REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 417 of 2011

SILVESTER MOMANYI MARUBE....……..…….....……....PLAINTIFF

VERSUS

GULZAR AHMED MOTORS……..……1ST DEFENDANT

ANSAR SHEHZAD…….……2ND DEFENDANT

RULING

By a Motion on Notice dated 27th September 2011 brought under the provisions of Order 40 rule 2 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act together with other enabling provisions of the law, the plaintiff herein seeks the following orders:

1. **That this application be certified as urgent.**

2. **That the defendants be restrained from alienating the said motor vehicle to any party.**

3. **That the 1st defendant through its servants and or agents and in particular Taifa Auctioneers be ordered to release to the plaintiff unconditionally the Motor Vehicle Registration number KBM 920T, NISSAN CARAVAN.**

The application is supported by an affidavit sworn by the plaintiff himself on said 27th September 2011. The gist of the said affidavit is that he entered into a sale agreement with the first defendant to buy a motor vehicle in the sum of Kshs. 1,350,000.00. Pursuant to the foregoing he paid a deposit of Kshs. 580,000.00 in cash while the balance of Kshs. 670,000.00 was payable in 12 months instalments of Kshs. 55,000.00 for 11 months and Kshs. 65,000.00 in the last month. He then proceeded to take possession thereof on 22nd September 2010. However, the 1st defendant, without notice instructed a firm of auctioneers to repossess the said vehicle vide a letter dated 16th June 2011. Following the said impoundment, the plaintiff paid to the 1st defendant a further sum of Kshs. 420,000.00. However when he went with the agreed balance of Kshs. 130,000.00 on 30th July 2011 to pick the vehicle, the 1st defendant wanted to receive the said sum "on a without prejudice basis" and refused to release the said vehicle on the allegation that they were unable to trace the receipt for the earlier payment and hence demanded further payment from the plaintiff. In support of his case the plaintiff has annexed copies of the cash receipts which according to him confirms payment of Kshs. 1,219,000.00 and avers that the action by the Defendant is illegal and fraudulent.

In opposition to the application the 1st defendant has, through its director, **Iftihar Ahmed**, filed a replying affidavit sworn on 13th December 2011. In the said affidavit it is conceded that there was an agreement

between the 1st defendant and the plaintiff in respect of the sale of motor vehicle with Chassis Number VWM25-030183 Nissan Caravan in which it was agreed that the plaintiff was to purchase the said motor vehicle on hire purchase at a price of Kshs. 1,350,00.00. out of which the plaintiff was to deposit Kshs. 580,000.00 with Kshs. 100,000.00 on being given a number plate and the balance was to be settled by way of twelve monthly instalments of Kshs. 55,000.00 effective from 5th November 2011. According to the deponent, the plaintiff completed paying for the number plate Reg. No. KBM 920T on 8th October 2010 and proceeded to collect the same. He however paid for the 1st instalment on 23rd November 2010 instead of the agreed 5th November 2010 and further paid Kshs. 10,000.00 in the month of December with no payment being made in January 2011. In February a total payment of Kshs. 12,000.00 was made while in March Kshs. 44,500.00 was made. Thereafter the next payment in the sum of Kshs. 270,000.00 was made in July 2011. Whereas the agreement stipulated that payments were to be made on 5th of every month in none of the months was payment made on the said date and by 5th day of July 2011 only a sum of Kshs. 66,500.00 had been made leaving arrears of Kshs. 603,500.00 excluding interests thus prompting the 1st defendant to intimate its intention to repossess the said vehicle at which point the plaintiff moved with speed to pay further sums of Kshs. 270,000.00 on 13th July 2011 and a further Kshs. 85,000.00 into the 1st defendant's account without informing the 1st defendant. The 1st defendant admits instructing auctioneers to repossess the said vehicle which according to the deponent is still being held and continues to accrue daily storage charges in the sum of Kshs. 250.00 over and above the auctioneer's charges in the sum of Kshs. 51,000.00. At the time of repossession, it is contended that the plaintiff was in arrears in the sum of Kshs. 158,500.00 in respect of the said vehicle excluding interests and when requested to settle the same, instead of responding, these proceedings were instituted at the time when the 1st defendant was in the process of computing the amount of interest due from the plaintiff.

