



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NO. 47 OF 2013

DONAL INTERNATIONAL TRADING LIMITED 1ST PLAINTIFF

SAMUEL VARGHESE 2ND PLAINTIFF

V E R S U S

IMPERIAL BANK LIMITED 1ST DEFENDANT

GEORGE KIMANI T/A MURPHY MERCHANTS 2ND DEFENDANT

RULING

1. There are certain facts in this Ruling which are not disputed. One of those facts is that the first and second Plaintiffs hold bank accounts with the 1st Defendant. The 2nd fact is that the 1st Defendant in April 2013 through the 2nd Defendant attached motor vehicles KAZ 368Z, KBA 762Y and KBP 290S which were in the 2nd Plaintiff's possession.
2. It is not clear from the documents before Court whether the 1st Defendants advanced to the 1st or 2nd Plaintiff a loan facility. The Plaintiffs allege that the loan was granted to the first Plaintiff Company while the 1st Defendants in its replying affidavit allege that the loan facility was requested by the 2nd Plaintiff. Interestingly however, the 1st Defendants documents show that the loan was granted to the 1st Plaintiff.
3. The Plaintiffs have filed this case alleging that the 1st Defendant is claiming exorbitant interest rates on the loan facility. For damages to be granted for the wrongful attachment of the aforesaid vehicles for a declaration to be made that such attachment was wrongful and an order for the release of those motor vehicles.
4. The Plaintiffs have filed an interlocutory application by Notice of Motion dated 29th April 2013. They seek for an order that the 2nd Defendant do disclose the whereabouts of the motor vehicles; for an order restraining the Defendants from selling the attached vehicles and finally for an order for the unconditional release of those vehicles.

5. At this stage and time and bearing in mind the prayers that are sought in the application the Court will not concern itself with whether or not the 1st Defendant has charged exorbitant interest rates or penalties on the loan facility nor will the court concern itself with whether the Plaintiffs have failed to repay the loan granted by the 1st Defendant.
6. It should be recognized that the 1st Plaintiff is a limited liability company. The 2nd Defendant is one of its Directors.
7. The Plaintiff in his affidavit in support of the application stated that the 1st Defendant instructed the 2nd Defendant to unlawfully attach the motor vehicles which were parked outside his residence. The value of those vehicles was stated as Kshs. 2.5million. He further deponed as follows-

***“15. THAT I am aware that we have never signed a Lease or Hire Purchase agreement with the 1st Defendant, the 1st Plaintiff did not purchase any of the motor vehicles attached and or repossessed under any finance agreement or arrangement with the 1st Defendant and it has have (sic) never offered the said motor vehicles as security for the said overdraft or credit advanced to the 1st Plaintiff, therefore the said attachment and or repossession is wrong and amounts to an illegal act. The 2nd Defendant had a duty and ought to have verified the instructions given to him and confirmed that they were correct and by failing to do so, he acted negligently and the Defendants have exposed me and the 1st Plaintiff to damages which they knew or ought to have known.*”**

16.(a) Motor vehicle Registration NO. KAZ 368Z (Toyota Mark II) registered in the 1st Plaintiff's name is a security for a financial arrangement with another bank in whose custody the Log Book is.

(b) Motor Vehicle Registration No. KBP 290S (Toyota IST) does not belong to the Plaintiffs and is owned by a 3rd party who has claimed it from 2nd Plaintiff who had hired it from a third party for personal use. The owner of the same has demanded that the 2nd Defendant should return the motor vehicle. I produce hereto as exhibits a copy of the Log Book for the vehicle and a letter dated 30th April 2013 and a Search Certificate for the vehicle in a bundle marked ‘SV 3’.

(c) Motor Vehicle Registration No. KBA 762Y (Nissan Cab) though registered in the name of the 1st Plaintiff is not a security for any loan or financial arrangement with the 1st Defendant nor was it purchased through Lease or Hire Purchase arrangement with the 1st Defendant and the Log Book thereof is in the hands of the 1st Plaintiff.

(d) Further, no chattels mortgages or debentures have been registered and or created relating to the said Motor Vehicles.”

8. In response to the Plaintiffs claim the 1st Defendant's Legal Officer confirmed that the 1st Defendant accorded the 1st Defendant a loan facility. That loan facility was guaranteed by its Directors. According to the documents attached to her affidavit the 2nd Plaintiff requested for a temporally overdraft of Kshs. 3 million. The deponent did not state that whether that request was indeed acceded by the 1st Defendant. The demand for repayment of that loan is contained in a letter by the 1st Defendant dated 4th April 2011. That letter is addressed to the 1st Plaintiff. In this regard reference is made to the 1st Defendants exhibit marked “PCN3”. The deponent then confirmed that the 1st Defendant had instructed the 2nd Defendant to attach the motor vehicles and

the reason she gave for such attachment is as follows-

“11. That on the 27th March, 2012, the Defendant Bank instructed the 2nd Defendant, M/s Murphy Merchants to establish the physical address, assets and financial status of the Plaintiffs, whose account was overdrawn, with a view to seek advice whether recovery of the outlay was viable. Annexed herewith is a copy of the letter of instructions to Murphy Merchants marked ‘PCN 6’.

