



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1237 OF 2015**

**DAVID ITHAU WAMBUA ..... CLAIMANT**

**VERSUS**

**LIBERTY KENYA HOLDINGS LIMITED .....RESPONDENT**

**RULING**

1. The Application before Court is dated 12.7.2016 brought under Section 12 of the Labour Institutions Act, the Employment Act, the Employment and Labour Relations Act and the Constitution of Kenya.

2. The Applicant seeks for Orders that:

- 1. That this Application be certified urgent and service be dispensed with in the first instance.***
- 2. That pending hearing and determination of this application inter partes an order be issued restraining the Respondent either directly or through its agents and or servants from harassing, intimidating or communicating to the Claimant in its efforts to repossess the Claimant's Motor Vehicle Registration Number KBV 836J Subaru Forester.***
- 3. That upon hearing and determination of this application interpartes but pending the hearing and determination of the main claim herein, an order be issued restraining the Respondent either directly or through its agents and or servants from harassing, intimidating or communicating to the Claimant in its efforts to repossess the Claimant's Motor Vehicle Registration Number KBV 836J Subaru Forrester.***
- 4. That pending hearing and determination of this application the Respondent be ordered to release and deliver to the Claimant the Motor Vehicle's log book which is in its custody.***
- 5. That pending hearing and determination of the application, the Respondent be ordered to refund the Claimant all the illegal deductions relating to the Motor Vehicle.***
- 6. That upon hearing and determination of the application, an order be issued for the hearing of the main claim herein on a priority basis.***
- 7. That the costs of this application be in the cause.***

3. The Application is premised on the grounds that:

**1. That after numerous phone calls and a letter, the Respondent, finally, on Wednesday, 29.6.2016, through its auctioneer agents went to the Claimant's place of residence to repossess the Claimant's motor vehicle.**

**2. That the said repossession was carried out through harassment, intimidation and violence and was done before the Claimant's family and neighbours in such a way that was a threat to peace and lowered his dignity.**

**3. The Claimant did not take a loan from the Respondent for purposes of purchasing the said motor vehicle as alleged.**

**4. That the Claimant purchased the motor vehicle through interest free salary advance of Kshs. 931,392/= from the Respondent and not a loan and the same was payable in 22 equal monthly installments of Kshs 42,336 with effect from August, 2013.**

**5. That all the salary advance in question was fully settled by the Claimant by the time of the unlawful termination.**

**6. That the motor vehicle log book is still in the custody of the Respondent even after payment had been fully made.**

**7. That although the security guards at the Claimant's compound drove away the agents before they repossessed the car, the agents promised they were going to ensure that the car is repossessed.**

**8. That the issues relating to illegal deductions by the Respondent from the Claimant's salary toward payment of the said car's insurance premium are part of the issues for determination in the Claim herein which is pending hearing.**

4. The application is further supported by the Affidavit of David Ithau Wambua, the Claimant, wherein he states that he received a letter dated 29.2.2016 from the Respondent demanding that he pays alleged car loan arrears, being motor vehicle registration number KBV 836J but the amount of the demanded loan arrears was not stated.

5. The Claimant/Applicant states that he responded to the said letter through his Advocates seeking to be furnished with particulars but the Respondent never responded.

6. He contends that on 29.6.2016, the Respondent sent its agent by the name Mugo of cell phone no. 0722680318 together with his team from M/s Haki Auctioneers to his residence to repossess the motor vehicle and in the process they caused an ugly scene by harassing and intimidating him in the full sight of his family members and neighbors. It only took the intervention of the Claimant's security guards to get the Auctioneers out of his compound.

7. He avers that the said auctioneers swore as they left his compound that they would ensure that the said motor vehicle is repossessed.

8. That the agents sought to undertake the repossession illegally and without any Court Order. The Applicant alleges that he had cleared his interest free salary advance of Kshs. 838,741.86/=, which he was to repay in monthly installments of Shs. 38,124.63/=, with effect from August 2013.

9. He alleges that all along the Respondent deducted Shs. 42,336/= from his salary which he did not question since he assumed that the number of months within which to repay the amount would be reduced. He states that he only realized in April, 2015, that his pay slip showed an interest of Shs. 4,211.37/= was being deducted illegally from his salary.

10. The Applicant states that it is the Respondent who owes him money in relation to insurance premiums

deductions which he had paid for in full in advance. In a further affidavit sworn by the Applicant he states that in violation of the interim orders of the Honourable Court of 12.7.2016, the Respondent proceeded to repossess the vehicle in question without any other Order to the contrary.

11. That any issues pertaining to the aforesaid motor vehicle can only be dealt with at the hearing of the main suit. He prays for his application to be allowed as prayed and for the Respondent's Regional Managing Director to be held in contempt.

12. The Respondent filed a replying affidavit sworn by one Musili Kivuitu the Regional Head of Risk and Compliance at Liberty Holdings Limited and was the Claimant's immediate supervisor at the material time.

13. The Respondent state that contrary to the Claim by the Claimant in his application, the Claimant applied for a staff loan amounting to a principal sum of Shs. 1,350,000.00 payable in 36 monthly instalments. That the loan was advanced on the understanding that he would execute an instrument under the Chattels Transfer Act which he neglected to do. Under the said instrument there is a term to the effect that the employee would be charged a rebated interest of 10%.

