



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 231 OF 2020**

**ALVIN OTIENO .....CLAIMANT/ RESPONDENT**

**VERSUS**

**OMYA EAST AFRICA LIMITED .....1<sup>ST</sup> RESPONDENT/APPLICANT**

**OMYA INTERNATIONAL AG.....2<sup>ND</sup> RESPONDENT/APPLICANT**

**RULING**

1. The Applicants filed a Notice of Motion dated 13.10.2020 seeking the following Orders:

**a. Spent.**

**b. Spent**

**c. That pending the hearing and determination of this application, the Claimant/ Respondent be restrained from altering, offering for sale, selling, disposing off, transferring and/or interfering in any way, with the Motor Vehicle registration number KCH 056B, Chevrolet Trailblazer 2.8cc.**

**d. THAT pending the hearing and determination of this application, the Claimant/Respondent be ordered to release Motor Vehicle Registration Number 056B, Chevrolet Trailblazer 2.8cc to the Respondent/Applicants' possession.**

**e. THAT pending the hearing and determination of this suit, the Claimant/ Respondent be restrained from altering, offering for sale, selling, disposing off, transferring and/or interfering in any way, with the Motor Vehicle Registration Number 056B, Chevrolet Trailblazer 2.8 cc.**

**f. THAT pending the hearing and determination of this suit, the Claimant/Respondent be ordered to release Motor Vehicle Registration Number 056B, Chevrolet Trailblazer 2.8cc to the Respondent/Applicant's possession.**

**g. THAT pending the hearing and determination of this suit, a mandatory injunction do issue, compelling the Claimant to release Motor Vehicle Registration Number 056B, Chevrolet Trailblazer 2.8cc, to the Respondent/Applicant's possession and ownership.**

**h. THAT the Claimant be compelled to release the Original Log Book for Motor Vehicle Registration Number 056B, Chevrolet Trailblazer 2.8cc, to the Respondents/Applicants and execute all necessary transfer documents to effect transfer of the Motor Vehicle Registration Number 056B, Chevrolet Trailblazer 2.8cc to the Respondent/Applicants.**

**i. THAT the costs of this application be borne by the Claimant/Respondent.**

2. The Application is premised on grounds that:

a. The Respondent was employed by the 1<sup>st</sup> Applicant as an Agronomist vide a contract dated 1.11.2019 but its effective date was backdated to 1.1.2016.

b. On 14.1.2016 he entered into a Car Loan Agreement with the 2<sup>nd</sup> Respondent who paid 100% purchase price being Kshs. 5000,000.

c. The Car Loan Agreement provided that the in the event of termination of the Respondent's employment, he would obligated to

surrender the motor vehicle on the day the contract terminates, or alternatively reimburse the company the remaining car value as at the time of termination of his employment, assuming a straight-line amortization over 5 years.

d. The car that was bought was a Chevrolet Trailblazer 2.8cc bearing registration number KCH 056B, and it was registered in the name of the Respondent alone since as at the time of acquisition the 2<sup>nd</sup> Applicant, had no known legal status in Kenya capable of joint registration with the Respondent.

e. On 28.4.2020, the Respondent's contract was legally terminated vide a letter dated 28.4.2020 but the Respondent did not return the car and has persisted in his refusal to do so in total disregard of the employment contract.

f. The Applicants have hired new employees to replace the Respondent, whose job requires a company motor vehicle as a tool of trade and the company cannot afford to purchase another motor vehicle for the employee due to the financial constraints its facing as a result Covid-19.

g. If the Respondent is indeed the real owner of the motor vehicle in question as he purported to be, he should produce the purchasing documentation to prove how he acquired the motor vehicle.

h. The Applicants stand to suffer immense loss and damage as they are the rightful owners of the motor vehicle who have paid all the purchase price.

3. The application is supported by the affidavit of Francis Kirema, the 1<sup>st</sup> Applicant's Country Manager, sworn on 13.10.2020 in which he reiterated the grounds set out in the motion.

4. The Respondent opposed the application vide his Replying Affidavit sworn on 28.10.2020. He deposed that in January 2016, he was engaged as a consultant by the 2<sup>nd</sup> Applicant to provide consultancy services as the agronomist in the East Africa region; that Clause 6.1 of the Consultancy Agreement defined the relationship as being on "*Professional Consultancy Basis*" while Clause 4 and 5 made provision for the consultancy fee and the manner it was to be paid to him; and that in total he worked for the 2<sup>nd</sup> Applicant as a Consultant for a period of 3 years.

