REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY

CIVIL CASE NO. 476 OF 2010

MARA HIPPO TENTED CAMP LIMITED ….....……..…….. PLAINTIFF

VERSUS

ABDULRAZAK HUSSEIN OMAR …….…….….. DEFENDANT

R U L I N G

1. Under Certificate of Urgency, the first Defendant has brought his Notice of Motion dated 3rd March 2014 seeking Orders that the Plaintiff do release to him all the motor vehicles being the subject matter of this suit more particularly identified as motor vehicle registration nos. KBH 660X, KBD 176U, KBE 706V, KBG 583K and KBE 979E. The Application was brought under the provisions of **sections 3A, 63 (e)** and **100** of the *Civil Procedure Act* as well **as Order 51 rule 1** of the *Civil Procedure Rules, 2010*. The Application was supported by a total of 9 Grounds and the Supporting Affidavit of the first Defendant sworn on 4th March 2014. The latter document to a large extent echoed the Grounds in support of the Application.
2. The first Defendant listed his Grounds in support of the Application as follows:

"i. THAT the 1st Defendant/Applicant is owed inter-alia monies in the amount of Kshs. 7,793,646.00 by the Plaintiff, as more particularized in the Statement of Defence and Counter-claim filed herein;

ii. THAT the Plaintiff is enjoying possession and the use of the motor vehicleS the subject matter of this suit without fulfilling its obligation to pay for the Motor Vehicles Registration Numbers KBH 660X, KBD 176U, KBE 706V, KBG 583K, KBE 979E and spares among other items in full;

iii. THAT the vehicles in question are wasting away and depreciating and the 1st Defendant will have no means of recovering his dues should He succeed in the suit as the Plaintiff has ceased all commercial activities and is in no financial position to make good any Judgment that may be entered in this court in favour of the 1st Defendant;

iv. THAT the Plaintiff attempted and failed to acquire an injunction to prevent the repossession of the above mentioned motor vehicles by way of a chambers summons dated 9th July 2010, which was heard and determined before the Honourable Justice Kihara Kariuki, wherein the Judge held that the Plaintiff failed to provide sufficient material evidence establishing a prima facie case with a probability of success for a number of reasons including:-

a. **"The Plaintiff is not the registered owner of the motor vehicleS nor is the plaintiff in possession of the Log books.**

b. **The Plaintiff has not provided any material evidence to show that**

- **It has paid for the motor vehicles in full as alleged in the affidavits in support of the Plaintiff's application for injunctive orders.**
- **That the cheques procured by the Defendant were indeed procured by the Defendant under duress.**
- **That the Plaintiff has over paid the purchase price".**

v. THAT the Honourable Justice Kariuki in his ruling also noted that, "Indeed, no receipts issued by the Defendant for the payment alleged have been produced nor bank statements or cheques issued by the plaintiff to the Defendant to establish that the payments have in fact been made". Also stating that the Plaintiff cannot have it both ways, keeping the vehicles and not paying for them;

vi. THAT since the Plaintiff was denied injunctive orders by this court against the 1st Defendant, it is only logical that this court ought to take the next step and grant the orders sought to complete the reason and purpose of its earlier orders dated 3rd day of November 2010;

vii. THAT the 1st Defendant has made several attempts to recover the motor vehicles in question and has been continually aggravated by the Plaintiff's evasive and obstructive actions, making it impossible to repossess the vehicleS that are rightfully the 1st Defendant's;

viii. THAT the 1st Defendant has attempted to report the matter to the police, who consequently advised that they require a court order to take up the matter. Therefore, the 1st Defendant humbly stands before this Honourable Court praying for an order to recover the vehicles that rightfully belong to the 1st Defendant; and

ix. THAT without the court's intercession the 1st Defendant/Applicant stands to lose monies rightfully owed to him by the plaintiff without the courts intersession".

