REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

Civil Case 97 of 2003

FRED SIMIYU WANYONYI

**NICHOLAS BARASA WANAMBISI ……..……
PLAINTIFFS**

JAFRED WAMALWA KIMOKOTI

VS

**NZOIA SUGAR CO. LTD…….....……
DEFENDANT**

RULING

The plaintiffs were under the employment of the defendant holding Senior positions until they were summarily dismissed on 24th November2003. Each of the plaintiffs was served with a letter of summary dismissalshowing that they lost their jobs due to misconduct and culpable acts.

At the time of dismissal, each of the plaintiffs had outstanding loanson account of car loans advanced to them by the defendant to purchasemotor vehicles. The loans were liquidated by the plaintiffs by monthlydeductions from their salary as indicated in their pay slips. The 1st plaintiffhad an outstanding loan of Ksh. 220,000/= in respect of Motor vehicleregistration number KAR 596 H. The 2ndplaintiff's outstanding loan was asum of Ksh.325, 000/= in respect of Motor vehicle registration number KAD

542 Y and the 3rd plaintiff's outstanding loan was a sum of Ksh.408,332/50in respect of Motor vehicle registration number KAM 487 A.

On the 10th day of December 2003 the defendant served each of theplaintiffs with a letter showing the outstanding car loan in respect of theirrespective motor vehicles. However the letters contained the followingdemand:

"Following your exit on 24th November, 2003 from NzoiaSugar Company services you are hereby required to

surrender the Motor Vehicle registration number.....

to the company immediately. Failure to comply, the samewill be impounded at your own cost. Take this matterseriously and act urgently. "

This prompted the plaintiffs to institute an action by way of a plaintdated 22nd December 2003. The plaint was later amended on 26th January2004. The plaintiffs made the following prayers in the plaint:

(a) Terminal benefits in the sum of Ksh. 1,707,624/60 plus interest

(b) Pension

(c) Gratuity

(d) An order of injunction to restrain the defendant fromrepossessing Motor Vehicles registration numbers KAR 596 H,KAD 542 Y and KAM 487 A from the plaintiffs

(e) General damages for defamation and unlawful dismissal.

2

(f) Costs of the suit

(g) Fuel and gas or the equivalent in monetary terms for months ofMay and November 2003.

At the same time of filing the plaint the plaintiffs also filed a chambersummons the subject matter of this ruling pursuant to the provisions ofOrder XXXIX rules 1, 2 and 9 of the Civil Procedure rules. The summonscontains the grounds it is based. The same is supported by three supportingaffidavits sworn separately by each plaintiff.

The defendant opposed the application by filing a replying affidavitsworn by Benson Khwatenge dated 26th January 2004.

The first ground argued in favour of the summons is that theapplicants have a prima facie case with a probability of success. It is thesubmission of the plaintiffs that the decision by the defendant to summarilydismiss them was arrived at contrary to and in breach of the relevantregulations and procedures of the defendant's own binding HumanResources Policy manual and the rules and principles of Natural Justice.The plaintiffs aver that they were denied the right to know the accusationsmade against them, a right to be heard and a right of the aggrieved to appealagainst any adverse decision made against them. The applicants annexed totheir respective affidavits a copy of the rules of conduct and discipline. It

was the view of the plaintiffs that there are high chances that their actionwill succeed and that they are likely to receive an award which surpasses theoutstanding car loans. The first plaintiff put his known claim at a sum ofKsh.708,090/=. The second plaintiff quantified his claim at Ksh. 446,070/=and the third plaintiff's claim was stated to be a sum of Ksh.485,910/40. Itis stated that the amount specified or specifically pleaded by the plaintiffsdoes not include pension and gratuity for the years worked, which figure isyet to be established at the trial.

The plaintiffs also submitted that the defendant had no right torepossess the motor vehicles purchased through a loan without giving theman option to settle the outstanding loan as per the car loan scheme.

