity Building Society (*hereinafter referred to as Equity*) some amount which was advanced to him. When the Plaintiff was unable to pay the said amount owed, Equity ordered the Defendant to attach the Plaintiff's motor vehicle. The Plaintiff's motor vehicle was attached at Kimende, Limuru and left at Kimende Police Post to await the Plaintiff to sought out his financial obligations with Equity. On the 26th of October 2004, Equity wrote to the Defendant and informed him that the Plaintiff had paid off the loan. It was submitted that at the time the letter was written, the Defendant had already paid the Defendant the sum of Kshs 7,000/-, and according to the understanding between the Plaintiff and the Defendant the balance of Kshs 2,000/- was to be paid on the 29th of October 2004. The Plaintiff argued that the Defendant with a view of harassing the Plaintiff, went to Kimende Police Post and towed the Plaintiff's motor vehicle from Kimende to Nakuru. The Plaintiff submitted that the Defendant did this for the sole purpose of charging the Plaintiff more fees. It was contended that from the date that the said motor vehicle was towed to Nakuru, the Defendant had retained the said motor vehicle upto the time that the application was argued. The Plaintiff submitted that the Defendant ought to have filed his bill of cost in court for the court to tax and ascertain the same if he felt that he was unable to agree on his fees with the Plaintiff. The Plaintiff further submitted that the Defendant did not have a warrant of attachment that gave him authority to attach the Plaintiff's motor vehicle. The Plaintiff therefore argued that the attachment of the Plaintiff's motor vehicle was unlawful and a criminal act. The Plaintiff argued that he should be granted the mandatory injunction application sought as he had suffered irreparable damage by the continued detention of his motor vehicle by the Defendant. The Plaintiff argued that the Defendant had committed the tort of conversion by illegally attaching and detaining the Plaintiff's motor vehicle. The Plaintiff submitted that Equity had not registered any chattels mortgage that would have given it authority to repossess the motor vehicle. The Plaintiff further submitted that the bill of costs allegedly filed by the Defendant was only annexed to the replying affidavit to mislead the court as no such bill of

costs had been filed in court. The Plaintiff referred the court to the decision of the court in **Nairobi HCCC No. 1150 of 2002 Shariff Forex Bureau Company Ltd –versus- Dubai Bank of Kenya Ltd (unreported)** in support of his submissions. The Plaintiff urged the court to allow the application as prayed.

Mr Mwangi, Learned Counsel for the Defendant opposed the application. He submitted that the Defendant in the entire transaction acted as an agent of Equity, Nakuru Branch. The Defendant submitted that the Plaintiff ought to have sued Equity and not the Defendant. The Defendant further submitted that he had been instructed by Equity to attach the Plaintiff's motor vehicle after he had failed to repay the loan advanced to him. The Defendant submitted that the Plaintiff was therefore required to pay the Defendant attachment charges. The Defendant further submitted that the court could not grant mandatory injunction as prayed by the Plaintiff as there was no exceptional circumstance that could make the court grant the orders sought. The Defendant submitted that the Plaintiff had not met conditions precedent for mandatory injunction to be granted. It was the Defendants argument that the Plaintiff did not have a case against the Defendant. The Defendant contended that the instructions that it had received from Equity to attach the Plaintiff's motor vehicle had not been challenged. The Defendant submitted that **Section 2 (1) of the Auctioneers Act (Act No. 5 of 1996)** as read with Section 6 of the Judicature Act protected the Defendant from being sued. The Defendant argued that he was holding the Plaintiff's motor vehicle as lien pending the settlement of his charges.

The Defendant referred this court to the decision made in **Nairobi HCCC No. 1780 of 2000 Southern Credit Banking Corporation –versus- Charles Wachira Ngundo (unreported)** to support his submissions. The Defendant urged the court to dismiss the Plaintiff's application with costs.

