



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 266 OF 2014

SAMUEL NJOROGE KAMAU.....PLAINTIFF

VERSUS

CMC MOTORS GROUP LIMITED.....1ST DEFENDANT

AL FUTTAIM MOTORS & MACHINERY COMPANY LTD....2ND DEFENDANT

RULING

1. The application before me is for an interlocutory injunction. The plaintiff, **SAMUEL NJOROGE KAMAU**, has asked the court to grant an injunction to restrain the defendants, **CMC MOTORS GROUP LIMITED**, from dealing with, interfering with, alienating or otherwise disposing of the following motor vehicles;

- a. KBM 115 V;*
- b. KBN 277 F;*
- c. KBP 272 K;*
- d. KBP 271 K;*
- e. KBP 270 K;*
- f. KBQ 462 Q;*
- g. KBQ 463 Q;*
- h. KBQ 515 U;*
- i. KBQ 516 U;*
- j. KBQ 517 U;*
- k. KBQ 518 U; and*
- l. KBP 273 V.*

2. According to the plaintiff, the defendant had sold to him vehicles which were either faulty or defective. The situation is said to have been so bad that they continued to suffer perpetual and recurring breakdowns.
3. The problems are said to have started shortly after the defendant delivered the vehicles to the plaintiff.
4. It is the plaintiff's case that the defendant had, unequivocally, admitted liability in respect to the defects and faults in the vehicles.
5. The vehicles in issue are buses; and the plaintiff states that they lacked economic viability. Primarily, the defendant's mechanics have failed to repair the defects, and the defendant is also said to lack the necessary spare parts.
6. As a consequence, the plaintiff says that the buses had stalled at the defendant's yard.
7. The considered view expressed by the plaintiff was that the defendant had provided buses which were not roadworthy.
8. Therefore, the plaintiff wants the defendant to be ordered to refund the full purchase price, amounting to Kshs. 30,841,953.60.
9. Whilst the plaintiff's said claim was still pending, the defendant instructed auctioneers to sell-off the buses, with a view to recovering the balance of the purchase price.
10. It is that action, of getting an auctioneer who was supposed to sell the buses, that prompted the present application for an injunction.
11. Secondly, and in any event, the plaintiff believes that there were no outstanding arrears of the installments payable to the defendant.
12. Indeed, the plaintiff insists that there were buses which had been paid for in full. Payments were said to have been made by **CO-OPERATIVE BANK** and **ALIOS FINANCE KENYA LIMITED**.
13. In those circumstances, the plaintiff contends that the defendant was very wrong to withhold the buses in their yard.
14. Because he plaintiff has been deprived of the use of the buses, he says that he will be asking the court to order the defendant to pay aggravated damages.
15. If the buses were sold by the defendant when this case was still pending, the plaintiff believes that that would render a nullity, the pending case. It was for that reason that the plaintiff submitted that the justice of the case demands that an injunction be granted to restrain the defendant.
16. The plaintiff's further submission was that the consideration of the adequacy or otherwise of damages was irrelevant in a case in which the probability of success merits a full trial.
17. According to the plaintiff, an injunction ought not to be denied just because the court could award damages to the plaintiff, and because the defendant may have the ability to pay such damages.
18. I found that reasoning to be out of sync with the often-quoted authority of **GIELLA Vs CASSMAN BROWN [1973] E.A 358**, in which the Court of Appeal held as follows;

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of

damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience”.

19. I would have expected the plaintiff to make out a case as to why, his is an exception to the general rule, which is that when an injury can be adequately compensated by an award of damages, the court would not normally grant an interlocutory injunction. Instead, the plaintiff said;

“The potential injury facing the plaintiff, as a result of the threatened and impending irregular proclamation could well be adequately compensated by an award of damages”.

20. The reason for that position is well appreciated when one looks at the prayers in the plaint. That is because prayer marked (b) is for the award of;

“Special Damages for breach of contract in the sum of Kshs. 30,841,953.60 together with interest thereon at commercial rates of interest prevailing from time to time from the respective due dates until payment in full”.

21. Apart from that relief, the plaintiff sought a mandatory injunction to restrain the 3rd Defendant from buying out the 2nd defendant until the suit was heard and determined.

22. The plaint does not have any 3rd Defendant.

23. Finally, the plaint sought the costs of the suit.

24. In effect, the plaintiff had already quantified the damages which he was claiming. And as the plaintiff says that he is aware that the threatened and impending proclamation could well be adequately compensated by an award of damages, I find no basis, in law, for granting an injunction to restrain the defendant.

25. I also find no merit in the plaintiff’s contention that the defendant had come to court with dirty hands, simply because the defendant had engaged the plaintiff in “out of court negotiations”, and had then “ambushed” the plaintiff with a Proclamation Notice.

26. If the parties had arrived at some understanding or if the defendant had given some undertakings or promises to the plaintiff, I would have found the defendant to have acted irregularly if it ignored such understanding, undertaking or promises.

27. The plaintiff appears to have purchased the buses in the years 2010, 2011 and 2012.

28. Therefore, I find that the contention, made in the suit filed in 2014, that the buses were faulty within days of delivery to the plaintiff, is not probable.

29. If the buses were faulty within days of being delivered, it would have been expected that the plaintiff would have complained soon after he received the first few buses. And, indeed, it would have been unlikely that the plaintiff would thereafter, have continued ordering for more of the buses from the defendant.

30. I also find, on a prima facie basis, that a party who finds buses to be of no economic value, is most unlikely to want to continue holding onto such assets. The party would, more probably than not, have no need to hold onto buses which had no economic value.

31. A sale of the buses, when they might still fetch some money may ultimately be beneficial to both parties.

32. In the circumstances, I find no merit in the plaintiff’s application for an interlocutory injunction.

Therefore, the application dated 10th June 2015 is dismissed, with costs to the Defendant.

DATED, SIGNED and DELIVERED at NAIROBI this 23rd day of March 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of:

Mburu for the Plaintiff

Kefa Ombati for the 1st Defendant

Kefa Ombati for the 2nd Defendant

Collins Odhiambo – Court clerk.