



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS
CIVIL SUIT 306 OF 2012

SUSAN WANGARI NDUTA..... PLAINTIFF

VERSUS

YUASA MOTORS LTD DEFENDANT

RULING

The Motion before me is dated 11th May, 2012 brought, inter alia, under order 40 Rules 1 & 2 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act. It is supported by the Affidavit of Susan Wangari Nduta sworn on 11th May, 2012. The application was served upon the Defendant on 16th May, 2012 according to the Affidavit of Service of Josiah Nyamu but the Defendant did not file any documents in opposition thereto. The application was therefore heard ex-parte this morning.

The Plaintiff contends that she bought Motor vehicle Registration No. KBQ 385 W Toyota Corolla Fielder on 22nd December, 2011. She produced as “SNN1” a Sales Agreement of that date. The Sale Agreement is between the Plaintiff and the Defendant. The purchase price was for Kshs.1,150,000/- of which she paid Kshs.500,000/- and the balance of Kshs.650,000/- was payable in five (5) monthly installments. The last of such installment is payable on 22nd June, 2012. The Plaintiff produced “SN2”, “SN3” and “SN4” as evidence of payments of Kshs.60,000/-, 40, 000/- and 30,000/- in the months of January, February and March, 2012 respectively towards settlement of the balance of the purchase price.

The Plaintiff contends that the Defendant instructed auctioneers to repossess the said motor vehicle on 18th April, 2012 which was before the five months contracted had expired. That the Defendant had therefore breached the terms of the Hire Purchase Agreement in repossessing the motor vehicle, that the continued holding of the said motor vehicle was an infringement and violation of the Plaintiff’s rights under the contract and that the Defendant has further threatened to resell the motor vehicle. Mr. Sakwa, learned Counsel for the Plaintiff therefore urged the court to grant the application.

I have considered the application, the Affidavit in support and the submissions of Counsel. This is an injunction application whose principles for consideration as enunciated in the **Giella –vs- Cassman Brown (1963) EA** are well known. Although the application is unopposed, still the Plaintiff is enjoined to

bring its application within those principles that is, she must establish a prima facie case with a probability of success, an injunction will not normally be granted unless the applicant will suffer irreparable damage that cannot be compensated by an award of damages and that if in doubt the court will consider the matter on a balance of convenience.

A prima facie case as has been defined in the Court of Appeal case of **Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 others (2003) KLR 137** as a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which apparently has been infringed by the opposite party as to call for an explanation or rebuttal by the latter.

Further to the foregoing, the prayer being sought is not just prohibitory, it has a mandatory injunction element in it. This is so because the latter part of prayer No. 2 reads:-

“ and further be compelled to hand over the said motor vehicle KBQ 385W Toyota Corolla fielder to the Applicant”

In the case of **Kamau Mucuha –vs- Ripples (1990 – 1994) EA** the Kenya Court of Appeal upheld the principles that a temporary mandatory injunction will only be granted exceptionally and in the clearest cases and further that the status quo to be maintained is the circumstances which existed before the wrongful act of a party against whom such order is to be made.

In view of the foregoing, is there a right established by the Plaintiff that has been infringed by the Defendant that it requires the latter to give a rebuttal? Is this case very clear to warrant the order sought?

I have perused the agreement that has been exhibited as “SWN1”. It is only one page. It has the particulars of the parties to this suit as the seller and buyer. It also has the particulars of the subject motor vehicle. **BUT** it is not signed. An agreement that is not executed by any of the parties, can it be said to really exist even though it is not denied by the Defendant? I entertain some doubt.

Mr. Sakwa submitted that the Plaintiff has paid a total of Kshs. 650,000/- and there is a balance of Kshs.500,000/- under the agreement. That the balance of Kshs.650,000/- was payable in five installments, that the installments were not specified in the agreement, that condition No. 4 of that agreement only entitled the Defendant to repossess the motor vehicle if there was default at the end of the 5 month period i.e. as at 22nd June, 2012.

I am unable to agree with Mr. Sakwa in that condition No. 3 of the agreement provides:-

“3. The deposit paid to the company at the time of purchase of the vehicle is not refundable and the seller has a right to repossess the afore-mentioned vehicle, if the buyer defaults in the making payment of the installment or outstanding balance equivalent to one installment.” (emphasis mine)

My understanding of this condition is that the balance of Kshs.650,000/- was payable in installments. The installments payable have not been disclosed. Neither in the agreement produced by the Plaintiff nor in her Affidavit. The agreement reserved to the Defendant the right to repossess the motor vehicle in the event there was default. Surely this clause/condition could not have been included in the agreement between the parties if the parties did not agree on the amount of installments and period of payment.

The other thing that is lacking is the evidence of repossession. Save for mere statements in the Affidavit, there is nothing to show that the motor vehicle, the subject matter of these proceedings, was repossessed on 18th April, 2012 or any other time and by who.

The combination of all the foregoing is to cast doubt in my mind as to the Plaintiff’s case. The Plaintiff, in my view has not established that the Defendant had repossessed the motor vehicle and if so, that it was not entitled to do so under the agreement. In the circumstances I find it difficult to hold that his is a clear case in which a mandatory or even a prohibitory order can issue.

On the foregoing, I find that no prima facie case with a probability of success has been established.

Being of that conviction, I need not consider the other two limbs of the **Giella –vs- Cassman Brown** and I dismiss the application. Since the same was not defended, I make no orders as to costs.

DATED and **DELIVERED** at Nairobi this **21st** day of **May, 2012**.

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A. MABEYA
JUDGE