



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. E 017 OF 2019

PUT SARAJEVO GENERAL

ENGINEERING CO. (F 21/80).....PLAINTIFF

-VERSUS-

NATIONAL BANK OF KENYA.....1ST DEFENDANT

OSMAN BASCELIJA.....2ND DEFENDANT

ESED BECIREVIC.....3RD DEFENDANT

ADNAN TERZIC.....4TH DEFENDANT

RAMO GAGULA.....5TH DEFENDANT

GRADEVINSKO PREDUSECE.....6TH DEFENDANT

REGISTRAR OF COMPANIES.....7TH DEFENDANT

RULING

PLEADINGS

By a certificate of urgency application dated 5th August 2019 and filed in court on 6th August 2019, the Applicant raised the following grounds;

a) That this Honourable Court on 31st July 2019 coerced the Plaintiff's advocates into entering into a consent with the 1st Defendant's advocates at 4.10pm after having prevailed upon the Plaintiff's advocates all day to concede to the consent despite the fact that the matter had come up for a mention for directions on the 1st Defendant's application dated 25th July 2019 which had only been served upon the Plaintiff's advocates on 30th July 2019;

b) That this Court dictated the terms of the consent by prevailing upon the parties to agree on where the motor vehicles particularized in prayer 2 of the 1st Defendant's aforesaid application would be surrendered by the Plaintiff, failure to which she would issue orders to that effect;

c) That this Court declined to appreciate the fact the 1st Defendant's application had only been served upon the Plaintiff's advocates one day before the mention date and proceeded to disregard the Grounds of Opposition filed by the Plaintiff's advocates and their letter dated 25th July 2019, which explained the genesis, development and outcome of the proceedings filed by the 1st Defendant's agent in **Kisii Principal Magistrate's court *Miscellaneous Civil Application No. 20 of 2019 – Geoffrey Ishua Kariuki T/A Direct O. Auctioneers –vs Put Sarajevo Engineering Company***;

d) That this Court failed to appreciate the fact that the said motor vehicles were released to the Plaintiff pursuant to the aforementioned orders issued on 11th July 2019 by a court that had full knowledge of the proceedings herein and status order issued on 27th July 2019;

e) That the Court failed to appreciate the fact that the orders issued on 11th July 2019 had never been stayed, set aside or appealed against;

f) That this Court failed to record the Plaintiff's advocates explanation and defence of the orders issued on 11th July 2019 and implied that **the Plaintiff was in contempt of the status quo orders issued herein on 27th May 2019 despite the fact that the only party that had disobeyed the said orders was the 1st Defendant who had instructed auctioneers who repossessed New Holland Tractor TS 6040, from Kangundo DCI premises in June 2019 and visited the Plaintiff's premises on 5th July 2019 to harass the Plaintiff's officials and threaten to repossess more motor vehicle;**

g) By demanding that the parties agree on where the motor vehicles would be stored pending the outcome of the Plaintiff's Notice of Motion dated 8th March 2019, the Court effectively disregarded the valid and subsisting orders **issued on 9th July 2019 in Kisii Principal Magistrate's Court Miscellaneous Civil Application No. 20 of 2019 – Geoffrey Ishua Kariuki T/A Direct O. Auctioneers VS Put Sarajevo Engineering Company and proceeded to irregularly hear and determine an appeal against the said orders despite the fact that there was no appeal before her and the 1st Defendant had already exercised its right of review by filing an application under order 12, Rule 7 before the Kisii Principal Magistrate's Court;**

h) That this Court dictated the terms of the consent and prevailing upon the Plaintiff's advocates to sign the same despite their opposition and their proposal that the motor vehicles be installed with tracking devices to safeguard the interests of the 1st Defendant and ensure the Plaintiff stayed afloat in light of the valid and subsisting orders issued by the Kisii Principal Magistrate on 11th July 2019.

Grounds of Opposition Filed on Behalf of 1st Defendant/ Respondent

The 1st Defendant opposed the Applicant's application on grounds;

- a) That the application is mischievous, frivolous, amounts to abuse of the court process and should be dismissed forthwith;
- b) That the Plaintiff is in contempt of orders of court issued on 31st July 2019 and, unless and until the said contempt has been purged, the Plaintiff is not entitled to audience before this Honourable Court;
- c) **That the Plaintiff's application is deliberately deceptive and frivolous, as the subject matter consent order was recorded with their participation and free will.** By accusing the trial Judge of coercion, the Plaintiff mischievously seeks to have the judge recuse herself from this case and, effectively, delay the dispensation of justice.

