



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
Civil Suit 155 of 2005

AMIR SULEMAN.....PLAINTIFF/APPLICANT

VERSUS

BIRAJ BRAHMBHATT.....1ST DEFENDANT/RESPONDENT

JITENDRA BRAHMBHATT.....2ND DEFENDANT/RESPONDENT

RULING

A. FAMILY SCHISM IN THE AFTERMATH OF DEATH, CONFLICTING

PROPERTY CLAIMS: THE PLAINTIFF'S APPLICATION FOR INTERIM

RELIEF

The plaintiff's Notice of Motion dated and filed on 11th February, 2005 and falling under the umbrella of a suit of even date, was brought under sections 3 and 3A of the Civil Procedure Act (Cap. 21) and Order XXXIX rules 1, 2, 3 and 9 of the Civil Procedure Rules.

The plaintiff's prayers may be set out as follows:

(a) that, an order of injunction be issued restraining the defendants whether by themselves or their servants or agents or any other person whosoever, from doing any of the following acts: from threatening and/or seizing the plaintiff's motor vehicles-Audi A6, and BMW registration number KAJ 999Z and/or in any way howsoever, trespassing into the plaintiff's premises and/or interfering with the plaintiff's possession of the said motor vehicles pending the hearing of this application;

(b) that, an order of mandatory injunction compelling the defendants whether by themselves or their servants or agents, to return and to surrender to the plaintiff's custody all the registration documents, the registration marks of the said motor vehicle Audi A6, the duplicate key, the alarm device and all other particulars to the said motor vehicle within 7 days of the Court's determination;

(c) that, an order of mandatory injunction be issued compelling the 1st defendant to execute a transfer form transferring the said Audi A6 motor vehicle in favour of the plaintiff within 7 days of the Court's determination and in default, the Court's Registrar do sign the transfer form in favour of the plaintiff;

(d) that, there be liberty to apply for any further or other orders and/or directions as the Court may deem just to grant.

In the supporting grounds the plaintiff states that the defendants have issued a oneday notice of their

intention to forcefully move into the plaintiff's premises for the purpose of seizing and removing his motor vehicles including an Audi A6 and a BMW Reg. No. KAJ 999Z. It is contended that such threatened action is unlawful for several reasons:

- (i) the defendants have no proprietary rights in the two vehicles;
- (ii) the two vehicles had been purchased by the plaintiff; the 1st and 2nd defendants are daughter and father respectively; the plaintiff is the father-in-law of the 1st defendant; the plaintiff's son who was married to the 1st defendant, died on 30th August, 2002 while on a visit to Kenya from the United Kingdom where he had resided with the 1st defendant; the Audi A6 was at all times stationed in the U.K. and was meant to assist the plaintiff and his wife while visiting the U.K. for business purposes; at other times the Audi A6 was available to the deceased son of the plaintiff, *Arif Suleman*, who was then a student in the U.K.;
- (iii) although the plaintiff had permitted his late son *Arif Suleman* to register the Audi A6 in his own name, since he was in the U.K. continuously, the 1st defendant who then married *Arif Suleman* expressly or impliedly did know that this vehicle had been purchased by the plaintiff and it was the plaintiff's property;
- (iv) recognising the plaintiff's rights to the said vehicle Audi A6, the 1st defendant had requested him to allow her to transfer it to her name for the purpose of freighting from the U.K. to Kenya, after the death of *Arif Suleman*, and after the vehicle was shipped to Kenya it was stored in the plaintiff's home;
- (v) at the request of the 1st defendant, the plaintiff bore the cost of freighting the vehicle Audi A6 from the U.K. to Kenya and paid insurance, fees and other disbursements related to clearing and delivery;
- (vi) the 1st defendant was entrusted with the custody of most of the documents relating to the said motor vehicle Audi A6 by the plaintiff on account of her having been married to the plaintiff's son and her having taken the decision to remain in the plaintiff's homestead as his daughter helping out like any other member of the plaintiff's family; the plaintiff did not doubt the 1st defendant's bona fides, and entrusting to her the documents to enable her to freight the motor vehicle from the U.K. to Kenya was in any case a necessity;
- (vii) the 2nd defendant subsequently moved back to the homestead of her father, the 2nd defendant, and had a change of heart, in the course of which she ceased to deputise for the plaintiff or accord him any family assistance;
- (viii) the plaintiff had accorded the 1st defendant the use of his motor vehicle BMW registration number KAJ 999Z during all material times following the death of *Arif Suleman*; this vehicle had been bought, maintained, insured and licensed by the plaintiff; and it was returned to the plaintiff by the 1st defendant after its licence and insurance expired;
- (ix) the said motor vehicles are not part of the estate of the deceased, and are not personal effects which could become due to the 1st defendant at the demise of *Arif Suleman*; and already, the 1st defendant had already collected all the personal effects;
- (x) the plaintiff is not in any form indebted to the defendants, and they have made no monetary claim against the plaintiff.

