



**Baye & another v Miznazi (Civil Case 032 of 2018)
[2021] KEHC 158 (KLR) (Commercial and Tax) (7 October 2021) (Ruling)**

Neutral citation: [2021] KEHC 158 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 032 OF 2018
F TUIYOTT, J
OCTOBER 7, 2021**

BETWEEN

TIMOTHY WAKO BAYE 1ST PLAINTIFF

LYSTRA MOTORS LIMITED 2ND PLAINTIFF

AND

TARIK MIZNAZI DEFENDANT

RULING

1. In the Notice of Motion dated 29th October 2020 the defendant seeks the following prayers:-
 1.
 2. THAT the orders issued by this Honourable Court on 16th August 2018 be lifted/dispensed forthwith;
 3. THAT the Plaintiffs/Respondents be ordered to furnish security for costs in the sum of Kshs.33,500,000/= or any other sum this Honourable Court may deem fit to grant into Court or in a joint interest earning account to be opened between the parties Advocates as security for the Defendant's counterclaim within thirty (30) days of this order pending the hearing and determination of this suit;
 4. THAT the Plaintiff/Respondent's suit be struck out and judgment be entered in favour of the Defendant/Applicant's counterclaim in default of the provision of the security deposit within the prescribed period;



5. THAT an order of injunction do issue restraining the Plaintiffs/Respondents either by themselves, servants, agents or anyone claiming under them from selling, disposing, transferring or otherwise dealing with motor vehicle registration number KCH 598M, KCK 359R, KCL 311S, KCL 569H, KCN 088V, KCN 099Q, KCN 861Z, KCP 654G and KCP 921G pending the hearing and determination of this suit;
 6. THAT an order do issue against National Transport and Safety Authority (NTSA) restraining their servants, agents, assigns, employees and/or anyone acting under their authority from approving, effect any change or registration of transfer and/or dealing with motor vehicle registration KCH 598M, KCK 359R, KCL 311S, KCL 569H, KCN 088V, KCN 099Q, KCN 861Z, KCP 654G and KCP 921G pending the hearing and determination of this suit;
 7. THAT an order do issue directing the Plaintiff/Respondents to return motor vehicle registration KCH 598M, KCK 359R, KCL 311S, KCL 569H, KCN 088V, KCN 099Q, KCN 861Z, KCP 654G and KCP 921G for purposes of preserving them in a mutual safe custody to be agreed by both parties pending the hearing and determination of this suit;
 8. THAT alternative to order 7 above, an order do issue to Directorate of Criminal Investigation (DCI) to trace and impound motor vehicle registration 598M, KCK 359R, KCL 311S, KCL 569H, KCN 088V, KCN 099Q, KCN 861Z, KCP 654G and KCP 921G pending the hearing and determination of this suit;
 9. THAT the costs of this Application.
2. The defendant has a counterclaim against the plaintiffs. The defendant imports motor vehicles. His case against the plaintiffs is that pursuant to an arrangement in which the plaintiffs would sell vehicles to third parties, he surrendered 9 vehicles to the plaintiffs. He complains the vehicles have been sold to third parties but without the purchase money being remitted to him as agreed.
 3. An attempt by the defendant to repossess the 9 vehicles was faced with an application for injunction dated 7th June 2018 which this Court granted. The Court will shortly be revisiting the reasons why it granted the order.
 4. Although hearing of this matter had commenced, the parties entered into the following consent on 10th March 2020.

“We the parties hereby record the following consent.

1. The scope for the arbitral dispute in respect to arbitration will be the following:
 - a. Determination of the Nature of the business Relations.
 - b. Determination of the modes of payments.
 - c. Determination of whether there were monies owed to either parties and if so, how much and in respect to what.



2. That Mr. Tarik Miznazi will be the Claimant and will thus file a memorandum of claim while Lystra Motors Limited and Mr. Timothy Wako Baye will be the Respondents and may file a Counterclaim if they so wish.”
5. The defendant complains that the plaintiffs have been noncommittal and inactive towards progressing the Arbitration and is therefore unable to prosecute his counterclaim. This frustration is what has triggered the application before Court. The evidence of this inaction has not been controverted by the plaintiffs and the Court believes it.
6. Yet even on that factual basis the Court is unable to grant the orders sought.
7. The nature of orders sought are twofold. One, that the nine vehicles be repossessed and preserved in neutral custody pending the hearing and determination of this suit. The second is that the Court orders the plaintiffs to furnish security of costs in the sum of Kshs.33,500,000/= or any other sum that the Court may deem fit to grant and in default the plaintiffs suit be struck out and the counterclaim be allowed.
8. To order for repossession of the vehicles which are still in the hands of third parties who have neither been joined to the counterclaim or granted an opportunity to be heard would be an antithesis for the grant of the injunctive orders in the first place. The Court had rationalized:-

“(15) As earlier observed, the evidence put forward by the Plaintiffs has not been refuted or rebutted. The nine (9) vehicles are now with 3rd parties who have bought them. repossession of the vehicles affects the 3rd parties. It has not been alleged or proved that the surrender of the vehicles to the 3rd parties is stage-managed to place the vehicles beyond the reach of the Defendants. It being so, it would be patently unjust to allow the Defendant to repossess the vehicles to the detriment of the purchasers.”
9. As to the request for security of costs, the defendant correctly anchors it on the provisions of Order 26 Rule 1 which reads:-

“In any suit the court may order that security for the whole or any part of the costs of any defendant or third or subsequent party be given by any other party.”
10. Yet when seeking for a security deposit of Kshs.33,500,000/= ,the applicant reveals that the interest is not to secure costs. Order 26 Rule 1 is intended to cushion a defendant against a loss in costs if he/she succeeds in defending a claim where it appears that the plaintiff will not be able to ultimately pay those costs. The provisions are not intended to secure the value of the subject matter or the claim sought.
11. From the Counterclaim, the defendant avers that the amount sought in respect to the 9 vehicles is Kshs.33,500,000/= (See paragraph 20). That is the value of the vehicles. These are not estimated costs and the application before Court therefore belies its true intention.
12. The Notice of Motion dated 29th October 2020 is hereby dismissed with costs.

DATED AND SIGNED THIS 29TH DAY OF SEPTEMBER 2021

F. TUIYOTT

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF OCTOBER 2021



A. MABEYA, FCI Arb

JUDGE

PRESENT:

