



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 481 of 2006

**1. WASHINGTON RURIGI
KING'ORI**
2. SAMUEL KIMOTHO GICHURUPLAINTIFFS

V E R S U S

1. RAMA HAMISI BINDO
2. THE COMMISSIONER GENERAL,
KENYA REVENUE
AUTHORITYDEFENDANTS

R U L I N G

This is an application by the Plaintiffs by **chamber summons dated 10th May, 2006** seeking temporary injunctive relief pending disposal of the suit. Two orders are sought. The first one is to restrain the 1st Defendant from:-

“...releasing any funds, transacting, making any payments and/or dealing in any manner whatsoever with the bank accounts in the names of the 1st Defendant, being RAMA HAMISI BINDO ACCOUNT NUMBER 0150192121800, STANDARD CHARTERED BANK, NKURUMAH ROAD, MOMBASA and RAMA HAMISI BINDO ACCOUNT NUMBER 016 (2012118), BARCLAYS BANK OF KENYA LIMITED, NKURUMAH ROAD, MOMBASA ...”.

The second order sought is to restrain the 2nd Defendant from:-

“.....taking possession of all those motor vehicles registration numbers:-

- a. KAU 737T TOYOTA CORONA PREMIO**
- b. KAU 088R TOYOTA CORONA PREMIO**
- c. KAU 280U TOYOTA PRADO**

- d. **KAU 922X TOYOTA CORONA PREMIO**
- e. **KAU 032M TOYOTA CORONA PREMIO**
- f. **KAU 317G TOYOTA SALOON**
- g. **KAU 400M TOYOTA RAV J**
- h. **KAU 203T NISSAN PICK-UP”.**

In the alternative, the Plaintiff seeks an order against the 1st Defendant for him to furnish security to produce and place at the disposal of the court the sum of KShs. 3,879,689/00.

The main application is brought under **Order 39, rules 1, 2, 3, 5 and 9 of the Civil Procedure Rules** (the Rules). The application for security is stated to be brought under **Order 37, rule 5**. This must be a typographical error. Order 38, rule 5 surely must have been intended, and I shall proceed upon that basis.

The application is supported by two affidavits annexed thereto. The first affidavit is sworn by the 1st Plaintiff, while the second one is sworn by the 2nd Plaintiff. To these affidavits are annexed various documents. The affidavits are essentially a re-hash of the Plaintiffs' case as set out in the plaint.

That case, briefly, is that the Plaintiffs duly purchased from the 1st Defendant the subject motor vehicles after verifying from the 2nd Defendant that the motor vehicles were duly registered in the name of the 1st Defendant. They paid the full agreed purchase prices. Subsequently, the 2nd Defendant made a demand for unpaid taxes upon all the motor vehicles totalling the sum of KShs. 3,879,689/00. The 1st Defendant agreed to pay the said taxes but then reneged. The 2nd Defendant threatened to impound the motor vehicles.

The main reliefs sought in the plaint are as follows:-

- 1. A declaration that the taxes payable on the suit motor vehicles are payable by the 1st Defendant and/or the importer(s) of the vehicles, and that the 2nd Defendant cannot legitimately demand such taxes from the Plaintiffs, or impound the vehicles.**
- 2. An order that the 1st Defendant do pay the said taxes in the sum of KShs. 3,879,689/00 “...to the Plaintiffs for onward transmission to the 2nd Defendant, and judgment be entered for this sum as against the 1st Defendant”.**
- 3. A permanent injunction against the 2nd Defendant to restrain him from impounding the suit motor vehicles from the Plaintiffs.**

The Defendants filed defence and denied liability.

On 12th May, 2006 the Plaintiffs obtained, *ex parte*, an interim injunction. The same was extended from time to time but appears to have lapsed at some point. But there is an order in place for maintenance of the *status quo* pending delivery of this ruling.

The Defendants raised separate preliminary objections to the application, the 1st Defendant by notice dated and filed on 29th May 2006, and the 2nd Defendant by notice dated and filed on 11th December, 2006. It is not apparent from the record if the 1st Defendant's preliminary objection was ever disposed of. But that of the 2nd Defendant was argued and in a ruling dated and delivered on 19th October, 2007 (Osiero, J) it was overruled.

