REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NARIOBI

CIVIL CASE NO. 64 OF 2018

MUTHANGARI VENTURES LIMITED.....PLAINTIFF

VERSUS

AVIC SHANTUI CONSTRUCTION

MERCHINERY E.A. CO. LIMITED.....1ST DEFENDANT

CHARLES KINYUA KARANJA.....2ND DEFENDANT

RULING

The plaintiff brought this suit against the defendants jointly and severally relating to a machine known as a wheel loader which it said was purchased for Ksh. 6,500,000/= through instructions given to the 2nd defendant.

In a lengthy plaint dated 27th March, 2018 and filed on 29th March, 2018 the plaintiff has detailed the involvement of the two defendants in relation to the said machine. The bottom line is that, the said machine was repossessed in what appears to be the failure on the part of the plaintiff to pay the balance of the purchase price of Kshs. 2,336,566/=

Following the said repossession, this suit followed and the plaintiff now prays for a permanent injunction against the two defendants from interfering with the utilisation of, operations of any business or assignment or work the plaintiff undertakes using the said machine. There is also a claim for general damages for unlawful and irregular repossession of the machine. Alongside the plaint, the plaintiff filed an application for injunction to bar the defendants or their agents and or employees or appointed representatives among others from offering for sale, selling, advertising, instructing to sell, disposing off or removing from the physical location the said machine pending the hearing and determination of this suit. The reasons for seeking those orders are set out on the face of the application in addition to an affidavit sworn by one of the directors of the plaintiff.

The application is opposed and there are replying affidavits sworn by the defendants. All the parties have filed submissions which I have considered. The order sought by the plaintiff is an equitable relief which the court exercises its discretion after taking into consideration the interest of the parties to the suit.

The applicant must show that it has a prima facie case with a probability of success and that if the order is not granted irreparable loss and damage may follow that may not be compensated by an award of damages. If the court is in doubt it will decide the matter on a balance of convenience. – see **Giella vs. Cassman Brown Co. Limited (1973) EA 358.**

I have related the above principles to the plaint, the application and the averment in the respective affidavits. The subject machine, its purchase, payment and alleged default are the substratum of the plaint herein. In fact, there are only two prayers in the suit. That is the injunction orders sought and general damages.

The defendants have not filed any defences, however it can be gleaned from the affidavits that the machine was repossessed following breach of payment on the part of the applicant. The whole transaction was governed by an agreement executed by the parties and which appears in the record. If the order Sought were to be granted, the court would be entering into the arena of conflict by rewriting the contract between the parties. The price of the subject machine is known, the default figure is known and there is no allegation that in the event the applicant succeeds against the defendants, the defendants would not be in a position to replace the machine or refund the applicant any monies that it may have expended in the transaction.

The applicant also must demonstrate at this stage that it is not at fault and that the defendants' step to repossess the subject matter is not supported by the provisions of the agreement or at all. Considering that this is an interlocutory application and where the orders sought shall be the ultimate interrogation in the trial, it is sufficient for this court to observe that the applicant has not shown a prima facie case with probability of success. The value of the subject matter in any case is ascertainable and an award of damages would be sufficient to compensate the applicant.

The earning that may result by the use of this machine are also ascertainable going by the pleadings and affidavits of the applicants. Damages payable as a result of repossession if proved, are also ascertainable. I am not in any doubt in the above findings and therefore a balance of convenience does not arise. However, even if it were the scales of justice would still tilt in favour of the defendants. I say so because the applicant is not the registered owner of the machine, the first defendant is yet to be paid and there is no guarantee that the balance of the purchase price will be paid in full. For the last three years since June, 2015 there has been inconsistency in the payment. The end result is that this application is dismissed with costs to the defendants.

Dated, signed and delivered at Nairobi this 31st day of October, 2018.

A. MBOGHOLI MSAGHA

JUDGE