



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO 37 OF 2020

UMOJA RUBBER PRODUCTS LIMITED.....1ST PLAINTIFF

MZURI SWEETS LIMITED.....2ND PLAINTIFF

MITCHELL COTTS FREIGHT (K) LIMITED.....3RD PLAINTIFF

VERSUS

SYNERGY INDUSTRIAL CREDIT LIMITED.....1ST DEFENDANT

HENRY KURIA t/a WESTMINSTER

MERCHANT AUCTIONEERS2ND DEFENDANT

RULING

1. On the 11.06.2020 the plaintiffs jointly moved the court, pursuant to the Notice of Motion dated the 06.06.2020, and sought, in the main, orders that some identified six containers be released to them forthwith and for an order to restrain the defendants from continued interference by way of detention of the named containers and their cargo therein contained.
2. The application and the suit reveal that it was premised on the fact that the 1st and 2nd plaintiffs were the consignees and importers of the containers while the 3rd defendant was entrusted with the duty to handle the containers and deliver same to the owners premises at Kikambala. In turn, the 3rd defendant contracted one **Shiva Carriers Ltd** to transport the and deliver the cargo contained in the said containers to the 1st and 2nd defendant's premises and to deliver the empty containers to the 3rd defendant's premises.
3. It was in the course of the containers being in the hands of the said Shiva Carriers Ltd, and while loaded aboard the motor vehicles owned by the said transporter, that the 2nd defendant, while carrying out instructions from the 1st defendant, to repossess took possession of the motor vehicles together with their cargo.
4. In the application it is asserted that there is no dispute as to ownership of the containers and the cargo; that the defendants were obligated to deliver the cargo to destination or to the plaintiffs and take away the motor vehicles; that it is unlawful to continue holding the containers and the cargo on the basis of a dispute between the defendants and a third party and lastly that it is in the interests of justice that the sought orders be granted to mitigate further losses being occasioned by way of accrued demurrage charges. Those same grounds were reiterated in the Supporting Affidavit sworn by One Hitendra Nanji Solanki which exhibited to court a contract for CFS services between the 1st and 2nd plaintiffs and the 3rd plaintiff, loading lists for the containers onto the repossessed trucks, copies of email and letters exchanged between the parties as well as bills of lading and container guarantees executed by the plaintiffs for the return of the empties.
5. The defendant opposed the application by Grounds of opposition raising some nine points whose gist and purport was that the application was abusive of the process of the court being intentioned to circumvent due legal process towards the execution of a court decree otherwise as the law dictates to be by way of objection proceedings under Order 22 rule 51, Civil Procedure Rules; that the application is escapist, disclosing no proof that the containers were loaded into the trucks proclaimed and attached by the defendants and that the application and the entire suit were fatally defective, untenable for attacking an execution process in a suit to which the plaintiffs were not parties hence was a conjecture with no basis in law.
6. There was also a Replying Affidavit sworn by one Jacob M Meeme, a legal officer with the 1st defendant. In that affidavit the deponent takes the position that the application is a design to circumvent the lawful execution process by a means other than that provided by the law being objection proceedings and that the grievances in this suit ought to have been canvassed in an objection. It was further asserted and averred that there had been not availed any proof as to ownership of the container which it is contended belong to Shiva carriers ltd and employed in its transport business. The plaintiffs were then accused of collusion with the said Shiva Carriers to fraudulently defeat a lawful

execution process by indolence and craft and that any losses alleged were the direct consequence of failure to take the proper legal step with promptitude it being reiterated that the detention of the containers was lawful in furtherance of execution. For the said reasons the defendants urged that the application is fit for dismissal for being frivolous, vexatious and an abuse of the court process.

