



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL SUIT 16 OF 2001[1]

ELEONORA COZZI.....PLAINTIFF

=V E R S U S=

ALI HUSSEIN MOTORS.....DEFENDANT

R U L I N G

The applicant brought this application under Order 39 Rules 1, 2 & 3 of the Civil Procedure Rules and S.3A of the Civil Procedure Act seeking for both Mandatory and Prohibitory injunctions against the Defendants.

Mandatory injunction to order the Defendant to forthwith release the Plaintiff's Log Book relating to motor vehicle registration number KAM 100D, a Mitsubishi Pajero Intercooler and an Ownership Transfer Form duly signed by the Defendants in favour of the Plaintiff to enable her register ownership of the said motor vehicle in her name or to her order. Prohibitory Injunction to restrain the Respondent from repossessing, collecting or in any other way interfering with Applicant's direct possession of the said motor vehicle until the suit is heard and determined. The supporting affidavit was sworn by the Plaintiff/Applicant while the Replying Affidavit was sworn by the 2nd Defendant.

The facts as I understand them are that the Plaintiff who wanted to purchase the abovementioned motor vehicle at the price of Kshs.1,750,000/- from the defendants agreed with them to sell to them or to their company, Al Hussein Motor Ltd., the 2nd Defendant, the Plaintiff's motor vehicle KAM 585M, a Toyota Turf, Pick-Up. It is not clear at what price the latter was to be valued at, and there is some kind of dispute between the parties over this.

The Plaintiff's version is that the agreed price was Kshs.1,250,000/- while the defendants position is that the price was either Kshs.1,000,000/- or 900,000/-. Whichever of the two was the correct one, one fact is not really in dispute; that the deposit towards the purchase price if the Mitsubishi Pajero would come from the proceeds of sale of the Plaintiff's said Toyota Pick-Up Registration Number KAM 585M. The Plaintiff alleged that the two parties in the said sale and purchase of the vehicles, entered into written agreements of sale in respect of either vehicle, exhibited as EC(a) and EC(b). She also claimed that an oral agreement was entered in addition.

She further argued that the effect of the agreements of sale aforesaid was that she would be entitled to a refund of Kshs.250,000/- after the purchasers of his vehicle who also would be her sale agents in respect of the vehicle KAM 585M will have kept Kshs.100,000/- possibly as sale commission. On the other hand the Defendants argued that they received a sum of Kshs.900,000/- from the Plaintiff as deposit and a further total sum of Kshs.750,000/- by four cash installments, three of Kshs.200,000/- and 50,000/- as the

fourth installment. Thus, they claimed, they received a total sum of Kshs.1,650,000/- which is less by Kshs.100,000/- of the agreed purchase price of Kshs.1,750,000/- aforementioned. Hence the reason why they refused to part with the Log Book and Ownership Transfer Forms herein demanded by the Plaintiff.

I am conscious of the fact that the material before me from both sides is merely contained in affidavits. It has not been tested in cross-examination which will be done during the full hearing of the case. I have examined the contents of the said affidavits from both sides. I accept on a prima facie basis that the Plaintiff released his vehicle Registration Number KAM 585M to the Defendants on the ground that the latter would sell it and account the proceeds to the Plaintiff. It is probable from the material or the record that the price agreed between them would be Kshs.1,250,000/- out of which 100,000/- would be kept by them as the sale commission. The balance would be turned over to the Plaintiff, less the sum required as deposit for the purchase of the vehicle they were selling to the Plaintiff, i.e. KAM 100D, Pajero. Under the said circumstances, the Defendants would refund to the Plaintiff, a sum of Kshs.250,000/-. It is interesting to note that throughout the arguments before me, the defendants did not want to admit that the sale of the two motor vehicles mentioned hereinabove was in a single transaction. Indeed, they insisted that the two were different transactions involving two sets of different parties. They were not even prepared to admit that the deposit in relation to the purchase price of KAM 100D by the Plaintiff came from the sale or valuation of KAM 585M. And even assuming that the sum of Kshs.1,000,000/- received by the Defendants from the Plaintiff as confirmed in the sale agreement Exhibit "EC(b)", was not related to the sale of motor vehicle KAM 585M and that there was no other agreement, oral or otherwise as the Defendants wanted me to believe, the final result would still be that the Defendants had by the time they received a demand to release the Log Book and the Ownership Transfer Form, have received a total sum of Kshs.1,750,000/- which was the full purchase price of the motor vehicle Registration Number KAM 100D, Mitsubishi Pajero.

