



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Case 303 of 2009

KINZA MOTORS LTD. PLAINTIFF/APPLICANT

VERSUS

**TRACK IT LTD (IN RECEIVERSHIP)
DEFENDANT/RESPONDENT**

R U L I N G

1. What is before this court is an Application by way of Notice of Motion dated 25 June, 2012 filed herein on 26 June, 2012. It is an application by the Plaintiff herein that pending the hearing and determination of -this suit, that it be granted leave to dispose by way of sale, 4 motor vehicles being registration numbers KBE 969Y, KBD 373Q, KBA 512E and KBA 741B. The Application is based on the following grounds:

- “a) That the Plaintiff obtained an order issued on the 19th April 2011 directing seizure of several vehicles to wit KBC 173L, KBD 373Q, KBA 741B, KBE 452H, KBC 014C, KBG 937A, KBE 969Y, KBA 511W, KBA 512E and KBE 199G and for preservation of the same pending determination of the suit.**
- b) That due to the passage of time, the Plaintiff has only managed to so far trace only 2 vehicles namely KBE 969Y and KBD 373Q which it has repossessed and is unable to trace the rest.**
- c) That in the meantime, the receiver managers are holding a further 4 vehicles being KAZ 974W, KAZ 693X, KBA 512E and KBA 741B according to the affidavit of Mary Radido filed on 2nd June 2009 and have refused to release the same in contravention of the court order.**
- d) That the court in the ruling found as a matter of fact that the vehicles still belong to the Plaintiff and the ruling was not challenged to date.**
- e) That the said vehicles continue to wear out due to passage of time and it is necessary to have the same sold to enable the Plaintiff recover the proceedings thereof.**
- f) The possibility of the Plaintiff recovering the funds due as sought in the alternative in the suit is not guaranteed hence this application.**
- g) Such recovery from the proceeds of sale will be applied to reduce the Plaintiffs claim in the suit.**
- h) That the Plaintiff stand to suffer irreparably should the orders sought are not granted.**

i) That the interests of justice can only be met by granting this application as the Defendant stands to suffer no prejudice”.

2. The Application is supported by the Affidavit of one **NADEEM ABDULLAH** sworn on 25 June, 2012. Therein he describes himself as the Managing Director of the Plaintiff Company. He detailed that in April 2009 he had filed before this court an application seeking an order directing the seizure of several motor vehicles as listed in the Affidavit in support. He had noted that this court had on 19 April, 2011 issued an order directing the seizure of the several motor vehicles. He annexed to his Affidavit in support a copy of the Ruling the delivered by my learned brother Muga Apondi J. dated nineteenth of April 2011, in which he maintained that the Judge expressly found that since the Defendant Company had not paid for the vehicles so listed prior to the Company being placed in receivership, the vehicles belonged to the Plaintiff and the interest therein had not passed. He noted that the Judge's said order had not been appealed against nor set-aside. The deponent stated that since the Order of this court dated 19 April, 2011, the Plaintiff had only managed to trace and seize two vehicles and had been holding the same pending tracing the other vehicles being the subject of the said Order. The deponent further noted that the Plaintiff had lodged a claim for payment of the sums due in respect of the said motor vehicles in the amount of Shs. 6,339,557.50, as claimed in the Plaint. Mr. Abdullah maintained that as this is a monetary suit, the Plaintiff desired to sell the two vehicles that it had traced so as to redeem part of the amounts due to it.

3. Without leave of the court, the Plaintiff herein filed a Further Affidavit dated 27 July, 2012, again sworn by Mr. Abdullah. The main purpose of that Affidavit was that the Receivers of the Defendant Company had released 2 further vehicles to the Plaintiff on twenty-fourth of July 2012, one of which have been involved in an accident. The deponent attached to his Further Affidavit photographs of the accident vehicle. He noted that in his previous affidavit in support of the Application, he had deponed to the fact that the said motor vehicles were deteriorating and consequently their value reducing. He endorsed his viewpoint, as expressed in the Affidavit in support of the Application, that the traced vehicles should be sold in order to reduce the sum as claimed in the Plaint.

