

THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2023/HP/1704

BETWEEN:

SUWILANJI SICHULA

AND

GABRIEL MASEKO
MARK MASEKO



PLAINTIFF

1ST DEFENDANT

2ND DEFENDANT

BEFORE THE HONOURABLE MRS. JUSTICE M.C. KOMBE

For the Plaintiff : Mr. C.M. Zulu- Linus E. Eyaa & Partners

For the 1st Defendant : No-appearance

For the 2nd Defendant: Mr. T. Banda- Munkanta Mulenga Legal
Practitioners

R U L I N G

Cases referred to:

1. Chisenga v. MTN Zambia and another (Appeal No. 150 of 2020).
2. Southern Cross Motors Limited v. Nonc Systems Technology Limited (2011/HK/223).
3. Shell and BP v Conidaris and Others (1975) Z.R 174.
4. American Cyanamid Company v. Ethicon Ltd (1975) A.C 396.
5. Cambridge Nutrition Limited v. BBC (1990) 3 All ER 523.
6. National Airports Corporation Limited v. Mines Air Services Limited (T/A Zambian Airways) (2011) 2 Z.R 180.
7. Standard Bank Limited v. Brocks 1972 Z.R 306.
8. GDC Logistics Zambia Limited v. Joseph Kanyanta and 13 Others (Selected Judgment) No.17 of 2017.

9. **Cayne v. Global Natural Resources (1984) 1 ALL E.R 225.**
10. **Francome v. Mirror Group Newspapers (1984) 1 W.L.R. 892.**

Legislation and other material referred to:

1. **The High Court Rules, Chapter, 27 of the Laws of Zambia.**
2. **The Rules of the Supreme Court (RSC-White Book) 1999 Edition.**
3. **Halsbury Laws of England Volume 24, Fourth Edition.**

1. INTRODUCTION

1.1 This is a Ruling on the Plaintiff's application for an Order for preservation and attachment of property. The application is made pursuant to Order 26 rule 3 and Order 27 rule 1 and 2 of the High Court Rules, Chapter 27 of the Laws of Zambia as read together with Order 29 rule 2 of the Rules of the Supreme Court.

1.2 The Plaintiff seeks an order that:

- i) *The 2nd Defendant whether by himself, agents, servants or whosoever acting under him or otherwise be restrained from using, dealing with, disposing the property namely motor vehicle Nissan Navara Registration Number BAZ 9261 ZM the property subject of this dispute;*
- ii) *The said property be preserved at the Court premises or suitable location to be agreed upon by the parties in*

*default of which the Court shall direct a suitable location,
until full determination of the matter.*

2. PLAINTIFF'S AFFIDAVIT EVIDENCE

- 2.1 The application is supported by an affidavit deposed to by **SUWILANJI SICHULA** the Plaintiff herein.
- 2.2 He deposed that sometime in 2021, he entered into an agreement with the 1st Defendant for the delivery of a motor vehicle which vehicle the 1st Defendant failed and or neglected to deliver.
- 2.3 That as a result of the 1st Defendant's failure to deliver the motor vehicle as agreed, it was settled that the 1st Defendant was to refund him the sum of K100,000.00.
- 2.4 In furtherance of the agreement to refund him, he entered into a guarantee agreement with the 2nd Defendant wherein the 2nd Defendant pledged as security for the 1st Defendant's indebtedness a motor vehicle Nissan Navara Registration Number BAZ 9261 ZM. A copy of the agreement was exhibited and marked "**SC/1.**"
- 2.5 According to the terms of the agreement, in the event of non-payment of the K100,000.00 by the 1st Defendant by 30th April, 2023, he would be at liberty to dispose of the 2nd Defendant's Nissan Navara Registration BAV9261 ZM to

recover the K100,000.00 without any recourse to the 2nd Defendant. Further, that the 2nd Defendant consequently handed over to him all the ownership documents relating to the Nissan Navara.

2.6 However, on 30th April, 2023, the 1st Defendant did not pay the K100,000.00 and despite the guarantee agreement, the 2nd Defendant refused or neglected to hand over the vehicle as agreed and he commenced this action to enforce that agreement. That at the moment, the motor vehicle was currently in custody and use of the 2nd Defendant and in danger of being damaged and its value diminishing.

2.7 That since the motor vehicle was the subject matter of this action, the Court should intervene and order the preservation of the motor vehicle by securing and ordering that it be parked at the Court premises or any other place the Court may deem appropriate.

