



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT NAIROBI**

**MILIMANI COMMERCIAL AND ADMIRALTY DIVISION**

**Civil Case 211 of 2008**

**AGNES NTHENYA MWINZI.....PLAINTIFF**

**- VERSUS -**

**NIC BANK LIMITED.....1<sup>ST</sup> DEFENDANT**

**INTEGRA TRADING (K) COMPANY.....2<sup>ND</sup> DEFENDANT**

**R U L I N G**

1. Before the court is a **Notice of Motion** dated **11<sup>th</sup> April 2012**. It seeks injunctive relief against the Defendants being *inter-a-alia* an injunction restraining the Defendants from interfering with the Plaintiffs' quiet possession and ownership of motor vehicle KBR 142P and for its release to the Plaintiff. The application is premised on the grounds stated therein being that the Defendants have wrongfully and illegally impounded the aforesaid motor vehicle and have now advertised it for sale thereby denying the Plaintiff ownership and quiet possession.
2. The application is supported by affidavit of **AGNES NTHENYA MWINZI** dated **11<sup>th</sup> April 2012** together with its annextures. The application is opposed by a replying affidavit sworn by **HENRY MAINA** dated **4<sup>th</sup> May 2012** with its annextures.
3. Briefly the history of the application is that the Plaintiff and the 1<sup>st</sup> Defendant are joint owners of motor vehicle registration number KBR 142P vide a Chattels Mortgage Agreement dated 16<sup>th</sup> April 2012. The 1<sup>st</sup> Defendant finalized the purchase of the said vehicle under the said Chattels Agreement for a sum of Kshs.3,365,250/= under which agreement the Plaintiff is obligated to repay the loan by way of 35 monthly installments of Kshs.132,046/= and one final installment of Kshs.132,016/= plus Kshs.5,000/= being the option to purchase. The Plaintiff then took possession of the said motor vehicle on 20<sup>th</sup> March 2012 and had enjoyed quiet possession of the same until the 5<sup>th</sup> April 2012 when the 1<sup>st</sup> Defendant, through the 2<sup>nd</sup> Defendant impounded the said motor vehicle and has advertised the same for sale by public auction.
4. The Plaintiff submits that the impounding of the said motor vehicle is unlawful and unjust, and is in disregard to the said Chattels Agreement, hence the prayers in the application herein.

5. On their part the 1<sup>st</sup> Defendant submitted that the Chattels Agreement was entered into and approved on certain terms which are stated in paragraph 5 of the replying affidavit of **HENRY MAINA**. The 1<sup>st</sup> Defendant further submitted that during a routine appraisal of the statements of account presented by the Plaintiff to the 1<sup>st</sup> Defendant for consideration in evaluation of whether the Plaintiff qualified for the grant of the said facility, the 1<sup>st</sup> Defendant established that the statements of account presented by the Plaintiff allegedly issued by CFC Stanbic Bank Limited were forgeries. Those statements were annexed to the replying affidavit as “**HM4**”. On this ground the 1<sup>st</sup> Defendant decided to terminate the agreement citing Clause 9 (h) of the Chattels Instrument which deals with fraudulent actions. The 1<sup>st</sup> Defendant then instructed the 2<sup>nd</sup> Defendant to repossess the said motor vehicle on 4<sup>th</sup> April 2012 and subsequently advertised the same for sale in the Daily National Newspapers of 11<sup>th</sup> April 2012. The 1<sup>st</sup> Defendant further reported the matter to the Banking Fraud Investigation Unit and the Plaintiff was charged in court in **Criminal Case Number 437 of 2012** with *inter-a-alia* the offence of uttering a false document.

The charge sheet was annexed to the Replying Affidavit as Annexure Number “**HM5**”. The Plaintiff then engaged in unsuccessful negotiations with the 1<sup>st</sup> Defendant on how to repay the entire loan facility. The 1<sup>st</sup> Defendant annexed annexure “**HM6**” to the replying affidavit showing the same.

6. I have considered the application and the submissions of the parties in this matter. It is important to note that the Applicant has not challenged the submissions by the 1<sup>st</sup> Defendant that the Plaintiff engaged in fraud and altered documents in order to secure the loans under the Chattel’s Agreement. I am satisfied that the Plaintiff gave false information so as to secure the loan and finalization of the purchase of the said motor vehicle. This action was not only wrong but criminal, and the matter is pending in a criminal court. When the Plaintiff came to court *ex-parte* on 13<sup>th</sup> April 2012 the Plaintiff did not disclose to the court these fraudulent actions. The Plaintiff made the court to believe that the 1<sup>st</sup> Defendant arbitrarily terminated the contract and then threatened to sell the suit property. That was material non disclosure. Further, the Applicant’s supporting affidavit is so scanty of relevant information. Failure to fully respond to these allegations by the 1<sup>st</sup> Defendant also shows that the Plaintiff’s conscience is overflowing with guilt under the weight of equity.

This court is a court of equity. The Plaintiffs’ hands are dirty. The Plaintiff cannot expect mercy from this court.

7. The relevant motor vehicle is currently owned jointly between the Plaintiff and the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant under the circumstances has no obligation to continue entrusting the said motor vehicle to the charge of the Plaintiff. The Bank’s interest in the suit property is clearly threatened, and it has the obligation to take any lawful steps to secure those interests.

8. In my view, the Plaintiff has not proved existence of a *prima-facie* case capable of succeeding at the trial stage. Further, all the principles established under the celebrated case of **GIELLA – VS – CASSMAN BROWN** have not been met in this application. For these reasons, without going any further, this application must fail.

I dismiss the Notice of Motion dated 11<sup>th</sup> April 2012, and discharge the interim orders issued on 13<sup>th</sup> April 2012. The costs of this application shall be for the 1<sup>st</sup> Defendant/Respondent.

It is so ordered.

**DATED, READ AND DELIVERED AT NAIROBI**

**THIS 2<sup>ND</sup> DAY OF JULY 2012.**

**E. K. O. OGOLA**  
**JUDGE**

**PRESENT:**

*Thuo for the Plaintiff*

*M/s Mburu for the Defendants*

*Teresia – Court Clerk*