3. A Replying Affidavit was sworn in by one **Beryl Clare Ackel** on 14th April 2014. She maintained that she was a director of the Plaintiff company and consequently competent to make and swear the said Affidavit. The deponent maintained (more by way of submission than statement of fact) that firstly the Application of the first Defendant was unfounded in law and secondly that he was bound by his pleadings and as per his Defence and Counterclaim/Set-off what he was seeking from this Court was as against the second Defendant Moses Ayiecho Owiti, now deceased. The Court had been notified of the second Defendant's death on the 13th March 2012 and, in the circumstances, the deponent maintained that the first Defendant's claim had abated as against the second Defendant and that his Counterclaim as against the Plaintiff did not pray for repossession of any motor vehicle as prayed for in the Application before Court. Finally, the deponent detailed that the first Defendant was only transacting with the second Defendant and, to the best of her knowledge, the Defendant, through his agents, had already repossessed the said motor vehicles in question and there were none left.
4. Mr. Taib learned counsel for the first Defendant submitted before Court on 23rd June 2014 that he relied upon the Grounds and Affidavit in support of the Application as well as the findings of this Court in its Ruling delivered by **Kihara Kariuki J.** (as he then was) on 3rd November 2010. He commented that the Replying Affidavit to the Application intimated that the first Defendant was bound by his pleadings. If the Court looked at the Defence and Counterclaim dated 7th September 2010, more particularly paragraphs 4, 5 & 6 as well as the entire Counterclaim, the first Defendant had pleaded in the alternative both as against the Plaintiff herein and the second Defendant. The Plaintiff had alleged that the second Defendant was deceased but had never produced an original

Death Certificate in this connection, only an uncertified copy.

5. In turn, Mr. Kulecho, learned counsel for the Plaintiff, detailed that he relied upon the said Replying Affidavit of Beryl Clare Ackel. He pointed out that the first Defendant's Defence and Counterclaim never prayed for the repossession of the said motor vehicles. Instead, he had applied for judgement in the amount of Shs. 7,793,646/-, costs and interest. In counsel's view, the first Defendant's Application before Court was misconstrued and that there was never any arrangement for seeking the repossession of the said vehicles. Nowhere had **Kihara Kariuki J.** in his Ruling, mentioned or alluded to the repossession of the vehicles by the Defendants. Counsel noted that the Defence and Counterclaim of the first Defendant was as against the second Defendant who had passed away on 15th January 2012. The advocates on record for the second Defendant had advised the advocates for the first Defendant of the former's death by correspondence along with a copy of the Death Certificate which had been annexed to the Replying Affidavit herein. In counsel's view, the first Defendant should have moved the Court for appropriate amendment of his pleadings. Because, the First Defendant had failed to do so, the Plaintiff asked that the said Application before Court be dismissed. Counsel continued by stating that the said motor vehicles had been repossessed as per the exhibit "BC-2" to the Replying Affidavit. Finally, counsel commented that the Pleadings herein referred to 4 motor vehicles but that the Application before this Court introduced a further vehicle Registration No. KBH 660X. This just brought further confusion and made matters more difficult for the parties herein.
6. I have perused the Ruling delivered by **Kihara Kariuki J.** as referred to by the First Defendant. It is correct that the learned Judge refused the Plaintiff's Application for injunction and that he did find as detailed in Grounds No. iv a. & b. and v as set out above. At the conclusion to his said Ruling, the Judge detailed:

   "Lastly, the Plaintiff cannot have it both ways i.e. keep the vehicles without payment therefor – the balance of convenience must therefore lie with the Defendant."

   The advocates for the Plaintiff have submitted before Court that they believed that its injunction application having been dismissed by the learned Judge as above, the first Defendant had repossessed the said motor vehicles. Exhibit "BC-2" annexed to the Replying Affidavit is a Notification of Sale of Movable Property dated at 17th March 2012 as between the first Defendant and the second Defendant but only relates to one motor vehicle being Isuzu Giga Registration No. KBE 706V. There is no evidence before this Court in relation to any other vehicle having been repossessed by the first Defendant.