2.8 The granting the preservation would not in any manner be prejudicial to the 2nd Defendant as he had willingly made an undertaking to deliver possession of the motor vehicle in the event of default on the part of the 1st Defendant.

2.9 It was further deposed that the application sought to preserve the motor vehicle and not claim possession at this point and

as such, the application sought the intervention of a third party to keep custody of the vehicle pending the final determination of this matter.

3. DEFENDANT'S AFFIDAVIT EVIDENCE

- 3.1 The affidavit in opposition was deposed to by **MARK MASEKO**, the 2nd Defendant herein. He deposed that he did not willingly hand over the ownership documents to the Plaintiff as he was under duress when entering into the purported guarantee agreement as pleaded in his defence and counter claim.
- 3.2 That a further perusal of the said agreement revealed that it was purportedly made for the guarantee for a sum of money namely K100,000.00 owed by the 1st Defendant to the Plaintiff.
- 3.3 He added that even if the Court rendered a judgment in favour of the Plaintiff, the delivery of the motor vehicle was not primary to the re-payment of the sums purportedly owed.
- 3.4 He deposed that even if the Court held that the guarantee agreement was legal and enforceable, the said agreement clearly revealed that the said motor vehicle was merely security for the payment of the sums of money the Plaintiff partly received.

- 3.5 Further, that he had been sued in his capacity as a purported guarantor of the payment of sums owed to the Plaintiff by the 1st Defendant. That it would be unjust to deprive him of his property pending determination of the matter. In any event, he could not deal or sale the said motor vehicle as the ownership documents were with the Plaintiff.
- 3.6 It was also deposed that the Plaintiff had not adequately demonstrated to the Court what damage if any would be occasioned to the said motor vehicle by his use and how the motor vehicle would diminish below the sums owed by the 1st Defendant. Further, that he had not demonstrated how he would be inconvenienced if the injunction was not granted as the loss could be atoned for in damages.
- 3.7 That if this application was granted, he would be prejudiced and as he would be deprived of his property and that this was a proper case for the Court to dismiss the application.

4. HEARING

- 4.1 At the hearing of the application, learned counsel for the Plaintiff, Mr. C. Zulu relied on the affidavit and the skeleton arguments filed in support.

4.2 In the skeleton arguments, he referred to Order 26 rule 3 of the High Court Rules, Chapter 27 of the Laws of Zambia which provides that:

“It shall be lawful for the Court or a Judge, upon the application of any party to a suit, and upon such terms as may seem just, to make any order for the detention, preservation or inspection of any property being the subject of such suit, and, for all or any of the purposes aforesaid, to authorise any person or persons to enter upon or into any land or building in the possession of any party to such suit; and, for all or any of the purposes aforesaid, to authorise any samples to be taken, or any observations to be made or experiments to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.”

4.3 Reference was also made to Order 29 rule 2 of the Rules of the Supreme Court which provides that:

“On an application of any party to a cause or matter of the Court may make an order for the detention, custody or preservation which is the subject matter of the cause or matter, or as to which any question may arise therein, or for the inspection of any such property in possession of the party to the cause or matter.”

4.4 It was submitted that the import of the above provisions entailed that the property in question must be the subject matter of the cause or action and that the property had to be in danger of being wasted, damaged or alienated. He relied on the case of **Chisenga v. MTN Zambia and Another** ⁽¹⁾ which succinctly supplemented these requirements as follows:

“The tests in respect of preservation orders which the moving party must establish are as follows: (1) The assets sought to be preserved constitute the very subject matter of the dispute;(2) There is a serious issue to be tried regarding the plaintiff’s claim or counter claim to the assets; (3) The balance of convenience favours granting the relief sought.”

4.5 He submitted that the Plaintiff had satisfied the requirements of the law for the following reasons:

1. The property is the subject matter of the dispute in casu.

4.6 Mr. Zulu argued that preservation was to ensure that the successful party had the full benefit and value of the subject matter. That the subject matter involved a motor vehicle and the Court was tasked with the duty to ensure that the subject matter of any cause was preserved during an action. He

referred to the case of **Southern Cross Motors Limited v. Nonc Systems Technology Limited** ⁽²⁾ in this regard.

2. The property is in danger of being wasted or alienated

4.7 He submitted that this application satisfied all the three ingredients despite the law requiring that the procurement could be done by the satisfaction of one element. That this was a case fitting for a preservation order because the Nissan Navara registration number BAZ 9261ZM was in real danger of being wasted, damaged or alienated.