In opposing this ground the defendant urged this court to dischargethe ex parte orders granted to the plaintiffs because they failed to makematerial disclosure. It is the submission of the defendant that the

plaintiffsintentionally concealed the fact that there existed a car loan agreement whichgave the defendant a discretion to repossess the motor vehicles purchased bythe plaintiffs through the loans advanced by the defendant. It was furtheragitated that had this agreement been exhibited, this court could not havegranted the orders ex parte. The defendant exhibited a copy of theagreement attached to the affidavit of Benson Khwatenge as evidence of the

existence of the loan agreement. The defendant's advocate referred to thecase of UHURU HIGHWAY DEVELOPMENT LTD VS CENTRALBANK OF KENYA & 2 OTHERS C. APPL. No 140 of 1995 (U.R) in

which the court of appeal stated that a party who appears ex parte before acourt must make a full and frank disclosure of all material facts even whereit is against his claim. It was further stated that a man who is prepared todeceive a court into granting him an order ex parte cannot validly claim thathe has a meritorious case and would have been entitled to the order any way.If the case is meritorious, there can be no reason for concealing some part ofit from the court.

The defendant also stated that there is no nexus between the action forwrongful dismissal and the repossession of the applicant's motor vehicles. Itis the submission of the defendant that if the plaintiffs succeeded in theiraction against summary dismissal they would be paid damages.

It is further stated by the defendant that the plaintiffs knew the natureof the complaints raised against each of them and that the rules of conductand discipline annexed to the supporting affidavits of each of the plaintiffsdo not apply to decisions made by the board of directors. It was furtherstated that it is the plaintiffs who owe the defendant more money than whatis due to them. It was averred by the defendants that even if it was found out

that the defendant owed the plaintiffs money then the defendant is capablefinancially of settling the claim. It is the view of the defendant that theplaintiffs claim has no chance of success.

The plaintiff's second ground in support of the application is that theyare likely to suffer irreparable loss which cannot be quantified in terms ofdamages. The defendant is of the view that the plaintiffs have not shownthat they are likely to suffer irreparable loss. It was pointed out that non ofthe plaintiffs deponed that they would suffer irreparable damage save forcertificate of urgency which was signed by the plaintiffs advocate Mr. SalimMachio. The certificate stated that the plaintiffs are likely to sufferunjustified inconvenience, embarrassment and irreparable loss. It is averredthat the plaintiffs have not demonstrated the kind of loss they would sufferwhich will not be compensated by way of damages.

The final ground argued by the plaintiffs in support of the summons isthat they will be more inconvenienced that the defendant if the motorvehicles are repossessed and that no prejudice or injury will be suffered bythe defendant.

The defendant was of a different view. It is the submission of thedefendant that the motor vehicles are likely to be damaged by the plaintiffswhen it has no access to them. It was further averred that the motor vehicles

may be damaged due to unforeseen accidents and that the insurancecompany may not settle the claim arising out of such accidents hence theprinciple of inconvenience will tilt in favour of the defendant. The amountin respect of the car loan is said to keep on increasing due to the accruinginterest.

I have considered the rivaling submissions by learned counsels. Ihave also taken into account the material placed before me. One seriousallegation which need to be considered first is the fact that it is alleged thatthe plaintiffs did not make the fullest and frank material disclosure of thefact that there existed a car loan agreement. I am urged not to even considerthe merits of the summons on that account. The plaintiffs aver that theagreement in question is admitted but could not be exhibited in thesupporting affidavits because it was under lock and key of the defendants. Ihave perused and carefully examined the affidavits filed in support of theplaintiff's application

Paragraph 11 of each of the plaintiff's affidavit reads:

"That under the car loan scheme I have the option toretain possession of the said motor vehicle even ontermination of services, if I wished, provided I settle thebalance of the money owing to the Defendant. That Ihave opted to retain the motor vehicle. "

It is clear from this paragraph that plaintiffs did not conceal theexistence of the car loan agreement. Consequently I find no merit on theassertion by the defendant that there was material non-disclosure. In fact itis clear from the affidavits that the plaintiffs laid bare what was within theirpossession.

The defendant has also averred that it had a discretion under clause 5of the car loan the agreement to repossess the motor vehicles in question.Clause 5 of the car loan agreements provides:

"Should the employee, for whatever reason, cease to be anemployee of the company, the company shall reserve theright and discretion to retain the car and Logbook untilsuch time that the employee shall pay the total outstandingloan such inclusive of interest accrued. "