4. Prior to the filing of the Plaintiff's Further Affidavit, the Defendant herein had filed Grounds of Opposition dated twentieth of July 2012. The main ground put forward was that if the Plaintiff was allowed to dispose of the motor vehicles, which are the subject of this suit, such would be tantamount to prejudging this suit in the Plaintiff's favour without conducting any trial or hearing any evidence. Further, the Defendant noted that to allow the Plaintiff to dispose of the said motor vehicles would give to the Plaintiff, who is an unsecured creditor of the Defendant Company, priority in its claim over and above the claim of the secured creditors and would thus defeat their security. In the opinion of the Defendant, the Plaintiff had failed to completely demonstrate why it felt it necessary for an order to be made for the disposal of the said vehicles.

5. Mr. Maondo making submissions before court on the part of the Plaintiff stated that it relied upon the grounds detailed on the face of the Application as well as on the two Affidavits sworn by Mr. Abdullah. Counsel pointed out that in the Ruling of Apondi J. dated 21 April, 2011, the court had allowed the Plaintiff to attach the various vehicles therein and have the same preserved pending the hearing of suit. The Plaintiff had only managed to attach two of the vehicles listed in its previous Application but after the filing of the current Application, it had managed to get its hands on two further vehicles (from the Receivers of the Defendant) being vehicles registration numbers KAZ 693X and KBA 512E. It was for that reason, that the Plaintiff filed the Further Affidavit. The reason why the Plaintiff sought the permission of the court to sell the vehicles was that they continued to depreciate in value. He stated that the Defendant, being in receivership, if the Plaintiff's claim was allowed by the court, then the Plaintiff would recover very little money. Without assuming that the Plaintiff obtained judgement, it would be for the benefit of both parties if the said vehicles were to be sold. The Plaintiff would undertake to give credit to the Defendant for the sale monies of the vehicles. Counsel further pointed out that in the said Ruling at pages 16/17 the learned Judge had made a finding that as a matter of fact, the interest in or title to the said vehicles had not passed to the Defendant and the vehicles still belonged to the Plaintiff. In Counsel's opinion the Ruling had resolved the major issue between the parties being that the vehicles belonged to the Plaintiff and if the Plaintiff was allowed to sell off the vehicles, the court may direct as to the manner of disposal of the sale proceeds. Counsel then referred the court to **Order 40 rule 9** of the *Civil*

Procedure Rules which allows the court to grant a disposition of assets which are likely to decay while awaiting the results of the case.

6. Mr. Maondo then commented upon the Grounds of Opposition especially as regards paragraph 3 thereof, relating to pre-judging the result of the suit. He reminded the court once again, that the said Ruling of Apondi J. had found that the vehicles belonged to the Plaintiff, thus there was no question of pre-judgement in that regard. Further, Counsel maintained that paragraph 4 of the said Grounds of Opposition would not arise as the said vehicles do not form the basis of any claim as regards the receivership. Similarly for paragraph 5 of the said Grounds, which objected to the Application by stating that the ownership of the vehicles still remain to be determined by way of trial and hearing of the suit. This was not the case as the ownership had already been decided in the said Ruling. With regard to the disposal of the proceeds of sale, Counsel pointed out that the court had the discretion as to how the same should be held, if it was uncomfortable that the same should be retained by the Plaintiff and credit given to the Defendant as against the sum owed as claimed in the Plaintiff.

7. In reply behalf of the Defendant, Mr. Sarvia stated that the Application was opposed and referred to the Grounds of Opposition. He stated that the major plank upon which the Application rests is the unfortunate finding of Apondi J at pages 16 and 17 of his said Ruling which actually has two dates. On page 18 the Ruling is said to have been signed and delivered in open court on the 19th day of April 2011 and a little further down the page, the Judge has signed the same with the date immediately thereunder reading 21st April, 2011. In Counsel's opinion, Apondi J's finding as to ownership of the vehicles is *obiter* and not binding on this court. If it was to be interpreted in any other way, the trial judge would have nothing to decide in respect of this case. In Counsel's view, it was wrong of Apondi J. to make such finding as he was dealing with an application for a temporary injunction. He was not dealing with an application for summary judgement or for any final orders in the suit. Counsel submitted that no hearing or trial had been conducted and it was wrong of the Judge to make such a finding on the basis of Affidavits alone. As the Defendant considered the finding to be *obiter*, it did not appeal. The prayers granted in the interim injunction application preserved the status quo and subject matter of this suit, to which the Defendant had no real objection.