It is stated as a ground in support of the plaintiff's application that he stands to suffer grave injury, loss and damage if the defendants proceed to effect their unfounded claim and if they carry out their threat to enter the plaintiff's premises; he would thereby be harassed and intimidated and the peace at his abode breached, and he would be deprived of the utility of his property. Such loss and harm, it is stated, would be irreparable. The plaintiff contends that he has a good, prima facie case for relief as sought in the suit

against the defendants. It is urged that it will be just and equitable in the circumstances, that injunctive relief be granted.

Evidence in support of the application is in the affidavit of *Amir Suleman*, the plaintiff himself, dated 11th February, 2005. He depones that the 1st defendant is a British citizen, the holder of Passport No. 037301099, and is the daughter of the 2nd defendant. She had been married to the plaintiff's only son, Arif Suleman, who died on 30th August, 2002 while visiting Kenya from the UK where he resided with the 1st defendant. *Arif Suleman* was a student in the U.K. and, together with the 1st defendant as his wife, depended substantially on the plaintiff – for fees, upkeep, and sundries. There was no issue of the matrimonial union between the 1st defendant and *Arif Suleman*.

The deponent avers that sometime in 1999 he had purchased from his own funds, a motor vehicle Audi A6, metallic green in colour. Purchased at Harrow in Middlesex, England the vehicle was for the use of the plaintiff and his wife on those occasions when they visited the U.K. on business or for other purposes. At other times, this vehicle was available for the use of Arif Suleman, during his stay and studies in the U.K. – at the plaintiff's pleasure and discretion.

It is deponed that the circumstances of the vehicle, Audi A6 were well known to both *Arif Suleman* and the 1st defendant who married him subsequent to the purchase of the vehicle, on 18th August, 2000. It is deponed that the plaintiff's ownership of the vehicle was well within the express and constructive knowledge of the couple. The deponent avers that the consistent conduct of the 1st defendant showed her recognition that the plaintiff was the proprietor of the suit motor vehicle, Audi A6.

The plaintiff depones that there were circumstances well understood by the 1st defendant, which occasioned trust being reposed in her by the plaintiff, in respect of the documents relating to the suit vehicle. For instance, the 1st defendant on her own volition had intimated that having been married to the plaintiff's only son and child, she would remain in the plaintiff's homestead as his daughter and would do everything to help and to deputise for him and his wife in the same way a sibling would. She later had a change of heart and relocated to the home of the 2nd defendant and started deputising for the 2nd defendant instead of the plaintiff.

The plaintiff depones that the 1st defendant upon receipt of documents, had procured a transfer of the suit motor vehicle from the name of the late *Arif Suleman* to her own name, and since then she has not executed a transfer of the vehicle in the plaintiff's favour. He has asked the 1st defendant to release to him the documents of freighting, receipting and registration for the suit motor vehicle, and for the duplicate ignition key and the alarm device for the same, but she has neglected to act on the request. The 1st defendant has failed and/or refused to sign the documents for transfer of the suit motor vehicle to the plaintiff. Besides, the defendants did subsequently, at a meeting among the parties which took place on 9th January, 2005 notify the plaintiff – which notice was then repeated by telephone communication – that they would enter the plaintiff's homestead for the purpose of collecting the suit motor vehicle as well as the BMW reg. No. KAJ 999Z.

