REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO.94 OF 2015

STEPHEN BLANCHET.......................................APPELLANT

VERSUS

1. WOLFGANG MULLER

2. HEINO DAHMEN.......................................RESPONDENTS

JUDGMENT

Outline

1. This appeal was by consent consolidated with Civil Appeal No.115 of 2015 on the 12.4.2016 with the consequence that the second Respondent in this appeal was constituted and designated the 2nd appellant. I will therefore for Record puposes refer to the parties as follows:

STEPHEN BLANCHET......................1ST APPELLANT

HEIN DAHMEN..................................2ND APPELLANT

MULLER WOLFGANG..........................RESPONDENT.

2. The appeal faults the ruling and determination of Hon.J. Gandani dated 3.7.2015 in the original Mombasa PMCC No.513 of 2014 in which the Respondent sued the Appellant seeking one substantive order, a mandatory injunction compelling the Defendants (now appellants) to release to the plaintiffs water pump machine lying at their premises.

The pleadings

3. In the plaint the cause of action is not very clearly defined but seems to border on the tort of detinue or conversion. In it, the plaintiff contends that he imported the suit water pump and agreed with the defendants that it be kept at the defendants yard on the understanding that upon sale the defendant would be paid a sum equal to 5% of the purchase/sale price as commission. The suit was then filed when the plaintiff alleged that the defendant denied him access to the machine to enable prospective buyers view it. The plaint together with a Notice of Motion, both dated 26.3.2014, were filed in court on the same day. The application in the main sought an order that the defendants be ordered by the court to release the suit machine to the plaintiff with an enabling order that the OCS Mtwapa Police Station do give security to the plaintff in getting the water pump in a container out of the premises of the defendants.

4. Upon service, the 1st defendant entered appearance and filed a statement of defence, Notice of Preliminary Objection and a Replying Affidavit through the firm of OKATA & CO. ADVOCATES.

5. In the statement of defence the defendant admits the agreemnt for payment of commission of 5% but subject to the machine being sold on or before the 31.12.2012. It was further pleaded that the agreement was between, not the parties to the suit, but between Kenya Boat Limited, to which the defendant was Director, and Leyco Wassertechnic Bmbh; That the said Kenya Boat Limited would carry out installation works at **350 EUROS** and charge storage at 220 Euros per month after 31.12.2012 if the machine remained in their possession. It was then pleaded that Leyco Wassertechnic failed to sell the machine as agreed hence as at the time the matter came to court, Kenya Boat Limited was claiming the sum of Kshs.404,800 on account of storage fees which continued to accrue till payment in full and which the said Kenya Boat Ltd insisted was due and payable before the owner of the machine or his agents could be allowed access and take possession of the machine.

6. The defendant further insisted that the person who left the machine with Kenya Boat gives official communication that the plaintiff be allowed access to the machine. It was then contended that there was no privity of contract between the plaintiff and Kenya Boat Limited nor its directors.

7. Those pleadings were effectively repeated by the 2nd defendant albeit with less electrity with an addition that the only part the 2nd defendant played was to instal the machine at the 1st defendants premises at Mtwapa. He denied my privity with the plaintiff nor the holder of the power of attorney. From the pleadings by the 2nd defendant he is portrayed as an independent contractor for Kenya Boat Limited and no more. The pleadings by the 2nd defendant was filed by R.A.Osimo & Co. Advocates who also filed a replying affidavit in opposition to the application seeking the release of the machine.

8. The application dated 26.3.2016 was then placed before the trial court on the 21.11.2014 after the preliminiary objection having been disposed off on 29.8.2014.

Analysis and Determination

9. That application as worded and filed was one seeking a mandatory injunction. The principles upon which a court grants a mandatory injunction are now well settled. It is to the effect that a mandatory injunction cannot issue unless the case is shown to be unusually strong and clear. I may only add that a court sought to issue a mandatory injunction should only do so when convinced that after trial it shall not look back and feel that there was an indiscretion in the grant of the mandatory injunction at an interlocutory stage.

10. In **KENYA RAILWAYS CORPORATION -VS- MONAS M.NGUTI** the court cited the decion in **SHEPHERD HOMES LTD -VS- SANDHAU** with approval as follows:-

> ***"... I think the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enfore a contractural obligation"***

11. In the matter before the court, another cosideration the court ought to have taken into account but which it did not was the fact that the only prayer sought in the plaint was the same prayer sought by the application the court considered and allowed. It was the prayer for the release of the machine. The effect is that once the application was allowed, there was nothing outstanding in the suit for consideration by the court. It is indeed undesirable that a matter like the one before the court, with several contested issues was determined on the basis of affidavits and without giving the parties the chance to lead evidence. It is evident that the 1st defendant who admitted that his company was in possession of the suit machine was succient that its only interest in the machine was the storage charges. There were also the contested issues of privity of contract between the parties. In **STEPHEN KIPKEHUT T/A RIVERSIDE LODGE AND ROOMS -VS- NAFFATALI OGOLA [2009] EKLR** the court held that an order which results in the grant of a major relief claimed in this suit ought not to be granted at an interlocutory stage. The court was more candid in **ALEX WAINANA T/A JOHN COMMERCIAL AGENCIES -VS-**

JOHNSON MWANGI WANJIHIA [2015] eklr when it said concerning the factors to be considered by a court before granting a mandatory injunction:-

> ***"The appellant having been in possession of the land which he developed before the Respondent's rights accrued; the fact that the appellant had asserted that he was a purchaser for value without Notice which was a triable issue; the nature of the inconvenience the Respondent would suffer if the injunction were to be withheld and that which would be suffered by the appellent if the injunction were to be granted; whether the Respondent could be compensated by way of damages for loss of use of the suit property during the pendency of the litigation; the uncertain outcomes of various relevant case before this and other courts, and also whether granting the relief in the manner sought would leave any issue for agitative in the main suit."***

12. I have isolated and relied upon the two cases above and the principles enuciated in there as a way of drawing the path upon which this decision will take.

