



PUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS CIVIL APPLICATION NO. 105 OF 2020

SYNERGY INDUSTRIAL CREDIT LIMITED.....APPLICANT

VERSUS

MITCHELL COTTS FREIGHT (K) LTD.....RESPONDENT

RULING

1. The Application before the court for determination is a **Notice of Motion** application dated **6th July, 2020** brought by the Applicant under **Sections 1A, 1B and 3A** all of the **Civil Procedure Act** and **Order 51 Rule 1** of the **Civil Procedure Rules**. The application seeks for the following orders:-

a. Spent.

b. That pending the hearing and determination of this application inter parties, this Honourable Court be pleased to grant an order directing the Respondent to release to the Applicant its Motor Vehicles registration numbers KBX 905E, KBY 218E & KBY 219E.

c. That this Honourable Court be pleased to grant an order directing the Respondent to release to the Applicant its motor vehicles registration numbers KBX 905E, KBY 218E & KBY 219E.

d. That this Honourable court be pleased to grant any orders it may deem fit.

e. That the costs of this application be provided for.

2. The application is supported by an **Affidavit** dated **6th July, 2020** and a **further Affidavit** dated **26th August, 2020** both sworn by the Applicant's **Legal Officer, Jacob Meeme**.

3. The grounds upon which the application is based are that the Applicant entered into various hire purchase agreements with **Shiva Carriers Ltd** to finance it in the purchase of **twenty one (21) vehicles** including motor vehicles registration numbers **KBX 905E, KBY 218E & KBY 219E**. Consequently, the Applicant was registered as a co-owner as reflected in the **log books** attached to the Application as "**JMM-01**." The finance arrangement fell into arrears and the dispute thereof culminated into the filing of **HCCC No.2 of 2017, "Shiva Carriers Limited... Vs... Synergy Industrial Credit Limited"**. However, the suit was compromised by a **Consent Agreement** dated **31st May, 2017** which was later adopted as an Order of the court on **5th June, 2017**. Nonetheless, **Shiva Carriers** defaulted the terms of the Consent necessitating the repossession of all the **21 motor vehicles** which formed part of the Applicant's securities.

4. The Applicant avers that vide a **letter** dated **10th September, 2019**, **Shiva Carriers** handed over all the motor vehicles for repossession. The Applicant has then repossessed all the motor vehicle except **three (3) motor vehicles**, registration numbers **KBX 905E, KBY 218E & KBY 219E**. As per the **letter** dated **10th September, 2019**, the said motor vehicles were described to be stored at **Shiva Carrier's Yard in Kibarani** but it turned out that the vehicles were in the Respondent's possession.

5. The Applicant further avers that it demanded for the release of the **3 motor vehicles** vide a **letter** dated **25th September, 2019** but the Respondent responded by demanding **Kshs.1,000,000/=** in a **letter** dated **15th October, 2019**. The Applicant contends that the Respondent has not demonstrated how the **3 motor vehicles** came into its lawful custody since the **letter** dated **10th September, 2019** by **Shiva Carriers Ltd** indicated that the vehicles were in its **Kibarani yard**. In the absence of an explanation to the contrary, the Applicant pleads with the court to find that the Respondent is in unlawful possession of the motor vehicles and make an Order compelling the release of the motor vehicles since a continued detention of the motor vehicles will lead to their dilapidation, depreciation and possible vandalization.

6. The Respondent opposed the application on basis of **Grounds of Opposition** dated and filed on **21st July, 2020**. It contended that the application is bad in law, incompetent and ought to have been through a substantive suit by way of a **Plaint, Originating Summons or Petition** to enable the court completely, and effectively adjudicate the dispute between the parties. That such a procedure deprives a party the right to lodge a Counter-claim for storage charges. That the Application amounts to duplicity of proceedings in view of an existing suit between the parties being, **Civil Case No. 37 of 2020, Umoja Rubber Products & 2 Others...Vs...Synergy Industrial Credit Ltd & Another**.

7. The Respondent avers that the Applicant ought to have filed a Counter-claim in **H.C.C.C No.37 of 2020** or in the alternative, the Applicant should have enjoined the Respondent in the earlier mentioned suit being **H.C.C.C No.2 of 2017**.

8. In **reply to the grounds of opposition**, the Applicant in its further affidavit sworn on **26th August, 2020** and filed on **27th August, 2020** is critical that the application is not a duplicity to other suits since there is no nexus between the application and **H.C.C.C No.37 of 2020** because the prayers sought in the latter are totally different. The Applicant is thus of the view that the allegations by the Respondents are merely a delaying tactic.

9. Directions were issued on **21st July, 2020** that the application be disposed of by way of written submissions. Both parties complied by filing their respective submissions. The Applicant's submissions are dated **26th August, 2020** and filed on **27th August, 2020** whilst the submissions by the Defendant are dated **22nd September, 2020** and filed on **23rd September, 2020**. I will briefly summarize the position taken by each party in its submissions as below.

