REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NUMBER 13 OF 2019

M.ORIENTAL BANK LIMITED................................1ST APPELLANT

FRANCIS GITAU T/A FEMFA AUCTIONEERS......2ND APPELLANT

VERSUS

SAMUEL NYINGI MATIMU.................................1ST RESPONDENT

KISHAN SUPPLIERS LIMITED..........................2ND RESPONDENT

(Being an appeal from the Ruling and Order of Hon. B. Mararo, PM dated

28th November 2018 at the Chief Magistrates Court at Nakuru in Civil Case No. 451 of 2018)

RULING

1. The Respondent filed an Application dated 10th May 2018 and which was filed in court on 17th February 2020,in **Chief Magistrates Court at Nakuru in Civil Case No. 451 of 2018** *(Samuel Nyingi Matimu Vs Oriental Bank Limited, Francis Gitau T/A Femfa Auctioneers & Kishan Suppliers Limited)* brought under **Order 40 Rule 1 & Order 51 Rule 1 of the Civil Procedure Rules and section 3A of the Civil Procedure Act** sought the following orders;

i) THAT this Application be certified as urgent and service thereof be dispensed with in the first instance.

ii) THAT pending the hearing and determination of this Application the Honourable Court be pleased to issue a Mandatory Injunction compelling the defendants both jointly and severally to release to the 1st respondent Motor Vehicle Registration Number KBU 530 U being unlawfully held by the 2nd Defendant herein under the instructions of the 2nd respondent.

iii) THAT pending the hearing and determination of this suit the Honourable Court be pleased to issue a mandatory injunction compelling the defendant both jointly and severally to release to the 1st respondent Motor Vehicle Registration Number KBU 530 U being unlawfully held by the 2nd defendant under the instructions of the 2nd respondent.

iv) THAT pending the hearing and determination of this suit the defendants both jointly and severally either by themselves agents, employees and servants be restrained from advertising, selling, disposing off and /or in any way interfering with the 1st respondent's Motor Vehicle Registration Number KBU 530 U.

v) *THAT the costs of this Application be provided for*.

2. The application was premised on grounds that the 1st respondent was the registered owner of the Motor Vehicle Registration Number KBU 530 U having purchased the same on 9th March 2016 at a consideration of Kshs. 800,000/= from the 2nd respondent.

3. That on or around 7th May 2018 the 2nd applicant on the instructions of the 1st applicant illegally repossessed the suit Motor Vehicle without any colour of right, any valid court order purporting that the same had been offered as collateral by the 3rd defendant to secure a loan which was allegedly in arrears to sum of Kshs. 1,600,000/=

4. That the applicants' acts were causing irreparable losses to the 1st respondent as the vehicle was the only tool of business for the 1st respondent and he has a prima facie case with high chances of success against the applicants.

5. The application was opposed by the 2nd respondent through its director Tejas Patel who swore a Replying affidavit on 19th June 2018; that the 2nd Respondent sold the suit Motor Vehicle to the 1st respondent vide Sale Agreement dated 9th March 2016 at a consideration of Kshs. 800,000/=and the 1st respondent paid the 2nd respondent Kshs. 400,000/= and was yet to clear the outstanding balance as the cheques issued by the 1st respondent towards settling the balance bounced due to insufficient funds in his account.

6. That the 1st respondent was aware that the motor vehicle was charged to the 1st applicant as security for banking facilities advanced by the 2nd respondent and it was due to the 1st respondent failure to settle the arrears that necessitated the 1st appellant to commence the process of realizing its security by attaching the motor vehicle. That the original registration of the motor vehicle was in possession of the 1st appellant and was never released to the 1st respondent and therefore the one presented to the Court by the 1st respondent was a forgery. This was supported by the fact that the 1st respondent attached invoices for the payment for the duplicate registration hence the inference that the process of issuance of the duplicate log book to the 1st respondent was marred with irregularities chief of which was the failure to disclose that the motor vehicle was charged to the 1st appellant as security for repayment of banking facilities advanced to the 3rd defendant

7. The application was also opposed by the 1st appellant through its Bank Manager George Karanja, who swore his Replying Affidavit on 14th June 2018 to the effect that the 3rd defendant/appellant had been granted loan facilities, and was to execute a chattels mortgage over Motor Vehicle Registration number KBU 530 U among other vehicles and the 3rd respondent deposited the original registration certificate for the said Motor Vehicle with a transfer of ownership of a Motor Vehicle with the bank.