13. The appellants have faulted the decision of the grounds among others; failure to appreciate the principles of grant of an interlocuroty mandatory injunction; that the court made final determination on the disputes before it prior to hearing the evidence on storage charges and that it failed to appreciate the law on privity of contract.

14. This being a first appellate court, the discretion to interfere with the determination of the trial court are well defined. See **SELLE -VS- ASSOCIATED AUTOR BOAT CO. LTD.[1968] E.A. 123.**

15. I have looked at the decision by the trial court and the following excerpt is of relevance to the determination by this court on whether or not the question of privitiy of contract was a triable issue before the trial court.

The court said at page 439-440 of the Record of Appeal:-

> ***"In all the pleadings here and the importation documents availed by the plaintiff it is clear that there is no other party who has come to claim ownership of the pump except the plaintiff here. It is my finding that the pump is wholly owned by the plaintiff. Though the 1st defendant has said he has no privity of contract with the plaintiff over this matter, in his replying dated 10/4/2014 in paragraph 11, he stated that when the plaintff went to the offices of Kenya Boats not to allow the plaintiff to see it but that M/s Wasserttechnic do pay the outstanding rent first and that Kenya Boat Ltd receives official communication from the said company. It is clear from his paragraph, that though the 1st defendant claims to have no privity of contract with the plaintiff, he is involved in the obstructing of the plaintiff from even accessing the said pump.***
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> ***Though the 1st defendant claims that there was to be storage charges for the machine no document has been shown in these pleadings to confirm so. The only document available shows that the installer, Kenya Boats would have received 5% of the sale price. This is as per the letter dated 13/12/2014 by Michael Leyendecker to the plaintiff. It confirms the plaintiff paid for the water treatment pump for a 3rd party who is the 1st defendant here to claim that Kenya Boats was entitled to anything else is totally unjustified."(emphasis provided)***

16. With due respect, the trial court fell into error. It fell into error because, it totally failed to appreciate the principle of privity of contract that a none party to contract should never be bound by it or derive a benefit from it. Equally, the further affidavit by the 1st defendant to be found at pages 87-89 of the Record of Appeal and sworn on the 18/11/2014 exhibited among other documents a notice under the Disposal of uncollected Goods Act, a Notice to sell all directed at a party other than the plaintiff, ust as much the replying affidavit exhibited exhibits of claim including invoices. There having been a claim for storage charges, the matter ceased to be a simple and straight forward, strong and clear case to warrant being dealt with in a summary way by grant of mandatory injunction.

17. One of the reasons an appellate court may interfere with the findings of a trial court is where there is an error in principle or failure to consider a relevant matter or giving undue consideration to an irrelevant matter. To this court the distinction of the applicable principles for grant a mandatory injunction as opposed to a prohibitory injunction was not given due consideration.

18. In the decision appealled against, the tiral court ultimately rendered itself as follows:

> ***"The continued detention of the machine by the defendnats is causing the plaintiff great inconvinience and loss. The plaintiff has therefore demonstrated a prima facie case with a good chance of success because on the face of the application which, though is yet to be tested, he has proved he is the owner of the pump who has unlawfully been denied access. The defendant who are detaining machine are detaining it illegaly as they were only entitled to 5%. Commission of the sale price"(emphasis provided)***

19. It is clear to this court that the trial court approached, treated and determined the application before it as it if was an applicaiton for prohibitory injunction. He did not consider and take into account the fact that the principles of grant of a mandatory injunction are not the same as those of a prohibitory injunction. That is an outright error in principle and this cout is bound to correct the error by interfering with those findings. In so interfefing I am guided by the decision in **ALEX WAINANA T/A JOHN COMMERCIAL AGENCIES -VS- JANSON MWANGI WANJIHIA** (supra) where the court of appeal in reversing a decision by the trial court said:-

> ***"The consistent reiteration of those principles by the courts is an affirmation that the remedy of mandatory injunction is a drastic one which ought not to be granted mechanically but considered with caution. We have applied the above principles to the rival arguments herein with regard to the trial court's exercise of discretion and we find it safe to interfere with that discretion. It is beyond arguement that the factual matrix of the case before us is not clear and straight forward capable of summary disposal of the case."***

20. On my part I have taken into account the findings foregoing and having applied the facts disclosed to the law, found, and I now hold that the matter before the trial court was never a simple, straight forward, strong and clear case capable of summary disposal in the manner the trial court did.

21. I therefore allow the appeal, set aside the decision of the trial court dated 3/7/2015 and in its place substitute an order that the application 26/3/2014 be and is hereby dismissed with costs to the Appellant.

22. I award the costs of this appeal to the appellant.

Dated, signed and and delivered this 3rd day of August 2016.

P. J.O. OTIENO

JUDGE