7. Both counsel before this Court referred to the first Defendant's Statement of Defence, Counterclaim & Set-off dated 7th September 2010. More particularly, Mr. Taib pointed to paragraphs 5, 6 and 7 of the Defence as well as the whole of the Counterclaim. He maintained that the pleadings of the first Defendant were in the alternative seeking retribution as against both the second Defendant and the Plaintiff. From my perusal of the same, I find that learned counsel is correct, the first Defendant's pleadings, particularly the Counterclaim, are expressed in the alternative as between the Plaintiff and the second Defendant. However, Mr. Kulecho is correct that in the prayers of the Counterclaim, the first Defendant has sought the said sum of Shs. 7,790,646.00 from the second Defendant and/or the Plaintiff as well as costs and interest thereon. There is no prayer for the release of the said motor vehicles.
8. I should also comment that the Application before this Court, so far as **sections 3A and 63 (e)** of the *Civil Procedure Act* are concerned, are based on the inherent jurisdiction of the Court. **Section 100** of the Act is the Court's general power to amend. I didn't quite understand the relevance of bringing the Application under **section 100** unless it was to seek an amendment to the first Defendant's Counterclaim and Set-off. The Application before Court is specific to the return of the said motor vehicles listed. I did not understand Mr. Said as saying that he was seeking an amendment to the prayers of the Counterclaim. In my opinion, orders being sought as specific as those cannot be brought under a general prayer as to what the Court should deem "fair and just". In this view, I consider that the position was admirably put in the Australian case of **Dare v Pulham (1982) 148 CLR 658 at 664**:

"Pleadings and particulars have a number of functions: they furnish a statement of the case sufficiently clear to allow the other party a fair opportunity to meet it; they define the issues for decision in the ligigation and thereby enable the relevance and admissibility of evidence to be determined at the trial; and they give a defendant an understanding of a plaintiff's claim in aid of the defendant's right to make a payment into court. Apart from cases where the parties choose to disregard the pleadings and to fight the case on issues chosen at the trial, the relief which may be granted to a party must be founded on the pleadings. But where there is no departure during the trial from the pleaded cause of action, a disconformity between the evidence and particulars earlier furnished will not disentitle a party to a verdict based upon the evidence. Particulars may be amended after the evidence in a trial has closed …..".

This viewpoint is supported in the local case of **Galaxy Paints Co. v Falcon Guards Ltd C.A 219 of 1998**, in which it was held inter alia:

"i. it is trite law as confirmed by the provisions of Order XIV of the Civil Procedure Rules that issues for determination in a suit generally flow from the pleadings.

ii. unless the pleadings are amended, the trial court as per requirement of order XX Rule 4 Civil Procedure Rules may only pronounce judgment on the issues arising from the pleadings or such issues as the parties have framed for the court's determination."

Of course **Order XX rule 4** has now been replaced by **Order 21 rule 4** of the *Civil Procedure Rules, 2010* which reads:

"Judgements in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision."

I consider that the same position applies in relation to Rulings delivered by Court.

9. In ***Sande v Kenya Co-operative Creameries Ltd [1992] LLR 314 (CAK)*** by which I am bound, the Court of Appeal observed:

"We do not know that these cases are really of any assistance to the Appellant in this matter. As was said in the case of Bhag Bhari v. Medhi Khan (1965) 2 EA 94 at 104 Letters H to I:

'The rules of procedure are designed to formulate the issues which the court has to determine and to give fair notice thereof to the parties. Were it not that the Judge had seen fit to determine a number of issues which were never raised in the originating summons, I should not have thought it necessary to state that a Judge has no power to determine an issue which was not before him. If authority were needed for that proposition, I would refer to Gandy v Caspair Air Charters Ltd, supra. It is for this reason that the court will freely grant applications for amendment if they are made at the proper time, do not create injustice and do not change the suit into one of a substantially different character …..'

We would endorse the well-established view that a Judge has no power to decide an issue not raised before him but having said so, we must revert to the question of how or the manner in which issues are to be raised before a Judge. In our view, the only way to raise issues before a Judge is through the pleadings and as far as we are aware, that has always been the legal position. All the rules of pleading and procedure are designed to crystallize the issue which a Judge is to be called upon to determine and the parties are themselves made aware well in advance as to what the issues between them are".

10. As a result of the foregoing, I consider that I must uphold the submission made by Mr. Kulecho for the Plaintiff, that the first Defendant is bound by the prayers of his Counterclaim and before his Application before Court can be allowed, there must be appropriate amendment made to such

prayers. The upshot of all the above is that I must decline the first Defendant's Notice of Motion dated 3rd March 2014 with costs to the Plaintiff.

DATED and delivered at Nairobi this 31st day of July, 2014.

J. B. HAVELOCK

JUDGE