8. He contended that the bank instructed the firm of Nyaundi Tuiyot & Co. Advocates to prepare the chattels mortgage which they did but the 2nd respondent refused to execute, hence the registration process was not completed. The 3rd respondent defaulted in servicing loan despite various demand by the bank. He annexed copies of demand letters.

9. The bank instructed the 2nd appellant to repossess the motor vehicle and were surprised to note the 1st respondent possessed another certificate of registration yet the bank was in possession of the original. The bank reported the matter as a case of fraud at Eldoret Police Station vide OB No.99/29/5/2018 The 1st respondent did not file a Further/Supplementary Affidavit. The learned trial magistrate in the Ruling dated 28th November 2018 granted orders that; *Pending the hearing and determination of the suit a mandatory injunction be and is hereby issued compelling the Defendants (appellants and 2nd respondent) both jointly and severally to release to the Plaintiff (1st respondent) the motor vehicle registration number KBU 530 U being held by the 2nd defendant (2nd appellant) under the instructions of the 1st appellant* .

10. The court awarded the costs of the application to the 1st respondent and to be borne by the 2nd respondent.

11. The order was grounded on the reason that the 2nd respondent had not executed a chattel mortgage which would have enabled the 1st appellant to exercise its right to repossession without any reference to anyone and that in the absence of the chattel mortgage, it required a court order to exercise its right to repossession.

12. In view of the above the subordinate court found the repossession to be irregular and illegal.

13. The Appellants herein were dissatisfied with the above Ruling and appealed to this court against the entire Ruling on the following grounds;

> *(i) THAT the learned trial Magistrate erred in law and in fact by granting a mandatory injunction at the interlocutory stage against the weight of the evidence placed before him.*
>
> *(ii) THAT the learned trial Magistrate reed in law and in fact in failing to consider the submissions filed on behalf of the Appellants and thus arrived at the wrong conclusion that the respondent had satisfied the conditions for the grant of a mandatory injunction at the interlocutory stage.*
>
> *(iii) THAT the learned trial magistrate erred in law and in fact in holding that the 1st Respondent purchased the subject Motor Vehicle KBU 530 U from the 2nd Appellant without information that the said car had been pledged to the 1st Appellant as security for a loan.*
>
> *(iv) THAT the learned trial magistrate erred in law and in fact in not finding that the 1st Respondent was a beneficiary of the fraudulent acts of the 2nd Respondent.*

14. The Appellants prayed that the Appeal be allowed with costs and the Ruling and order dated 28th November 2018 be set aside and be substituted with an order dismissing the 1st respondent's application dated 10th May 2018.

15. The Appellants filed their submissions on 21st October 2020.

16. With respect to ground 1 and 2 of the Appeal, the appellant submitted that it is trite that the grant of a mandatory injunction determines the issues in a dispute in a summary manner, hence courts should be careful in granting such orders because if it turns out at the full hearing that such order was undeserving at the interlocutory stage, the party against whom the order was made would have been greatly prejudiced.

17. The appellants relied on the following cases.

1. **Joseph Kithuku Kitonga vs Dena Kalume & another (2018) eKLR** where the Court cited with approval the holding of ***Megarry J*** in **Shepherd Homes Ltd vs Sandahm (1971) 1 Ch. 34,** where he stated that:

"It is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effects than a prohibitory injunction. At the trial of the action, the court will, of course grant such injunctions as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation.

On motion, as contrasted with the trial, the court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case the court must, inter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction."