NOTICE OF MOTION OF 10TH SEPTEMBER 2019

On 12th September 2019 the counsel for the 1st Defendant filed a **Notice of Motion application dated 10th September 2019 under the provision of Section 5(1) of the Judicature Act (Cap 8 laws of Kenya), Section 3A of the Civil Procedure Act** and all other enabling provisions of law and sought orders;

- a) That this Honourable Court does find that the Plaintiff's Director, Usamah Yussuf Timimi is in contempt of court for disobedience of the court orders issued on 31st July 2019;
- b) That upon grant of prayer 1 above, this Honourable Court does impose a fine/penalty of Kenya Shillings Five Million (Kshs. 5,000,000/-) against the Plaintiff (contemnor) and in default of payment is such fine, all the Defendant's movable and immovable assets, including land and buildings be attached and sold in execution of this order to satisfy the penalty for contempt;
- c) That upon grant of prayers 1 & 2 above, this honourable court does issue an order that the said Plaintiff's Director, Usamah Yussuf Timimi, be committed to civil jail for a period of six (6) months; and
- d) That the Plaintiff's Director, Usamah Yussuf Timimi, ordered to surrender his passport to this Honourable court and an order be issued barring him from travelling out of the jurisdiction of this court, without the express permission of this court.

NOTICE OF MOTION DATED 27TH SEPTEMBER 2019;

The Plaintiff/Applicant on 30th September 2019, filed further Notice of Motion application dated 27th September 2019, seeking orders;

- a) That this Honourable Court disqualifies itself from hearing and determining this suit;
- b) That this Honourable Court be pleased to order that this suit be heard and determined by a different Judge and/or be referred to the Presiding Judge, Commercial and Tax Division for purposes of appointing another Judge to proceed with hearing and final determination of this suit;
- c) That this Honourable Court be pleased to issue such other orders as may be fair and just to secure the Plaintiff/Applicant's right to a fair and just trial; and

d) That the costs of this Application be provided for.

The Application is based on the following grounds;

- 1) That the Plaintiff has a reasonably grounded apprehension that this Honourable Court will not render a fair hearing and/or determination of this suit;
- 2) That this Honourable Court has on various occasions conducted proceedings in this suit in such a manner as to lead a fair minded and informed observer to conclude that there is a real possibility that the Learned Judge is biased;
- 3) That the Plaintiff filed this suit on 8th March 2019, contemporaneously with the Notice of Motion of even to date seeking, inter alia, injunctive orders to restrain the 1st Defendant from exercising its purported statutory power of sale pending the determination of the said Notice of Motion and the suit;
- 4) That the Learned Judge heard the aforesaid Notice of Motion ex parte and directed that the same be served upon the Respondents for further directions on 14th March 2019;
- 5) That on 14th March 2019, the 1st Defendant's Advocates sought leave to file their response while the Plaintiff's advocates made an application for interim orders and/or status quo orders pending further hearing of the aforesaid application;
- 6) That despite the Plaintiff having sufficiently demonstrated that the repossession of its vehicles was ongoing and there was a need to restrain the 1st Defendant, the Learned Judge declined to issue any interim orders and directed the 1st Defendant to file its response for inter partes hearing on 8th April 2019;
- 7) That in the intervening period and emboldened by the Learned Judge's refusal to issue interim orders, the 1st Defendant instructed its agents to continue repossessing the Plaintiff's vehicles;
- 8) That the Plaintiff soon learnt that the repossession was being done **pursuant to orders issued by the Chief Magistrate Court at Kisii on 4th March 2019** and instructed its advocates to establish the validity of the said orders;
- 9) That the Plaintiff's advocates moved the Chief Magistrate's Court at Kisii by way of a Preliminary Objection disputing the territorial jurisdiction of the Court to issue the orders of 4th March 2019;
- 10) That the Court directed the 1st Defendant to serve the Application for directions on 31st July 2019, and the 1st Defendant effected service upon the Plaintiff's advocates on 30th July 2019;
- 11) That the Plaintiff's advocates filed their Grounds of Opposition to the 1st Defendant's Application on the morning of 31st July 2019, but the learned Judge disregarded the same and completely ignored and failed to record the Plaintiff's Advocates' chronological and clear explanation in defence of the orders issued by the Chief Magistrate's Court at Kisii on 9th July 2019;
- 12) That the Plaintiff's advocates sought leave to file a substantive response given the application had only been served upon them the day before, but the Learned Judge failed to appreciate this fact **and directed the parties to step outside and deliberate on how to proceed with the 1st Defendant's application and preserve the status quo**;
- 13) That the parties could however not agree and informed the Honourable Judge as much, but the Learned Judge insisted that the motor vehicles needed to be secured at a central storage yard despite the fact the Kisii Principal Magistrate had ordered that the motor vehicles be released to the Plaintiff;
- 14) That the Plaintiff's advocates again drew the attention of the Court to the Plaintiff's Grounds of Opposition dated 30th July 2019 but this Court declined to address the same and directed the parties to once again agree on how to preserve the motor vehicles;
- 15) That this Court having been furnished with a copy of the orders **issued on 9th July 2019 in Kisii Principal Magistrate's Court Miscellaneous Civil Application No. 20 of 2019**, insisted that the motor vehicles needed to be surrendered to a neutral facility in spite of the fact that the aforementioned orders were still validly in force;
- 16) That this Court dismissed the Plaintiff's advocates argument and stated that the Court was an appellate Court even though there was no appeal before it;
- 17) That this Court then called to the stand a Ms Judy Mbugua, an official of the 1st Defendant, who proceeded to give evidence despite the fact that the matter had come up for a mention;
- 18) That by giving Ms. Judy Mbugua audience, this Court considered extraneous factors and formed an opinion about the Plaintiff from the same without calling the Plaintiff's officials to rebut Ms. Judy Mbugua's statements;
- 19) That the Plaintiff's advocates informed the Court that the 1st Defendant had disobeyed the status quo orders issued on 27th May

