



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 555 OF 2010

PAWS AFRICA SAFARIS LIMITED.....PLAINTIFF
VERSUS
HENRY KURIA T/A
WESTMINITERS MERCHANTS.....1ST DEFENDANT
KIRAN KUMAR PATEL.....2ND DEFENDANT
DAVID LIVINGSTONE LTD.....3RD DEFENDANT

RULING

By a Notice of Motion dated 17th August, 2010, and filed on the same date, the Plaintiff/Applicant seeks orders against the 2nd Defendant/Respondents, *inter alia*, as follows;-

1. That pending the hearing and determination of this application, an injunction be issued restraining the defendants whether jointly or severally, by themselves, their servants, employees or agents or otherwise from using, driving, selling, offering for sell, (*sic*) giving possession to any one other than the plaintiff, transferring, alienating and/or in any way dealing with motor vehicles registration numbers T568 ANP, T577 ANP and T 437 APF.
2. That in the interim, the motor vehicles registration numbers T568 ANP, T577 ANP and T437 APF be released to the OCS, Hardy Police Station by the defendants jointly and severally for safe keeping pending the hearing and determination of this application.
3. That in default, the OCS, Hardy Police Station, does proceed immediately to take possession of the motor vehicles aforesaid in furtherance of the order No. 3 above.
4. That pending the hearing and determination of this application a mandatory injunction be issued compelling the first and second defendants to release the motor vehicle registration numbers T568 ANP, T577 ANP T437 APF to the Plaintiff.
5. An injunction be issued restraining the second defendant whether by himself, his servants, employees or agents or otherwise from using, driving, selling, offering for sell, (*sic*) giving possession to any one other than the Plaintiff, transferring, alienating and/or in any way dealing with the motor vehicle registration numbers T568 ANP, T577 ANP and T437 APF pending the hearing and determination of the suit.
6. A mandatory injunction be issued compelling the first and second Defendants to release the motor vehicle registration numbers T568 ANP, T577 ANP and T437 APF to the Plaintiff pending the hearing and determination of this suit.

Costs of this application be in the cause.

In exercise of its discretion the court granted prayers 1, 2, and 3 above on 21st October, 2010 pending this Ruling.

In the grounds advanced in support of the application, the applicant states that it instructed the 1st Respondent to sell several of its motor vehicles by way of a public auction on an “*as is*” basis. The auction was conducted on 26th February, 2010 wherein the 2nd Defendant representing the 3rd Defendant successfully bid for the three motor vehicles (the subject matter of these proceedings) at a price of Kshs. 1,500,000/= each, exclusive of Customs duty. He issued a cheque for Kshs. 4.5 Million in favour of the 1st Respondent and took immediate possession of the motor vehicles. On 3rd March, 2010, the 2nd Defendant informed the 1st Defendant that he had stopped the cheque and sought a reduction of the purchase price to Kshs. 1 Million in respect of each of the three motor vehicles, claiming that there had been a misrepresentation as to the age of the motor vehicles. In response, the applicant made a counter offer of Kshs 1,100,000/= (exclusive of customs duty) for each motor vehicle and requested the 2nd Defendant to pay Kshs 3,300,000/=, which despite several demands made, the 2nd Defendant has declined to do.

The two Defendants have also declined to return the motor vehicles as requested by the applicant, in the alternative. This notwithstanding, it has come to the knowledge of the applicant that the 2nd Defendant has converted the vehicles into game drive viewer vehicles and is using same as such for a profit. (See paragraph 9 of the supporting affidavit). Being apprehensive that the Respondents will continue to use the motor vehicles without paying for them, to the prejudice of the applicant, and fearing that the value thereof will depreciate considerably, with the result that the applicant will suffer irreparable loss and damage, the applicant filed the suit herein and the subject Notice of Motion. The application is supported by the affidavit of Robert Cullens the managing director of the applicant, in which he depones to the facts as stated in the grounds set out on the face of the application.