Applicant's Submissions

10. The Applicant identified three issues for determination, which are that:-

- a. Whether the Applicant is the co-owner of the Motor Vehicles and has an indefeasible right to the motor vehicles;**
- b. Whether the Applicant's Notice of Motion dated 6/7/2020 is bad in law and ought to have been brought as a suit, and**
- c. Whether there is duplicity of proceedings.**

11. On the first issue, the Applicant reiterated that it was the financier of the subject motor vehicles and a registered co-owner of the vehicles. A Consent Order was later entered into and adopted by this court authorizing the Applicant to sell the motor vehicles in the event that **Shiva Carriers Ltd** defaulted in the repayment of the loan facility. That the Applicant subsequently started the repossession exercise on default by **Shiva Carriers** and only the subject motor vehicles have not been repossessed. It is submitted that the Respondent has no right whatsoever to demand storage payment from the Applicant because neither did the Applicant or **Shiva Carriers Ltd** contract the Respondent to store the subject motor vehicles. In any event, the Respondent has not tendered any explanation on how it came into possession of the motor vehicles.

12. The second issue that has been submitted on by the Applicant is whether the application is bad in law for not having been brought as a suit. It is submitted that **Section 2** of the **Civil Procedure Act, 2010** which is buttressed by **Section 19** of the same Act defines a suit as all civil proceedings commenced in any manner prescribed by the rules. According to the Applicant, **Section 19** of the **Civil Procedure Act** is not conclusive on the manner in which suits may be instituted and there are instances where a court is called upon to grant an Order and or consider a procedural issue being sought and not to determine on the rights of the parties. In such a case where there is no an action *per se*, then the party can file a Miscellaneous Application. That being the case, the Applicant further submitted that the court should intervene and compel the Respondent to release the motor vehicles because the Respondent has no legal interest on the Motor vehicles and continued detention of the same might lead to their depreciation of their market value and occasion unwarranted loss to the Applicant.

13. The Applicant also sought the court to invoke the overriding objective of the **Civil Procedure Act** under **Sections 1A** and **1B** as well as **Article 159(2)** of the **Constitution** which enjoins the court to ensure substantive justice as opposed to procedural technicalities. To buttress this line of argument, the Applicant placed reliance on the cases of **Joseph Kibowen Chemjor...Vs...William C Kisera[2013] eKLR, Stoic Company Limited...Vs...Scope Telematics International Sales Ltd & Another[2015] eKLR** and **Githere...Vs...Kimungu [1975-1985] E.A 101**.

14. The last issue for consideration in the Applicant's submissions is whether there is duplicity of suits. The Applicant submitted that **H.C.C.C No.2 of 2017** involved the enforcement of the Applicant's rights against **Shiva Carriers Ltd** with regard to repayment of the Hire Purchase facility as opposed to the instant application which seeks the Respondent to release the subject motor vehicles. With regard to **H.C.C.C No.37 of 2020**, the Applicant reiterated that there is no nexus between the said suit and the instant application since the prayers that have been sought in the **Plaint** are far much different from the claim in the instant application.

Respondent's Submissions

15. The Respondent's submission is that **Sections 1A, 1B and 3A** all of the **Civil Procedure Act** and **Order 51 Rule 1** of the **Civil Procedure Rules** presupposes the existence of a suit upon which an application may be filed. On that note, the Respondent submitted that there is no suit that has been filed by the Applicant regarding the issues espoused in the application. In the view of the Respondent, the Applicant should have considered the various ways of commencing a suit as provided for under **Order 3 Rule 1** of the **Civil Procedure Rules**.

16. In interpreting **Section 2** of the **Civil Procedure Act** which defines a suit, the Respondent opines that a **Notice of Motion** is not a pleading hence it is not capable of forming a basis for the determination of a dispute. Further, that it has to be filed within a suit since it has no legs to stand on on its own and such defect cannot be cured by invoking the court's inherent powers under **Section 3A** of the **Civil Procedure Act** or **Article 159** of the **Constitution**. This line of thought is supported by reliance on excerpts from the cases of **Fidelity Bank**

Limited...Vs... John Joel Kanyali[2014] eKLR, Salim Tunja Gambo...Vs... Commissioner of Lands & Councillor Ali Didi & 8 Others [2001] eKLR, Raila Odinga...Vs...Independent Electoral & Boundaries Commission & Others[2013] eKLR and Chalicha FCS Ltd..Vs... Odhiambo & 7 Others [1987] KLR 182-188.

17. Lastly, the Respondent submitted that the application seeks for orders that are substantive in nature, that is, to have the three subject motor vehicles released to them whilst the parties have not been given an opportunity to be heard on the issues of storage charges that gave rise to the dispute. Further that the Applicant admitted that the storage charges had been demanded and if orders sought were granted, it would then have the effect of extinguishing the Respondent's claim without due process of the law.