12. That on the 19th April, 2013, we received an investigation report from the 2nd Defendant on the residence, assets and place of work of the Plaintiffs. Annexed herewith is a copy of the said report marked ‘PCN 7’.

13. That on the same day we received the investigation report from the 2nd Defendant, we instructed the auctioneers to collect and repossess the properties of the Plaintiffs as per the investigation report, albeit inadvertently, based on email correspondences between our bank officials, where Mr. Samuel Varghese had approached the Bank seeking Hire Purchase Finance Request to purchase a New Tata Truck/Tipper sometimes in year 2010. Annexed herewith is a copy of the email correspondences between the 2nd Defendant Bank officials in regard to that request by the Plaintiffs for Hire Purchase financing marked ‘PCN 8’.

It is however to be stated the 1st Defendant did not produce evidence of such Hire Purchase agreement with the 2nd Plaintiff.

9. As stated before there are various issues the parties have raised in their submissions which I will not consider at this interlocutory stage. What is for consideration is whether the Court should or should not order the release of the Plaintiffs' motor vehicles.

10. The Defendants learned Counsel in his written submissions in respect of that order for release had this to say-

“However, by a twist of fate, the Defendant Bank, instructed the 2nd Defendant to establish the physical address, assets and financial status of the Plaintiffs, with the sole purpose of establishing whether recovery of the amount outstanding was viable. The report was received on the 19th April, 2013 and the contents were to the effect that the 1st Plaintiff's Company's Managing Director was not a man of straw and as such the recovery was reasonably viable. On the same day the report was received, the Defendant Bank, rather aggrieved by the impassiveness of the 2nd Plaintiff, instructed the 2nd Defendant to collect and repossess the properties identified, albeit inadvertently. The inadvertence, which is excusable, resulted from some email correspondences, and were in reference to sometimes when the 2nd Plaintiff approached the Defendant Bank seeking Hire Purchase Finance in the year 2010 (See annexure “PCN 8” of the Defendants' Replying Affidavit). Your Lordship, it is as a result of that inadvertence that the Defendants have been dragged to this Honourable Court, although, not as the aggrieved but rather as the perceived aggressors. A company that was in a “financial crisis”, and whose Directors appeared to have vanished into thin air, have finally resurfaced with an application against the Defendant Bank.”

11. It is clear that the first Defendant did not have judgment against the Plaintiffs which authorized the attachment of the motor vehicles. It is also clear that the Defendants did not have a chattels mortgage or hire purchase agreement over those motor vehicles. I need to dissuade the Defendants in their justification for the attachment of those vehicles on the bases that the 2nd Plaintiff was using the 1st Plaintiff as a cloak to avoid his liability towards the 1st Defendant. Even if that were true that would not justify the 1st Defendant's attachment of the motor vehicles.

12. On a prima facie basis having found that the 1st Defendant has failed to prove justification for that attachment, I find that the Plaintiffs prayer for mandatory injunction is merited. I find that such an injunction meets the standards which are stated in the case **KENYA BREWERIES LTD & ANO. -VS- WASHINGTON OKEYO CIVIL APPEAL NO. 332 OF 2000** where the Court stated-

“The test to grant a mandatory injunction or not is correctly stated in Vol. 24 Halbury’s Law of England 4th Edition paragraph 948 which reads:

“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 it ought to be decided at once, or 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 ... a mandatory injunction will be granted on an interlocutory application.”

There are special circumstances in this case justifying that injunction. That is the 1st Defendant has attached the vehicles some which are alleged to belong to third parties who are not parties before this case and in so doing the Defendants have failed to show any legal justification for such attachment.

13. Accordingly the Notice of Motion dated 29th April 2013 is granted in the following terms-

- a. **The 1st and 2nd Defendants are hereby ordered to henceforth release motor vehicles Reg. Nos. KAZ 368Z, KBA 762Y and KBP 290S to the Plaintiffs.**
- b. **The Plaintiffs are granted the costs of the Notice of Motion that shall be paid by the 1st Defendant.**

Dated and delivered at Mombasa this 4th day of October, 2013.

MARY KASANGO

JUDGE