5. He further deposed that he entered into a Car Loan Agreement dated 27.1.2016 with the 2<sup>nd</sup> Applicant in which it was agreed that the 2<sup>nd</sup> Applicant would facilitate the acquisition of the a car to be used and owned by himself, as a consultant; that the car loan agreement clearly indicated that his consultancy relationship with the 2<sup>nd</sup> Applicant was the basis of the agreement; and that under clause 3, it was implied that the loan agreement was subject to amortization pan.

6. He further stated that pursuant to the said Car Loan Agreement, the Car was acquired on 12.5.2016 and registered as KCH 056B; that the registration was in his name as the sole owner and without any indication of a contrary intention; and that the title to the car passed to him and neither the 2<sup>nd</sup> Applicant nor any other entity can claim any interest in it.

7. He contended that the 2<sup>nd</sup> Applicant took into account his diligence and hard work in his duties and on 1.10.2019, the 2<sup>nd</sup> Applicant offered to employ him as an Agronomist in the 1<sup>st</sup> Applicant but his entry date in the Omya Group would be considered as 1.1.2016 and he accepted by signing the a new contract of employment with the 1<sup>st</sup> Applicant on 1.11.2019.

8. He further contended that during his entire working period, he had never been asked to transfer the motor vehicle to the now registered entity (the 1<sup>st</sup> Applicant). Again he contended that he since the time he acquired the vehicle, he has personally been insuring and maintaining the car.

9. He also contended that the 2<sup>nd</sup> Applicant is aware that he has already paid an agreed valuation amount of the vehicle considering the amortization process and period but some of the 1<sup>st</sup> applicant's officers are out to frustrate him. He clarified that considering the amortization period and the remaining value of the car, he has since paid the amount proposed by way of set off from the terminal dues owed to him by the Respondents.

10. He denied there being an employer-employee relationship when the car loan agreement was being executed between himself and the 2<sup>nd</sup> Applicant and contended that this court has no jurisdiction to entertain the application herein as it is contravention of Article 162 (2) (a) of the Constitution.

11. He contended that he would suffer prejudice should the court permit the prayers sought.

12. In response to the Replying Affidavit, the Applicants filed a Supplementary Affidavit also sworn by Francis Kirema on 5.11.2020. He averred that the Respondent's Replying Affidavit is in bad faith, incompetent and full of falsehoods and material non-disclosure.

13. He admitted that on 1.1.2016, the Respondent and the 1<sup>st</sup> Applicant entered into a consultancy agreement but contended that a cursory review of the salient terms of the agreement reveals that the Respondent was under the control and supervision of the applicant's despite it being titled as 'a consultancy agreement'.

14. He contended that pursuant to clause 1 of the car loan agreement, the car was to be used according to Omya Car Policy thus this is enough confirmation that the Applicants supplied the motor vehicle and maintained control of how it was to be used. He further observed that Clause 2 stated that Omya International AG would cover 100% of the purchase price of Kshs. 5,000,000.

15. He clarified that the legal status of the Applicants was regularised on 1.10.2019 through the 2<sup>nd</sup> Applicant's letter dated 1.10.2019 when it confirmed the incorporation of the 1<sup>st</sup> Applicant. He further clarified that due to the confirmed legal status of the 1<sup>st</sup> applicant and as admitted by the Respondent, his employment was confirmed and back dated to 1.1.2016.

16. He contended that the Respondent having admitted that his employment was confirmed on 1.10.2019 and backdated to 1.1.2016, he cannot be heard to claim that the motor vehicle does not belong to the Applicants but to him yet it was acquired because of the employee-employer relationship.

17. He further contended that the Applicants never sought to have the Respondent transfer the motor vehicle to the 1<sup>st</sup> Applicant because the provisions of the car loan agreement provided for what would happen should the Respondent cease being an employee of the Applicants. He further explained that in accordance with Clause 4.2 of the agreement the Respondent would incur pocket expenses that related to the provision of services to the Applicants but the same would be reimbursed.

18. He denied that the Respondent has already paid an agreed valuation amount and stated that he has not produced any evidence to support such payment on the basis of amortization. He clarified that the amount of Kshs. 666,667 stated in the annexure "AO-10", produced by the Respondent, was not the exact appropriate amount to be paid but a mere proposal, which was not actualized.

