



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 155 OF 2011

MUSTAFA MOHAMED ISSA LTD.PLAINTIFF

VERSUS

GATEWAY MARINE SERVICES LTD.....DEFENDANT

RULING

The Notice of Motion application dated 8th June, 2011 expressed to be brought under order 40 rule 2 and 39 rules 5 and 7 of the Civil Procedure Rules seeks orders for;

(a) Spent

(b) An Injunction to restrain the Defendant from selling and or transferring plaintiffs motor vehicle registration number T456 Amp, Trailer T672ANE to themselves and or any other persons whatsoever until this matter is heard and determined

(c) An order for attachment of the subject motor vehicle registration number T456 AMP Trailer T672 ANE for placement at a place (neutral) other than the Defendants parking yard.

The grounds are that the plaintiff did not at any time authorize the Defendant to have its motor vehicle herein taken or delivered to the said Defendants yard in Mombasa.

Secondly, the Defendants acts and or omissions relating to the plaintiffs motor vehicle were all undertaken by the Defendant without the knowledge of the plaintiff.

In the supporting affidavit of the plaintiffs chairman one Mustafa Mohamed Issa its deponed that an agreement was entered between the Defendant and the Plaintiff on 10th September, 2010. The plaintiff was to take on hire from the Defendant two generators (“gensets”) for mounting onto his motor vehicle registration T456 AMP, Trailer T672 ANE for its business operations in Juba South Sudan for a period of Ten (10) days.

The plaintiffs contention is that delivery was on 17th September, 2010 instead of 14th September, 2010 as covenated.

On 7th October, 2010 the motor vehicle in question was involved in an accident 120 kilometers from Juba City (town).

It is further deponed that in the month of January, 2011 unbeknown to the plaintiff and without

authority and consent the Defendant proceeded to Juba, collected the plaintiffs motor vehicle, loaded it into another truck and took it first to Kampala and later to its yard in Mombasa where it is still held.

It is further contended by the applicant that the Defendant on the 20th May, 2011 wrote to the plaintiff claiming for payment in the sum of USD 52,624 including a sum of USD 6500 which is classified as transport costs, a sum of USD 2250 lifting crane charges, loading and offloading and storage charges of USD 4,250 and administrative fees of USD 5500. Total under that head USD 18,500. It is argued that there was no authorization on the part of plaintiff for the Defendant to undertake what it did. That the Defendant has threatened to transfer the subject motor vehicle to itself as a mode of repaying itself what the plaintiff allegedly owes it.

Further that a visit to the Defendants yard revealed the the prime mover and its trailer both had their wheels removed and that there are attempts to conceal the identity of the subject motor vehicles and that its apparent that the Defendant is indeed in the process of alienating the subject motor vehicle from the plaintiff.

This application is opposed. The Defendant relies on the replying affidavit of one Haggai Saraih Nyongesa the Administrative Manager of the Defendant Company.

The agreement between the plaintiff and the Defendant is not denied but the delivery of the gensets to the plaintiff is said to have been done on 10th September, 2010 for the agreement to take effect on 14th September, 2010.

It is deponed that the gensets were mounted on the plaintiffs motor vehicle registration number T456 AMP, Trailer T672 ANE which proceeded to Juba where it was involved in accident.

That after the accident the plaintiff deliberately abandoned the subject motor vehicle and the “gensets” still mounted onto it for a period of over 204 days contrary to the agreed Ten (10) days and in breach of the contract.

Subsequently in order to mitigate its damages the Defendant took it upon itself to take steps to recover the gensets from Juba and transported the plaintiff Trailer and the gensets from Juba to Mombasa arriving on 3rd January, 2011.

Further that in the process of transportation the Defendant incurred expenses on the tune of USD 52,624 inclusive of demurrage sum of USD 20,400.

It is contended that the plaintiff gave the original logbooks for Scania Truck Motor Vehicle registration number T456 AMP, Trailer No. T672 ANE to the Defendant as alien to guarantee performance of the contract.

That the plaintiffs were appraised of the fact that **“We further accept original logbooks for your Scania registration number T456 AMP and Trailer number TC 672 ANE to undertake as lien for genset number 35. Please note that we shall hold above mentioned truck and trailer in case you fail to return gensets in good working condition”**.

In this application, the main point of departure is whether the plaintiff did authorize the Defendant to take the subject motor vehicle lorry from Juba to its yard in Mombasa and whether in their contract there was provision for seizure of he plaintiffs motor vehicle in the form of penalty.

These are issues which can only be canvassed in the main hearing.

In the present application the prayers sought are for an injunction to restrain the Defendant from alienating, selling, Transferring the plaintiffs motor vehicle registration number T456 AMP, Trailer T672 ANE pending hearing and determination of this suit and secondly, an order for attachment of the same vehicle for placement at a neutral place other than the Defendants parking yard.

The Defendant contention is that since the original logbooks were surrendered to it as lien to guarantee the performance of the contract then they were granted powers to **“hold”** the subject motor vehicle if the plaintiff failed to return the gensets as per agreement.

That may be so but it would not be tantamount to granting to themselves or any other person for that matter.

The second prayer is that for attachment of the subject motor vehicle to be kept at a neutral place I do find that a neutral place has not been determined and moreover this may cause additional expenses.

In the present suit itself there is a plaint and a counterclaim and in the balance of convenience there is need for conservatory orders for the subject motor vehicles in terms of the injunction prayed.

Prayer 6 is found to be ambiguous and it is rejected.

Costs in the cause.

The upshot is that an injunction is hereby granted in terms of prayer 6 of the Notice of Motion application dated 8th June, 2010 pending hearing and determination of the suit. The motor vehicle to remain stored at the Defendants yard in Mombasa.

Ruling delivered dated and signed this **21st** day of **February, 2014**.

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M. MUYA

JUDGE

21ST FEBRUARY, 2014

In the presence of :-

Learned Counsel for the applicant Mr. Hamza

Learned Counsel for the Respondent

Court clerk Musundi