



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & TAX DIVISION**

**CIVIL SUIT NUMBER 450 OF 2015**

**FRANK MERCHANTS LIMITED ..... PLAINTIFF**

**versus**

**FAMILY BANK LIMITED .....1<sup>st</sup> DEFENDANT**

**JOSEPH KARIUKI trading as JOSRICK MERCHANTS**

**AUCTIONEERS ..... 2<sup>nd</sup> DEFENDANT**

**LEAKEY'S STORAGE LIMITED ..... 3<sup>rd</sup> DEFENDANT**

**R U L I N G**

1. The Application now before the Court is brought under a Certificate of Urgency on behalf of the Plaintiff. In the Complaint the Plaintiff is described as a "private limited company duly incorporated as such in the Republic of South Sudan. The Complaint does not state where and what kind of business it carries out. The Verifying Affidavit is sworn by one LLYOD SILAS MBAE who is a resident of Nairobi and describes himself as a director of the company duly authorised. No Letter of Authority is included in the documents. The Certificate of incorporation that is exhibited is completely illegible.

2. The Defendants are firstly Family Bank Limited which as the name denotes is a limited company operating as a Bank. The Second Defendant is an Auctioneer trading under the name Josrick Merchants. The Third Defendant is also an Auctioneer, which operates the storage facility that the Plaintiff says has stored its vehicle.

3. The Application seeks the following Orders:

*"1. That this application be certified as urgent and be heard ex parte in the first instance (Spent)*

*2. That pending the hearing and determination of this application inter-parties, this Honourable Court be pleased to issue an order of temporary injunction, restraining the Respondents, whether by themselves, their agents, employees, servants or any person acting at their behest, from selling, disposing off, alienating, or in any other manner interfering with Motor Vehicle SSWE 00900A. (Spent)*

*3. That pending the hearing and determination of this application inter-parties, this Honourable Court be pleased to issue an order directed to the Respondents to release the Motor Vehicle SSWE 009A to Pangani Police Station for safe custody. (Spent)*

*4. That this Honourable Court be pleased to order that all accrued storage charges due to the 3<sup>rd</sup> Respondent be paid by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents*

*5. That this Honourable Court be pleased to order the Respondent to release Motor Vehicle SSWE 009A to the Applicant;*

6. *That pending the hearing and determination of this suit, this Honourable Court be pleased to issue an order of temporary injunction, restraining the Respondents, whether by themselves, their agents, employees, servants and any other person acting at their behest from selling, disposing off, alienating, or in any other manner interfering with Motor Vehicle SSWE 009A*

7. *That the costs of this application be provided for.*”

4. The Application is brought by Notice of Motion and is supported by the Affidavit of LLYOD SILAS MBAE. The Grounds relied upon appear on the Grounds appearing on the face of the Notice of Motion and the Supporting Affidavit. The Application is brought under the provisions of **Section 1A, 3, 3A of the Civil Procedure Act, Order 40 rule 1 of the Civil Procedure Rules** and all the other enabling provisions of the law.

5. In summary the Plaintiff’s case is that the Auctioneer on behalf of the Bank re-possessed its vehicle Registration Number SSWE 009A on a date which is not set out without notice or proclamation or warrant of attachment and thereafter have stored the vehicle in the premises of the Third Defendant. It is alleged that this is a case of “mistaken identity”. The Respondents were interested in repossessing a vehicle jointly owned by the Bank and a company also known as Frank Merchants Limited whose principal director is one Francis Njoroge Kinyanjui who is said to have no connection whatsoever with the Plaintiff. At Ground 8 it is said “*The Applicant has a prima facie case against the Respondents with a high probability of success for reasons that:*

*i. Motor Vehicle KAZ 070L which was pledged to the 1<sup>st</sup> Respondent as security is clearly different from Motor Vehicle SSWE 009A*

*ii. The Applicant has not guaranteed any loan obligation of Francis Njoroge*

*iii. The 2<sup>nd</sup> Defendant did not serve a proclamation, notice, warrants of attachment or any notice at all upon the Applicant.*

At Ground 9 it is said that unless the orders are granted the Applicant will suffer loss and damage that cannot be adequately compensated by an award of damages due to the unlawful actions of the Respondents. The Affidavit in Support asserts that the two vehicles are different and that the Plaintiff and its director has no connection whatsoever with the entity that owes the Respondent Bank loan arrears. The Plaintiff seeks to portray the Second Defendant as little better than a thug who “stole” his vehicle by force and/or mis-statement. The documents exhibited are also exhibited by the Defendants (in clearer versions). I will deal with them below.