8. Counsel observed that there was a further problem with the finding in that it was inconsistent with the Plaintiff's case. On the one hand, the Plaintiff states that ownership of the vehicles has not passed from the Plaintiff to the Defendant. Yet the Plaintiff's case as per the Plaintiff is not claiming ownership of the vehicles – see the prayers thereto. The second prayer for Shs. 6.3 million is not an alternative prayer to prayer one seeking a permanent injunction. Counsel asked the question as to how was it possible for the Plaintiff to be the owner of the vehicles but at the same time claim the sum of Shs. 6.3 million being the purchase price of the same vehicles? Counsel maintained that if the trial court agreed with the Plaintiff and granted the prayers sought, then, of necessity, the trial court would have to disagree with the learned Judge's finding. In Mr. Sarvia's opinion the court cannot hold that the Plaintiff is the owner of the vehicles and at the same time, give judgement for the purchase price thereof. Counsel noted that the Defendant would have no issue with the vehicles being sold off but would request that the proceeds be preserved in some way. The court will have to make such provision as to provide for a fair method of undertaking the sale of the vehicles, which are all of different makes. Counsel further observed that by allowing the Plaintiff to sell the vehicles and keep the money, such would defeat the security of the debenture holders. The Plaintiff is only an unsecured creditor of the Defendant and nothing more. The debenture holders have a prior right to all the assets of the Defendant Company. Counsel requested that the court should consider the position of the debenture holders and stated that if the court was to order the sale of the vehicles then the proceeds should be held in an interest-bearing account in the name of the advocates on record for the parties.

9. In a brief reply, Mr. Maondo for the Plaintiff noted that his colleague had taken issue with the findings of Apondi J. The Defendant had a right of appeal or review as against the Ruling. It was not true that these issues were not raised with the Judge and that his findings were *obiter*. If the court referred to the Affidavits in support and in opposition to the Application the before Apondi J. it would see that all such issues were raised before him particularly issues as regards the ownership of the vehicles which the Judge thereafter made his Ruling upon. Counsel maintained that **section 6** of the *Civil Procedure Act* was

very clear in that where an issue has been determined previously, it becomes *res judicata*. Finally he stated that whatever proceeds would be raised upon the sale of the vehicles, credit would be given against the sum claimed in the Plaintiff.

10. Quite obviously, the major sticking point between the parties is the interpretation or otherwise of my learned brother Apondi J's Ruling whether the same be dated the 19th April 2011 or the 21st April 2011. I do not consider there is anything of import in this observation made by Mr. Sarvia but not pressed forward. Under **section 99** of the *Civil Procedure Act*, the Court at the request of any party or by its own motion may correct accidental slips or omissions that occur in judgements, decrees or orders. I note in that regard that the Order extracted as a result and arising out of Apondi J's Ruling noted that such was given in open Court on 19th April 2011 and thus I believe that this is the date that should be taken as correct when referring to Apondi J's said Ruling.

11. The next point to consider is the matter again raised by Mr. Sarvia as to Apondi J's finding on page 17 of his Ruling when he stated:

"The position of the law in the above case shows that the ownership of the vehicles had actually not passed to the defendants. That means that in law the defendant is not the legal owner of those vehicles and it is illogical for the receiver/manager to put any claim on those said vehicles."

Mr. Sarvia submitted that such words were uttered by my learned brother "*obiter*". According to **Collins English Dictionary – complete and unabridged** *obiter dicta* in law means:

"An opinion voiced by a judge that has only incidental bearing on the case in question and is therefore not binding. Also called *dictum*." Secondly the dictionary reads: **"An incidental remark or observation. A passing comment."**

Mr. Maondo observed that the whole question of the ownership of the said vehicles was raised and covered in the Affidavits in support and opposition to the application upon which Apondi J was ruling being Chamber Summons dated 30th April 2009. For example, in paragraph 16 of the Affidavit in support of that application sworn by the said **Mr. Abdullah** on thirtieth of April 2009, he stated:

" That I have been advised by my Advocate on record Mr. P. Munge Murage of Muiru Mungai & Company Advocates that no proper title has passed to the third parties and that this Honourable Court has the power to compel the third parties to return the said motor Vehicles."