Both Defendants otherwise opposed the application by filing replying affidavits. The 1st Defendant's replying affidavit, sworn by him, was filed on 29th May, 2006. The grounds of opposition arising therefrom include:-

- 1. That the Plaintiffs have lied to court that they have locus to institute this suit.**
- 2. That the Plaintiffs have also lied to court that the 1st Defendant has ever been the registered owner of the suit vehicles, or that he sold the same to them, or that he is under obligation to pay taxes on them to the 2nd Defendant.**
- 3. That the sale agreements exhibited by the Plaintiffs in their respective supporting affidavits are forgeries.**
- 4. That the Plaintiffs' claim is monetary and can be met by an award of damages.**
- 5. That the application otherwise lacks merit.**

On 6th June, 2006 the Plaintiffs filed further affidavits in response to the 1st Defendant's replying affidavit.

The 2nd Defendant filed a replying affidavit on 27th March, 2009. It is sworn by one **SILVESTER OKELLO**, an acting senior assistant commissioner within the investigation and enforcement department of the 2nd Defendant. The grounds of opposition emerging therefrom include:-

- 1. That all the suit motor vehicles are uncustomed notwithstanding that they were registered, and total duties of KShs. 3,879,989/00 are outstanding and payable upon them.**
- 2. That the fact of the unpaid duties came to light after post-import investigations.**
- 3. That the 2nd Defendant duly issued a "compounding order" under section 219 of the East African Community Customs Management Act, 2004 (hereafter called the Act), and that the outstanding taxes on the vehicles ought to have been paid within 30 days of the issuance of the compounding order.**
- 4. That under section 219 (3) (e) of the said Act the compounding order is final and not subject to appeal, and may be enforced in the same manner as a decree or order of the High Court.**
- 5. That the 2nd Defendant is thus entitled to impound or seize the suit motor vehicles under section 210(c) of the Act and claim unpaid duty.**
- 6. That the Plaintiffs are holding uncustomed motor vehicles contrary to section 200 of the Act.**
- 7. That the responsibility to pay duty under section 130(1) of the Act lies with the owner of the goods or the person in possession thereof, and that responsibility, therefore lies with the Plaintiffs.**
- 8. That under section 130(2) of the Act the 2nd Defendant has a lien over the uncustomed suit motor vehicles for the unpaid taxes.**
- 9. That it is not true that the Plaintiffs carried out a search with the 2nd Defendant to verify that taxes on the suit vehicles had been paid. In any event, there was no communication from the 2nd Defendant that those taxes had been paid.**
- 10. That the 2nd Defendant is not estopped in law from demanding payment of taxes upon the suit vehicles.**

11. That the application otherwise lacks merit.

The learned counsels appearing chose to put in written submissions. I have read and duly considered them, together with the authorities cited.

Many substantive issues of fact and law have been raised in this application. They should not be decided with finality in an interlocutory application. That must await trial of the action.

In an application for temporary injunction pending disposal of suit, the applicant needs to satisfy the court that he has a *prima facie* case with a probability of success. He must also satisfy the court that he stands to suffer irreparable loss unless the order sought is granted. If the court is unable to decide the application upon those two principles, it will decide it upon a balance of convenience.

With regard to the alternative prayer for security, the Plaintiff must satisfy the strict requirements of **Order 38, rule 5** of the Rules.

I will first deal with the application for temporary injunction as against the 1st Defendant. The Plaintiffs' case against the 1st Defendant in this application is that he intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiffs will, or may, be obstructed or delayed in the execution of any decree that may be passed against the 1st Defendant in the suit. It will be recalled that the reliefs sought against the 1st Defendant in the plaint are, one, a declaration that the 1st Defendant is liable to pay the taxes upon the suit vehicles demanded by the 2nd Defendant and, two, an order that the 1st Defendant pay the said taxes amounting to KShs. 3,879,689/00 to the Plaintiff “**...for onward transmission to the 2nd Defendant...**”.

Have the Plaintiffs demonstrated against the 1st Defendant a *prima facie* case with a probability of success? It is not immediately obvious to me why the 1st Defendant should not be ordered to pay the taxes directly to the 2nd Defendant. Why should they be paid through the Plaintiffs? The Plaintiffs are not claiming the taxes of KShs. 3,879,689/00 for themselves. They are not claiming a refund after paying them. Those taxes belong to the 2nd Defendant. Why then should they pass through the Plaintiff to get to the 2nd Defendant from the 1st Defendant?