7. The matter was argued orally with the parties wholly relying on the affidavits filed. The plaintiff's arguments were that on the basis of the documents exhibited, including those exhibited in the defendant affidavit, it was clear that the 2nd defendant was instructed to repossess identified and identifiable motor vehicles and was thus not executing any warrants of attachment and sale or indeed any order of the court because no judgment, order, warrants or the details of the case had been revealed. For that reason, the plaintiff urged that the court disregards the defendant's contention that the suit property was seized in execution of a court order and to find that there being no evidence that the defendant had any interests in the containers, it would only be just that the same be released to mitigate the losses by way of accruing demurrage. On the same vein it was underscored that objection proceedings only follow an attachment in execution and that there being no evidence that any court order was being executed, no objection proceedings could validly be undertaken. In summary it was urged that the plaintiffs having demonstrated title while the defendant having not justified the continued detention of the property, a threshold had been met for grant of an injunction pending suit. The counsel put forth an offer that the plaintiffs were prepared to offer an undertaking as to damages as a condition of grant of the order if the court determined so.

8. For the defendant, counsel narrowed her argument to failure to use the objection proceedings route in time and at all and stressed the point that where the law provide for a procedure to be followed a litigant has no liberty to depart therefrom. Counsel then submitted that none of the letters and email alleged to have been copied to the 1st defendant ever reached and that all the losses alleged was out of the indolence and dilatory conduct of the plaintiff who knew the fate of the container way back in March 2020 but chose to do nothing till May 2010. Counsel added that to grant any of the orders sought would be to prejudice the defendant while rewarding the plaintiffs for indolence and thus prayed that the application be dismissed with costs and the suit set down for hearing.

9. I have had the benefit of reading the papers filed and the submissions offered. As far as the prayer for prohibitory injunction is concerned, the courts mandate is to find out if the prerequisites for grant of a temporary injunction has been made but in undertaking such task, I must be reminded not to make any determinative finding as may ultimately embarrass the trial when conducted, by production of evidence. On the other hand, to grant an interlocutory mandatory injunction, the court must be satisfied that the case is clear in favour of the applicant and that exceptional circumstances are revealed to justify and merit making an order that may appear final even at that early stage.

10. I appreciate the dispute and the issue for determination to be, who between the plaintiff and the defendant is, on a prima facie basis, entitled to the possession of the good pending the determination of the suit. The answer to that question would beg the question if the plaintiff has established a clear prima facie case with probabilities of success. In making this determination I have given regard to the fact that the defendant is yet to file a defence.

11. While the plaintiff has exhibited documents that point to some title to the containers, the defendant has taken the very strong position that the suit property is in its custody and control pursuant to an execution process. However, no iota of evidence is put forth to show in what case the process issued and when the order being executed was issued. To this court, the defendant is vaguely invoking the provisions of section 34 of the Civil Procedure Act but without any material to support the same. To me section 34 of the Act is a bulwark of a defence that would displace the suit if material was to be availed to show that indeed there was a decree issued in a previous suit between the parties. In this matter the defendant has, in an attempt to justify the right to retain custody of the property, exhibited a proclamation dated 8. 11.2019, pursuant to instructions given on the 6.11.2019 and showing that only nine prime mover and trailers were proclaimed and seized. That proclamation does not show that any of the plaintiffs here was involved in the dispute leading to that seizure. There is no mention of any other property leave alone the suit containers. To the contrary the plaintiff did exhibit a letter of demand directed at the defendants and a letter by the 2nd defendant to Mombasa Storage Yard which was explicit that motor vehicles and trailers were **repossessed** and stored at the yard and permitting the release of any personal belonging and cargo but with written authority of the 1st defendant.

12. I do find that the named motor vehicles were repossessed and not attached in execution of any court order and that there is no prima facie claim on the suit property by the defendants. To the contrary the bill of lading and container guarantee forms exhibited demonstrate a prima facie title upon the plaintiffs. In my view and opinion, it is the proclamation that vests upon an auctioneer the right to hold the goods and therefore as things stand now there is nothing to show that the auctioneer has lawfully taken possession of the suit property. On the foregoing findings and without finally making a determination on the parties' rights, I do hold that there is a clear prima facie case disclosed by the plaintiff which merits preservation by an order of injunction in terms of prayer 3 of the motion.