2019 by repossessing New Holland Tractor TS 6040, from Kangundo DCI premises in June 2019, but once again the Court failed to record the same and instead prevailed upon the parties to agree on where the motor vehicle would be surrendered to;

20) That the Plaintiff's Advocates attempted to convince the court on the need to have the motor vehicles continue operating while in possession of the Plaintiff so as to enable the Plaintiff continue servicing its road construction contracts, but the Court dismissed the plea and failed to record here reasons thereto;

21) That the Plaintiff's advocates again presented the reasonable proposal that the motor vehicles to be installed with tracking devices and informed the Court that the Plaintiff was willing to grant the 1st Defendant access to the motor vehicles for the purpose, but the Court declined to consider the proposal and stressed the need to have the motor vehicles surrendered;

22) That this Court asked the advocates to agree on where to have the motor vehicles surrendered and record a consent to that effect, thereby dictating the terms of the said consent, failure to which the Court would order that the motor vehicles be surrendered at a particular place;

23) That the advocates once again failed to agree and at 4 O'clock, the Learned Judge asked the advocated to notify her once they had recorded the consent and thereafter walked out of the courtroom and retreated to her chambers.

24) That the Plaintiff's Advocates had no option but to concede and sign the consent as a result of the Learned Judge's coercion and the fact that the court assistant needed to return the court file to the Learned Judge's Chambers since the day's proceedings were over;

25) That the Learned Judge conducted the proceedings of 31st July 2019 so improperly that any reasonable and objective person watching those proceedings would conclude that the Learned Judge did not and will not bring an impartial mind to bear on the adjudication of this suit.

CHRONOLOGY OF EVENTS AS PER THE COURT RECORD

On 8th March 2019, the Plaintiff filed under certificate of urgency, Notice of Motion brought under **Order 40 Rule 1& 2 of CPR Sections 1A, 1B, 3A & 63 E of CPR 2010**. The Applicant sought among other orders, a temporary injunction restraining the 1st Defendant from repossessing, selling or interfering with the plaintiff's possession of all those vehicles listed in the Defendants letter of 22nd February 2019 addressed to Purple Royal Investments.

The Plaintiff filed on the same date a Plaint and deponed particulars of fraud and illegalities; loss and damage whereby the Applicant sought permanent injunction and declaration that facilities purportedly advanced to the Plaintiff by the 1st Defendant were obtained by persons lacking full authority of the Plaintiff and acting in connivance of the 1st -7th Defendants among other orders.