4.8 He argued that the Nissan Navara was subject to the guarantee agreement wherein it was agreed that in default of the sums owed to the Plaintiff, the motor vehicle was to be delivered to the Plaintiff, making the issue of possession and ownership contentious. He relied on the case of **Chisenga v MTN Zambia and another** where the Court of Appeal stated that:

“We are of the view that the lower Court properly exercised its discretion by refusing to discharge the custody and preservation order dated 25th October, 2018 pursuant to the power to order for the preservation of any property

which is the subject matter of the suit until final determination of the dispute as to ownership of the vehicle in issue. The issue of ownership of the motor is contested. The only way to preserve the property subject of the dispute is by way of order of preservation so that the suit is not rendered a nugatory.”

4.9 It was submitted that the only sure way of ensuring that the Nissan Navara was not alienated was by way of a preservation order. That this was because in the absence of the said order, the proceedings herein would be rendered a nugatory especially in the event of the vehicle being sold or alienated.

3. There is a serious issue to be tried regarding the Plaintiff's claim and the balance of convenience.

4.10 It was submitted that it was a requirement as the test in the *Chisenga* case that the Applicant to an interim order for the preservation must show to the Court that there was a serious issue to be tried regarding the Plaintiff's claim. That in the case in casu, the affidavit in support showed that there was a breach of obligation under a guarantee agreement on the part of the 2nd Defendant and on that footing this requirement was satisfied.

4.11 It was further submitted that the balance of convenience in

this matter favoured the reliefs sought, namely an order for the delivery to the Plaintiff of the Nissan Navara Registration No. BAV 9261ZM in accordance with the guarantee agreement of 18th January, 2023 between the Plaintiff and the 2nd Defendant. In the alternative an order that the Defendants pay the Plaintiff the amounts to be determined by the Court. He relied on the case of **Shell and BP v. Conidaris and Others** ⁽³⁾ wherein the Halsbury's Laws of England, 3rd Edition, Vol 21 paragraph 766 (on page 366) was quoted as follows:

“Where any doubt exists as to the plaintiff’s right, or if his right is not disputed, but its violation is denied, the Court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the defendant, on the one hand, would suffer if the injunction was granted and he should ultimately turn out to be right, and that which the plaintiff on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right. The burden of proof that the inconvenience which the plaintiff will suffer by the refusal of the injunction is greater than, which the defendant will suffer, if it is granted, lies on the plaintiff.”

4.12 It was submitted that if the preservation order was not granted and it turned out that the Plaintiff was right on the merits, the Plaintiff would be unable to enjoy the fruits of the judgment due to the fact that the vehicle would have already been dissipated and wasted through wear and tear. Thus the balance of convenience favoured the Plaintiff.

4. It is in the interest of justice that the property is attached and preserved

4.13 It was submitted that the Court had the power to grant an interim order for attachment and preservation based on the provisions of Order 3 rule 2 of the High Court Rules.

4.14 He submitted that the Plaintiff was aware that the remedy sought from this Court was injunctive in nature. That the order of preservation sought herein was not fettered by the rule that such a remedy should be denied where damages would suffice. **Order 29/8A/9 of the Rules of the Supreme Court** was also referred to.

4.15 It was submitted that it was in the interest of justice that the vehicle in question should be attached and preserved as the Defendant was continually using the vehicle exposing it to continual danger and waste.

- 4.16 In the oral submissions, Mr. Zulu reiterated his argument that the sole purpose of the application was to preserve the property which was subject to these proceedings.
- 4.17 Learned counsel for the 2nd Defendant, Mr. Banda relied on the affidavit and the skeleton arguments filed on 24th June, 2024.
- 4.18 In the skeleton arguments, Mr. Banda referred the Court to Order 26 rule 2 and 3 of the High Court Rules and submitted that the Plaintiff had not met the standard as stated in the rules as he had not stated at any point that the 2nd Defendant may dispose of the said property and neither had the Plaintiff stated the value of the property sought to be attached. That it was also not in dispute that the Plaintiff was in possession of the ownership documents relating to the motor vehicle and the 2nd Defendant could not therefore dispose of the vehicle.
- 4.19 It was argued that the ***Southern Cross Motors Ltd*** case referred to by the Plaintiff could be distinguished from this case as the Plaintiff attempted to recover the purchase price of the motor vehicle it sold and that the Court in that matter proceeded to state:

“In my view, the intention in the above cited legal provisions is to preserve the subject matter of the cause or matter, or property in

dispute in the suit so that the applicant, if successful at the trial, is not deprived of the true or full value thereof. From the pleadings and affidavit evidence on the record there is no doubt, that the “subject matter” or “property which is in dispute” in this case is motor vehicle Mitsubishi Sportero 200 Registration Number ALB 2631. The Plaintiff seeks protection over that property in two ways. Firstly, the Plaintiff seeks to recover its purchase price.”