The plaintiff depones that the threat made by the defendants is illegitimate and would entail a trespass onto his homestead and property. He avers that the two contested vehicles, the Audi having a current value of Kshs.4 million and the BMW a value of Kshs.1.5 million, are his property and the defendants have no colour of right to the same.

B. THE RESPONDENTS' DEPOSITONS

Biraj Brahmhatt, the 1st defendant, swore and filed an affidavit on 18th February, 2005 in which she deposes that the plaintiff in his affidavit had misrepresented the facts in relation to the suit motor vehicle, registered in the United Kingdom as No. W153 VLY, and now registered in Kenya as No. KAS 422Y. She avers that the BMW registration No. KAJ 999Z is not at all in issue and she has never made any claim to it. She avers that the suit motor vehicle was purchased in July 2000 just one month before she married the deceased son of the plaintiff, in August, 2000. She states that while it was in the U.K., the suit motor vehicle was registered in the name of the deceased, *Arif Suleman*; and in proof she attaches the

registration documents issued in the U.K. She avers that she and the deceased had used the suit vehicle as their car while they lived in the U.K. She avers that her husband was no longer a student at the time the suit vehicle was purchased; he had already graduated from the University of Bradford the previous year, in 1999.

The deponent avers that her husband died in Kenya on 30th August, 2002 through a road accident. She then took out letters of administration in respect of *Arif Suleman* in the U.K. The letters of administration were later resealed in Kenya (and she annexes copies of the same). She avers that she got registration as owner of the suit motor vehicle, as the sole beneficiary of her husband's estate.

The 1st defendant avers that her father-in-law, the plaintiff, has misrepresented certain facts in his depositions. It is her averment that the suit motor vehicle was bought by her late husband, who told her so. She annexes to her affidavit the purchase invoice for the suit vehicle, which gives the name of the customer as *Mr. Arif Suleman*, her late husband.

She depones that she is the owner of the suit vehicle, she being the sole beneficiary of her husband's estate. As regards the process in which she was registered as title-holder for the vehicle, the deponent avers:

“My father-in-law raised no objection when I was registered as the owner. I was however not registered as the owner for any of the reasons given by my father-in-law in his application and affidavit.”

The deponent deposes that she has endeavoured to be as helpful as possible to the plaintiff, and had wanted to help him recover debts which were due to her husband's estate, but the plaintiff has progressively become hostile towards the 1st defendant. She avers that she relocated her residence from the plaintiff's home in November, 2004 and now stays with her sister and not the 2nd defendant as deposed by the plaintiff.

The 1st defendant deposes that the plaintiff had given her his car, a BMW, registration number KAJ 999Z, but she has returned it to him duly serviced, for the reason that he had asked for its return. The letter from the plaintiff's advocate dated 27th January, 2005 and annexed as JS5 to the plaintiff's affidavit, indicates that the *plaintiff did indeed demand the return of the BMW registration No. KAJ 999Z*.

The 1st defendant depones that she had paid the freight charges for the suit vehicle “except for a sum of US\$800 which the applicant paid when the vehicle together with all [her] household goods arrived in Mombasa.” She avers that she is prepared to refund the said sum of U.S. \$800.

The 1st defendant avers that she had, on 14th December, 2004 signed a power of attorney in favour of the plaintiff, this being agreed to be only a draft and not to be registered until amended as requested by the deponent; but she was thereafter not allowed to see it again. The 1st defendant's lawyer had taken up the matter with the plaintiff's lawyer, but to no avail.

The second defendant's brief replying affidavit carries only one main point: “That the application does not disclose why I have been sued or why the reliefs sought therein should be granted against me.”

C. AUDI 6 SALOON – WAS IT PART OF ESTATE OF THE DECEASED, OR WAS IT PROPERTY OF FATHER OF DECEASED? IS THERE A CASE FOR EQUITABLE RELIEF AGAINST THE DEFENDANTS?