6. The Defendants have filed Grounds of Opposition and the Replying Affidavit of the Second Respondent. The Opposition is brought under Order 51 Rule 14. The Grounds of Opposition state:

“The 2<sup>nd</sup> defendant shall at the hearing of the plaintiff’s application dated 17<sup>th</sup> September 2015 oppose the same and he shall advance the following grounds:

(1) The application is frivolous, vexatious and an abuse of the court process

(2) The Plaintiff does not have a prima facie case with a probability of success.

(3) The plaintiff has not demonstrated that it will suffer irreparable loss that may not be compensated by way of damages

(4) The plaintiff is guilty of laches

(5) The plaintiff has come to equity with dirty (sic) hands

(6) There are no exceptional circumstances to warrant the issuance of a mandatory injunction

(7)The Plaintiff wants to steal a march on the defendants and more particularly the 2nd defendant

(8)The balance of convenience tilts in favour of the defendants.

7. The Plaintiff filed the Supplementary Affidavit of Mr Mbae on 14<sup>th</sup> March 2016 together with its Written Submissions

8. The particulars of the two vehicles as they appear from their respective logbooks (as provided by the Plaintiff) and evidence filed are as follows:

<b>Registration :</b>	<b>KAZ 070L</b>	<b>SSWE 009A</b>
<b>Make and Model:</b>	Nissan Diesel CWB450	Nissan Diesel CWB450
<b>Colour:</b>	White	Blue and White
<b>Year of Manufacture:</b>	2007	2009
<b>Engine No:</b>	PF6-127111A	PF6-127111A
<b>Chasis No:</b>	CWB450PO8327	CWC45P-00271
<b>Attachments:</b>	Prime Mover	Prime Mover
Registered owner	Family Bank and Francis Njoroge Kinyanjui	

9. Moving onto the objections. Objection 1 takes its wording from Order 2 Rule 15 but does not ask the Court to strike out the Application and therefore is incongruous in the way it is placed before the Court. **Order 2 Rule 15** provides:

*Order 2, rule 15. Striking out pleadings.*

*15. (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—*

*(a) it discloses no reasonable cause of action or defence in law; or*

*(b) it is scandalous, frivolous or vexatious; or*

*(c) it may prejudice, embarrass or delay the fair trial of the action; or*

*(d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.*

*(2) No evidence shall be admissible on an application under subrule (1) (a) but the application shall state concisely the grounds on which it is made.*

*(3) So far as applicable this rule shall apply to an originating summons and a petition.*

10. The Respondents rely on Order 1 Rule 14 which provides: 14.” Any application to add or strike out

or substitute a plaintiff or defendant may be made to the court at any time". The applicability of that provision is not readily apparent to the arguments before the Court.

11 The Replying Affidavit sets out the history from the perspective of the First and Second Respondents. He states that he was instructed by the bank by a letter of instruction dated 27<sup>th</sup> October 2011 he was instructed to search, seize and repossess motor vehicle Nissan Diesel, Model CWB 450 Prime Mover registration Number KAZ 070L registered to Francis Njoroge Kinyanjui. The Letter of Instruction is exhibited and the deponent goes into great length as to his instructions. He was also given a copy of the log book. The crux of the matter is that he was instructed to repossess the Motor vehicle. He says that on 28 November 2011 at 11.20 am he located the Motor Vehicle at the Premises of the borrower, Frank Merchants Ltd and Francis Kinyanjui. He says he proclaimed the Motor Vehicle and a copy of the proclamation dated 28<sup>th</sup> October 2011 is exhibited as JK4. He says that when he went back, the motor vehicle could not be traced despite visiting the premises during November and December 2011. He says that he was informed by one of the employees of the Plaintiff, Samuel Mukui Njoroge that the vehicle had gone to South Sudan and been re-registered there. The Log Book from South Sudan exhibited by the Plaintiff shows registration of that vehicle was on 3<sup>rd</sup> November 2011. That is less than a week after the proclamation. That may or may not be a coincidence.