2. **Kamau Mucuha v Ripples Ltd [1993] eKLR** the Court of Appeal cited with approval ***Mustil, L J*** in **Locabaill International Finance Ltd. v. Agroexport (1986) 1 ALL E.R. 901,** where he held;

The matter before the court is not only an application for a mandatory injunction, but is an application for a mandatory Injunction which, if granted, would amount to the grant of a major part of the relief claimed in the action. Such an application should be approached with caution and the relief granted only in a clear case

3. **Galexon Kenya Limited Kenya Limited vs Centre for Youth Linkages and Empowerment Programmes & 2 others (2018) KLR** the High Court cited with approval **Bharat Petroleum Corp Ltd vs Haro Chand Sachdeva, AIR 2003**

4. **Nandan Pictures Ltd. V Art Pictures Ltd & Others, AIR 1956, CAL 428** the High Court of Calcutta *(Chakravartti, C.J.)*

5. **Kenya Breweries Limited & another vs Washington 0. Okeyo [2002] eKLR** where it was held that;

> ***A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the 1st respondent.***

6. **Nguruman Limited vs Jan Bonde Nielsen & 2 others (2014) eKLR** in which the court stated the principles upon which injunctions can be granted, in the following **terms:**

> ***"In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;***
>
> ***(a) Establish his case only at a prima facie level,***
>
> ***(b) Demonstrate irreparable injury if a temporary injunction is not granted, and***
>
> ***(c) Ally any doubts as to (b) by showing that the balance of convenience is in his favour.***
>
> ***These are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct, and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd vs Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law are an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to*** injunction *d*irectly without crossing the **other *man* b**etween."

18. The Appellants submitted that applying the tests laid in the above cases it was clear that the facts as put forth by the 1st Respondent did not pass the tests, no prima facie case had been established and the trial court ought to have dismissed his application.

In addition, the Appellants submitted that manner in which the 1st Respondent obtained the duplicate Registration Certificate was suspect and even if he had established a prima facie case, this was a case in which damages would have been an appropriate remedy; that the failure of the 2nd respondent to execute a chattel mortgage did not deprive the 1st appellant its right to repossess the motor vehicle in case of default because the offer letter expressly stated that the motor vehicle was to be offered as security and the 2nd respondent was to sign a chattels mortgage, hence the letter of offer operated as a contract between the 1st appellant and the 2nd respondent. In the event of default by the 2nd respondent in servicing the loan then the 1st appellant was within its rights to repossess the motor vehicle. They relied on **Meshack Mariera Ongeri vs Credit Bank Limited (2018] KLR** where the court held as follows;

"The provisions I have set out show that the CTA is intended to protect the lender from third party claims. *In* ***Geoffrey Njenga vs Godfrey Karuri and Another NBI ML HCCC No, 795 of 1999 [2000] EKLR, Mbaluto J.,*** considered such an argument and dismissed it in the following terms:

> ***"The next issue that has to be determined in this matter relates to the validity of the Chattels Transfer Instrument in respect of motor vehicle registration number KAC 596R executed by the 1st respondent in favour of the 2nd defendant. It is common ground that the instrument was not registered; neither was there a proper affidavit in Form 1 in the First Schedule to the Chattels Transfer Act. Mr. Mbigi claims that the effect of non-registration is to render the instrument ineffectual. With due respect, I do not agree with that contention. Section 13 of the Chattels Transfer Act provides that an unregistered instrument shall be deemed fraudulent and voidable as against certain persons who are specified in the section. Those persons do not include the 2nd defendant. It is therefore plain from the wording of the section that failure to register instrument does not in any way affect the rights and obligations under the instrument of the grantor and grantee as between themselves.***
>
> ***The appellant is not one of the parties contemplated under section 13 aforesaid as failure to register the chattel mortgage instrument remains a contract inter-parties (see Walsh v Lonsdale (1882) 21 Ch D 9. Clarke vs Sondhi (1963) EA 107 and Meralli vs Parker, [1956] 29 KLR 26). In this case, the appellant readily admitted that he was indebted, and he offered the motor vehicle as security for the loan, the respondent was within its rights to repossess and sell the vehicle to recover the debt."***

19. With regard to ground 3 and 4 of the Memorandum of Appeal, the appellants argued that the 2nd respondent could not have transferred title of the motor vehicle to the 1st respondent because it did not have title. Citing the principle of ne*mo dat quod non habet*, they relied on;

1. Katana Kalume & another vs Municipal Council of Mombasa & another (2019) eKLR the court cited with approval the holding in **Bishopsgate Motor Finance Corporation Ltd vs Transport Brakes Ltd (1949) 1 KB 322, at pp. 336-337** where it was held as follows:

> ***"In the development of our law, two principles have striven for masterly. The first is for the protection of property; no one can give a better title than he himself possesses. The second is for the protection of commercial transactions: the person who takes in good faith and for value without notice should get a good title. The first principle has held sway for a long time, but it has been modified by the common law itself and by statute so as to meet the needs of our own times."***

2. Republic vs The Registrar Of Titles, Mombasa & 2 Others ex parte Emfil Limited (2012) eKLR the Court defined the law principle as follows:

> ***"Moreover, the private law principle of nemo dat quod non habet (see Brown's Legal Maxims, (1939) 10th at p. 546) is only a general principle that where goods are sold by a person who is not the owner and who does not sell under the authority of the owner or with the consent of the owner, the buyer acquires no better title to the goods than the seller and it has important exceptions including sale by apparent owner of the goods and usage of the market and the buyer acquires good title if he buys in a market overt, in good faith and without notice of defect or want of title of the part of the seller."***

3. Daniel Kiprugut Maiywa vs Rebecca Chepkurgat Maina (2019) eKLR the Honourable Court pronounced itself as follows:

> ***"The nemo dat principle means one cannot give what he does not have. This principle is intended to protect the title of the true owner. The rationale behind this principle is that whoever owns the legal title to property holds the title thereto until he or she decides to transfer it to someone else. Accordingly, an unauthorized transfer of the title by any person other than the owner generally has no legal effect, which means the owner continues to hold the title to the property while the person who received the invalid title owns nothing. However, the law provides some exceptions to this rule in the following certain circumstances; For example where a person buys the property in good faith believing that the person who sold it to him was the owner or authorized agent of the owner; where the property is sold by a mercantile agent who is in possession of the goods or documents of title; sale by a joint owner who sells the property with the permission of the co-owner or sale by a person in possession of goods or property under a voidable contract. This principle was applied in the case of Haul Mart Kenya limited vs Tata Africa Kenya limited (2017) eKLR and Katana Kalume vs Municipal Council of Mombasa (2019) eKLR."***

20. That the 2nd respondent passed the title of the motor vehicle to the 1st appellant upon signing the blank transfer forms. This would enable the 1st appellant to easily transfer the vehicle to the new owner in case the vehicle was sold because of default in servicing the loan.

21. The appellants argued that 1st Respondent did not controvert the evidence tendered by the 2nd Respondent that the 1st Respondent had notice that the original Registration Certificate of the subject motor vehicle was offered to the 1st Appellant as security for credit facilities advanced to the 2nd Respondent. Hence the trial court erred in ignoring that uncontroverted evidence. On this the appellants relied on;

Republic v Chief of General Staff & another (2017) eKLR where the Court of Appeal explained the effect of failure to controvert issues of fact contained in a replying affidavit and as follows;

> *"...* ***failure to file a further affidavit to rebut the respondents' averments in the replying affidavit together with the annexures thereto left the respondents assertions ... unshaken"***

22. The Appellants also contended that the 1st respondent was not an innocent purchaser for value which would have exempted him from the *nemo dat quod non habet* rule.

23. The Court of Appeal in **Weston Gitonga & 10 others vs Peter Rugu Gikanga & Another** **[2017] eKLR** adopted the definition "b*ona fid*e purchaser" as given by the **Black's law Dictionary 8th Edition** as:

> ***"One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims."***

24. The 1st respondent having failed to controvert the averments by the 2nd Respondent that he was made aware that the Registration Certificate was held by the 1st Appellant as security either by filing a reply to the Defence filed by the 2nd Respondent or a Supplementary Affidavit left those averments unshaken. Further he did not explain how he obtained a duplicate Registration Certificate for subject motor vehicle when the original Registration Certificate was in the possession of the 1st Appellant.

