



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 187 OF 2012

FREDRICK SAISI ISHAGA PLAINTIFF

V E R S U S

ZENITH MEDIA SERVICES 1ST DEFENDANT

PATRICK KINISU2ND DEFENDANT

RULING

1. Plaintiff has sued both Defendants alleging in the Complaint that the 2nd Defendant on his own behalf and on behalf of 1st Defendant Company where he is a Director, approached the Plaintiff and invited him into a partnership with them to carry out business ventures in Nairobi and Mombasa. That in consideration of the plaintiff being engaged in that business full time the Defendants purchased and registered into the Plaintiff's name motor vehicles registration numbers KBM 680J, KBM 494J and KBM 512L (hereinafter referred to as the three subject vehicles). That in breach of that agreement the 2nd Defendant on his own behalf and on behalf of the 1st Defendant has harassed the Plaintiff by using Police and has seized the three subject motor vehicles. Plaintiff by his final prayers seeks declaration that he is the rightful owner of the three subject vehicles; an injunction to restrain Defendants from intimidating or harassing him through the Police; and an injunction to stop Defendants from taking possession of the three subject vehicles.
2. The Defendants filed their defence on 17th May, 2013 by simply denying the Plaintiff claim. Defendants without leave of this Court filed an amended defence on 19th November, 2013. That amended defence having been filed without leave of the Court will not be considered in this Ruling.
3. For Court's consideration in this Ruling are three applications. I shall proceed to consider each separately.

Notice Of Motion Dated 5th October 2012

4. This application is filed by Plaintiff. By it Plaintiff seeks interlocutory injunction to restrain 1st and 2nd Defendants, using the Kenya Police, from impounding or taking possession of the three subject vehicles. In the affidavit in support of the application Plaintiff reiterated what he averred in his complaint, that he was invited by the Defendants to enter into a partnership to operate a joint business. That the business ran into financial problems and its landlords distressed for rent arrears

by attaching the 1st Defendant Company's property. Plaintiff then deponed in his affidavit-

“8. THAT in consideration on my part in the running of the business full time on a day to day Motor Vehicles Registration No. KBM 680J, KBM 494J and KBM 512L acquired by the joint business [True copy of Registration Books are annexed and marked ‘FSL-4-6’] were registered in my name.”

Further that the Defendants had sought the handing over of the Company's assets by the Plaintiff and in so doing had received assistance of the Police in which regard the Police had sought to arrest the Plaintiff. That in wanting the return of the subject vehicles the Defendants were intending to transfer them into the 2nd Defendant's name.

5. Plaintiff by his written submissions filed on 3rd January 2014 conceded that the three subject motor vehicles were being held by the Police as exhibit in **Mombasa Chief Magistrate's Criminal Case No. 2960 of 2010**. He therefore submitted that he was seeking orders to conserve the motor vehicles until the hearing and determination of this suit.
6. The Defendant's affidavit in reply dated 24th June 2013 is incomprehensible. It refers to matters that do not reply to the Plaintiff's depositions. It was however submitted on behalf of the Defendants that the Plaintiff registered himself as an owner of the subject motor vehicles for which he is presently facing a forgery charge in **Mbsa Criminal Case No. 2960 of 2012**. This submission has not been denied. Defendants did also attach Registration Certificates of the subject vehicles showing the vehicles were registered in third parties names.
7. It was further submitted, and is evidenced by documentation attached to 2nd Defendant's witness statement, that Plaintiff was not a partner of Defendants as alleged but that rather was the 1st Defendant's employee. To this end 1st Defendant attached its Letter of Appointment of Plaintiff as Lead Logistic Executive (Assistant Operations Manager).

Analysis and Determination

8. It is settled law that the guiding principles for an injunction are as set out in the case **GIELLA – Vs- CASSMAN BROWN AND COMPANY LTD [1973]E.A.** These principles were discussed in the case **KAREN BUPASS ESTATE LTD –Vs- PRINT AVENUE AND COMPANY LTD [2014]eKLR** as follows-

“Those principles are first, that the applicant must show a prima facie case with a probability of success; secondly that he stands to suffer irreparable harm not compensable in damages; and thirdly; if in doubt, the court must assess the balance of convenience. Being a discretionary remedy, there is also ample authority that a party, who has acted in a manner not acceptable to a court of equity, will be denied remedy. See Kenya Hotels Limited Vs Kenya Commercial Bank and another [2004]1 KLR 80, Public Trustee Vs Nicholas Kabucho Murimi HCCC ELC 610 OF 2011 [2012]e KLR, George Munge Vs Sanjeev Sharma & 3 Others HCCC ELC 677 of 2011 [2012]e KLR. The conditions outlined in Giella's case (supra) are sequential ‘so that the second condition can only be addressed if the first one is satisfied and when the Court is in doubt then the third condition can be addressed’ Kenya Commercial Finance Company Ltd Vs Afraha Education Society [2001]1 E.A. 86.”

