



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO 555 OF 2011

CRESCENT DISTRIBUTION SERVICES LIMITED.....PLAINTIFF

VERSUS

EGNITE TECHNOLOGIES LIMITED.....1ST DEFENDANT

PETER KARIUKI.....2ND DEFENDANT

KLINESOFT TECHNOLOGIES LIMITED.....3RD DEFENDANT

CHRIS KARIUKI.....4TH DEFENDANT

RULING

INTRODUCTION

1. The 1st and 2nd Defendants' Notice of Motion application dated and filed on 10th July 2013 was brought under the provisions of Section 3A of the Civil Procedure Act Cap 21 (laws of Kenya), Order 51 Rule 1 of the Civil Procedure Rules, Article 40 of the Constitution of Kenya, 2010 and all the enabling provisions of the law. The said application was seeking orders **THAT:-**
 - a. **The Plaintiff be ordered to immediately release logbooks for Motor Vehicle Registration Numbers KAW 934B and KAX 606V to the registered owner.**
 - b. **A mandatory injunction do issue compelling the Plaintiff to release the logbooks aforesaid as they were illegally held by them.**
 - c. **Any such orders as this Honourable Court may deem fit to grant.**
 - d. **The costs of this application be provided for.**
2. The grounds on which this application was premised were generally as follows:-
 - a. **THAT the logbooks belonged to parties who were not parties to the suit herein and who had no connection with the subject matter herein.**
 - b. **THAT the said logbooks were obtained irregularly and by coercion by the Plaintiff as they were submitted to secure the release of the 2nd Defendant who had been arrested and held at the Parklands Police Station to compel him to pay money which was the subject matter of this suit.**
 - c. **THAT the continued holding of the said logbooks by the Plaintiff was illegal and an affront to the Constitution of Kenya which protected the right to own property.**
 - d. **THAT the Plaintiff would not suffer any prejudice if the said logbooks were released to the owner of the aforesaid motor vehicles.**

1ST AND 2ND DEFENDANTS' CASE

3. Their said application was supported by the Affidavit of Peter Kariuki, the 2nd Defendant herein. The same also sworn on 10th July 2013. He reiterated the grounds of the face of the application and added that the owner of the said aforesaid motor vehicles continued to suffer prejudice occasioned by the continued illegal holding of the said logbooks by the Plaintiff. It was the 1st and 2nd Defendants' case that the court had inherent powers to issue a mandatory injunction.
4. In their written submissions dated and filed on 25th February 2014, the 1st and 2nd Defendants argued that there were special circumstances herein to justify the granting of a mandatory injunction. They referred the court to the case of **Donal International Trading Limited & Another vs Imperial Bank Limited & Another [2013] eKLR** which had relied heavily on the case of **Civil Appeal No 332 of 2000 Kenya Breweries Limited vs Washington Okeyo** (unreported) where the Court of Appeal stated as follows:-

“...A mandatory injunction can be granted on an interlocutory application as well as at the hearing but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the action is a simple and summary one which can be easily remedied or if the Defendant attempts to steal a march on the Plaintiff... a mandatory injunction will be granted on an interlocutory application.”

5. They submitted that the owner of the aforesaid motor vehicles was not privy to the contract that was subject of the suit herein and that in any event, the Plaintiff, which would not suffer any prejudice, did not have any statutory powers over the said motor vehicles.

PLAINTIFF'S CASE

6. In response thereto, on 20th January 2014 the Plaintiff filed a Replying Affidavit that was sworn by its General Manager, Leila Bashir Ibrahim on the same date. It was the Plaintiff's case that the said logbooks and fourteen (14) cheques were voluntarily given to it as security for payment of amounts that were due and owing to it from the Defendants (sic) on account of computer and computer accessories supplied to Coffee Research Foundation at the Defendant's (sic) request and assurance of payment.
7. It was its argument that the Defendants (sic) were seeking to have the counter-claim determined without hearing the merits of the case. It stated that although **Criminal Case No 3502 of 2011** had been terminated as against the 2nd Defendant, he was still required to testify against the 4th Defendant herein.
8. It averred that the Defendants' (sic) had already disposed of the said motor vehicles and that the request for the release of the said logbooks was further to defeat its interests. It therefore urged the court to dismiss the 1st and 2nd Defendants' application.
9. In its written submissions dated 7th March 2014 and filed on 13th March 2014, the Plaintiff identified the following as issues for determination by the court:-
 - a. **Whether the logbooks were obtained irregularly and by coercion?**
 - b. **Whether the logbooks as issued constituted proper security and as whether its continued possession of the same was illegal and an affront to its right to own property?**
 - c. **Whether it would suffer prejudice if the orders sought were granted and if it was fair and in the interests of justice that the application be allowed?**
10. It argued that the said logbooks were voluntarily given to it and there having been allegations of coercion, it was incumbent upon the Defendants (sic) to prove the fact. In other words, it stated that the burden of proof lay with the 1st and 2nd Defendants as was contemplated under Section 109 of the Evidence Act Cap 80 (laws of Kenya) and the Latin maxim ***“Ei incumbit probatio qui dicit, non qui negat”*** (“burden of proof lies upon him who affirms, not him who denies”). It relied on the case of **Abdullahi Haji Mohamed vs Habiba Ali Nur & Another [2013] eKLR**

in this regard.