(a) Submissions for the Plaintiff/Applicant

Learned counsel, *Mr. Katwa*, restated the statements in the plaintiff's affidavits: that it is the plaintiff who paid for the suit vehicle in the U.K.; that the vehicle was left in the U.K. and was used by his son who was a student in the U.K.; that when the plaintiff's son got married in the U.K., in August, 2000 the newly-weds came to enjoy the use of the suit motor vehicle, but at the discretion and pleasure of the plaintiff.

Learned counsel submitted that since the deceased was a student, it had fallen upon the plaintiff to provide him (even after he got married) with food, water, energy and sundries. This is a controversial point: for the 1st defendant has deponed that (i) the suit vehicle was purchased in 2000, and only one month before the deceased and the 1st defendant established their matrimonial relationship; (ii) the deceased was at this stage no longer a student, as he had graduated in 1999; (iii) the suit vehicle was purchased by the deceased himself, and was (as is common ground) registered in his name.

The 1st defendant did not agree with the representations by the plaintiff: that when the suit vehicle had to be freighted to Kenya she requested that to facilitate that process, it be registered in her name. This, clearly, is a matter of fact in respect of which one party is telling the truth and the other telling a lie. It is an important point especially in relation to the main suit; and it must await determination at that stage.

Counsel submitted that the mere fact of registration of the suit vehicle in the name of the 1st defendant, did not prove that this was her car (The Traffic Act (Cap. 403), s.8). Registration only led to a *rebuttable presumption* of ownership; registration in the present circumstances had been only for convenience, and, it was submitted, the 1st defendant held title only in trust for the plaintiff. It is obvious that this is a crucial proprietorship question which would dispose of the whole case - and therefore it must wait to be resolved during the trial of the suit.

An interesting point, and one which pointed in the direction of the bona fides of this application, was raised by counsel – founded on the applicant’s affidavit.

“The plaintiff had taken out an insurance cover in favour of his son (the deceased); this became due and payable when he died, for Kshs.75 million. It was paid to the 1st defendant in full. So the plaintiff has already benefited the 1st defendant; and it is not proper for the 1st defendant to claim ownership of the suit motor vehicle.”

The 1st defendant has in the first place contested the insurance amount alleged. But more important, if it is the case that when the 1st defendant married the deceased, the deceased had a life policy which matured upon death and the beneficiary became the 1st defendant, this would be the natural and inevitable course of the law, and the original source of the insurance premiums would be of no materiality.

Therefore it would not be correct legal reasoning, that if the 1st defendant under the law of succession benefited from her deceased husband’s estate, then an obligation would rest on her to facilitate the registration of the suit motor vehicle in the name of the plaintiff.

Mr. Katwa, however, urged that there was such a duty of self-abnegation on the part of the 1st defendant. He based such a perceived duty on the doctrine of constructive trust. And in aid of this contention he cited *Halsbury’s Laws of England*, 4th ed., Vol. 48 at para.585:

“A constructive trust attaches by law to specific property which is neither expressly subject to any trusts nor subject to a resulting trust but which is held by a person in circumstances where it would be inequitable to allow him to assert full beneficial ownership of the property. Such a person will often hold other property in a fiduciary capacity and it will be by virtue of his ownership of or dealings with that fiduciary property that he acquired the specific property subject to the constructive trust. A stranger who receives property in circumstances where he has actual or constructive notice that it is trust property being transferred to him in breach of trust will, however, also be a constructive trustee of that property.”

Learned counsel also sought to rely on the Court of Appeal decision in *Mumo v. Makau* [2002] 1E.A. 170 in which it was held (p.171):

“Trust was a question of fact to be proved by evidence...There was ample evidence showing that Makau had owned the original parcel of land and lived there with his entire family. Upon its demarcation and registration, the appellant’s mother was to hold the suit land in trust for the entire family and in trying to deny the other house of its natural inheritance, she

had acted fraudulently.”

