



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Case 8 of 2010

DONALD K. KIPKORIR.....APPLICANT/PLAINTIFF
VERSUS
MOHAMMED A. HAJI.....RESPONDENT/DEFENDANT

RULING

Simultaneously with the suit, the applicant has by a motion on notice moved this court for mandatory orders of injunction to compel the respondent or his servants and agents to return and/or give possession of motor vehicle No. KBB 333W Mitsubishi Pajero (the motor vehicle) to the applicant pending *inter partes* hearing and determination of the application and also pending the hearing of the main suit. There is also a prayer that the OCS Kisumu Central Police Station be ordered to supervise the execution of the orders.

In the alternative, the applicant seeks interim injunction to restrain the respondent or servants and agents from selling, disposing, using or in any way dealing with the motor vehicle in question. The *ex parte* prayers pending *inter partes* hearing of the application were granted in terms of the alternative prayer. The order and the application were served upon the respondent who did not attend the hearing of the application *inter partes* on 29th January, 2010 and the hearing proceeded *ex parte*. Learned counsel for the applicant urged the court to grant a mandatory injunction as prayed relying on the case of Gusii Mwalimu Investment Company Limited and Another Vs. Mwalimu Hotel Kisii Ltd. (1995-1998) 2EA 10 (CAK).

Briefly, the applicant and the respondent entered into a written agreement for the purchase of the motor vehicle in question, whereby the applicant agreed to purchase and the respondent agreed to sell to the applicant the motor vehicle at a consideration of Kshs.3,200,000/=. It would appear that that agreement was breached by the applicant, hence the agreement dated 19th February, 2009 (the agreement). It was a term of the agreement that due to the aforesaid breach, the purchase price would be Kshs.3,500,000/=. Kshs. 2,000,000/= to be paid upon execution of the agreement, with Kshs. 750,000/= being paid before 19th March, 2009 and the balance of Kshs.750,000/= before 20th April, 2009. Upon payment of the last installment, the respondent was to deliver to the applicant's counsel the original log book together with other documents specified in the agreement. It was also agreed in clause 2 that:

“...the motor vehicle shall continue to be in the possession of the purchaser.”

Remedy for breach of the agreement was provided in clause 4 as follows:

“4. Any party who breaches this agreement shall pay to the other a sum equal to 20% of the agreed purchase price being liquidated damages.”

The applicant has deposed that on 28th July, 2009 he called the respondent to Nairobi for the final payment. He had requested the respondent to bring along the original log book and the other documents aforesaid. These, he explained, were to be used to secure funds from a money lending company, Ameri Source at Hazina Towers. The respondent indeed traveled to Nairobi but only with an incomplete transfer form. The applicant and respondent went to the respondent's showroom in Nairobi as the money lending company prepared loan document. The respondent abandoned the applicant at the show room and disappeared with the motor vehicle, hence this suit.

I have stated earlier that the respondent did not reply to this application. Although the application proceeded *ex parte*, it is nonetheless mandatory for the applicant to prove his case against the respondent to the standard required by the law. There is no doubt that 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. In other words, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is simple and summary one which can be easily remedied, or if the defendant attempts to steal a match on the plaintiff, mandatory injunction will be granted on an interlocutory application. See Gusii Mwalimu Investment Co. Ltd (Supra).

The circumstances of this matter are clear. The applicant, in accordance with the agreement, was in possession of the motor vehicle. He called the respondent to go for the final payment which was to be obtained from a money lending company, which in turn required certain documents. The respondent in a clandestine fashion dispossessed the applicant of the motor vehicle.

This is a clear case of the respondent trying to steal a match on the applicant. The respondent did not lack a remedy if he felt there was delay in settlement of the purchase price. He had voluntarily entered into a written agreement with the applicant, the terms of which are clear. The court can only interpret the sense of the agreement as framed. As was stated in Michira Vs. Gesima Power Mills, Civil Appeal No.KSM 197/2001:

“If the words of the agreement are clearly expressed and the intention of the parties can be discovered from the whole agreement then the court must give effect to the intention of the parties.”

See also section 97 of the Evidence Act. The respondent agreed in writing that the only remedy available to him in case of a breach was a liquidated damages based on a sum equal to 20% of the purchase price.

The respondent's right of *lien*, if any, could not be exercised in the light of the above agreement and possession having passed to the applicant.

For these reasons, it is ordered that there will be an order of mandatory injunction in terms of prayer (iii) of the motion pending the hearing of the main suit. The court will not order the use of the police in the enforcement of its orders in civil cases unless there is evidence that there is a threat to law and order. There is no such evidence in this matter. I award costs to the applicant.

Dated, Signed and Delivered at Nakuru this 12th day of March, 2010.

W. OUKO
JUDGE