



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

**Civil Suit 140 of 2012**

**CHINA PETROLEUM PIPELINE BUREAU  
LTD.....PLAINTIFF**

**- VERSUS -**

**ANDERSON NDWIGA NJERUT/A BRAJAN ENTERPRISES.....1<sup>ST</sup>  
DEFENDANT**

**DUNCAN MUGAMBI MUTUNGI T/A WRIGHT AUCTIONEERS..... 2<sup>ND</sup>  
DEFENDANT**

**R U L I N G**

**1.** Before the court is a **Notice of Motion** application dated **30<sup>th</sup> May 2012** filed under **Section 3, 3A and 6** of the **Civil Procedure Rules**, and **Order 40 Rule 1**, and **Order 51 Rule 15** of the **Civil Procedure Rules**. The application seeks as the substantive prayer an order that pending the hearing and determination of this suit a temporary injunction be issued to stay and set aside the order made by S. Atambo Principal Magistrate on **23<sup>rd</sup> May 2012** in **Misc. Cause No. 393 of 2012**.

**2.** The application is based on the grounds stated therein namely:-

**a)** That this Honourable Court ordered through a Ruling on **19<sup>th</sup> April 2012** that possession of the subject matter of the suit which is motor vehicles KBL 525 M and KBL 526 M (herein referred to as the said Motor Vehicles) remain in the possession of the Plaintiff.

**b)** That the Plaintiff together with the 1<sup>st</sup> and 2<sup>nd</sup> Defendant deposit the sum of **Kshs.3,600,000.00** in a joint interest earning account to be opened in the names of the advocates for the parties.

**c)** That the 1<sup>st</sup> Defendant through an *ex-prate* application to the Chief Magistrate's court sought an order for physical repossession of the said motor vehicles.

**d)** That the advocate for the 1<sup>st</sup> and 3<sup>rd</sup> Defendant has refused, neglected and/or failed to open the joint interest account as ordered by this Honourable Court.

**e)** That the said order from the Chief Magistrate Court is in breach of this Honourable court and an abuse of the court process.

**3.** In support of the application a supporting affidavit sworn by **LENG DONGSHENG** dated **30<sup>th</sup> May**

2012 has been filed with supporting annexures. The affidavit mainly amplifies the grounds stated in the application.

4. The application is opposed vide a replying affidavit sworn by **ANDERSON NDWIGA NJERU** filed in court on **6<sup>th</sup> June 2012**.

5. The brief history of this application is that on **19<sup>th</sup> April 2012**, the Honourable Justice George Odunga delivered a Ruling which *inter-a-alia* required the Plaintiff to deposit the sum of **Kshs.3,600,000/=** in a joint interest earning account to be opened in the names of the advocates for the parties within **21 days** from the date of that Ruling. This deadline appears not to have been met by the Plaintiff who, by its advocate's letter dated **14<sup>th</sup> May 2012** intimated that they were ready to open the said joint account. By their letter dated **16<sup>th</sup> May 2012**, the 1<sup>st</sup> Defendant's advocates stated that the money was to be deposited within **21 days** from **19<sup>th</sup> April 2012** and that since the Plaintiff had failed to do that within the stipulated time, they had no further instructions on the matter. Accordingly the account opening forms in Duplicate sent to the 1<sup>st</sup> Defendant's advocates on **16<sup>th</sup> May 2012** were never acted upon by the 1<sup>st</sup> Defendant.

6. On **23<sup>rd</sup> May 2012** the 1<sup>st</sup> Defendant sought an **ex-parte** order from S. Atambo Principal Magistrate directing the repossession of the subject motor vehicles if the Borrower (Mary Wambui Njuguna) failed to pay **Kshs.18,720,000/=** being the principal loan plus interest, legal fees, auctioneers fees and other costs in full. It is this order that the current application seeks to stay and or set aside.