In a further affidavit sworn on 28th February 2012, the plaintiff deposes that by 5th July 2011 he had paid a sum of Kshs. 109,500.00 and not Kshs. 66,500.00 as alleged. According to him, there is no doubt that a sum of Kshs, 1,101,500.00 has been paid and a further Kshs. 130,000.00 deposited in court, bringing the total to Kshs. 1,349,500.00. Subsequent to the repossession a further sum of Kshs. 420,000.00 was paid on request and therefore the applicant contends that as the payments made exceed 2/3rd the 2/3rd rule under section 15 of the Hire Purchase Act protects him. By accepting further payment of Kshs. 420,000.00 it is contended that the defendants waived any right to continuously hold the vehicle and hence the action borders on fraudulent conduct, is malicious and geared towards wrongful enrichment on their part.

On the part of the 1st defendant it is submitted that the defendant was legally justified to repossess the subject motor vehicle as this was provided for in the agreement. Therefore the 1st defendant had the option of moving to court or repossessing the said vehicle. It is further submitted that the sale agreement was not a Hire Purchase Agreement or a contract for sale but rather a sale agreement with terms providing for payment in instalments since there was no Hire Purchase Agreement prepared and registered as provided by the Hire Purchase Act Cap 507. In any case, it is submitted that by the time the repossession was done the plaintiff had not paid the said 2/3rd as the 2/3rd margin was only achieved on 13th July 2011. According to the said defendant this application is simply meant to enable the plaintiff buy time to raise funds towards the purchase of the suit motor vehicle. According to the defendants the real issue in dispute is with respect to which party is obliged to pay the repossession charges and nothing else. On the decision in **Amjad Malik & 2 Others vs. NIC Bank** (supra) it is submitted that the same is inapplicable to the circumstances of this case. However, the defendants rely on **Richard M. Mutiso vs. CFC Bank Ltd HCCC No. 264 of 2006** in which **Kasango, J** held that once a contract falls outside the ambits of the Hire Purchase Act, parties cannot rely on the same Act and that the contract is binding and the parties are obliged to follow the terms of the Agreement.

It is clear that the applicant in the instant application is seeking both mandatory and prohibitory injunctions. The principles for grant of the latter have been with us since time immemorial. The conditions necessary for the grant of interlocutory injunction in this country is generally accepted to be the ones laid down in **Giella Vs. Cassman Brown & Co. Ltd. [1973] EA 358** in which **Spry, VP** who delivered the leading judgement of the Court stated as follows:

"The granting of an interim injunction is an exercise of judicial discretion and an appellate court will not interfere unless it be shown that the discretion has not been exercised judicially…The conditions for grant of an interlocutory injunction are now well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience".

The foregoing conditions are, however, not exhaustive. At an interlocutory stage the Court is not required and indeed forbidden to purport to decide with finality the various relevant "facts" urged by the parties. The remedy being an equitable one, the Court will decline to exercise its discretion if the supplicant to relief is shown to be guilty of conduct which does not meet the approval of the Court of equity. Injunction being an equitable remedy, the court is enjoined to look at the conduct of the supplicant for the injunctive orders, the surrounding circumstances whether the orders sought are likely to affect the interests of non-parties to the suit, the issue whether an undertaking as to damages has been given as well as the conduct of the Respondent whether or not he has acted with impunity. The Court is also, by virtue of section 1A(2) of the Civil Procedure Act, enjoined to give effect to the overriding objective as provided under section 1A(1) of the said Act in exercising the powers conferred upon it under the Civil Procedure Act or in the interpretation of any of its provisions. One of the aims of the said objective as interpreted by the Court of Appeal is the need to ensure equality of arms, the principle of proportionality and the need to treat all the parties coming to court on equal footing.

In determining this application, I am well aware that at this stage the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law and that in an application for injunction although the Court cannot find conclusively who is to be believed or not, the Court is not excluded from expressing a prima facie view of the matter and the Court is entitled to consider what else the deponent to the supporting affidavit has stated on oath which is not true.

Therefore the first issue for determination is whether the plaintiff has established a prima facie case with probability of success. . It was held by the Court of Appeal in **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125** that:

"A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true that the Court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by "prima facie case", but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence...The terms "prima facie" case, and "genuine and arguable" case do not necessarily mean the same thing, for in using another term, namely a sustainable cause of action, the words "prima facie" are frequently used to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner of considering, which was in relation to the pleadings that had been put forward in the case. It would be in the appellant's interest to adopt a genuine and arguable case standard rather than one of a prima facie case, the former being the lesser standard of the two...In civil cases a prima facie case is a case in 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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case.