The gist of the claim is that the Plaintiff acquired full legal and beneficial interest of the Plaintiff Company and is the sole Director/Shareholder. The 1st Defendant withdrew credit facilities to the Plaintiff because of default to service the facilities. The Plaintiff alleged these facilities were to different Company(ies) masquerading with the Plaintiff 's Company name. The Plaintiff /Applicant deponed that there are 3 similar Companies involved;

- a) PUT SARAJEVO ENGINEERING COMPANY
- b) PUT SARAJEVO GENERAL ENGINEERING COMPANY (F.21/80)
- c) PUT SARAJEVO GENERAL ENGINEERING COMPANY (C.98786)

On 11th March 2019, this Court granted orders for Plaintiff's application to be served to/on the Respondents who would file Replying Affidavits and serve and include their memorandum and Articles of Association and CR-12s of their Company (ies). The matter was to be mentioned on 14th March 2019 for further directions.

On 14th March 2019 Mr. Wachira for the plaintiff informed the Court that service to 2nd-6th Defendant was not effected because the Defendants left the country.

Mr Odhiambo appeared for 7th Defendant but had not filed Notice of Appointment.

Mr Njoroge for the 1st Defendant informed Court that he had a Replying Affidavit in form of a huge bundle but had not filed.

The Court gave the following directions;

The matter would be mentioned on 8th April 2019 to establish which entity/directors obtained loans from the Bank. The bank was to provide;

- a) Bank opening documents of the accounts where loan funds were remitted;

- b) The loan documents to establish who signed on behalf of (which) Company;
- c) The 2nd -6th defendants to provide memorandum and Articles of Association of the Company(ies) they were/are involved in so that ;
- d) On 8th April 2019 with availability of documents; it shall be discerned the Company that obtained the loan(s);
- e) The defendants who were not in Court were to be served by substituted service.

On 8th April 2019, Mr Wachira for the Plaintiff informed the Court that he was served the Replying Affidavit (huge bundle) on Thursday 4th April 2019 at 3.30 pm. It was quite detailed/bulky and he had not perused the entire bundle and sought time to file response by way of Affidavit.

Mr Njoroge for the 1st Defendant informed Court that they would need time to reply to the intended Affidavit. He explained the issue was/is that the plaintiff obtained a loan with the Bank in 1977 for a sum of Ksh 330 million and they had all security documents. The Company sued was incorporated in 1977, the other Company the 1st document is of 2009. The 1st defendant has no other account of PUT SARAJEVO GENERAL ENGINEERING COMPANY. The documents in Court show arrears of Ksh 1 billion and this is tax payers money. As such any request of temporary injunction to be issued has not been met under the required threshold of law. Counsel for 1st Defendant promised that any sale of Plaintiff's company's assets would not take place until expiry of notices period that is 30 days. Counsel proposed an attempt of out of Court settlement.

Mr Ogolla for the Plaintiff informed the Court that there was/is risk of grounding operations as the attachment of Company assets would ground the business.

The Court granted the following orders;

The Replying affidavit by the 1st Defendant was to be served to the plaintiff and then the plaintiff would file reply and serve and 1st Defendant may reply too.

If there was/is any other Company involved, it was to be enjoined to proceedings they were at liberty to be joined.

No sale of properties of the Plaintiff Company would take place until expiry of the notices.

The hearing of the substantive application was to commence on 27th May 2019.

The Court would take the Court file and the bulky Replying Affidavit to read through before next hearing date.

On 27th May 2019, Mr Wachira for the Plaintiff told the Court that he filed a Response to the Further affidavit filed on 24th May 2019.

Mr Njoroge for 1st Defendant stated that they would not file any other documents. The bulky bundle Replying Affidavit was enough.

The Court informed the parties that Registrar of Companies was in Court.

Mr Wachira informed the Court that the documents in Court were/are ok and he had no claim against Registrar of Companies.

The Court granted following orders;

- a) The Court had read the 1st Defendant's bulky bundle/Replying Affidavit and had a team that prepared a summary filed in Court and was available to parties from Deputy Registrar upon payment of requisite fees (photocopying)
- b) The Registrar of Companies was released from Court at the time.
- c) **The service to the 2nd -6th Defendants had not been effected and was to be done by substituted service through print media.**
- d) **The parties were to file and exchange written submissions to be highlighted after each party had 14 days each to prepare and exchange the same and highlight on 26th June 2019.**
- e) **The status quo was maintained on the attached assets until hearing and determination of the application.**
- f) The Court file would be kept in the Strong Room.