19. He maintained that there existed an employer-employee relationship between the Respondent and the Applicants at the time of entering into the car loan agreement based on the intention and conduct of the parties. Further, he stated that the Respondent in his Statement of Claim confirmed that his employment relationship with the applicants was backdated to 1.1.2016 and he accepted since it came with all benefits that accrue to an employee by virtue of the Employment Act..

### **Applicants' submissions**

20. As regards the prayer a temporary injunction, the applicants submitted that the principles applicable were laid down in the **Giella v Cassman Brown & Co. Ltd [1973]eKLR** including prove of a prima facie case with a probability of success, irreparable injury if the order is denied, and balance of convenience if the court is in doubt.

21. They further adopted the meaning of a prima facie case given by the Court of Appeal in **Mrao v First American Bank of Kenya Ltd & 2 Others (2003) KLR 125** and submitted that they have established a prima facie case as the respondent has not honoured any of his obligation under clause 3 of the Car Loan Agreement by surrendering the motor vehicle upon termination of his employment.

22. They argued that unless the orders sought are granted, the applicants are likely to lose their motor vehicle to their significant detriment. They further argued that the balance of convenience tilts in their favour.

23. They maintained that the intentions, conduct and actions of the parties to the consultancy agreement was that of an employer-employee. They relied on **Fredrick Byakika v Mutiso Menezes International Unlimited [2016] eKLR** where the Court held that where parties have reduced the terms and conditions regulating the relationship into writing, such importance is given to form basis and intention of the parties and that a true independent contractor works on his own hours, runs his business and will invoice the employer each month for his services.

24. They further relied on **David Odwori Namuhisa v Magnate Ventures Limited [2017] eKLR**, **Republic v Kenya Revenue Authority ex-parte Yaya Towers Limited [2008] eKLR** and **Edward Ngaraga Gacheru v Nation Media Group Limited [2019] eKLR** where the courts discussed the indicators of an employment relationship.

25. They argued that having proven that the Respondent was an employee of the Applicants, it should not be doubted whether the Court has jurisdiction to hear and determine the matter. They further argued that the Respondent filed the matter at the Employment and Labour Relations Court having in mind that the issue in dispute was an employment related issue.

26. They relied on the jurisdiction of this Court as set out under section 12 of the Employment and Labour Relations Court Act and the decision in **Kenya Medical Research Institute v Davy Kiprotich Koech [2018] eKLR** where the court held that this Court was established with exclusive jurisdiction to hear and determine disputes between the employer and the employee.

27. With respect to the prayer for a mandatory injunction, they submitted that the Court in **Locabail International Finance Limited v Agro-Export (1988)** held that a mandatory injunctions should not be granted on an interlocutory application in the absence of special circumstances and in clear cases where the court thinks that the matter ought to be decided at once.

28. They submitted that the injury occasioned to them cannot be adequately compensated by way of damages for reasons that their right to property under Article 40 of the Constitution is being violated. They submitted that they continue to suffer violation and deprivation of their constitutional rights as the Respondent's stay with the motor vehicle is causing them immense strain, inconvenience and loss as they are constrained to seek alternatives for their new employees at an added expense yet they had bought the subject vehicle for a purpose.

29. They argued that they have a clear and straight forward case warranting the grant of the mandatory injunctions for reasons that the Respondent is in possession of their property, when the employment relationship was terminated. They maintained that the Respondent is acting in breach of his contract of employment.

30. They further contended that they have discharged the burden of proving not only a prima facie case but also after granting mandatory injunction the court will not arrive at a different holding after trial. They relied on **Jubilee Insurance Company of Kenya Limited v Joseph Ndungu Karega T/A Leather Touch Foot Care Specialists [2014] eKLR**, where the said thresholds were met and a mandatory injunction was issued.

31. They submitted that they were duped into ceding possession and use of the motor vehicle by the Respondent, besides curtailment of their right to ownership of property. Consequently, they contended that they will suffer irreparable injustice and loss which cannot be compensated by way of costs or damages if the order is denied.

#### **Respondent's submissions**

32. The Respondent also submitted that the principles guiding the grant of interlocutory injunctions are as set out in **Giella Case (Supra)**. He further submitted that the locus classicus on jurisdiction is the case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (1989) KLR 1** where the Court held that jurisdiction is everything and that without it the Court has no power to make one more step.

33. He submitted that the Applicants are not entitled to injunctive orders sought as they have not satisfied the threshold for a prima facie case. They relied on the principles setting out a prima facie case as laid down in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others (2003) KLR 125**. He further relied on **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR** where it was held that the Court ought to see whether a person applying for an injunction has a right which has been threatened with violation.