The plaintiff's case is that the repossession was illegal and despite complying with the terms of the agreement between the parties, the defendants still refused to release the suit motor vehicle. According to the plaintiff the purchase price was Kshs. 1,350,000.00 out of which Kshs. 100,000.00 was to secure the

number plate. He paid Kshs. 580,000.00 leaving a balance of Kshs. 670,000.00 to be paid by monthly instalments of Kshs. 55,000.00 for 11 months and Kshs. 65,000.00 for the last month. However, the 1st defendant without notice instructed auctioneers to impound the vehicle vide a letter dated 16th June 2011. By that time (some 8 months later), going by the plaintiff's own version, the sum which should have been paid was Kshs. 440,000.00. It is therefore clear that if after the impounding of the said vehicle the plaintiff paid Kshs. 420,000.00, he was clearly in default. The next question that follows is whether the 1st defendant was entitled to repossess the vehicle. Whereas the plaintiff alleges that the transaction was a Hire Purchase Agreement no evidence has been led to show that the conditions stipulated under the said Act were complied with. Without such evidence I am not able at this stage to find that the provisions of the Hire Purchase Act applied. It would follow that the applicable provisions would be under the Sale of Goods Act. Section 19 of the said Act provides:

(1) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

Section 20 of the said Act on the other hand provides:

Unless a different intention appears, the following rules apply

for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer—

(a) where there is an unconditional contract for the sale of goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery or both be postponed;

It follows that property in goods where the contract falls under the foregoing provisions passes when the contract is made unless the contract is conditional or unless a contrary intention is manifested by the parties to the contract. See **Anwar vs. Kenya Bearing Co. [1973] EA 352** and **Osumo Apima Nyaundi vs. Charles Isaboke Onyancha Kibondori & 3 Others Civil Appeal No. 46 of 1996.**

The defendants' position, however, is that the intention of the parties' as expressed in their agreement was that in event of default, the defendants were entitled to repossess the said vehicle. The said agreement provided inter alia:

"The seller has the right to repossess/resale this vehicle without notice in case of failure in payment of remaining amount/instalments if there is (are) any balance/instalment to be paid by the buyer according to this agreement and all expenses and charges during repossession of this vehicle will be the sole responsibility of the buyer".

It is therefore clear that as the plaintiff was not up todate in remitting the due instalments the defendants were properly within their contractual rights to repossess the said vehicle. Although a Court has the power in the exercise of its equitable jurisdiction to set aside the contract where it is of the opinion that it was unconscientious for the other party to avail himself of the legal advantage, which he had obtained, such jurisdiction is not to be invoked lightly. In this case I am not satisfied that this Court ought to interfere with the defendants' contractual right under the contract to repossess the suit vehicle.

However, the plaintiff contends that by subsequently accepting further payments, the defendants waived their right to repossess the said vehicle. Obviously if the defendant has received the full payment of the purchase price, it would amount to unjust enrichment for the defendant to insist on selling or impounding the said vehicle. In this respect the plaintiff may be justified in instituting these proceedings.

The defendants in their submissions however, state that the real dispute between the parties herein is on who is to pay the repossession charges and nothing else.

That being the position and pursuant to the overriding objective it would be unnecessary to dwell on whether or not the other conditions for the grant of an injunction have been fulfilled. Prima facie, the plaintiff is liable to pay any charges arising from his default in remitting the instalments. I have already found that there is prima facie evidence of default on the part of the plaintiff.

Taking into account the circumstances of this case, I hereby grant the application dated 27th April 2011 in terms of prayers 2 and 3 thereof and direct that the 1st defendant through its servants and or agents in particular Taifa Auctioneers be ordered to release to the plaintiff the motor vehicle Registration No. KBM 920T, Nissan Caravan, on condition that the plaintiff pays the repossession charges.

The costs of this application will be in the cause.

Dated at Nairobi this 18th day of October 2012

G V ODUNGA

JUDGE

Delivered in the presence of

No appearance for Plaintiff

Mr. Midikira for the Defendant