Mr. Katwa submitted that the 1st defendant was holding the suit vehicle in trust for the plaintiff. He submitted that the suit vehicle was not a matrimonial property, and that the 1st defendant was holding it fraudulently. He sought to rely on the High Court decision in *Njoroge v. Ngari* [1985] KLR 480 in which Butler – Sloss, J had held:

“If property is held in the name of one person, even if that property is registered in the name of one person, but another contributed towards acquisition of the property, then both persons have proprietary interests in that property. If legal ownership of such property is registered in the name of only one of them, that one is deemed to hold the land in trust beneficially for himself and the other person.”

Learned counsel submitted that if the 1st defendant had contributed to the purchase of the suit vehicle, she could have claimed in that regard. He contended that the suit vehicle was purchased so that it would be at the use and disposal of *the plaintiff*; and so the 1st defendant was in a position of trust, a trust which did not abate owing to the death of her husband. This was a matter, counsel contended, which fell properly within the parameters of the grounds for injunctive relief. It was a fit case, it was submitted, for the grant of orders restraining the defendants against interference with the plaintiff’s premises; and it was a case meriting mandatory injunction in respect of the registration of the suit motor vehicle, and in respect of the handing over by the 1st defendant of the car keys and the registration marks.

Counsel submitted that if the suit vehicle is released to the 1st defendant, then the plaintiff will have been deprived of enjoyment of property which he had obtained for valuable consideration; the vehicle would be subjected to wear and tear, with the plaintiff being compelled to obtain another vehicle in the meantime. It was contended that the suit vehicle could be jeopardised, as the 1st defendant was not a Kenyan citizen, and it would not be possible to know how she would dispose of the vehicle if she chose to leave the country.

Learned counsel submitted that the plaintiff stood to suffer irreparable harm if the suit motor vehicle were released to the 1st defendant; in his words:

“There is a relationship between the vehicle and the plaintiff’s son: this cannot be captured in the value of the motor vehicle.”

He urged that the balance of convenience tilted in favour of allowing the plaintiff to use the motor vehicle.

From the plaintiff’s affidavit and from learned counsel’s submissions, it is clear that the thrust behind the instant suit is *distrust and suspicion*, a feeling of being hard-done-by. This is clear from the persistent claim by the plaintiff that he had secured a large insurance policy for his deceased son, and its beneficiary has been the 1st defendant; from the mode of handling the power of attorney which would have entrusted to the plaintiff substantial decision-making in matters touching on the 1st defendant; from the claims by the plaintiff that the 1st defendant is not an honest person; and from the contradictory factual accounts emanating from the two sides. As already noted, the determination of veracity in such allegations is reserved for the full trial – with examination-in-chief, cross-examination and re-examination. What that means is that the *prima facie* position, for best judgement in the resolution of the interlocutory application, is *left lying on mere distrust, suspicion and apprehension*.

Learned counsel, **Mr. Katwa**, remarked:

“The plaintiff secured for the 1st defendant the whopping sum of Kshs.75 million; and this shows that it is only fair that the [suit] vehicle be secured to the plaintiff.”

He then said:

“We suspect that the 1st defendant is not acting in good faith, and is a dishonest person. She uses different names as it suits her – one being Suleman and the other being **Brahmbhatt**; she has two signatures – one for **Suleman** and the other for **Brahmbhatt**; if the Court were to give out the [suit] vehicle, would it be to **Suleman** or **Brahmbhatt**...she is capable of telling lies; so the Court should bear this in mind.”

(b) Submissions for the Defendants/Respondents

Learned counsel for the respondents, **Mr. Mwangi**, opened his submissions by making the observation, which, with respect, has much merit, that “the application by the plaintiff does not show any reason why the 2nd defendant was enjoined in this suit. Why should relief be granted against him? No cause of action has been shown against him.” **Mr. Mwangi** prayed for the application against the 2nd defendant to be dismissed with costs.

