



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 414 OF 2009

JOHN MWAGEFWA MWANGEMI.....PLAINTIFF

VERSUS

LECK ALEKSANDROWICZ.....DEFENDANT

J U D G M E N T

1. By his plaint dated 17/11/2009, the plaintiff sued the defendant and prayed for judgment against the defendant for an injunction and a declaration that motor vehicles KAY 630G and KAY 640G belong to the plaintiff and that their registration into the name of the defendant should be cancelled and instead they be registered in the name of the plaintiff.
2. The plaintiff further prayed for damages together with costs and interests on such damages and costs.
3. The defendant being a non-Kenyan National, the plaintiff sought to serve process by substituted service and was granted the orders on the 22/12/2009. Even with such service there was never an appearance nor defence filed and therefore the plaintiff fixed the matter for formal proof. That was after the court, Prof. J.B. Ojwang J, had on the 25/6/2010 granted to the plaintiff an order of temporary injunction directed at the defendant and restraining him either by agents, servants or otherwise from repossessing, attaching, disposing off, selling or any in any otherway alienating and or interfering with the plaintiffs possession of the suit motor vehicles pending the hearing and determination of the suit.
4. The matter then came up for hearing before Mwongo J, on 25/4/2017 when the plaintiff gave evidence and produced his exhibits before closing his case.
5. The evidence led by the plaintiff was to the effect that he bought the two suit motor vehicles from Amunda Fundi Manda and Mirram Fundi Chidzunga at Kshs.2,500,000/= and 2,800,000/= respectively. Having signed a sale agreement and paid the purchase price, the plaintiff was given all documents, I would call completion documents, to enable him effect the transfer in his favour. However, when he sought to transfer the motor vehicles, he was unable to because the vehicles were found to be registered in the name of the defendant.
6. About the same time, the plaintiff was confronted by actioneers who had been retained to reposses the two motor vehicles on the strength of a judgment apparently issued in Milimani Commercial Courts, CMCC No. 1963 of 2009 which decreed that the two motor vehicles be registered into the name of the defendant. The orders were dated 23/6/2009 and 2/7/2009. The auctioneers carried out their instruction and took away the motor vehicles and kept the same in their yards. The plaintiff herein sought to be joined in the suits and was so joined had the court orders set aside and the Registrar of Motor Vehicles ordered to restore the ownership thereof to the two individuals who had sold same to the plaintiff.
7. The plaintiff pleaded and gave evidence that when we got back the motor vehicles in November 2009, the same were vandalized and he spent a period of two weeks effecting the repairs. At the time the motor vehicles were taken away from the plaintiff, evidence was led that the plaintiff had a contract to transport containers between Mombasa and Nairobi and the repossession curtailed and disrupted that contract. For that loss, the plaintiff contended that he lost about Kshs.80,000 per month per vehicle and produced an auditors report for the period and 31st December 2009 as exhibit P19. On the basis of the audited accounts the plaintiff claimed to have lost Kshs.1,100,000.00. The witness produced the documents listed in the list of documents dated 13/5/2011 as exhibits P1-17, copies of Records for the two motor vehicles as exhibits 18A& 18B.
8. With that evidence the plaintiff cleared his case and urged the court to grant to him the prayers in the plaint dated 17/11/2009 and sought a period of 14 days to file written submissions. The submissions were never filed, as so requested, till the 22/11/2016.
9. In those submissions, nothing additional is brought forth save that the plaintiff seeks contrary to the oral evidence that he be awarded Kshs.2,428,571.40 being losses calculated at Kshs.250,000 per week for the 9 weeks and 5 days the vehicles were taken away from him.

10. The upshot of the foregoing is that the plaintiff has on a balance of probabilities prove his case against the defendant who did not enter appearance file a defence or resist the claim in anyway.

11. I enter judgment for the plaintiff for the order of a permanent injunction in terms of prayer 1, a declaration in terms of prayer 2 together with costs of the suit and interests on such costs.

12. I however decline to grant to the plaintiff any damages in terms of prayer (C) because as pleaded it is not clear damages are sought for what wrong. Granted that the motor vehicles were advertised for sale and taken away from the plaintiff for the proved period the damages pleaded are in the nature of special damages which the law demand to be specifically pleaded and strictly proved. I find that the plaintiff did not meet the threshold of pleading and proof.

13. It is so ordered.

Dated and delivered at Mombasa this 20th day of June 2017.

P.J.O. OTIENO

JUDGE