25. To benefit from this exception the 1st respondent would have to fit in the holding in **Lawrence P. Mukiri vs Attorney General & 4 Other** **(2013) eKLR** where the court cited with approval the holding of the Court of Appeal of Uganda in **Katende vs Haridar and Company Limited** and held as a follows:

> ***"... A bona fide purchase for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchase to successfully rely on the bona fide doctrine, he must prove the following:***
>
> ***a) He holds a certificate of Title;***
>
> ***b) He purchased the Property in good faith;***
>
> ***c) He had no knowledge of the fraud;***
>
> ***d) The vendors had apparent valid title;***
>
> ***e) He purchased without notice of any fraud;***
>
> ***f) He was not party to any fraud.***
>
> ***A bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner".***

26. It was the Appellants' submissions that the 1st Respondent approached the court with unclean hands and its inequitable for him to pray for possession of the subject motor vehicle when he knew at the time of purchase that the 1st Appellant was holding title to subject Motor Vehicle as security for credit facilities advanced to the 2nd Respondent.

27. The appellants further contended that it was unequitable for the 1st Respondent to be granted possession of the vehicle yet he had not cleared the balance of the purchase price and was being allowed to benefit from the fraudulent transaction in which he had participated.

28. They relied on the cases of;

1. Francis Munyoki Kilonzo & Another vs Vincent Mutua Mutiso **(2013) eKLR** where the court held as follows:

> ***"The maxim of equity on the principle of equity is expressed as follows;***
>
> ***"No one is entitled to the aid of a court of equity when that deed has become necessary through his or her own fault...a court of equity shall not assist a person in extricating himself or herself from the circumstances that he or she has created..."***

2. Anne Mumbi Hinga v Gaitho Oil Limited (2019) eKLR the court stated as follows:

> ***"Based on my evaluation of the evidence presented above, I wish to rely on the doctrine of equity demands that he who comes to equity must come with clean hands. From the 1st respondent's actions and averments, I find that her conduct towards the transaction is contradictory as she does not have clean hands to cry foul."***

29. The appellants prayed that the Appeal be allowed.

30. The 1st respondent's counsel said they had filed submissions but none were on the record at the time writing this ruling.

Analysis & Determination

The issue for determination is whether the trial court erred in a granting mandatory injunction at an interlocutory stage

31. The principles for grant of ***an order for interlocutory injunction were set out in*** **Giella vs Cassman Brown** **(1973) EA 358** and

reiterated in the case of **Nguruman Limited vs Jan Bonde Nielsen & 2 others** **CA No.77 of 2012 (2014) eKLR**

a. **For interlocutory mandatory injunction** the Court of Appeal in **Kenya Breweries Ltd & Another vs Washington O. Okeya [2002] eKLR**, stated;

> ***"A mandatory injunction ought not to be granted on an interlocutory application in the absence or special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the 1st respondent. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction and in Nation Media Group & 2 Others vs John Harun Mwau [2014] eKLR,*** *stated;*

> ***"It is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances… A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrate as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases."***

32. Was this the clearest of cases to warrant he order of mandatory injunction? Did the 1st respondent demonstrate any special or exceptional circumstances to warrant the orders sought?

33. The learned trial magistrate's position that the 1st respondent was an innocent purchaser for value, and had title to the motor vehicle, that the 2nd respondent had acted fraudulently in selling the motor vehicle while it was security for its loan with the 1st appellant and that the fact that the Chattels Mortgage documents had not been signed, prohibited the 1st appellant from repossessing the motor vehicle. It was also his position that the allegations of fraud against the 1st respondent were best dealt with by the police and that the 1st appellant would have to seek alternative means to recover the loan. He laid the blame for this case on the 2nd respondent.

34. From the trial court's decision it is clear it was encumbered by the various issues that emerged for determination in the pending suit: whether the 1st respondent was an innocent purchaser for value without notice; whether the 1st respondent had paid the full purchase of the motor vehicle to the 2nd respondent; whether the original title for the motor vehicle was deposited with the 1st appellant; whether the 1st respondent's title was obtained by fraud; whether there was a contract between the 1st appellant and the 2nd respondent where the motor vehicle was mortgaged for a loan in favour of the 1st appellant, what was the effect of not signing the chattels mortgage .

35. It was also clear that the 1st respondent had not controverted the 1st appellant's and 2nd respondent's evidence on these facts and therefore they were unshaken.