4.20 Mr. Banda argued that in the matter at hand, what was sought to be recovered was a fraction of the purchase price of the property and not the entire sum and that unlike in the ***Southern Cross*** case, the 2nd Defendant was sued as a guarantor to a debt and not as the debtor.

4.21 Further reliance was placed on the case of ***Shell and BP Zambia*** case and also the case of **American Cyanamid Company v. Ethicon Ltd** ⁽⁴⁾ where the House of Lords observed that in deciding whether to grant an injunction relief, the Court should consider where the balance of convenience lies.

4.22 He submitted that this was not a suitable case for the injunction to be granted to the Plaintiff as he had not

adequately demonstrated the requisite elements before the Court.

4.23 He argued that the guidelines were authoritative and he referred to the case of **Cambridge Nutrition Limited v. BBC** (5) to buttress the foregoing.

4.24 In his oral submissions, Mr. Banda reiterated his argument that the cause of action was for indemnification of K100,000.00 and the motor vehicle was a secondary aspect. He argued that there was no evidence of disposal from the Defendant of the said motor vehicle as it was also a key ingredient in granting preservation orders.

4.25 He argued that the Plaintiff had further not shown that damages would not be sufficient if the order was not granted.

4.26 In reply, Mr. Zulu submitted that the guarantee agreement was a secondary agreement which made the guarantor liable after the primary debtor failed to fulfil his or her obligation towards the creditor. That this matter was properly made against the 2nd Defendant.

4.27 Further that in response to Mr. Banda's argument on the High Court decision, he argued that the position of preservation and attachment of property was well settled in the ***Chisenga v. MTN*** case that what was needed to be established on an

application for preservation was that the property must be subject of the dispute and likely to be wasted. He therefore submitted that there was a likelihood that the property would be wasted if the 2nd Defendant continued using it and a likelihood that it would be sold. He submitted that there were serious issues to be tried as established by the Plaintiff.

5. DECISION OF THE COURT

- 5.1 By this application, I have been called upon to determine whether the Plaintiff is entitled to an interim order for attachment and preservation of property namely motor vehicle Nissan Navara Registration Number BAZ 9261ZM.
- 5.2 The Plaintiff's application is therefore two-fold in that he seeks an order to attach and preserve the property.
- 5.3 The Plaintiff's contention is that he entered into a guarantee agreement with the 2nd Defendant wherein he pledged as security for the 1st Defendant's indebtedness of K100,000.00, a motor vehicle Nissan Navara Registration Number BAZ 9261ZM.
- 5.4 That it was agreed that in the event of non-payment by the 1st Defendant of the K100,000.00 by 30th April, 2023, he would be at liberty to dispose of the 2nd Defendant's Nissan Navara

and the ownership documents of the vehicle were consequently handed over to him.

5.5 The Plaintiff argues that the 1st Defendant defaulted and the 2nd Defendant has refused or neglected to handover the vehicle in his custody and use and thus was under continued danger of being damaged and diminishing in value. That since the motor vehicle was the subject matter of this action, the Court should order its attachment and preservation.

5.6 The 2nd Defendant on the other hand argues that he was under duress when entering into the purported guarantee agreement and that the delivery of the motor vehicle was not primary to the re-payment of the sum owed as the vehicle was merely for security.

5.7 The 2nd Defendant contends that the Plaintiff has not met the standard required for an order for attachment to be granted as he had not stated that the 2nd Defendant would dispose of the property nor stated the value of the property to be attached. That the Plaintiff was in possession of the ownership documents of the vehicle and the 2nd Defendant could not therefore dispose of it.

5.8 **Order 26 rule 1 of the High Court Rules, Chapter 27 of the Laws of Zambia** provides that:

“If the defendant, in any suit for an amount or value of fifty thousand kwacha or upwards, with intent to obstruct or delay the execution of any decree that may be passed against him, is about to dispose of his property, or any part thereof, or to remove any such property from the jurisdiction, the plaintiff may apply to the Court or a Judge, either at the time of the institution of the suit, or at any time thereafter until final judgment, to call upon the defendant to furnish sufficient security to fulfil any decree that may be made against him in the suit, and, on his failing to give such security, to direct that any property, movable or immovable, belonging to the defendant, shall be attached until the further order of the Court or a Judge.”