On 26th June 2019, Ms Kimani held brief for Mr. Wachira for the Plaintiff and she informed the Court that Mr. Wachira was indisposed and written submissions were not filed and served.

Mr Njoroge for 1st Defendant stated that he had not filed written submissions but he was aware that Counsel wrote to Court and explained his predicament as per the letter dated 24th June 2019.

Ms Kimani requested for 14 days for Mr Wachira to file written submissions.

The Court granted the application the Plaintiff was to file and serve written submissions and serve and the Respondent(s) would also file written submissions and serve. When the submissions were filed, parties would obtain a date from the Registry for highlighting.

On 26th July 2019, the application of 25th July 2019 was filed by 1st Defendant under certificate of urgency as the Duty Court, I granted orders that the application be served to the Plaintiff/Respondent and they would file Replying affidavit and serve. The parties were to avail the Court orders mentioned in the Instant application.

The matter was to be mentioned for directions on 31st July 2019.

On 31st July 2019, Mr. Njoroge for 1st Defendant informed the Court that he was ready to address the Court on the Application as the Respondent had filed grounds of opposition.

The Court heard all Counsel explain the events that occurred and culminated with proceedings and orders from CM's Court Kisii.

This Court declined to entertain the said matter that was dealt with by Kisii CM's Court on the basis of the fact that the Court could only sit on appeal of orders by the said Court until the relevant appeal was filed, therefore this Court lacked jurisdiction to entertain the events leading to filing the said matter, the proceedings and the court orders.

The Court reminded the parties of this Court's orders of 27th May 2019 of status quo to be maintained of the attached assets until hearing and determination of the application. Therefore if any party went against this order then they would have to revert to status quo ante before any application in this Court would be heard and determined.

The parties through Counsel engaged in discussions in Court with regard to recording a consent. At one point a party seemed to be involved with Mr Ogolla on the issue of whether a truck would be released to the Plaintiff as long as it had a tracking device or not. As the discussion heated up I asked the lady to speak out loudly to the Court. The lady spoke and I did not record or grant any orders. After a while I left Court and asked parties when ready to have me called and I would come back and find out if they had agreed or not. If they had agreed, they recorded their Consent.

On coming back the parties recorded the following Consent;

1. The status quo ante as at 27th May 2019 be maintained by the Plaintiff returning all the motor vehicles listed in paragraph 2 of the Notice of Motion application dated 25th July 2019.
2. The motor vehicles be surrendered/delivered at Leakey's storage Yard in Embakasi within 7 days from the date of this order in the same condition they were in prior to repossession.
3. Parties to have mediation meeting on Tuesday 6th August 2019.
4. Motor vehicle Registration Number New Holland Tractor 640 to remain in the possession of the Plaintiff.
5. The Notice of Motion application dated 25th July 2019 be and is hereby withdrawn with no orders as to costs.

DETERMINATION

This Court has considered the application by the Applicant on recusal of the Court from hearing and determination of this matter and would like to outline the legal threshold of bias of the Court, reasonable apprehension that the court will not grant fair trial to parties due to ;

- a) Failing to hear , record and determine events that occurred culminating with orders from CMs Court Kisii**
- b) Refused to grant interim injunction to the Plaintiff;**
- c) Coerced parties/Counsel to negotiate and to record Consent under duress;**
- d) Called to the stand a witness Ms Judy Mbugua and did not allow the other party to address the court.**

LAW

The Court of Appeal in ***Capital Markets Authority vs Alnashir Popat & 8 Others [2019] eKLR*** considered the test for impartiality or apprehension of bias relying on the cases of; ***Kaplana H. Rawal vs JSC & 2 Others*** thus;

“It cannot be gainsaid that the Applicant bears the duty of establishing the facts upon which an inference is to be drawn that a fair minded and informed observer will conclude that the judge is biased. It is not enough to just make a bare allegation. Reasonable Grounds must be presented from which an inference maybe drawn.”

Prof Anyang Nyongo & 10 Others EACJ where the Court held;

“We think that the objective test of reasonable apprehension of bias is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the mind of a reasonable, fair minded and informed member of the public that the judge did not

(will not) apply his mind to the case impartially.”