34. He relied on section 8 of the Traffic Act which provides that a person in whose name a vehicle is registered is deemed to be the owner of the vehicle unless the contrary is proved. He submitted that having been registered as the sole owner of the motor vehicle meant that the 2<sup>nd</sup> Applicant or any other entity would not claim any interest in it. He further submitted that the Applicants have not adduced sufficient evidence to prove that they are the owners of the motor vehicle. He argued that the Applicants have not disputed that they owe him terminal dues of not less than Kshs. 3,000,000.

35. He submitted that the suit property and the unpaid amount was quantifiable and in the unlikely event the suit is determined in favour of the Applicants, he can compensate them with any monetary loss suffered. In support of this, he relied on the decision in **Sambai Kitur & another v Standard Chartered Bank & 2 others [2002] eKLR**.

36. He submitted that the third principle in **Giella case** is that where the Court is in doubt, it is to decide the application on the balance of convenience and contended that he has already cast doubt as to who is legally entitled to the ownership of the motor vehicle. He further submitted that in the main suit, he has sought a permanent injunctive orders against the applicants from claiming the said motor vehicle in view of the consultancy and therefore urged that the balance of convenience tilts in his favour.

37. He reiterated that this court has no jurisdiction to hear and determine the application because the car loan agreement clearly indicated that the parties' consultancy relationship was the basis for the agreement. He cited the **Magnate Ventures Limited v David Odwori Namuhisa [2020] eKLR** where the Court of Appeal recently held that discerning the parties' intention on whether the parties' relationship was based on consultancy agreement or an employment relationship requires an interrogation of the context, meaning and language of the document.

38. Finally, he submitted that the application lacks merit and should be dismissed.

#### **Issues for determination**

39. Having considered the pleadings, application, affidavits and submissions by both parties, it is common ground that the Applicants engaged the Respondent as an agronomist vide the Consultancy Agreement signed on 1.1.2016 and Offer of Employment Letter signed on 13.1.2020. It is also a common ground that on 27.1.2016 the respondent and the 2<sup>nd</sup> Applicant entered into a Car Loan Agreement in which the latter covered 100% of the purchase price of Kshs. 5000,000. Again there is no dispute that pursuant to the said Car Loan, the respondent acquired the car, a Chevrolet trailblazer 2.8cc registration number KCH 056B which was registered in his name alone.

40. The possession and ownership of the motor vehicle is the gist of the application. Therefore, the main issues of determination are:

- a. *Whether this Court has jurisdiction to determine the application*
- b. *Whether the Applicants should be granted of an interlocutory injunction as prayed.*
- c. *Whether the Applicants should be granted a mandatory injunction*

#### **Jurisdiction of this Court determine the application**

41. The Respondent averred that this Court has no jurisdiction to determine the application for reason that there was no employer–employee relationship when the car loan agreement was being executed between himself and the 2<sup>nd</sup> Applicant. The applicants are however of the view that the respondent was an employee from 1.1.2016 despite the fact that he was described as a consultant. They contended that they exercised control over the respondent through the 2<sup>nd</sup> respondent's car use policy. They further contended that even if the initial relationship was a consultancy, the same was changed to an employment contract and the effective date backdated to 1.1.2016 and thereby brought any dispute between the parties under this court's jurisdiction.

42. Under Clause 10 of the Consultancy Agreement the jurisdiction of Kenyan courts was excluded in the following terms:

***"The Agreement shall be governed by the Laws of Switzerland and shall be subject of the exclusive jurisdiction of the courts of Aargau Switzerland."***

43. However, the Clause on Variation/Amendments of the Agreement in the Letter of Offer of Employment provided that:

**“...This contract and all other documents related to your employment shall be governed and construed under the Kenyan law and regulations.”**

44. The foregoing clause narrows down the issue of jurisdiction to the specific Kenyan court with the jurisdiction to entertain the instant application. The jurisdiction of this court is well anchored in the constitution of Kenya and the Employment and Labour Relations Court (ELRC) Act. Article 162 (2) (a) of the constitution delegated the power to the parliament to establish the court with jurisdiction to hear and determine employment and labour relations disputes. The parliament exercised that power in 2011 by enacting the ELRC Act.