Learned counsel submitted that no evidence had been produced that it is the plaintiff who bought the suit vehicle which was purchased and registered in the name of the deceased, **Arif Suleman**, in July, 2000 just before he married the 1st defendant on 18th August, 2000. He submitted that all the evidence in hand pointed to the 1st defendant, as administratrix of the estate of **Arif Suleman**, being the owner of the suit motor vehicle. The 1st defendant had duly obtained grant of letters of administration, issued in the U.K. on 24th April, 2003 and resealed in Kenya on 25th August, 2004; and she has deponed that she was registered as owner of the suit motor vehicle in her capacity as the administratrix. Counsel submitted that since the registration book for the vehicle is in the 1st defendant’s name while the plaintiff, though having custody of the vehicle itself, has shown no evidence that he did purchase the same, he has no interest in the vehicle and it is the property of the 1st defendant. On that basis, learned counsel submitted, the plaintiff is not entitled to injunctive relief.

Mr. Mwangi submitted that by s.8 of the Traffic Act (Cap.403) the registered owner of a motor vehicle is presumed to be the owner, and evidence was required to displace this presumption. He submitted that no evidence of a trust-holding by the 1st defendant had been adduced, and that “it would have been easy to register the 1st defendant as trustee for the plaintiff if that was the intention.”

Counsel contested the appropriateness of the plaintiff’s prayers, and especially prayer 2(b) which sought restraint orders against trespass by the defendants; for the 1st defendant had left the plaintiff’s premises some time back, in November, 2004. An injunction in these circumstances, counsel submitted, would serve no purpose.

Learned counsel submitted that although the momentum of this application partly arises from the issue of *insurance benefits already drawn by the 1st defendant*, in the aftermath of her husband’s death, there was no evidence that it is the plaintiff who had paid for that policy; and that in any event, the plaintiff had no interest under that policy.

The 1st defendant prayed for the dismissal of the application, and expressed concern that it tends to trivialise the death of her husband, whose demise had left her a widow at the tender age of only 26.

Learned counsel submitted that the basis advanced by the plaintiff in his prayers for injunction, had not met the terms of grant of injunctive relief, the core of which is stated in **Giella v. Cassman Brown** [1973] E.A. 358. **Mr. Mwangi** contended that no prima facie case had been established for the grant of interlocutory injunction. He relied on the English House of Lords decision in **Owners of cargo lately laden on board the vessel Siskina and Others v. Distas Compania Naviera SA [The Siskina]** [1977] 3 All E.R. 803. In the leading judgement in that case **Lord Diplock** had remarked (p.825):

“To come within the sub-paragraph [R.S.C. Ord. 11, r.1] the injunction sought in the action must be part of the substantive relief to which the plaintiff’s cause of action entitles him; and the thing that is sought to restrain the foreign defendant from doing in England must amount to an invasion of some legal or equitable right belonging to the plaintiff in this country and enforceable here by the final judgement for an injunction.

“In the instant case the cargo owners have no legal or equitable right or interest in the insurance moneys payable to the shipowners in respect of the loss of the Siskina which is enforceable here by a final judgement of the High Court. All that they have is a claim to monetary compensation arising from a cause of action against the shipowners which is not justiciable in the High Court without the shipowner’s consent – which they withhold. To argue that the claim to monetary compensation is justiciable in the High Court because if it were justiciable it would give rise to an ancillary right to a Mareva injunction restraining the shipowners doing something in England pending adjudication of the monetary claim, appears to me to involve the fallacy of *petitio principii* or, in the vernacular, an attempt to pull oneself up by one’s own bootstraps.”

The vital point in the foregoing passage is also made in *L.A. Sheridan’s Injunctions in General* (p.4):

“With very few exceptions [ancillary orders in furtherance of the judicial process; restraint of contempt of court; restraint of judicial proceedings; Mareva injunctions in support of foreign proceedings], an injunction is granted only to an applicant who shows that he has a cause of action against the person he wishes to have enjoined or, in the case of an application *quia timet*, that there would be a cause of action if the defendant were to do the act which the applicant seeks to have restrained. The cause of action required is usually one in respect of which the applicant could sue either for damages in private law or for breach of an equitable duty.”

From these authorities it will be pertinent to determine whether the plaintiff has any legal or equitable rights, or a basis for inferring the same which could be established in the main suit, as against both the 1st and 2nd defendant. Learned counsel submitted that even if there were legal rights of the plaintiff at risk, he would have to show that damages could not compensate him, for the same.