9. Does Plaintiff meet the first principle? In my view and on a prima facie basis I find in the negative. It will be recalled that I reproduced part of Plaintiff's affidavit above where in not so clear terms Plaintiff deponed that the subject motor vehicles were purchased by the joint business. He does not disclose the name, if any, of the joint business. Even though purchased by the joint business, Plaintiff fails to give documentation of the agreement, if any, between the partners, that the said vehicles were to be registered in the name of the Plaintiff. But I think more importantly is

that there is now produced by Defendants Registration Certificates showing the vehicles were registered in names of 3rd parties. The question then that arises is; which Registration Certificate is genuine? In my view the evidence presented by the Plaintiff does not show a prima facie case with probability of success. It certainly does not show a prima facie case as defined in the case: **MRAO LTD –Vs- FIRST BANK OF KENYA LTD AND OTHERS (2003)KLR 125** where the Court of Appeal stated that prima facie case is one-

“Which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

10. In reaching my decision on Plaintiff’s Notice of Motion dated 5th October 2012 I am also guided by the holding in the case **CHARTER HOUSE INVESTMENTS LTD –Vs- SIMON K. SANG & OTHERS, CIVIL APPEAL NO. 315 OF 2004**, where the Court of Appeal stated that-

“Injunction is an equitable and discretionary remedy, given when the subject matter of the case before the court requires protection and maintenance of the status quo. The award of a temporary injunction by courts of equity has never been regarded as a matter of right, even where irreparable injury is likely to result to the applicant. It is a matter of sound judicial discretion, in the exercise of which the court balances the conveniences of the parties and possible injuries to them and to third parties. In the Giella case (supra) the predecessor of this court laid down the principle that for one to succeed in such an application, one must demonstrate a prima facie case with reasonable prospect of success; that he stands to suffer irreparable damage which cannot be compensated for by an award of damages; and that the balance of convenience tilts in his favour.”

11. Over and above, the Plaintiff concedes that the subject motor vehicles, are held by the Police in view of the fraud case Plaintiff is facing. If that be so this Court may make orders in respect of those motor vehicles which may contradict the order of the Criminal Court. That may bring absurdity to the Rule of Law and I therefore decline to grant the orders sought.

12. The Plaintiff having failed to show that there is a prima facie case with probability of success and because the principles of **GIELLA** case (supra) as set out in case **KAREN BYPASS** case (supra) are sequential I will not proceed to consider the other principles save to say that if the case is finally resolved in favour of Plaintiff the loss the Plaintiff will have suffered can be compensated by an award of damages.

Notice of Motion dated 16th May, 2013

13. This was filed by the Defendants. Defendants seek dismissal of the Plaintiff’s suit on the ground that it is frivolous and discloses no reasonable cause of action and is otherwise an abuse of the Court’s process.

14. The grounds upon which Defendants seek dismissal of the suit are that the subject motor vehicles are owned by the 1st Defendant; that Plaintiff was employed by the 1st Defendant; that the Plaintiff while in that employment fraudulently transferred the subject motor vehicles; the Plaintiff was arraigned in the Criminal Court for that fraud.

15. Plaintiff in opposition to that application stated that the application was bad in law because it failed to cite the correct Order in the Civil Procedure Rules upon which it is based; that the affidavit in its support was sworn by 2nd Defendant who failed to put in evidence authority of the 1st Defendant authorizing him to swear the affidavit; that the Plaintiff has denied being 1st Defendant’s employee; and that the Criminal charge Plaintiff is facing was brought on instigation of the 2nd Defendant who did so in the hope of defeating this claim.

Analysis and Determination

16. The case presented by both parties is that both Plaintiff and the Defendants claim to be owners of the three subject motor vehicles. Indeed both sides have presented Certificate of Registration to support their allegations. At this stage the Court has not had the opportunity to test the parties' allegations by receiving oral evidence. It is for that reason that I find the holding in the case **D. T. DOBIE & COMPANY (KENYA) LTD –Vs- MUCHINA (1982) KLR** helpful. The Court of Appeal held in that case-

“As the power to strike out pleadings is exercised without the Court being fully informed on the merits of the case through discovery and oral evidence, it should be used sparingly and cautiously.”