45. The preamble to the Act states:

**“An Act of parliament to establish the Employment and Labour Relations Court to hear and determine disputes relating to employment and labour relations and for connected purposes”.**

46. Section 12 of the Act then sets out some of the powers that the court has and the remedies it can award in exercising that jurisdiction. Section 12 of the Act states as follows:

**(1) The court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162 (2) of the Constitution and the provision of this Act or any other written law which extends jurisdiction to the court relating to employment and labour relations including –**

**(2) ...**

**(3) In exercise of its jurisdiction the court shall have power to make any of the following orders –**

**(v) award of compensation in any circumstances contemplated under this Act or any written law**

**(vi) an award of damages in any circumstances contemplated under this Act or any written law;**

**...”**

47. The jurisprudence emerging from this court and the Court of Appeal is that other claim between an employer and employee or former employer/and former employee can be heard and determined alongside a claim for unfair termination if such claim originates or springs up from employer/employee relationship. In **paramount Bank Ltd V Vagvi Syed Qumara & another [2017] eKLR** the Court of Appeal expressed itself as follows:

**“There cannot therefore be any doubt that in addition to the claim for unfair termination the claim relating to general damages for malicious prosecution and defamation which flowed directly from the dismissal, was equally within the jurisdiction of the court. In the exercise of its powers under section 12 of the Employment and Labour Relations Court Act, the court could entertain the dispute in all its aspects and award damages appropriately”.**

48. I have carefully considered the pleadings by both parties presented to the court and it is clear that it is the claimant who first invoked the court’s jurisdiction concerning the Car dispute and sought relief against the applicants. Additionally, in paragraphs 13 and 14 of his Statement of Claim, he contended that he was lured into employment by the 2<sup>nd</sup> Applicant and that his engagement as its employee was to commence on 1.1.2016. It is therefore ironical that when the applicants responded to the suit and brought a Counterclaim and the instant application, the claimant turned round to say that this court lacks jurisdiction over the car dispute.

49. That as it may, I am satisfied that this court has jurisdiction to determine the car dispute before it because of the circumstances of the case. First, the claimant and the 2<sup>nd</sup> applicant had a consultancy agreement and the latter financed a car for the claimant. Second, the 1<sup>st</sup> applicant was registered in Kenya as 100% subsidiary of the 2<sup>nd</sup> applicant and took over the consultancy agreement as per the email dated 20.9.2019 and thereafter employed the claimant vide the offer letter signed on 13.1.2020. Third, the effective date of the new employment relationship was backdated to 1.1.2016 when the Consultancy Agreement commenced. Fourth, the claimant was dismissed by the 1<sup>st</sup> applicant and retained the subject car and principally agreed with the employer that part of his terminal benefits be applied to clear the outstanding balance of the car loan calculated on a 5 year straight line amortization.

50. In my opinion, which is guided by the law and the above cited authority, the Car dispute can be determined alongside the unfair termination claim because of the employment relationship that arose in 2019 and purportedly backdated to 2016. The subject car issue is connected to the said employment relationship and this court has jurisdiction to determine it.

### **Interlocutory injunction**

51. The parties rightfully submitted that the threshold for granting a temporary injunction are the three principles laid out in the **Giella case (supra)** where the Court of Appeal held that:

**“The conditions for the grant of an interlocutory injunction are now settled in East Africa. First, an applicant must show a**

***prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”***

52. With respect to the issue of prima facie case, the Applicants submitted that they have established a prima facie case because, although the car is not registered in its name, it financed the purchase price 100%. It further argued that the Car Loan Agreement provided that the car was to be used according to its car policy and be returned upon termination of the Consultancy Agreement unless the Respondent opted to pay the value of the car based on a 5 year amortization plan. Finally, the applicants contended that the respondent breached the said Loan Agreement by retaining the car and failing to pay for the same after termination of his employment.

53. The respondent’s case, however is that he is the sole registered owner of the Car under the Traffic Act and he has also paid an agreed value under the amortization plan and as such neither the respondents nor any other person can lay a valid claim over the said car. Consequently, he accused the applicants for material non-disclosure and prayed for the application to be dismissed with costs.