7. I have considered the entire application and the opposing submissions. For me the issue as to whether or not the Plaintiff failed to meet the **21 days** deadline is important but not crucial in the nature of the matter at hand. Rather, what is crucial is the intent of the parties and whether their actions are actuated by malice or bad faith. It is important to note that the previous application ruled on by Honourable Justice Odunga was a difficult one. The Judge observed the peculiarity of the case. The Ruling read in part as follows:-

“In this case the Plaintiff's case is that it is the registered proprietor of the suit vehicles. However this contention is shaken by the findings by the police and the records of the Kenya Revenue Authority. The 2<sup>nd</sup> Defendant who it is alleged to be the registered proprietor's whereabouts are however, unknown since none of the parties seem to know how to trace her. Without the participation of the second defendant in these proceedings one cannot say with certainty who between the Plaintiff and the 2<sup>nd</sup> Defendant is the rightful claimant to the suit vehicles. Whereas, the official records indicate that the documents held by the Plaintiff are forgeries, no one seems to have come out to claim that the said vehicles are his. On the other hand the Plaintiff seems to have documents showing that the said vehicles were purchased from Toyota East Africa. The 2<sup>nd</sup> Defendant is indicated according to the 1<sup>st</sup> Defendant as the second owner of the said vehicles. There are no documents showing who were the first owners, according to the official records. It would have been helpful if the 1<sup>st</sup> Defendant had obtained records showing who the previous owners of the said vehicles were. Whether or not the Plaintiff has made out a *prima facie* case cannot be certain. This is a very much borderline case. The 1<sup>st</sup> Defendant on the other hand's interest in the said vehicles is not as the owner but simply as a pledgee. His interest is limited to recovering his money lent to the 2<sup>nd</sup> Defendant who has apparently gone underground.

In the foregoing premises, it is my considered view that this is a matter which should be decided on a balance of convenience. Since the Plaintiff is in possession and the 1<sup>st</sup> Defendant does not claim ownership of the vehicles, the maintenance of the *status quo* which is the cornerstone of prohibitive injunctive orders would dictate that the possession of the vehicles remain with the Plaintiff. Accordingly, the injunction sought in prayer 3 of the said motion is granted on condition that the Plaintiff deposits the sum of Kshs.3,600,000.00 in a joint interest earning account to be opened in the names of the advocates for the parties within 21 days. As mandated under the provisions of Order 40 Rule 6, the lifespan of these orders is one year unless ordered otherwise.”

8. Clearly, this is a matter that cannot be decided merely on the basis of a technicality. On **14<sup>th</sup> of May**

the Plaintiff indicated to the 1<sup>st</sup> Defendant that they were ready to comply with the court order. On **16<sup>th</sup> of May 2012**, the Plaintiff's Advocate enclosed for the 1<sup>st</sup> Defendant the account opening forms. On the same day the advocates for the 1<sup>st</sup> Defendant rejected the said forms stating they had no further instructions. On **23<sup>rd</sup> May 2012**, they moved to a lower court to secure the orders of repossession. In my view the resort to the lower court, to seek the repossession orders was in total bad faith both to the said orders of this court, and to the principle contained in the Ruling of Justice Odunga. A delay is a delay, even though the delay complained of herein was not inordinate. However, the parties must at all times consider that this is a court of equity. A court of equity seeks to settle matters fast with as less controversy as possible. Having been informed on **14<sup>th</sup> May 2012** that the Plaintiff was ready to open the said account, the 1<sup>st</sup> Defendant had no reason to go to an inferior court on **23<sup>rd</sup> May 2012**. This was an act in bad faith and meant to defeat the orders issued by Justice Odunga on **19<sup>th</sup> April 2012**.

Secondly, considering the sentiments expressed by the learned Judge on the difficulties of the matter at hand, the 1<sup>st</sup> Defendant sought to get an easy way out which rationalized the whole matter and making it as simple as that repossession order appears to make it. This action was mischievous in bad faith and an abuse of the court process.

**9.** In view of the foregoing, I allow the application and herewith set aside the order made by S. Atambo Principal Magistrate on the **23<sup>rd</sup> day of May 2012** in **Misc. Cause No. 393 of 2012**. I further direct and order that the orders issued by Honourable Justice George Odunga on **19<sup>th</sup> April 2012** be complied with within **7 days** from the date of this Ruling. The costs of this application shall be in the cause.

It is so ordered.

**DATED, READ AND DELIVERED AT NAIROBI**

**THIS 4<sup>TH</sup> DAY OF OCTOBER 2012**

**E. K. O. OGOLA**

**JUDGE**  
**PRESENT:**

*Kimathi for the Plaintiff*

*Osundwa for the Defendants*

*Teresia – Court Clerk*