17. The issues upon which Defendants seek to have this suit dismissed are contested by the Plaintiff. To allow the application for dismissal would mean that this Court accepts the material presented by Defendants, in respect of ownership of motor vehicles, over that provided by Plaintiff. That would be tantamount to having a trial by affidavit. That in my view would be the wrong approach. In that regard I rely on the case **WENLOCK –Vs- MALONEY AND OTHERS [1965]1 WLR 1238** as cited in **D. T. DOBIE** case (supra) as follows-

“This summary jurisdiction of the court was never intended to be exercised by a minute and a protracted examination of documents and the facts of the case in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial judge and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power.”

per Danckwerts LJ ibid at p 1244-

“The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading.”

18. The Plaintiff in seeking the dismissal of Defendants' application on the ground that Defendants cited the wrong Rule of the Civil Procedure Rules did not show what, if any, prejudice was suffered by him in Defendants' failure to cite the correct Rule. In view of that the Court declines to dismiss the application on that ground. I find support in that finding in the case **PAUL OJIGO OMANGA –Vs- JAPHETHA ANGITA NAIROBI HCCC No. 1823 of 2000**. The Court in that case stated-

“Although Order XLVI rule 5 has not been referred to in the application it has been relied on in the cause of hearing and this Court has jurisdiction under Order XLVI rule 5(2) to make the orders sought. The Respondent has not been prejudiced by the failure to refer to Order XLVI in the application and the order sought cannot be refused solely on the ground that Order XLVI rule 5(2) was not cited or that no order or wrong order has been cited.”

19. Also Plaintiff's objection to the 2nd Defendant's affidavit in support on the ground that he swore the same without authorization of 1st Defendant is wrong in two aspects. Firstly 2nd Defendant being a party in this suit is entitled to swear the affidavit. Secondly 2nd Defendant described himself as the Managing Director of the 1st Defendant and accordingly is an officer as contemplated in Section 2(1) of The Companies Act Cap 486.

20. In the end I find that the Defendants' application is without merit for the reasons that Plaintiff's case cannot be said to be frivolous nor can it be said to be without reasonable cause of action. The Notice of Motion dated 16th May 2013 is therefore dismissed with costs to the Plaintiff.

Notice of Motion dated 27th September 2013

21. This is an application filed by the Defendant seeking the following prayers-

- **THAT pending the hearing and determination of this application and suit a Temporary Injunction do issue restraining the Plaintiff/Respondent whether by themselves, their agents, servants or person claiming through them from selling by public auction, private treaty or in any manner whatsoever transferring or dealing in Motor Vehicle Registration Number KBM 512L.**
- **THAT pending the hearing and determination of this Application and Suit, in particular a restraining order do issue and be served upon the Registrar of Motor Vehicles at the Kenya Revenue Authority to bar him and his officers from facilitating any application for change of ownership of motor vehicle KBM 512L which may be lodged by the Plaintiff/Respondent whether by themselves, their agents, servants or any other person whatsoever.**
- **THAT pending the hearing and determination of this suit, a temporary injunction do issue restraining the Plaintiff/Respondent whether by themselves, their agents, servants or any other persons claiming ownership of Motor Vehicle Registration Number KBM 512L from selling by public auction, private treaty or transferring or dealing in any way with the Motor Vehicle.**
- **THAT pending the hearing and determination of this Application and Suit the Plaintiff/Respondent be ordered to release to the Applicants/Defendants forthwith Motor Vehicle Registration Number KBM 512L which is under his custody."**

22. The application is based on the ground that the aforesaid motor vehicles had been advertised for sale by public auction under Disposal of Uncollected Goods Act Cap 38 by Crystal Motor Garage Ltd for the recovery of accumulated storage charges. The sale was due 30 days from the date of the advert, that's 30 days from 30th May 2013.

23. The Defendants did not submit in respect of this application at all. The only submission on the application was made by the Plaintiff when the Plaintiff drew the Court's attention to the fact that the public auction was being conducted by Crystal Motors Garage Ltd, who are not parties to this action, and not by the Plaintiff. Plaintiff submitted therefore to grant the prayers sought would be in vain.

Analysis and Determination

24. In my view, the Plaintiff is correct to submit that the sale was to be conducted by a party who is not a party to this action and accordingly orders cannot be issued against that party. Further I note that the advert was dated 30th May 2013 yet the application was filed on 27th September 2013. By the time the application was filed the 30 days period had expired. So had the vehicle been sold? The Defendants having failed to support the application in their submissions leave room for speculation on the present state of the vehicle. For those reasons the application is also dismissed with costs.

25. In conclusion therefore the Notice of Motion applications dated 16th May 2012, 16th May 2013 and 27th September 2013 are all dismissed with costs.

DATED and DELIVERED at MOMBASA this 26TH day of JUNE, 2014.

MARY KASANGO

JUDGE