Indeed in the Replying Affidavit to the application sworn by one **Mary Radido** on 2 June, 2009 in her capacity as one of the joint Receivers and Managers of the Defendant Company, she stated in paragraph 6 (a) and (b) thereof as follows:

"(a) The Vehicles having been sold to the Defendant as aforesaid, and the Plaintiff having delivered physical possession of the respective registration (log) books and transfer forms relating to the Vehicles to the Defendant as claimed by the Plaintiff, the Plaintiff's claim against the Defendant is limited only to the payment of the purchase price therefor;

(b) the Vehicles became the property of the Defendant when they were sold to the Defendant as aforesaid, and upon our appointment as Receivers and Managers of the Defendant on 17th of April 2009 the Debenture-holders' floating charge over all the assets of the Defendant became a fixed charge over the said assets, including the Vehicles, with the Debenture-holders' claim ranking first in priority over those of all other creditors, including the Plaintiff;"

In my opinion, those paragraphs indicate that the question of the ownership of the vehicles was paramount in the minds of the parties and put before the court for decision. Accordingly, I do not find that the words as detailed and quoted above by my learned brother Apondi J. amounted to *obiter dictum* as suggested by the Defendant.

12. Another point made by Mr. Sarvia as regards the finding of my learned brother Apondi J. was that if this court went along with his findings as to the passing of ownership in the vehicles, there would be nothing left to try at the hearing of this matter in due course. With respect I don't think that this is the case. If one looks at the prayers in the Plaintiff the first one seeks a permanent injunction to restrain the Defendant from transferring and/or dealing with the suit motor vehicles. That injunction has been granted on a temporary basis pending the hearing of the suit. However, if it is proved that the ownership of the vehicles had not passed to the Defendant at the hearing of the suit in due course, such prayer may well fall away with appropriate orders as to costs. Further, the second prayer in the Plaintiff seeks the sum of Shs. 6,339,557.50 as against the Defendant. Again, if the ownership of the vehicles had not passed to the Defendant, the question remains as to how the Plaintiff seeks this sum from the Defendant rather than the vehicles themselves. Further, there is still the matter of whether the Defendant has breached the contract to purchase the said vehicles from the Plaintiff. All these questions are still to be decided upon by the trial judge in due course.

13. I now come to the substantial Application itself and the prayer that pending the hearing and determination of this suit, the Plaintiff be granted leave to dispose of by way of sale the 4 vehicles that it now has in its possession. There is no doubt in relation to vehicle registration number KAZ 693X as per the photographs of the same attached to the Further Affidavit of Mr. Abdullah dated to 27 July, 2012 that the same is a write-off. It could only be sold as scrap. There is also no doubt in my mind that the other three vehicles are losing value as time goes on. I would presume that as the Plaintiff has possession of the 4 vehicles, the Defendant has no further use for them. Certainly it has not said so in its Grounds of Opposition and has not seen fit to file any Replying Affidavit to the Application. These vehicles are wasting assets and it does make sense to me that they should be sold off and the proceeds of sale put into a joint interest-bearing account in the joint names of the advocates on record for the Plaintiff and the Defendant. I note the comments made by Mr. Sarvia that the Plaintiff is a car dealer and probably in a better position to sell the vehicles than is the Defendant. It is obviously in the interest of both parties that whoever sells the vehicles gets the highest price possible for them. In this regard, it seems to make sense that the Plaintiff should be charged with the responsibility of disposing of the vehicles so as to ensure that the highest price possible is obtained basically for its own benefit as well as for the benefit of the Defendant. Orders accordingly. Costs will be in the cause.

DATED and delivered at Nairobi this 4th day of October 2012.

J. B. HAVELOCK

JUDGE