13. For the purposes of this matter and noting that there is no claim laid on the goods by the defendants, I do find that it is not necessary to consider if damages would be an adequate remedy. I so hold because that is a consideration that would arise if there had been a claim as to title or other entitlement by the defendants. I am also of the opinion that ability to pay damages should not be the carte blanche to infringe on one's property rights. In **Shiva Carriers Limited v Imperial Bank Limited & another [2018] eKLR**

“To say that in such situation the defendant should be allowed to employ the law of the jungle merely because it shall pay damages is not to this court the way a civilized society should work. It would fly in the face of the law guaranteeing equal treatment before the law because every party able to pay damages would be free to infringe on others rights and

proclaim the financial ability to pay. In the *Victoria Pumps Ltd vs Kenya Ports Authority and 4 Others [2015] eKLR*, the court said:-

“In those circumstances I find that the plaintiffs loss as far it touches on his right to be heard goes to the very root of administration of justice and that the defendant or any them ought not to be allowed to disregard the law with abandon merely because they are capable of paying damages. To me that would create a situation and state where the financially strong would be above the rule of law merely by courtesy of their ability to pay damages. That to me would ran affront the provisions of Article 27 of the Constitution. I therefore find and hold that the plaintiff's injury in this regard would be incapable of adequate compensation by an award of damages”.

14. Prayer 2 is in the nature of a mandatory injunction which can only issue when special circumstances exist and when the court is convinced that the matter ought to be decided at once. It ought not to be given in every situation a restraining injunction would be given. An interlocutory mandatory injunction can only issue in exceptional circumstances and in the clearest of cases^[1].

15. In **Lucy Wangui Gachara v Minudi Okemba Lore [2015] eKLR** the court of appeal gave examples of what would amount to exceptional circumstances and said: -

“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 retrain, with the intention of defeating the plaintiff’s claim or where the defendant is otherwise bent on stealing a march on the plaintiff.

On the other hand, the court will not grant a mandatory injunction if the damage feared by the plaintiff is trivial, or where the detriment that the mandatory injunction would inflict is disproportionate to the benefit it would confer. We would also add that, save in the clearest of cases, the right of the parties to a fair and proper hearing of their dispute, entailing calling and cross-examination of witnesses must not be sacrificed or substituted by a summary hearing”.

16. In this matter I take the view and opinion that in insisting on continued detention of the good under the pretext of repossession of its financed assets when it has not demonstrated any claims to the suit property, the 1st defendant is seeking to steal a march on the plaintiff. I also consider that there would be more benefit, and no detriment, in granting a mandatory injunction and that to refuse the order would visit a detriment disproportionate to any benefit to the defendants.

17. I take notice that containers, by law and customs of trade in the Shipping industry, do attract demurrage if held for a period of time beyond set limit. I also appreciate that the law demands that an auctioneer discloses all the property it takes into possession and serves a proclamation of such property upon the person it has been seized from and that in this matter there is no proclamation over the suit containers and the cargo therein. In addition, I have been shown documents of title to the property which has not been challenged. Those are to this court are exceptional facts which present a clear case for which I am minded to issue an interlocutory mandatory injunction in terms of prayer 2 of the motion.

18. In conclusion I do find merit in the plaintiffs’ application which I hereby grant in terms of prayer 2 & 3. I also award the costs of the application to the plaintiffs.

19. However, to secure any injury that may be suffered by the defendants if the suit is determined in their favour, I direct that the 1st plaintiff shall forthwith file in court an undertaking as to damages.

20. In order to progress to suit forward, let the defendants file and serve their pleadings together with copies of all the documents they may wish to rely on at trial, within 21 days from today to enable the matter come up for case conference on the 23rd September 2020.

Dated, signed and delivered at Mombasa this 26th day of June 2020

**P.J.O
Judge**

Otieno