It is the submission of the defendant that it acted pursuant to clause 5of the car loan agreement to issue the notice to repossess the aforesaid motorvehicles. The plaintiffs are saying that the defendant acted capriciouslywithout giving them a chance to take the option of settling the outstandingloan which is not denied. I think what the plaintiffs are saying is that thedefendants do not have an absolute discretion in the matter. It is imperativeto refer to the demand notice issued dated 10th December 2003. In thisnotice the defendant is demanding from the plaintiffs to surrender the motor

vehicles. It is in my considered opinion that the discretion donated to thedefendant via clause 5 of the car loan agreement is not absolute. It has to bequalified. The defendant must demand payment of the outstanding loanbefore exercising the option to repossess the Motor vehicles. In this case thedefendant took the option to demand repossession without giving theplaintiffs a right of hearing. The letter of dismissal cannot be said to havegiven the plaintiffs an option to settle the outstanding loan. The motorvehicles cannot be strictly be categorized as company assets as alluded bythe defendant's advocate. It is a collateral where the defendant has a lienover them. The defendant company can only realize the security afterdemanding the outstanding loan. I am of the opinion that the plaintiffs haveestablished that the defendant acted without giving the plaintiffs a right ofhearing and the option to elect to settle the outstanding debt. I think to thisextent the plaintiffs have shown a prima facie case with a probability ofsuccess.

It has also been stated that there is no nexus between the claim onwrongful dismissal and the claim over repossession of the motor vehicles.Of course the plaintiffs were advanced car loans as employees of thedefendant and that the loan would be liquidated by monthly installmentsdeducted from the employee's salary as evidenced by the copies of the

Pay slips annexed to the affidavits of the plaintiff's. It is clear that there is anexus between the plaintiff's claim over employment and the motorvehicles.

The plaintiffs have stated that they were dismissed without a hearingon grounds which do not warrant an employee to be summarily dismissed.It is also stated that the plaintiffs' dismissals were ultra-vires the defendant'srules of conduct and discipline. It has also been shown that if the plaintiffsclaim succeeds, the award is likely to surpass the outstanding loan. Thedefendant is of the view that if the plaintiffs' claim succeeds the amountpayable will be far much below the outstanding car loan.

It should be noted that the defendant has not denied that the plaintiffswere not given a right of hearing. It is also admitted that the plaintiffs weresummarily dismissed and no provision of the law of contract of employmentwas cited to justify. There is a possibility that the plaintiffs claim maysucceed in the light of the submissions presented to me by both sides. I haveformed the opinion that the plaintiffs have shown

that they have a primafacie case with a probability of success. This satisfies the first principleenunciated in the notorious case of GIELLA VS CASSMAN BROWN& CO. LTD (1973) E.A. P. 358

In this case the principles of injunction were stated as follows:

(i) That an applicant must show a prima facie case with aprobability of success.

(ii) That the applicant must also show that the applicant might

otherwise suffer irreparable loss or injury unless an injunctionis granted.

(iii) That where the court is in doubt it will decide the applicationon the balance of convenience.

The fourth principle has also been developed by judicial decision overa period of time. The principle is that the conduct of the parties must beconsidered. The justification of this principle is that, the remedy beingequitable, it is necessary that he who comes to equity must observe the rulesor principles of equity.

The protagonists have submitted at length over whether the applicantswould suffer irreparable loss. The defendant has of course stated that theapplicants have not shown the nature of loss that would befall them if themotor vehicles are repossessed. I have considered these submissions andhave come to the conclusion that the loss which is likely to be sufferedcannot be quantified on the part of the plaintiffs. The defendant's interest isobviously defined. Its interest is stated and is certainable to be theoutstanding loan plus the accruing interest. The loan repayment is yet to be

demanded.. The damage or loss which will be occasioned to the plaintiffswill of course include the personal ego of owning a car, embarrassment andmental anguish. These are the losses or injuries which cannot be quantified.I therefore find that the applicants have satisfied the second principle towarrant this court to issue an order of injunction.

I will not consider the 3 principle because I am not in doubt.

The conduct of the parties in this matter should be considered. I havealready stated that the applicants have laid bare the facts leading to theinstitution of this suit. They were frank and did not deny the court theinformation that form the basis of the suit. I cannot at this stage also faultthe conduct of the defendant, perhaps its conduct will be fully known aftertaking evidence at the substantive hearing of the main suit.

The upshot therefore is that the summons is allowed. That is to saythat the defendant, its agents or servants are restrained from attaching and orrepossessing Motor Vehicles registration numbers KAR 596 H, KAD 542 Yand KAM 487 A pending the hearing and determination of this suit.

Costs of this application is awarded to the plaintiffs.

DATED AND DELIVERED THIS 8th DAY OF March 2004

J. K. SERGON

JUDGE