54. There is no dispute that the respondent is the registered owner under the Traffic Act. However, Section 8 of the Act only provides that a person in whose name a vehicle is registered is be deemed to be the owner of the vehicle, unless the contrary is proved. The Court of Appeal discussed the matter of ownership of a vehicle without registration in **Jared Magwaro Bundi & another v Primarosa Flowers Limited [2018] eKLR** where it expressed itself as follows:

***“...The burden is discharged if, on a balance of probabilities, it is shown that as a matter of fact the vehicle had been transferred but not yet registered, to a de facto owner, a beneficial owner or a possessory owner. Such an owner though not registered for practical purposes may be more relevant than that in whose name the vehicle is registered.***

***The position taken by this Court in Joel Muga Opija (supra) and Muhambi Koja (supra) appears to us to accord with modern thinking and jurisprudence where the law is encouraging courts to interpret the law governed more by substance than the technical chains of form, the latter which does not ordinarily look at the justice of a case...”***

55. In view of the foregoing binding authority, and the Car Loan Agreement signed by the parties herein, it is clear that the ownership of the subject car is in dispute. Despite the that the motor vehicle is registered in the Respondent’s name, there is a contest regarding whether or not he has settled the remaining car value as required under the Car Loan Agreement. The only evidence in support of the alleged payment are correspondences stating that the amount would be set off using his terminal dues, but in the applicants’ view, all that were proposals and the actual value has not yet been determined.

56. In **Mrao Limited v First American of Kenya limited & 2 others [2003] eKLR** the Court of Appeal held as follows concerning prima facie case: -

***“...in civil cases is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”***

57. Having considered the material presented by the parties to this court, I am persuaded that the respondent is acting in breach of the Car Loan Agreement by continuing to retain it without any evidence that he has fully paid for the car value after exiting the 1<sup>st</sup> applicant’s employment. Consequently, I find and hold that the applicant has proved a prima facie case with a probability of success.

58. With respect to irreparable injury, the applicants are supposed to prove that they may suffer irreparable harm if the temporary injunction is declined. In this case the Car Loan Agreement indicated that upon separation, the respondent was return the car or pay the value as at the date of the separation based on a 5 years straight-line amortization. It follows that the value of the car as at the time of the separation on 28.4.2020 is ascertainable in monetary terms.

59. In addition, the applicants have not denied that they have not yet paid the respondent his terminal dues, which according to a correspondence annexed as Annex “AO10” to the Respondent’s Replying Affidavit, could be deducted to settle the outstanding Car Loan balance. Consequently I find and hold that the applicants have not satisfied the court that they will suffer irreparable harm if the temporary injunction is withheld.

60. As regards the issue of balance of convenience, I find that it does not tilt in favour of the Applicants because I have already found that the applicants will not suffer irreparable harm if the injunction order is denied since they are still holding respondent’s terminal dues, which is sufficient to settle the outstanding car loan balance.

### **Mandatory injunction**

61. The Applicants averred that they have a clear case, that the Respondent is out to steal a march on them and that it appears that upon the determination of the main suit, the Court would not come to a different conclusion should it grant the mandatory injunction.

62. Seldom would a Court grant a mandatory injunction at the interlocutory stage save where there are special circumstances. The basis of this is to avoid a miscarriage of justice should the Court find otherwise after trial. The Court of Appeal in **Lucy Wangui Gachara v Minudi Okemba Lore [2015] eKLR** held that:

***“It has been stated time and again that although the court has jurisdiction to grant a mandatory injunction at the interlocutory***

*stage, such injunction should not be granted, absent special circumstances or only in the clearest of cases. The circumspection with which the court approaches the matter is informed by the fact that the grant of a mandatory injunction amounts to determination of the issues in dispute in a summary manner... Among the special circumstances that may justify the grant of a mandatory injunction at interlocutory stage is where the injunction involves a simple act that could be easily reversed or remedied should the court find otherwise after trial; the defendant has accelerated the development that the plaintiff seeks to restrain, with the intention of defeating the plaintiff's claim or where the defendant is otherwise bent on stealing a march on the plaintiff."*

63. In my opinion, I do not find any special circumstances that would necessitate the granting of a mandatory injunction at this stage. The issue of ownership and repayment of the remaining car value based on amortization is in dispute and can only be determined upon hearing the main suit. Therefore, the order for a mandatory injunction denied.

64. In conclusion I find that the Applicants have not met the threshold for granting both interlocutory and mandatory injunction sought herein and as such the application dated 13.10.2020 is dismissed with costs.

**Dated and delivered at Nairobi this 22<sup>nd</sup> day of April, 2021.**

**ONESMUS N. MAKAU**

**JUDGE**

**In the presence of:**

..... Advocate for the Claimant

.....Advocate for the Respondent.

**ORDER**

**In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> April 2020, this Ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**ONESMUS N. MAKAU**

**JUDGE**