- 5.9 Order 26 provides for conditions precedent before an order for interim attachment of property may be made. The Plaintiff ought to first show that the defendant with intent to obstruct or delay the execution of any decree that may be passed against him is about to dispose of his property or any part of it or to remove any part thereof or to remove any such property from the jurisdiction. The Plaintiff may then apply to the Court at any time to call upon the defendant to furnish sufficient security to fulfil any decree that may be made against him against him in the suit, and, on his failing to give

such security, apply to the Court to direct that any property, movable or immovable, belonging to the defendant, shall be attached until the further order of the Court or a Judge.

5.10 The Court also illustrated the import of Order 26 rule 1 above in National Airports Corporation Limited v. Mines Air Services Limited (T/A Zambian Airways ⁽⁶⁾ where it held that:

“The two requirements to be met under Order 26, rule 1, are that for such an order to be granted, there must first be a threat or intention on the part of the defendant to dispose of his assets in order to obstruct or delay execution of any judgment. Second, prior to making such an application, the plaintiff should call upon the defendant to provide security and only where the defendant fails to provide such security is the plaintiff empowered to apply for an interim order of attachment.”

5.11 Further in the case of Standard Bank Limited v. Brocks ⁽⁷⁾

it was held that:

“An interim attachment can only be issued where a defendant is about to remove or dispose of the property with intent to obstruct or delay execution of any decree that may be passed against him.”

5.12 It is clear from these authorities that interim attachment of property can only be granted where a defendant is about to

remove or dispose of the property with the intention of obstructing execution against him.

5.13 To further clarify this position, the Supreme Court in the case of GDC Logistics Zambia Limited v. Joseph Kanyanta and 13 Others ⁽⁸⁾ defined interim attachment as:

“...a provisional or temporary relief which allows the plaintiff to attach the defendant’s property, whilst a court action progresses. It effectively restricts a defendant’s ability to deal with the attached property in their possession pending the outcome of the action.”

5.14 An interim attachment is therefore only temporary, attaching the defendant’s property whilst an action progresses restricting the defendant’s ability to deal with the attached property.

5.15 From the affidavit evidence, the Plaintiff has not alluded to any fact insinuating that the 2nd Defendant is about to dispose of the motor vehicle or any part of it or to remove any part thereof or to move the property from the jurisdiction.

5.16 There is further no evidence indicating that an application was made by the Plaintiff calling upon the Defendant to furnish sufficient security to fulfil any decree that may be made against him against him in the suit, and, on the 2nd

Defendant's failure to give such security, he is applying to the Court for attachment of the subject property.

5.17 In this regard, I find that the Plaintiff has not satisfied the conditions to be fulfilled before an order for interim attachment of property can be granted.

5.18 Furthermore, **Order 27 rule 3 of the High Court Rules, Chapter 27 of the Laws of Zambia** provides for detention, preservation or inspection of any property as follows:

“It shall be lawful for the Court or a Judge, upon the application of any party to a suit, and upon such terms as may seem just, to make any order for the detention, preservation or inspection of any property being the subject of such suit, and, for all or any of the purposes aforesaid, to authorise any person or persons to enter upon or into any land or building in the possession of any party to such suit; and, for all or any of the purposes aforesaid, to authorise any samples to be taken, or any observations to be made or experiments to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.”

5.19 Rule 3 of Order 27 allows the Court to order for the detention, preservation or inspection of any property being subject of a

suit. The same is expressed under **Order 29 rule 2 of the Rules of the Supreme Court** which provides that:

“On the application of any party to a cause or matter the Court may make an order for the detention, custody or preservation of any property which is the subject matter of the cause or matter, or as to which any question may arise therein...”

5.20 The Court of Appeal in the *Chisenga v. MTN Zambia* case stated regarding the test to be satisfied in respect of preservation orders that:

“The tests in respect of preservation orders which the moving party must establish are as follows:

1)The assets sought to be preserved constitute the very subject matter of the dispute.

2) There is a serious issue to be tried regarding the Plaintiff’s claim or counter claim to the asset

3) the balance of convenience favours granting the relief sought.”

5.21 An application for a preservation order must therefore show that the asset to be preserved is the subject matter of the dispute. The applicant should also show that there is serious

issue to be tried and that the balance of convenience favours granting the order.