12. For some reason that is unclear Samuel Njoroge agreed to inform the Second Defendant when the vehicle would be back in the jurisdiction. That happened around 28<sup>th</sup> March 2014. It would appear that by then the loan had not been repaid, so the auctioneer's instructions were continuing. He visited the Borrowers/Plaintiff's premises in Ngara Road and found a very similar vehicle there. The main differences were that the Number Plate was different, bearing the number SSWE 009A and the colour which was blue and white instead of only white. The make model and possibly age of the vehicle was the same. The Auctioneer repossessed the vehicle and took it to the Yard of the Third Defendant. The driver of the vehicle accompanied them and took certain items from it in particular the tool box and jack.

13. The glove compartment of the vehicle contained certain items that are listed at paragraph 25 of the Affidavit. They tell an interesting story. In the main the Plaintiff says that they are not admissible.

14. The First Defendant has also filed a Replying Affidavit sworn by its legal officer, Anthony Ouma. Starts off by arguing a legal point that the application is incurably defective, incompetent and misconceived etc. A large part of the Affidavit is repetitious and contains a significant number of statements that can only be conjecture at this stage of the proceedings. He does inform the Court that the vehicle in question is the subject of criminal proceedings and is now seized by the relevant authorities as an exhibit (Milimani CMCC Misc App 1830 of 2015) so any order made along the lines prayed by the Plaintiff would be futile and ineffective. Although the "Annexure FBL-1 to FBL-5

The similarities/ differences of the two vehicles are: ..... According to the Second Defendant at paragraph 27, the particulars of motor vehicle registration number KAZ 070L in the logbook issued by Kenya Revenue Authority are exactly the same as those in the logbook for motor vehicle Registration number SSWE 009A ...

15. The connection and similarities between the motor vehicle seized and the motor vehicle which was to be security for the Plaintiff's indebtedness are too numerous, according to the Defendants, to be a coincidence. In fact they are alleged to be a concerted plan to avoid re-possession. The Plaintiff is seeking a mandatory injunction for the delivery up of the motor vehicle. The Application is brought under **Order 40** which provides:

[Order 40. rule 1] Cases in which temporary injunction may be granted.

1. Where in any suit it is proved by affidavit or otherwise—

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

2. (1) In a suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.

(2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.

### Reasoning and Decision

1. The Plaintiff in its Submissions lists its own issues for determination as follows:

(a) Whether Motor Vehicles KAZ 070L and SSWE 009A are the same;

(b) Whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were right in attaching the Applicant's Motor Vehicle for a third party's debt?

(c) Whether the documents annexed as Exhibits JK-8 to JK-15 in the 2<sup>nd</sup> Respondents replying affidavit are admissible?

(d) Whether the Applicant has met the criteria for the grant of the orders sought as set in **Giella v Cassman Brown 1973 CA**

2. Starting with the Plaintiff's argument. The Plaintiff's case is based squarely on there being absolutely no connection between the motor vehicle owned by Franks Merchants Ltd registered in Kenya and the vehicle that was proclaimed and the vehicle that is now in the possession of the Defendants. To that end the Exhibits to the Replying Affidavit make for interesting reading. In particular, JK 17 onwards.

3. The Plaintiff objects to the production of Exhibits JK8-JK-15. It is argued that they are not admissible. Those are documents that were found in the glove compartment of the vehicle seized by the Second Respondent. One such document is the Driving Licence of Francis Njoroge Kinyanjui. The Supplemental Affidavit states "14. THAT I have no knowledge of the documents referred to as EXHIBITS JK-8 TO JK-15 by the 2<sup>nd</sup> Respondent. Further, the 2<sup>nd</sup> Respondent has sufficiently not demonstrated how he obtained a third party's documents without his consent, a search warrant and or a court order. In the circumstances, the aforesaid documents are inadmissible and I urge the court to disregard them.". In fact 29 of the Replying affidavit sets out where and when the documents were found and lists them. If as alleged by the Plaintiff, it is true that the deponent of the Supporting and Supplementary Affidavits have no knowledge or connection with

4. The Plaintiff is seeking by prayers 4 and 5, a mandatory injunction. Prayer 6 seems to be in the alternative to Prayer 5. The grounds for granting a temporary mandatory injunction are well settled and rely on the case of **Paul Tirimba Machogu v. Rachel Moraa Mochama (2015) eKLR**. Which simply restates the principle 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 easily remedied or where the defendant had

*attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction the court had to feel a high 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.....”.*

does lend some guidance is the extract from Halsbury’s Laws Volume 24. What is relied upon is Paragraph 848 which states: “A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once of if the act done is a simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the plaintiff such as where on receipt of notice that an injunction is about to be applied for the defendant hurries on the work in respect of which complaint is made so that when he receives notice of an interim injunction is completed, a mandatory injunction will be granted on an interlocutory basis.” (**Locobail International Finance Ltd v Agroexport and others [1986] 1 All ER 901**). (emphasis added)

paragraph 486 also lends guidance and it states; “It has been said that the owner of granting mandatory injunctions should be exercised with the greatest possible care but every injunction whether restrictive or mandatory ought to be granted with care and caution, and no more care or caution is required in the case of a mandatory injunction than a restrictive injunction. The court has no more hesitation in granting a mandatory injunction in a proper case than any other injunction, and has frequently granted one in order, for instance, to remove obstruction to light. The court may grant a mandatory injunction upon the trial of the action, or in certain circumstances upon an interlocutory application.”

#### Prima Facie Case

5. Therefore the Court simply needs to be satisfied that there is a prima facie case, that the applicant will suffer irreparable harm which cannot be compensated for in damages and where the balance of convenience lies, as explained in the case of **Giella v Cassman Brown (1973) EA LR 358, 360 D-F**. These well accepted principles were set out by the Court of Appeal in **Giella v. Cassman Brown**, established that the court has to consider the following questions before granting injunctive relief: (i) *is there a prima facie case with a probability of success?* (ii) *does the applicant stand to suffer irreparable harm, if relief is denied?* (iii) *on which side does the balance of convenience lie?* The Court of Appeal also referred to earlier cases as follows:

**6. “I will begin by stating briefly the law as I understand it. First, the granting of an interim injunction is an exercise of judicial discretion and an appellate court will not interfere unless it be shown that the discretion has not been exercised judicially (Sargent v. Patel (1949), 16 E.A.C.A. 63)**

**7. The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience (E.A. Industries v. Trufoods, [1972] E.A. 420).**

*“a prima facie case is more than an arguable case, it is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.” Per Bosire JA in **the Mrao v First American Bank and 2 Others Civ App 39 or 2002***

8. The Plaintiff in its Submissions lists its own issues for determination as follows:

(e) Whether Motor Vehicles KAZ 070L and SSWE 009A are the same;

(f) Whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were right in attaching the Applicant’s Motor Vehicle for a third party’s debt?

(g) Whether the documents annexed as Exhibits JK-8 to JK-15 in the 2<sup>nd</sup> Respondents replying affidavit are admissible?

(h) Whether the Applicant has met the criteria for the grant of the orders sought as set in ***Giella v Cassman Brown***.

9. Starting with the Plaintiff's argument. The Plaintiff's case is based squarely on there being absolutely no connection between the motor vehicle owned by Franks Merchants Ltd registered in Kenya and the vehicle that was proclaimed and the vehicle that is now in the possession of the Defendants. To that end the Exhibits to the Replying Affidavit make for interesting reading. The Plaintiff must satisfy the Court that there is in fact no connection. In the circumstances, the Court would expect the Application to explain how the two vehicles came to be so strikingly similar. Further how did the Engine from the vehicle jointly owned by the Bank find its way into the body of a completely unrelated vehicle.

10. In addition, the vehicle contained documents belonging to the debtor to the Bank. The Court does not at this stage look at the probative value of those documents. The Plaintiff must demonstrate a prima facie case that there is no connection between the two vehicles. The engine, the documents and the same employee link the vehicle seized with the debtor. The Debtor/Applicant has not explained how that could be in his version of events. The bold statement that there is no connection is not sufficient to establish the case argued.

11. In the circumstances, the Court is led to the conclusion that even if the vehicle seized is not in totality the same as the vehicle that is jointly owned by the Bank, a significant part of it is, namely the engine and to that extent, the proclamation and attachment is justified. Against, that finding the Applicant has not established that the Second Defendant has acted beyond the authority of the Auctioneers Act.

12. Therefore, for the Reasons set out above the Court makes the following Order:

(1) Application dismissed

(2) Plaintiff to pay the Defendant's costs of the Application

(3) Such costs to be paid by the principal director of the Plaintiff – appropriate to pierce the corporate veil due to the attempts to mislead the Court in relation to the identity of the Plaintiff company.

Order accordingly,

**FARAH S. M. AMIN**

JUDGE

**DATED, SIGNED AND DELIVERED** at **NAIROBI** this 15<sup>th</sup> day of June **2017**.

In the Presence of

Clerk: Patrick Mwangi

Plaintiff: Mr Wanjohi

First Defendant : Mr Kago Holding Brief for Mr Kazungu

Second Defendant: N/A