In any case, the 1st Defendant's bank accounts which the Plaintiffs want the 1st Defendant enjoined from accessing are **not** the subject-matter of this suit. The Plaintiffs do not have any claim in law upon those bank accounts. I am thus not satisfied that the temporary injunction sought against the 1st Defendant would have any justification in law, and I decline to grant it.

What about the application under Order 38 rule 5 of the Rules against the 1st Defendant? The Plaintiffs have exhibited in the application sale agreements for the motor vehicles which in their face bear the 1st Defendant's name and appear signed by him. The 1st Defendant says that these sale agreements are forgeries. He has not claimed that the Plaintiffs are strangers to him, or that he has never had any business dealings with them. He has not suggested one reason why the Plaintiffs should falsely claim that he sold to them a total of eight (8) motor vehicles.

It is to be recalled that the Plaintiffs are in essence not claiming anything from the 1st Defendant except that he pays duty on the motor vehicles he sold to them (and for which they paid the full purchase prices). Ordinarily it would have been the obligation of the 1st Defendant to pay all taxes due upon the motor vehicles before he sold them to the Plaintiffs, unless it was clearly understood by the parties that the motor vehicles were sold with taxes thereon unpaid, in which case the Plaintiffs would have been responsible for payment of the taxes.

I am satisfied, upon the material now before the court, that the Plaintiffs have demonstrated a *prima facie* case with a probability of success against the 1st Defendant. I am also satisfied upon the affidavits of the

Plaintiffs, that the 1st Defendant, with intent to obstruct or delay the execution of decree that may be passed against him in this suit, is about to dispose of the whole or part of his property as contained in the two bank accounts the subject of this application. This is evidenced by the fact that after initially agreeing to pay the taxes demanded by the 2nd Defendant from the Plaintiffs, he avoided them and generally “went underground” in an effort to evade payment of the taxes. The 1st Defendant apparently “re-surfaced” only after the Plaintiffs obtained an order herein to “freeze” his said accounts.

In these circumstances, I am satisfied that the Plaintiffs have satisfied the strict requirements of Order 38, rule 5 of the Rules. I will therefore grant the alternative prayer 5 of the application. The 1st Defendant shall within 14 days of delivery of this ruling either deposit in court the sum of KShs. 3,879,689/00 or provide acceptable security for the same. In default there shall be an injunction restraining him from having access to the two bank accounts pending disposal of the suit.

I will now consider the application as against the 2nd Defendant. The 2nd Defendant has amply demonstrated that under the law he is entitled to demand the unpaid upon the suit motor vehicles. He has also demonstrated that he has a lien over the vehicles for unpaid taxes. The Plaintiffs do not appear to seriously dispute that the 2nd Defendant is indeed entitled to the unpaid taxes. Their main case appears to be that these taxes ought to be paid by the 1st Defendant and not by them. But they have also pleaded, in effect, that the 2nd Defendant should have first ensured that the taxes were paid before it permitted the motor vehicles to be registered by the 1st Defendant.

The Plaintiffs have also stated that after buying the motor vehicles they resold them to other parties who would have various claims against them should the motor vehicles be impounded by the 2nd Defendant.

As against the 2nd Defendant, I am unable to decide at this stage whether the Plaintiffs have established a *prima facie* case with a probability of success, or whether they stand to suffer irreparable loss unless the temporary injunction sought is granted. So, I must decide the application upon a balance of convenience.

Given the fact that since the Plaintiffs purchased the motor vehicles other persons have acquired interests in them, and given that a multiplicity of suits may be instituted against the Plaintiffs by those other persons should the motor vehicles be impounded by the 2nd Defendant, and, finally, given the passage of time since the suit herein and application were filed, I hold that it is convenient for all parties that the existing *status quo* be maintained. I would therefore allow the application as against the 2nd Defendant and grant the temporary injunction sought. The same shall remain in place till disposal of the suit or the further order of the court.

In summary therefore the application for temporary injunction as against the 1st Defendant is dismissed. The alternative prayer against him for security is allowed. The application for temporary injunction as against the 2nd Defendant is also allowed. The costs of the application shall be in the main cause. Those will be the orders of the court.

DATED AT NAIROBI THIS 9TH DAY OF JULY, 2009

H. P. G. WAWERU

J U D G E

DELIVERED THIS 10TH DAY OF JULY, 2009