Having therefore accepted this position, and subject to the facts being proved or disproved during the full hearing of this case, I make the finding that the Defendant had received the full purchase price of the motor vehicle in question. They therefore had no lawful excuse to detain the Log Book and the Ownership Transfer Forms. It is in evidence that the Plaintiff in writing by herself and through her lawyers demanded for the said documents to no avail. Instead the Defendants used the Police in Malindi to harass and threaten her to release the motor vehicle in question to the Defendants. The threats as admitted by the Defendants during their arguments before this court, have never been withdrawn. The Plaintiff without the Log Book in question cannot lawfully obtain a road license or an insurance cover since the authorities who issue them demand that the original log book must accompany the applications for them. A person is guilty of conversion if he deals with goods in a manner inconsistent with the rights of the true owner intending to negative the rights of the true owner or to assert a right inconsistent with that right. Whether the act arises out of negligence or is intentional does not matter. On a prima facie basis, therefore, I find that Defendants' conduct amounted to conversion. Their refusal to release the ownership documents when they knew that the property in them had in law and equity passed to the Plaintiff and their harassment of the Plaintiff by involving the Police in a purely civil matter as well as using unlawful threats against her which remain in place to date amount to a conduct in total disregard of the law. I agree that the detention of the Log Book and the Ownership Transfer Form effectively amount to detention of the motor vehicle in question. This is so because a motor vehicle without insurance and road license is of no use to the Plaintiff.

The final question now to answer is whether the Plaintiff is or is not entitled to the two kinds of injunctions prayed for considering the facts as I see them. There is now no doubt that under Order 39 rules 1, 2 and 3 an Applicant who fulfils the relevant necessary requirements will be entitled to obtain the Prohibitive injunction. I also appreciate that there are no exactly similar cases and that at the end of the day decisions will be made separately in accordance with the circumstances of each case. The discretion of this court is clearly wide. It is however now settled that an Applicant has to satisfy this court that she has a prima facie case with a probability of success; that she is likely to suffer an irreparable damage or loss or harm that cannot be easily compensated in damages; and that if the court is in doubt, it may decide the matter in favour of the side to where the balance of convenience tilts. Considering the facts of this case I hold that the Plaintiff has satisfied me that she has a prima facie case. I also find and hold that she will and has in fact been suffering irreparable harm due to the conduct of the Defendants. She cannot use

her motor vehicle without a licence which he cannot obtain due to the wrongful conduct of the Defendants. Indeed in respect of this remedy, the learned counsel for the Defendants admitted during his submissions before me that the Plaintiff is entitled to the prohibitive injunction restraining the defendants from continuing to harass the Plaintiff in the manner they have done before.

The issue of the mandatory injunction is a little different. It is now accepted that it cannot be issued under Order 39 of the Civil Procedure Rules because it is not provided for thereunder. It has however been granted in many cases to deal with cases under which the Respondent has flagrantly disobeyed the law of the land and the court decides that it must set matters right forthwith. In the case of Belle Maison Limited –vs- Yaya Towers Ltd., Nairobi HCCC. NO.2225 OF 1992 Bosire, J., as he then was, granted it.

Therein he thoroughly examined the circumstances under which the court has and will grant the remedy. I concur and adopt his reasoning therein. As I understand it, the jurisdiction must be exercised only in special circumstances which obviously will depend on the circumstances of each case. It is available not under Order 39 of Civil Procedure Rules or under any Order of the same but under the inherent power of this court to make orders as may be necessary for the ends of justice or to prevent abuse of the process of this court as provided under S.3A of the Civil Procedure Act.

Applying the principle to the facts of this case, I find that the Defendants unlawfully converted the Log Book and Ownership Transfer Forms to their use against the rights of the Plaintiff who had fully paid the purchase price of the motor vehicle KAM 100D Mitsubishi Pajero. They took the law into their own hands when they began threatening the Plaintiff not only by themselves but through the Police who had nothing to do with a matter purely of a civil nature. They have never, up-to-date withdrawn the threats to have the Plaintiff arrested by the Police in order to force her to release the motor vehicle in question to the Defendants despite the fact that the motor vehicle rightly belongs to her. I find this a suitable case to invoke a Mandatory injunction to aid the law and aid the Plaintiff under the law to obtain what rightly belongs to her but what is wrongfully being withheld by the Defendants.

The Applicant/Plaintiff had obeyed this court's interim order to deposit in this court the sum of Kshs.100,000/-. The same shall remain in court until the court hears and finally determines this case on tested evidence. The Applicant/Plaintiff's application must therefore succeed and the following are the final orders.

ORDERS:

1. That a Mandatory Injunction shall forthwith issue against the Defendants and their agents as prayed.
2. That a Prohibitive injunction shall forthwith issue against the Defendants and their agents as prayed.
3. Costs of this application shall be to the Applicant/Plaintiff.

Dated and delivered at Mombasa this 21st day of March, .2002.

D. A. ONYANCHA

J U D G E

Delivered in the presence of:-

Mr.Ouma – for Ole Kina -for the Applicant/Plaintiff

Mr. Gekonde - for Khamala -for the Respondent/Defendant