36. With all these issues the trial still arrived at the finding that the 1st respondent was the registered owner of the motor vehicle and therefor deserved mandatory order sought. Clearly the title was subject of a dispute having been challenged by the 1st appellant and the 2nd respondent. The Court of Appeal in -***Munyu Maina..Vs..Hiram Gathiha Maina, Civil Appeal No.239 of 2009,*** dealt with this issue thus;

> ***"We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register."***

Further in the case of **Daudi Kiptugen *vs* Commissioner of Lands & 4 Others [2015] eKLR** the Court held that:

> ***"…the acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through a proper process, the title itself cannot be a good title. If this were not the position then all one would need to do is to manufacture a Lease or a Certificate of Title at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein****."*

37. From the above authorities it is evident that had the learned trial magistrate applied his mind to the prima facie evidence on the issue of that the title to the motor vehicle, he would have found that the 1st respondent had not discharged this burden of proof at the interlocutory stage as to how he had acquired the title to the motor vehicle, This is an issue that could only have been determined at the hearing of the main suit and whose outcome could go any way depending on the evidence. This was especially so because he had not controverted the evidence that he was not an innocent purchaser for value See also **Katende v. Haridar & Company Limited [2008] 2 E.A.173 (supra), and Black's law Dictionary 8th Edition *(bona fide purchaser)***

38. It is not in dispute that the sale agreement between the respondents for the sale of the said motor vehicle did not speak about the encumbrance. However that is the mischief that is alleged by the 1st appellant. That despite the handing over the original log book to the 1st appellant the 2nd respondent refused to sign the Chattel's mortgage. The 2nd respondent also admitted to having delivered the original title to the 1st appellant. Hence the contention that the 1st respondent was not put in possession of the title documents was proof that he was aware of the mortgaged position of the motor vehicle.

39. Mandatory injunction is an equitable remedy. Equity demands that ***"he who comes to equity must come with clean hands".*** The 1st

respondent deponed that he fully paid the purchase price for the said motor vehicle, that he had a clean title but did not discharge his burden. In addition he did not controvert the fact that he bought the motor vehicle knowing it was charged to the 1st appellant, and worse still issued bouncing cheques. These are issues that were not settled during the hearing of the application before the learned trial magistrate.

40. **In Caliph Properties Limited vs Barbel Sharma & Another [2015] eKLR,** the Court stated:

> ***"Secondly, the injunction sought is an equitable remedy. He that comes to equity must come with clean hands and must also do equity. The conduct of the 1st respondent in this case betrays him. It does not endear him to equitable remedies. … He who comes to equity must fulfill all or substantially all his outstanding obligations before insisting on his rights. The 1st respondent has not done that. Consequently he has not done equity."***

41. From the foregoing it is evidently clear that the 1st respondent did not establish any special circumstances, neither was this clear case which could have been determined at the interlocutary stage It was in **Shepherd Homes Limited vs Sandahm (1971) 1 CH 34** where ***Megarry*** *J* stated;

> ***"It is plain that in most circumstances a mandatory injunction is likely, other things being equal to be more drastic in its effects than a prohibitory injunction. At the trial of the action the court will of course grant such injunctions as the justice of the case requires but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted even if it is sought in order to enforce a contractual obligation'***

42. In the upshot the appeal succeeds. The following orders commend themselves;

> **a) The Ruling of the learned trial magistrate made on 28th November 2018 with respect to the application dated 10th May 2018 be and is hereby set aside.**
>
> **b) The orders issued on 18th January 2019 emanating from the said Ruling be and are hereby set aside.**
>
> **c) The matter be and is hereby reverted to the Chief Magistrate to be assigned to different magistrate of competent jurisdiction for hearing and determination.**
>
> **d) Pending (c) above the 1st respondent be and is hereby restrained by himself his agents, employees and or servants from advertising, selling, disposing off the motor vehicle registration KBU 530U or in any manner adverse to the interests of the appellants and the 2nd respondent herein.**
>
> **e) The applicants will have the costs of this application.**
>
> **f) Orders Accordingly.**

DATED AND DELIVERED VIA EMAIL THIS 7TH DAY OF JUNE 2021.

Mumbua T. Matheka

Judge

Court Assistant Edna

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