I have carefully considered the rival submissions made by counsel for the Plaintiff and counsel for the Defendant. I have also perused the pleadings that were filed by the parties to this application. The issue for determination is whether the Defendant had legal authority to attach and detain the Plaintiff's motor vehicle. The other issue for determination is whether, on the facts of this case, the Plaintiff has proved that he is entitled to the orders of mandatory injunction sought. It is common ground that Equity Building Society instructed the Defendant vide its letter dated the 5th of August 2004 under reference EBS/NKR/7900513 to attach the Plaintiff's motor vehicle registration number KAB 328C. It is not indicated what authority the said Equity Building Society had to give such instructions for the Defendant to attach the Plaintiff's motor vehicle in the absence of a court order. This court is not aware, from the evidence before me, that the said Equity Building Society had registered a chattels mortgage over the said motor vehicle belonging to the Plaintiff.

Be it as it may, the Defendant proceeded and attached the said motor vehicle belonging to the Plaintiff at Kimende, Limuru in Central Province. Upon attaching the said motor vehicle, the Defendant took the same to Kimende Police Post where the said motor vehicle was kept awaiting the Plaintiff to pay the outstanding debt due to Equity Building Society. On the 26th of October 2004, the Plaintiff paid the loan due to the said Equity Building Society in full. Equity Building Society instructed the Defendant to release the Plaintiff's motor vehicle upon the payment of his charges. According to the Plaintiff, the Defendants charges had been agreed at Kshs 10,000/-. The Plaintiff paid the Defendant Kshs 7,000/=. The balance of Kshs 3,000/- was to be paid at the end of October 2004.

What happened thereafter cannot be described as a comedy of errors by the Defendant partly motivated by greed. Upon being instructed by the Equity Building Society to release the motor vehicle to the Plaintiff on the 26th of October 2004, the Defendant secured another letter from the said Equity Building Society on the same day (i.e. 26th of October 2004) which gave him instructions to tow the Plaintiff's motor vehicle to the Defendant's yard. In his submission before court, the Defendant stated that he towed the said motor vehicle to his yard to secure the payment of his charges. I have evaluated the evidence on record and the submission made before me. In the first instance, the Defendant did not have authority in law to attach the Plaintiff's motor vehicle. As an officer of the court, the Defendant ought to have been aware of the legal requirement that before any person's property may be attached there must be lawful authority. Lawful authority in the particular case meant that Equity Building Society ought to have shown the Defendant that it was possessed of a chattels mortgage over the said motor vehicle belonging

to the Plaintiff. Secondly, the Defendant was not possessed of a licence which gave him authority to attach the Plaintiff's motor vehicle at Kimende, Limuru in Central Province. According to the Auctioneers licence "**Class A**" No. 2097 which was annexed to the Defendant's replying affidavit, and marked as Exhibit No. "JMK1", the Defendant was allowed to conduct his business within the Rift Valley and the Western Provinces only. For the Defendant to purport to attach the Plaintiff's motor vehicle in Central Province was in breach of the conditions of the issuance of his Auctioneers licence. Further, there was no reason whatsoever why the Defendant towed the Plaintiff's motor vehicle from Kimende in Limuru to Nakuru so as to secure the payment of only Kshs 3,000/-! I hold that the Defendant being greedy towed the said motor vehicle to his yard at Nakuru so that he could extort extra money from the Plaintiff. The actions of the Defendant were avaricious.

This court took into account the totality of the evidence on record and found that the only order that commended itself to it was to grant the application by the Plaintiff for mandatory injunction to compel the Defendant to release motor vehicle registration number KAB 328C to the Plaintiff. Upon the conclusion of the hearing of the application, this court gave an order nisi releasing the said motor vehicle to the Plaintiff. The said order nisi issued is hereby confirmed.

The Plaintiff having established that his application fell within the exceptional circumstances where this court ought to grant a mandatory injunction, is hereby granted the said orders as prayed.

The Plaintiff shall have the costs of the application.

DATED at NAKURU this 17th day of February 2005.

L. KIMARU

JUDGE