11. It also contended that its act of holding the said logbooks was purely a contract of bailment as was anticipated by Section 3 of the Disposal of Uncollected Goods Act Cap 38 (laws of Kenya) and was therefore in no way an affront to Article 40 of the Constitution.
12. It submitted that the Defendants (sic) had not demonstrated that they were entitled to a mandatory injunction, which would be final in nature and result in the interlocutory stage. It said that such a relief would cause it prejudice as the said logbooks formed part of what was to be determined upon hearing the case. It placed reliance on the case of **Shepherd Homes Limited vs Shadahu [1971] 1 Ch. 34** where Meggry J had the following to say:-

“It is plain that in most circumstances a mandatory injunction is likely other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will of course grant such an injunction as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction can be granted even it is sought to enforce a contractual contract...”

LEGAL ANALYSIS

13. In the case of **Locabail International Finance Limited vs Agro-Export & Another 1986] 1 All ER,** the court therein stated as follows:-

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction the court had to feel a high sense of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

14. The basis of granting an order of a mandatory injunction at an interlocutory stage would essentially be that the court would have been satisfied that the logbooks would be automatically released to the registered owner of the said motor vehicles at the conclusion of the case. The aim of granting a mandatory injunction at the interlocutory stage would therefore be to save the court judicial time because an applicant seeking the said relief would have demonstrated very compelling special circumstances so as to be granted the said orders at that stage as opposed to being granted the same at the conclusion of the case.
15. The standard of the court's assurance is of such high standard as it would be issuing the orders for mandatory injunction without hearing the merits of the case. From the facts of this case, the 1st and 2nd Defendants have not demonstrated that high standard or the existence of special circumstances to avail themselves to the said order.
16. The question of whether or not the said logbooks were issued for the purpose that was alleged by either the Plaintiff or the 1st and 2nd Defendants, whether or not the same got into the Plaintiff's hands by coercion as was alleged by 1st and 2nd Defendants, whether the logbooks constituted proper security and whether or not the Plaintiff could avail itself to the relief under the Disposal of Uncollected Goods Act were all issues that had to be interrogated further. The court would be risking determining matters that would ideally be canvassed and determined after the full trial of the case herein.
17. In addition to the above, the court finds that the nature of the orders sought would not be granted where the registered owner of the vehicles was not party to the suit. The reference of who a party to a suit is has been well set out in Order 1 of the Civil Procedure Rules, 2010. Neither did the firm of M/S Mutunga & Co Advocates allude to having had instructions to act for the registered owner of the aforesaid motor vehicles nor did the 1st and 2nd Defendants show the nexus of their relationship with the said owner so as to purport to represent him in a suit in which he was not a

- party. The court finds that said advocates and 1st and 2nd Defendants action purporting to represent the interests of that registered owner has no legal basis in law and any application on his behalf would thus fail, right at the outset.
18. Assuming the court's conclusion was in the very unlikely event found to have been a technicality, which the Constitution of Kenya, 2010 frowns upon, the court finds necessary to consider other issues with a view to establishing whether indeed the 1st and 2nd Defendants would have been entitled to the orders that they had sought.
 19. In Paragraph 10 of its Replying Affidavit, the Plaintiff contended that the aforesaid motor vehicles had already been disposed of to a third party. The 1st and 2nd Defendants did not rebut this assertion.
 20. The question that the court finds itself asking is who then would the said logbooks be released to as there was a registered owner and beneficial owner of the said motor vehicles as the transfers did not appear to have been effected?
 21. Accordingly, having considered the pleadings, written and oral submissions and the case law relied upon by the respective parties, the court finds that the Plaintiff did not demonstrate that it was entitled to a mandatory injunction as they did not meet the threshold that was set out in the case of **Locabail International Finance Limited vs Agro-Export & Another** (Supra) which still remains good law.
 22. The court is thus not inclined to grant any of the orders that had been sought by the 1st and 2nd Defendants as that would be an indirect way of this court making a final determination of the matter herein without having heard the merits of the case in a full trial.
 23. Finally, the court observed that although the 3rd and 4th Defendants were added as defendants in the suit herein, the 1st and 2nd Defendants did not include them in the heading of the application herein. As the court was aware of this fact, it included their names hence the court's reference to **"Defendants (sic)"** while analysing the Plaintiff's case as the present application was filed by the 1st and 2nd Defendants. The parties herein are therefore directed to include the said Defendants when filing further documentation in the matter herein and to be specific as to which parties bring applications at any given time to avoid any confusion.

DISPOSITION

24. Accordingly, the upshot of this court's ruling is that the 1st and 2nd Defendants' Notice of Motion application dated and filed on 10th July 2013 was not merited and the same is hereby dismissed with costs to the Plaintiff.
25. It is so ordered.

DATED and DELIVERED at NAIROBI this 24th day of September 2014

J. KAMAU

JUDGE