14. That the Claimant duly acknowledged receipt of Kshs 1,350,000.00 by causing the motor vehicle to be registered in his name and that of the Respondent and as such it is not true that the Claimant took out an interest free salary advance. He was to repay the said amount in installments of Shs. 43,560/= each comprising of the principal amount and interest.

15. They state that in addition to the monthly instalment payable the Respondent also deducted Shs. 5,400 on account of the vehicle's insurance premium making a total of Shs. 48,960.00 deducted from his salary.

16. That in the course of employment the Claimant did not complain of the deductions made from his salary neither did he dispute the terms of the car loan.

17. The Respondent denies that the sum of Kshs. 1,350,000.00 was a salary advance as the Respondent never granted free salary advance and where they did the amount did not exceed one month's net salary of the particular employee and in this case the Claimant's salary was less than Shs. 300,000/=.

18. They state that the Claimant's salary was deducted with his full knowledge and consent. That at termination of the Claimant's employment the Respondent they did not deduct the loan balance of Shs. 564,093.00 on a goodwill basis considering the circumstances surrounding the Claimant's exit from the Respondent.

19. They further state that the Claimant undertook to continue servicing the loan until payment in full which failed to do forcing the Respondent to write a demand letter for settlement of the outstanding loan but the Claimant did not make things right.

20. The Respondent states that the motor vehicle in question being jointly owned between them and the Claimant, there was no need for a court order in order for them to exercise their right of repossession.

21. They also state that an order to release the motor vehicle to the Claimant should not be granted as his financial means are unknown and they stand to suffer loss should the suit succeed.

22. That in the event that the Court orders the motor vehicle released, the Claimant to be ordered to pay the sum of Shs. 627,612.10 in court or in a joint interest earning account to be held in the names of both advocates on record.

23. They pray for the application to be dismissed with costs.

24. The application was dispensed with by way of written submissions. The claimant in submissions states that the replying affidavit sworn by the Respondent is sworn by one Musili Kivuitu who alleges to

have been the Claimant's immediate supervisor which the Claimant states is untrue as his supervisor was one Mr. Mike du Toit.

25. The Claimant states that the replying affidavit is full of inconsistencies such as the averment that he applied for a loan of Shs. 1,350,000 payable in 36 instalments.

26. The Respondent further deponed that the terms and conditions of the loan would be made known to the Claimant later through an instrument that would be presented to him for execution which in the Claimant's view is an absurdity. Further that the Claimant refused to sign an instrument without suffering disciplinary action.

27. The Claimant further submits that registration in joint names is not an acknowledgement of any debt. The Claimant also alleges that another inconsistency is that the Respondent terminated his contract and went ahead to pay him his terminal dues but failed to deduct any amount alleged was outstanding. If he indeed owed the Respondent any money it would have been deducted from his terminal dues.

28. He also submits that there is inconsistency in the sum alleged to be owed to the Respondent at paragraph 16 of the said affidavit where the Respondent states Shs. 564,093.00 is due whereas in paragraph 21 they cite Shs. 627,612.00 which is said to include penalty and interest.

29. The Claimant also submits that the sum indicated on the loan application form is not conclusive proof of the amount the respondent advanced the Claimant.

30. That the Respondent place relies on an undated and unsigned agreement which is full of inconsistencies. For instance he refers to paragraph 3 thereof, it stated that the Claimant asked for a loan of 1,206,000.00 for the purchase of a motor vehicle as opposed to the Shs. 1,350,000.00 that has been reiterated in the replying affidavit.

31. The Claimant also refers to another inconsistency in paragraph 8 of the Replying affidavit wherein it is indicated that the monthly installment was for shs. 43,560.00 while in the purported car loan statement which is attached at page 11 of the Respondent's documents indicates that the monthly instalment comprising of the principal amount and interest was 42,336.00.

32. It is the Claimant's contention that any money deducted from his salary as car insurance premium was illegal and subject to challenge in the main suit. He states that he does not owe the Respondent any money and the application to be allowed with costs.

33. The Respondent in submissions state that the only issue for determination is whether the Claimant has satisfied the pre-requisite for granting of the injunction orders sought as set out in the case of **Giella Vs. Cassman Brown & Company Limited (1973) E.A. 358.**

34. The Respondent states that the application must fail for the reasons that it is evident that the Claimant applied for a loan of Shs. 1.35 Million and a salary advance of Shs. 931,392.00. That the Claimant did not demonstrate paying the amount in full whereas the Respondent produced a clearance certificate which indicated that a balance of Shs. 564,093.61 was due to the Respondent on account of car loan.

35. The Respondent further submits that it is fair and just that the Court protects the interest of both parties in the suit since the Applicant has not demonstrated any willingness to clear the loan.

36. That the Respondent will not be able to ever recover the sums due to it from the Claimant and it would therefore be in the interest of justice if the money claimed is deposited in a joint interest earning account in the names of the advocates on record. They pray for the application to be dismissed with costs.

37. Having considered the submissions of both parties, the only issue for determination by this Court is whether the Applicant has established a prima facie case against the Respondent.

38. In determining this, the Court considers whether the attachment was done legally. It is obvious that this attachment was done by the Respondents without any Court order which is an illegality.

39. In the circumstances I order the Respondent to release immediately the attached motor vehicle to the Applicant until further order of this Court.

40. The Respondent are further forbidden from any repossession until further orders of this Court.

41. Costs to the Applicant.

Read in open Court this 18<sup>th</sup> day of October, 2016.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Ngonde for the Respondent –Present

Gichoi for Claimant and holding brief for Wambola for Applicant – Present