In Re Estate Of Andrew Saikwa [deceased] W. Musyoka J stated;

“The broad legal framework ...encompasses the Constitution which guarantees a right to fair trial, the right to access to justice and to be heard by an impartial and independent Court of law. It also encompasses case law.”

In Jackson Mwalulu & Others CA Civil Application 310 of 2004, it was held;

“When Courts are faced with such proceedings for dis qualification of a judge; it is necessary to consider whether there is reasonable ground for assuming the possibility of a bias and whether it is likely to produce in the minds of the public at large a reasonable doubt about fairness of administration of justice. The test is objective and facts constituting bias must be specifically alleged and established.”

In Mumias Sugar Co Ltd vs Director Of Public Prosecutions & 2 Others (2012) eKLR :

Bias was defined as: inclination ; prejudice

Prejudice was defined as: preconceived judgment formed without factual basis; strong bias;

The Court in R vs David Makali & Others CA Criminal Application No 4 & 5 of 1995 went on and considered;

“I take the view that the Petitioner should establish such material facts as attend personal inclination or prejudice on the part of the judge towards a party on some extrajudicial reasons...The Applicant must therefore specifically set out facts constituting bias and prove them as such in order to establish real likelihood of bias for purposes of disqualification of the judge...it is absolutely necessary that the party applying should lay all relevant material before court. The best way of delivering that requirement is by adopting a method that inherently enables some form of deposition and production of evidence.”

Therefore, the question whether the Applicant has made out a case that the allegations made against me of bias, coercion, duress and reasonable apprehension that this Court is incapable of administering justice through fair trial as an impartial and independent Court ought to be interrogated. The Respondent to the Application opted not to file any documents with regard to the allegations /grounds of recusal and stated the allegations are against the Court.

I wish to state with regard to allegations outlined in the application for recusal as follows;

1) The Court’s refusal /declination to grant interim injunction.

The grounds for granting interim/temporary injunction are based on the celebrated case of Giella vs Cassman Brown where a *prima facie* should be established; irreparable damage not adequately compensatable by damages is proved and where a *prima facie* is not established a balance of convenience should suffice.

In the instant case as per the Plaint and Notice of Motion filed on 8th March 2019 pending for hearing; the Court did not find a *prima facie* case or a balance of convenience when the matter was filed under certificate of urgency. This is because; there is for hearing and determination the question of which Company of the 3 Companies named in the pleadings obtained loan facility from the 1st Defendant that ought to be subject to execution proceedings.

So the parties to the suit is in question and one of the issues for determination.

Secondly, the Plaintiff/Applicant has deponed fraud by another Company of its name and that the other company masqueraded as the plaintiff and obtained the loan facilities from the 1st Defendant. This means that parties to these proceedings are an issue for hearing and determination. Therefore, at this stage the Court found no basis to grant interim injunction pending hearing and determination of the matter. It is in doubt who the true parties to the suit are.

Instead after parties took directions on hearing of the matter, on 27th May 2019 when it was brought to this Court’s attention that Notices for sale repossessed assets of the Company were about to expire after 30

Days; this Court granted orders of maintenance of status quo pending hearing and determination of the application.

In the case of Prisillah Wanja Kibui vs James Kiongo Kibui & Charles Wambugu Gitonga ELC 170 of 2011 it was held as follows;

Status quo is defined in Blacks Law Dictionary as “**the situation as it exists**”

“In my view an order to status quo to be maintained is different from an order of injunction both in terms of the principles for grant and practical effect of each. While the latter is an substantive equitable remedy granted upon establishment of a right, or at interlocutory stage, a prima facie case, among other principles to be considered, the former is simply an ancillary order for preservation of the situation as it exists in relation to pending proceedings before hearing and determination thereof.”

Therefore, in this case, although the Plaintiff had not proved a *prima facie*, at this stage the Court found it prudent in the circumstances to maintain status quo pending hearing and determination of the application.

The Plaintiff’s application for an interim /temporary injunction sought on 31st July 2019 could not be considered and granted as it would fly in the face of an already existing Court order to maintain the situation as it exists (status quo) pending for hearing and determination of the application.

2) That the Court coerced the parties/Counsel to enter into a Consent.

The Consent by parties was/is arrived at under duress by the Court.

In the case of Benson Omwenga Anjere vs Kivati Nduto & Another [2013]eKLR the Court considered meanings of coercion, undue influence frustration and duress;

Coercion is defined by Black Law Dictionary as;

“Compulsion, constraint, compelling by force or arms or threat.”

