



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL & TAX DIVISION**  
**CIVIL CASE NO.238 OF 2016**

**TALENT GRAPHICS LIMITED.....PLAINTIFF**

**-VERSUS-**

**DANIEL OMALA ODURU.....DEFENDANTS**

**RULING**

[1] The Plaintiff/Applicant, Talent Graphics Limited, approached the Court vide the Notice of Motion dated **13 October 2015**, seeking orders that it be granted leave to amend its Chamber Summons dated **21 June 2016** so as to have the orders sought therein addressed to the **Officer Commanding Station, Ndhiwa Police Station**, under whose jurisdiction the subject motor vehicle was found. The application, which was filed pursuant to **Sections 1A, 3A and 100 of the Civil Procedure Act, Chapter 21 of the Laws of Kenya, Order 8 Rule 5(1) of the Civil Procedure Rules, 2010**, is predicated on the Supporting Affidavit annexed thereto sworn by **Tom Mboya Oduru**, a Director of the Plaintiff.

[2] The brief background to the application is that, vide its Chamber Summons dated **21 June 2016**, the Plaintiff/Applicant moved the Court for interim measures of protection in respect of **Motor Vehicle Registration Number KAS 549K** pending the *inter partes* hearing and determination of the said application. Interim orders in terms of Prayers 2 and 3 of the Chamber Application were granted ex parte on **27 June 2016** and an Order was thus drawn and issued in terms for execution by the Inspector General of Police as per prayer (3) of the Plaintiff's Chamber Application dated **21 June 2016**.

[3] It was averred on behalf of the Plaintiff that that for the reason that the subject motor vehicle was under the jurisdiction of the **OCS, Ndhiwa Police Station**, the Process Server, one **Tom M. Obingo**, proceeded to Ndhiwa Police Station on **6 July 2016** with a view of effecting service on the **OCS, Inspector Mutunga**, and although service was effected the **OCS** declined to execute the order, contending that Order was not addressed to him. To correct that anomaly, the Plaintiff filed the instant application, seeking leave to amend the Chamber Application dated **21 June 2016**, merely to delete the words "**Inspector General of Police**" appearing at paragraph 3 thereof, and replace it with the words "**OCS Ndhiwa Police Station**".

[4] To augment the Plaintiff's averments, the Affidavit of Service sworn by the Process Server as well as the draft Amended Chamber Summons Application were exhibited as attachments to the Supporting Affidavit, and on the basis of which Counsel for the Plaintiff/Applicant urged the Court to allow the

application and grant the orders sought.

[5] The application was opposed by the Defendant vide his Replying Affidavit sworn on **28 October 2015**. He averred therein that the application is not only vexatious and scandalous, but is also an abuse of the process of the Court. He stated that since the parties have already submitted to the arbitration process by filing their pleadings before the Arbitrator, an attempt to impound the suit motor vehicle can only be taken to mean that the Plaintiff/Applicant is out to scuttle the arbitral process. It was the Defendant's contention that the division of assets and liabilities, which include the subject motor vehicle, is one of the issues for resolution by the Arbitrator, and should therefore be left for determination in the arbitral process, rather than through a parallel process as the Plaintiff/Applicant purports to do herein. Counsel for the Defendant, **Mr. Odhiambo**, therefore urged the Court to dismiss this application with costs.

[6] In his response to the submissions of **Mr. Odhiambo**, Counsel for the Plaintiff, **Mr. Kirimi**, reiterated that the Plaintiff is merely seeking protective measures pending arbitration, and refuted the allegation that the Plaintiff is out to invoke a parallel process to the arbitral process for ulterior purposes.

[7] I have given due consideration to the respective positions taken by the parties herein and note that indeed, the Court has the requisite jurisdiction, by dint of **Section 7(1)** to entertain an application for interim measures of protection pending arbitration. That provision reads thus:

**"It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure."** (Emphasis added)

Accordingly, it cannot be said that the Plaintiff has engaged in a parallel process that is inimical to the arbitral process. Indeed, in the case of **Safaricom Limited vs. Ocean View Beach Hotel Limited & 2 Others [2010] eKLR** the Court ruled thus:

**"It may be necessary for an arbitral tribunal or a national court to issue orders intended to preserve the outcome of the arbitral evidence, to protect assets or in some way to maintain the status quo pending the outcome of the arbitral proceedings themselves ... Whatever their description however, they are intended in principle to operate as 'holding orders', pending the outcome of the arbitral proceedings. The making of interim measure was never intended to anticipate litigation."**

It would, thus, be illogical to argue that, in seeking the interim measures herein, the Plaintiff/Applicant set out in pursuit of a parallel course to the very arbitral process that he sought to underpin.

[8] Secondly, the record herein confirms that this suit was filed prior to the commencement of the arbitral process, and that it was at the instance of the Plaintiff that the matter was referred to arbitration on **11 July 2016**. The averment that he is out to scuttle the process is therefore untenable. At any rate, the instant application merely seeks to amend the initial application with a view of giving effect to the interim Order of the Court issued herein on **27 June 2016**. In this regard, **Order 8 Rule 5(1) of the Civil Procedure Rules** provides that:

**"For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just."**

[9] It is also noteworthy that the application sought to be amended is yet to be heard *inter partes*. Thus, as the Defendant will have a chance to express his views thereon at the opportune time, it cannot be said that the Defendant risks any prejudice that cannot be compensated for by way of costs.

[10] In the result, I find merit in the application dated **13 October 2016** and would allow it and grant orders prayed for therein in the following terms:

[a] Leave be and is hereby granted to the Plaintiff/Applicant to amend the Chamber Application dated **21 June 2016** in the terms proposed in the draft Amended Chamber Summons attached to the Supporting Affidavit;

[b] The amended Chamber Summons to be filed and served within 14 days from the date hereof and in the interim, an Order to issue in terms for execution by the OCS, Ndhiwa Police Station, in furtherance of the Order of **27 June 2016**.

[c] Costs of the application to be in the cause.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF NOVEMBER, 2016**

**OLGA SEWE**

**JUDGE**