5.22 It is clear from the statement of claim, the affidavit in support of the application that the Plaintiff's interest in the motor vehicle stems from the guarantee agreement wherein the 2nd Defendant undertook to secure the 1st Defendant's K100,000.00 debt using the motor vehicle registration No. BAV9261ZM. The Plaintiff contends that since the 1st Defendant has defaulted on the debt, the 2nd Defendant had neglected to deliver possession of the motor vehicle as agreed and he was thus concerned that the vehicle may be damaged and diminished in value due to the constant use by the 2nd Defendant.

5.23 The 2nd Defendant also filed a defence and counter claim to the effect that the purported guarantee agreement was illegal and unenforceable as it was signed under duress in the presence of several armed police officers. The 2nd Defendant therefore seeks *inter alia* an order compelling the Plaintiff to immediately surrender the ownership documents relating to the motor vehicle.

5.24 It is thus clear from these facts that there is a serious issue to be tried at the trial of this action.

5.25 Coming to the question of where the balance of convenience lies, I am guided by the case of Cayne v. Global Natural Resources ⁽⁹⁾ where May L.J explained that:

“That the balance of convenience is the phrase which of course is always used in this type of application. It is, if I may say so a useful shorthand but in truth, the balance that one is seeking to make is more fundamental more weighty than mere ‘convenience’. I think it is quite clear from both cases that although the phrase may well be substantially less elegant, the ‘balance of the risk of doing an injustice’ better describes the process involved.”

5.26 Sir John Donaldson M.R. expanded on the same theme in the case of Francome v. Mirror Group Newspapers ⁽¹⁰⁾ when he stated that:

“I stress again that we are not at this stage concerned to determine the final rights of the parties. Our duty is to make such orders if any as appropriate pending the trial of the action. It is sometimes said that this involves a weighing of the balance of convenience. This is an unfortunate expression. Our business is justice, not convenience. We can and must disregard fanciful claims by either party. Subject to that, we must contemplate the possibility that either

party may succeed and must do our best to ensure that nothing occurs pending the trial which will prejudice his rights. Since the parties are usually asserting wholly inconsistent claims, this is difficult but we have to do or best. In doing so, we are seeking a balance of justice, not convenience.” (*Underlined for emphasis only*).

5.27 I find the foregoing to provide persuasive points when considering the balance of convenience considering the facts of this case. Since at this stage I am not determining the final rights of the parties, my duty is to consider making an order which will be appropriate pending the determination of the matter.

5.28 In considering the balance of convenience, I have also had regard to the purpose of preservation orders as pointed out by the Court of Appeal in ***Chisenga v. MTN Zambia*** case that the purpose of preservation orders is so that viable claims are not frustrated by defendants who are prepared to ignore court orders, destroy evidence and or dissipate assets.

5.29 In other words, when seeking a preservation order, the applicant ought to show that the defendant intends to destroy evidence or dissipate assets which are a subject matter of the action.

5.30 The Plaintiff contends that this is a proper case fit for a preservation order because the Nissan Navara registration number BAZ9261 ZM is in real danger of being wasted, damaged or alienated so as to render these proceedings a nugatory.

5.31 Whilst the Plaintiff has advanced this argument that the vehicle is being used by the 2nd Defendant, he has not shown any proof that informs his apprehension that the motor vehicle now is in real danger of being wasted or damaged as a result of being used and that such use would diminish the value below what is owed by the 1st Defendant.

5.32 I say this taking into account the fact that the Plaintiff has also pleaded as an alternative to delivery of the said motor vehicle, the payment of the amount owed under the guarantee agreement with interest in accordance with the Judgment Act. In this regard, if the Plaintiff were to succeed at the trial of this matter damages would suffice.

5.33 Furthermore, there is no evidence that the 2nd Defendant is in the process of alienating the said vehicle especially that the Plaintiff has not disputed that he is in possession of the motor vehicle's ownership documents.


5.34 Given the foregoing therefore and in answering the question of where the balance of convenience lies, I find that the balance of convenience tilts in not granting the preservation order sought.

5.35 I therefore find from the foregoing that the facts presented do not show that the motor vehicle is any imminent or real danger of being wasted, damaged or alienated or sold so as to warrant a preservation order.

5.36 In a nutshell, I find that the Plaintiff has not satisfied the requirements warranting an interim order for attachment and preservation of property namely Nissan Navara registration No. BAV 9261ZM. The application is accordingly dismissed.

5.37 However, I make no order as to costs.

DELIVERED AT LUSAKA THIS 10TH DAY OF SEPTEMBER, 2024


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M.C. KOMBE
JUDGE