Duress is defined by Black Law Dictionary as;

“Any unlawful threat or coercion used by a person to a manner she or he otherwise would not (or would) [it is] subjecting a person to improper pressure which overcomes his will and coerces him to comply with a demand which he would not yield if acting as free agent.”

Undue Influence is described in Black’s Law Dictionary;

“persuasion, pressure or influence, short of actual force, but stronger than mere advice, that so overpowers the dominated party’s free will or judgment that he or she cannot act intelligently and voluntarily, but acts instead subject to the will or purposes of the dominating party.”

The same Court referred to PAO ON vs LIAU YIU LONG [1980] AC 614 where it was held;

“In determining whether there was coercion of will such that there was no true consent ; it is material to inquire whether the person alleged to have been coerced did or did not protest; whether , at the time he was allegedly coerced into making the contract he did or did not have an alternative course open to him such as an adequate legal remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it. All these matters arerelevant in determining whether he acted voluntarily or not.”

On 31st July 2019, the parties/Counsel were to inform the Court on whether pleadings were closed with regard to the Application filed under certificate of urgency of 25th July 2019 and take directions on how to dispose of the application of 25th July 2019 as per the orders of 26th July 2019.

Mr Njoroge for 1st Defendant informed the Court that the application was served and the Plaintiff filed Grounds of Opposition and he was ready to proceed.

Before, he started, Counsel for the Plaintiff brought to the attention of the Court proceedings and orders of **CMCC** Kisii Court on removal or carting away by parties of motor vehicles and truck.

This Court expressed itself thus, that the matters regarding **CMCC** Kisii would only be canvassed in this Court in form of an appeal otherwise this Court lacks jurisdiction to attend to those issues in any other legal way.

Secondly, this Court indicated that there were orders issued on 27th May 2019 maintaining status quo until hearing and determination of the main application filed on 9th March 2019. If any/both/all parties thereafter engaged in processes contrary to these orders, this Court would not sanitize those processes instead each party was/is to revert to *status quo ante*.

At that point, Counsel for parties engaged amongst themselves and with the Court on whether the court would hear the matter regarding events/proceedings/orders for CMCC Kisii Court. The Court told parties/Counsel to discuss/negotiate the matter with a view to amicable settlement and may record Consent. The Court saw and heard a lady stand up and engage with Mr. Ogolla on the release of the Truck and Mr Ogolla suggested that the Truck be released to the Plaintiff so as to operate and have a trucking device installed. With respect, Mr. Ogolla did not make this proposal to the court but to the negotiating party in the presence of the court.

The Court asked the lady to speak up; she stated she was against the proposal to release the truck with a tracking system/device. This Court made no record of these discussions as they pertained to matters that occurred in light of orders from another Court and this Court can/could only exercise appellate jurisdiction once an appeal was filed.

As posited by the Applicant the Court retreated to Chambers and they were to inform the Court the way forward.

The parties depone and acknowledge that they were involved in discussions in the absence of the Court. The Court adjourned and went to Chambers. When the Court came back the parties had a self recorded Consent and the Court appended its signature adopting the same as an order of the Court. Therefore, if the deliberations took place when the Court left, there was no opportunity or possibility for the Court to participate in discussions, coerce and unduly influence the parties on the terms of the Consent.

The Court hears and determines matters on evidence and law. If it was hell-bent on issuance certain orders; it would have heard the matter *interpartes* and granted the said relevant orders.

If the parties were unable to agree on any consent when the Court came back from chambers; the parties through Counsel should have informed Court that no Consent was reached and give the Court the opportunity to hear the matter/issue and grant orders on retracing back to the orders of 27th May 2019 of maintaining status quo on the hearing and determination of the application.

In *Agrafin Management Services Ltd vs Agricultural Finance Corporation & 5 Others 2012 eKLR* the Court stated;

“The Consent order is a binding agreement between parties since it is trite law that consent is a contract in which parties make reciprocal concessions in order to resolve their differences and therefore avoid litigation or where litigation commenced, bring it to an end. That when it complies with the requisites and principles of contract, it becomes a valid agreement which has the force of law between parties. The Consent once given judicial approval, becomes more than a contract. Having been sanctioned by the court, it becomes a determination of the controversy and has the force and effect of judgment.”

