



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

FAST TRACK CIVIL SUIT CASE NO. 2 OF 2016.

HEZRON MUNANGA SAMWEL.....PLAINTIFF

EZEKIEL MUNANGA MABURUPLAINTIFF

VERSUS

FAMILY BANK KENYA.....DEFENDANT

PAWABA AUCTIONEERSDEFENDANT

R U L I N G.

1. The application dated 12th January, 2016 was certified urgent on 13th January, 2016 and interim orders granted. The applicants seek the following orders:-

- i. *Spent;*
- ii. *Spent;*
- iii. *That the respondents either by themselves, agents, or anyone acting on their behalf be restrained by way of an injunction from selling or any other way disposing of the motor vehicle registration no. KCD 457K until the hearing and final determination of this application;*
- iv. *That the motor vehicle reg. No. KCD 457K be released to the applicants;*
- v. *That any other further orders be made as the honourable court may deem just and expedient.*

2. The application was anchored on the following grounds:-

- i. *That the respondents attached/repossessed the subject motor vehicle when the applicants had faithfully paid monthly instalments in terms of the agreement;*
- ii. *That the attachment/repossession aforementioned was unlawful and unjustified simple and clear;*
- iii. *That the applicants have been prejudiced by the respondent's (sic) conduct/action and the same ought to be mitigated by the grant of orders sought in this application;*
- iv. *That this application is made in good faith and has merit.*

3. Ms. Shirika for the applicants submitted that the respondents herein were served with the exparte orders issued on 13th January, 2016 which clearly indicated that the application dated 12th January, 2016 would be heard interpartes on 19th January, 2016. The applicants filed affidavits of service to show that the respondents were duly served with the said court orders. None of the respondents filed a response in court.

4. The applicants' application is supported by the affidavit of the 2nd applicant Ezekiel Munanga Mabuni. In the said affidavit he deposes that the applicants bought motor vehicle Registration No.

KCD 457K Isuzu bus from Kenya Coach Industries Ltd for the sum of Ksh. 3,706,800/= and that the 1st respondent, Family Bank was the financier. The loan advanced was the sum of Ksh. 2,956,800/= as per annexure 2 of the supporting affidavit.

5. The 2nd applicant deposes that the loan was to be paid by way of monthly payments of Ksh. 82,746.00 for a period of 48 months commencing June, 2015. The 2nd applicant deposes in paragraph 9 of his affidavit that they have repaid a sum of Ksh. 864,000.00 to date and attached the annexure marked HMS3 in form of a bank statement to support that assertion. This sum, the 2nd applicant avers, is over and above the sum of Ksh. 496,476.00 that the applicants should have paid by the end of December, 2015. The amount overpaid is said to be Ksh. 367,524.00.
6. The deponent deposes that the motor vehicle Registration No. KCD 457K Isuzu bus was seized by the 2nd respondent on the instructions of the 1st respondent through a letter dated 22nd December, 2015. The deponent avers that statutory provisions under the Chattels Transfer Act were not followed before the motor vehicle was repossessed. This has therefore caused the applicants to suffer irreparable loss and damages.
7. Ms. Shirika, learned counsel for the applicants took the court through the bank statements in respect to the loan account held by the applicants relating to the matter in issue.

Determination of the application

The issue for determination is if the actions of the respondents of repossessing motor vehicle registration No. KCD 457K Isuzu bus were unlawful, unjustified and unreasonable.

8. The actions of the respondents herein of repossessing the subject motor vehicle prompted the applicants to file a plaint and other requisite documents on 12th January, 2016. The non response of the respondents to the present application means that the averments by the said applicants remain uncontroverted. I am satisfied that the applicants have been making regular deposits into the bank account they hold with the 1st respondent towards the loan repayment. The act of the applicants of taking a loan was to improve their lot. The repossession of the said motor vehicle by the 2nd respondent on the instructions of the 1st respondent is thus a serious drawback for the applicants herein.
9. The applicants applied for an interim injunction until the hearing and determination of the application. They did not apply for an interim injunction pending the hearing of the suit as well. Although the applicants have anchored their application on all enabling provisions of law, this court will restrict itself to the prayers sought by the applicants in the application dated 12th January, 2016.
10. As to whether the respondents' action of repossession of motor vehicle Registration No. KCD 457K were justified. I make reference to the case of **Associated Provincial Picture Houses Ltd vs. Wednesbury Corporation (1947) 1 KB 223** with reference to the Master of the rolls Lord Greene's finding that:-

“It is true that discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word “unreasonable” in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said and often is said, to be acting “unreasonably”.

11. This court deems the acts of the respondents in repossessing the subject motor vehicle as unlawful and unjustifiable and amounted to unreasonable exercise of discretion as they have not through pleadings shown which terms of clause 12 of the loan agreement the applicants contravened.

12. I therefore hereby grant the following orders:-

- i. *That the motor vehicle registration No. KCD 457K be released to the applicants forthwith; and*
- ii. *Costs in the cause.*

DELIVERED, DATED and SIGNED in open court at **KAKAMEGA** this **2ND** day of **FEBRUARY**, 2016.

NJOKI MWANGI

JUDGE.

In the presence of

..... for the applicants.

..... for the respondents

..... Court Assistant.