Mr. Mwangi made a response to the plaintiff’s attribution of dishonesty to the 1st defendant. He submitted that an injunction could not be granted on the basis of mere suspicion. From the evidence, the 1st defendant is a British citizen, who had a British passport in her maiden name, ***Biraj Brahmhatt***, before she married the late ***Arif Suleman*** on 20th August, 2000. Consequently, counsel submitted, the appearance of some documents under the name ***Biraj Brahmhatt*** was by no means indicative of dishonesty on the part of the 1st defendant.

D. SEEKING INTERLOCUTORY INJUNCTION WHERE PRIMA FACIE CASE NOT

EVIDENT: A FURTHER ANALYSIS

This ruling benefits from the principles set out in *The Siskina* [1977] 3 All E.R. 803; in the words of ***Lord Diplock*** in that case (p.825), **“the injunction sought in an action must be part of the substantive relief to which the plaintiff’s cause of action entitles him; and the [thing complained of] must amount to an invasion of some legal or equitable right belonging to the plaintiff...enforceable...by the final judgement for an injunction.”**

In my review of the evidence and the submissions of learned counsel, I have found that certain critical elements in the evidence cannot be resolved at this interlocutory stage and must await the trial itself; such matters include:

- (i) *when was the suit vehicle purchased (the plaintiff says it was in 1999, the defendant says it was in 2000)?*
- (ii) *who purchased the suit vehicle, and in particular, who paid for it?*
- (iii) *what was the intention as to the ownership and beneficial use of the suit vehicle?*
- (iv) *did the suit vehicle become part of the intestate estate of the title-holder, Arif Suleman, after he*

died?

(v) *had the deceased held title to the suit motor vehicle in trust, or was it his personal property?*

Only a determination of the foregoing questions will justly and finally dispose of the issues in contention. Since that object can only be achieved through full trial, it follows that the instant application is an unfortunate one, in so far as it seeks interlocutory equitable relief on factual foundations not capable of being ascertained at this stage. The application *lacks a firm grounding on fact*, and there is not, I am convinced, a *prima facie* position to support it. I have already observed and recorded thus:

“From the plaintiff’s affidavit and from learned counsel’s submissions, it is clear that the thrust behind the instant suit is distrust and suspicion, a feeling of [having been] hard-done-by.”

At this interlocutory stage, what is the Court’s perception on who purchased the suit vehicle? The Court can only see conflicting evidence, apart, of course, from the fact that it is the deceased who held the indicia of ownership, which element later passed on to the 1st defendant. The 1st defendant, *ex facie*, does not hold the vehicle’s registration book illegitimately. At this stage, what is the correct perception of the holding of the registration book in the name of the 1st defendant? It shows *prima facie ownership*.

In these circumstances it is not at all evident that there is a *prima facie* case which stands distinctly in favour of the plaintiff; and the *balance of convenience clearly favours the 1st defendant*. On these grounds, injunctive relief cannot be granted to the plaintiff, quite apart from the fact that distrust, suspicions and apprehensions by themselves, as is already remarked herein, are not in law a basis for granting such relief. It is to be noted that no basis has been shown for proceeding against the 2nd defendant. I am in agreement with counsel for the defendants that the application against him must be, and is hereby, dismissed with costs to him.

In the result, the plaintiff’s application by Notice of Motion dated 11th February, 2005 is dismissed with costs to the defendants.

It is also ordered that *the plaintiff shall set down his suit by plaint dated 11th February, 2005 for hearing within 30 days of the date hereof*, and a hearing date before any Judge shall be given on the basis of priority.

Orders accordingly.

DATED and DELIVERED at Nairobi this 23rd day of September, 2005.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Mwangi

For the Plaintiff/Applicant: Mr. Katwa instructed by M/s. Katwa & Co. Advocates

For the Defendants/Respondents: Mr. Mwangi, instructed by M/s. J.K. Mwangi & Co. Advocates.