The Court no tangible benefit of/from the Consent save compliance of Court orders. The Concessions were assumed to be reciprocal between the parties. If not the parties ought to have protested and informed the Court that there was no consent to record.

Assuming there was coercion which the Court states it is not the case what would have been the cause of action available to the parties under the law? In my considered opinion, the parties ought to have applied/apply to set aside the consent and give the Court an opportunity to pronounce itself on the grounds that have been raised in the matter.

3) The Court refused /declined to hear the matter pertaining to the Court orders of Kisii PM.s Civil application No 20 of 2019.

From the Application filed on 30th September 2019, the Plaintiff /Applicant deponed that they learnt of the repossession being done pursuant to orders of Chief Magistrate’s Court on 4th March 2019 and moved the Court by way of Preliminary Objection and Ruling was delivered on 9th July 2019 which sought that all motor vehicles be returned to the plaintiffs. The plaintiff/applicant wanted to bring this order to the attention of this Court.

With respect, this Court already issued orders of status quo pending hearing and determination of the application of 3rd March 2019. If any contrary action took place the parties ought to have come to Court and ventilate compliance or non compliance of the Orders of 27th May 2019. The proceedings and order from **CMCC No 20 of 2019** are of circumstances that took place outside the Court orders of 27th May 2019 and parties appeared in the said Court. Hence parties were to regularize any contrary action to compliance of the orders of 27th May 2019. The Court order by **CMCC No 20 of 2019** was to bind parties in the circumstances.

Mr Wachira for Plaintiff /Applicant stated that the **CMCC Kisii Court in its Ruling of the Preliminary Objection stated it lacked jurisdiction**. The Parties/Counsel were/are at liberty to pursue any legal rights in the matter in Kisii High Court. If any redress was required with regard to the events that occurred in Kisii on repossession of motor vehicle and truck.

In terms of Hierarchy of Courts the orders by **CMCC Kisii Court** bound parties and not this Court. With respect, parties ought to have brought to the attention of the **CMCC Kisii Court**, orders of this court of maintenance of status quo of 27th May 2019 so as to avoid conflicting orders. Moreso, if the court lacked jurisdiction it could not grant any other orders.

4) The Court put Ms Judy Mbugua to the stand and did not ask the other party to address the Court.

On 31st July 2019, after the Court declined to hear the matter pertaining to Kisii CM Court orders unless an appeal was/is filed, the court asked the parties to revert to status quo ante; where parties were and the situation as it existed as at 27th May 2019, Counsel engaged in discussions and I noticed a lady ferociously engaging Mr Ogolla for the Plaintiff and asked her to speak up in Court for all of us to hear and find out what was the issue. She expressed herself that she did not agree to release of Motor vehicles or where they would be stored. This Court did not conduct a hearing, nobody took the stand as alleged no one was sworn to give evidence and there is no order that this Court

made on 31st July 2019 save for the Consent. There was/is no prejudice to any party as the court issued no orders.

Finally, the Court adopts the words of the Court in **Abdiwahab Abdullahi vs Governor, County Government of Garissa & 2 Others [2013] eKLR:**

“One last word of unsolicited advice to my brothers, legal Counsel involved in this case; the same way this Court and judicial officer presiding over it holds the parties and Counsel with respect and in high esteem, the same way the Court and Presiding Officer demands respect from Parties and Counsel appearing before it. It is a mutual relationship. The parties and Counsel practising before this Court must also be willing to be guided by the Presiding Officer. [We] must all submit to the rule of law. Any party who is not satisfied with a Ruling of this Court is at liberty to file an appeal. That party would be acting within its rights and that is why our courts are hierarchical.”

I have outlined the proceedings as per the Court record that culminated with the application for recusal. I have also explained the decisions and conduct of the Court during these proceedings. From the material placed before me am of the view that this Court has and will continue to ensure fair hearing to the parties in an impartial and independent manner as mandated by law and Constitution. There is no legal basis for recusal or disqualification of this Court as impropriety has not been established by the pleadings on record

The Parties are at liberty to determine the way forward.

DELIVERED SIGNED & DATED IN OPEN COURT ON 11TH OCTOBER 2019.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

MR. WACHIRA FOR PLAINTIFF

MR. NJOROGE FOR THE 1ST DEFENDANT- ABSENT

MS JASMINE – COURT ASSISTANT