Analysis and Determination

18. I have read and carefully considered the **Notice of Motion** application filed herein and the affidavits in support thereof as well as the **grounds of opposition** filed in response thereto together with the submissions on record. I find that the issues that stand out for determination are that:

a. Whether Applicant could commence these proceedings by way of a Miscellaneous Application or whether the suit is fatally defective;

b. Whether this suit amount to duplicity of suits;

c. Whether there are grounds shown for the release of the Applicant's motor vehicles registration number KBX 905E, KBY 218E & KBY 219E.

19. The Respondent submitted that there is no provision in law by which a party can institute a suit by way of a **Notice of Motion** application. That one can only institute a suit in the manner prescribed for under **Order 3 Rule 1** of the **Civil Procedure Rules** which is either through a **Plaint**, a **Petition** or an **Originating Summons**. Accordingly, the Respondent submits that the instant application cannot stand on its own and is suitable for dismissal.

20. The Applicant in response thereof submitted that there are no substantive rights to be determined and consequently that there is no action being enforced or tried. It is argued that the Applicant only needs a mere order compelling the Respondent to release the subject motor vehicles.

21. It is not in dispute that a "**suit**" is defined under **Section 2** of the **Civil Procedure Act**, as "**all civil proceedings commenced in any manner prescribed**". The understanding of this court is "**prescribed**" under **Section 2** of the **Civil Procedure Act** which means **prescribed by Rules**. And "**Rules**" means **rules and forms made by the Rules Committee to regulate the procedure of courts**.

22. **Section 19** of the **Civil Procedure Act** states that **every suit shall be instituted in such manner as may be prescribed by rules**. I agree with the view of the court in the case of **Joseph Kibowen Chejor..Vs... William C. Kisera(supra)** that **Section 19** does not confine a monopoly to the **Civil Procedure Rules** on how a suit should be instituted. It provides that suits may be instituted in the manner prescribed by rules and in the considered view of this Court, there could be rules in other Statutes on how proceedings may be commenced.

23. A similar view was express by the court in the case of **Abdi Abdullahi Somo..Vs...Ben Chikamai & 2 Others [2016]eKLR**, where Justice F. Gikonyo stated thus:

"In my life as a judge, I have in the past heard similar arguments being advanced that a Notice of Motion cannot commence substantive proceedings. But, it should be understood that, as a matter of general principle, a Notice of Motion is a competent way of initiating substantive proceedings in court. It will all depend on the particular statute governing the particular proceeding in question. Therefore, where the law provides for the manner of commencing a suit or proceedings in court, then that procedure applies." (emphasis added)

24. Needless to say therefore, where a person is commencing a civil suit (in this instance to "**enforce a civil action**"), he needs to follow prescribed rules, to wit, the **Civil Procedure Rules**. Accordingly, **Order 3 Rule 1** of the requires that:

"Every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be prescribed."

25. Stated in simpler words, the above provisions of the **Civil Procedure Rules** mean that all suits must commence by way of a **Plaint** unless the rules prescribe otherwise. This Court is also alive to the argument that there are times when all that a person wants is an Order of court where the rights of the parties are not going to be determined. In such a case, it would be appropriate for such a party to file a miscellaneous application because the court is not being asked to determine any other issues between the parties.

26. In the instant suit, the Applicant seeks for an Order to compel the Respondent to release the subject motor vehicles which form part of the securities for the Hire Purchase facility that was offered by the Applicant. It is also argued that the Respondent has not shown how it came into possession of the said motor vehicles nor has it led any evidence on whether it was contracted for storage of the subject motor vehicles. The Respondent on the other hand reiterates that the procedure adopted by the Applicant deprives it of its right to filing a counter claim in demand of the storage charges.

27. In the view of this court, the scenario of the circumstances of the dispute between the parties connotes the existence of some obligations one party owes to the other. For example, the Applicant seeks to compel the Respondent to hand over the subject motor vehicles whilst the

Respondent is hesitant since it depones that storage charges have to be paid first. In that view, this Court disagrees with the Applicant's position that there are no rights or obligations of the parties that this court has to adjudicate on. The issue of whether the Respondent should be compelled to release the subject motor vehicles is a contentious issue that must be tried on merits. Where there is a call to adjudicate on rights of parties then it must be said that there is a "**civil action**" and this must be commenced in the manner prescribed by the Rules.

28. As was held in the **Joseph Kibowen Case (supra)**, parties are advised to always commence an action by way of a **Plaint** unless there is an alternative procedure provided for in the Statutes. The Applicant in this case has not shown the court the provision of the law that mandates him to commence the current action by way of a **Notice of Motion** instead of a **Plaint**. I do not see how this matter will be determined without prejudice being caused to the Defendant. Even if no prejudice will be caused to the Defendant, this Court would rather strike out this application at this stage, having established that without a **Plaint**, the current suit is a non-starter. Having not succeeded on the first issue for determination, this court shall not delve on the other issues for determination.

29. Given the reasons above, it is this court's view that there is no suit before it capable of being determined on merits. I thus have no option but to strike out the miscellaneous application with costs.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA on this 6th day of November, 2020.

D. O. CHEPKWONY

JUDGE

6/11/2020

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all Judgments and Rulings be pronounced in open Court.

D. O. CHEPKWONY

JUDGE

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