The application is opposed on the strength of the Replying Affidavit sworn by the 1st defendant/Respondent on 3rd September, 2010, and that of the 2nd Defendant/Respondent sworn on 14th October, 2010, on behalf of the 3rd Respondent . The two Respondents admit that the subject motor vehicles were bought by the 3rd Defendant at the auction conducted by 1st Defendant/Respondent on 26th February, 2010 and duly paid for, as alleged by the applicant. They also admit that the 3rd Defendant/Respondent took possession of the subject motor vehicles and has held them since. The 1st Defendant/Respondent admits having received payment for the motor vehicles and that he holds the same to the credit of the applicant, while the 3rd Defendant/Respondent admits (in paragraph 11 of its Replying Affidavit) having “*put the motor vehicles in a state of repair*”.

The Respondents contend that the sale of the subject motor vehicles was subject to the applicant’s undertaking, given by its managing director, Mr. Robert Cullens, to cause and/or have the motor vehicles registered locally in order to complete the sale, which they say has not been done, hence the refusal by the 1st Respondent, to release the sale proceeds. The applicant denies having given any such undertaking or that the sale of the subject motor vehicles was subject to such a condition or requirement or that it is under any obligation to effect the local registration of the subject motor vehicles, which it claims, should either be returned to it in their original condition or be paid for, to bring the matter to a close. The 3rd Defendant refuses to return the motor vehicles unless it is compensated for the repairs it claims to have done to them, while the 1st Defendant refuses to release the purchase price, unless and until the applicant effects the local registration of the motor vehicles and delivers up to him the requisite registration documents. He fears that the 2nd and 3rd Defendant would otherwise hold him liable for breach of his obligations to them, under the fiduciary relationship between himself and them.

The applicant’s position is that the subject motor vehicles were sold on an “*as is*” basis which the Defendant/Respondents deny, with the 1st Defendant/Respondent stating that the letter of instructions

dated 17th February, 2010 did not contain such a condition. In this respect the 1st Respondent depones in paragraph 14 of his Replying Affidavit as follows:-

“At no time before or at the auction and subsequently----- had the applicant stated that the motor vehicles were being sold on “as is” basis or that they were not going to locally register the same”.

To support his claim that the applicants undertook the said responsibility, the 1st Respondent refers to the applicants’ letter dated 3rd May, 2010 under cover of which the 1st Respondent claims the applicant commissioned one Mr. Williams of Willies & Lillies Company to undertake the task. The said letter (annexture HKK3A) is referred to in paragraph 12 of the 1st Respondents’ Replying Affidavit where he depones, *inter alia* that, the letter was written **“instructing that their (applicants’) Mr. William was in the process of finalizing the motor vehicle registration (local registration of the vehicle)”** He depones further in paragraph 22 of the Replying Affidavit that:

“.....at the auction and as shown by the Applicant’s letter of 3rd March, 2010, it was understood and clear to all parties that the purchaser would pay import duty for the foreign registered motor vehicle while the applicant would be responsible for the local registration of the vehicles”.

In paragraph 6 of the Replying Affidavit the 1st Respondent depones that it is Mr. Cullen who assured him that the applicant would be responsible for the local registration of the subject motor vehicles. Central to the dispute are the letter of instruction, dated 17th February 2010, and the one of 3rd May, 2010. For the sake of clarity and necessary interpretation I have considered it necessary that the two be reproduced herein. The applicants’ letter of 17th February 2010, to the 1st Respondent reads as follows:

“ATT: Mr. Henry Kuria

RE; AUCTION OF VARIOUS MOTOR VEHICLES

The above matter refers. Following our discussions on the matter on 9th February 2010, we hereby formally instruct you to sell by public auction on our behalf the motor vehicles as per the attached list.

As earlier agreed you are required to move the motor vehicles from our yard on 23rd and 24th February 2010, to Leaky’s Storage Ltd and have them viewed by prospective purchasers on Thursday 25th February 2010, and auction to be held on 26th February 2010.

You are also asked to advertise the Vehicles Auction in the Daily Nation Newspaper indicating their make and registrations on 22nd and 24th February 2010 so as to attract more purchasers.

To (the?) reserve price for every vehicle is also indicated in the list and should there be an attractive bid, close to the same you are kindly requested to consult with the undersigned before you confirm it.

We undertake to meet the cost of the advertisements and vehicle storage charges until the date of the auction. Failure to (sic) the successful purchasers to remove the vehicles from the yard on the auction date they will be required to settle the storage charges as from that day.

The sales commission as earlier agreed will be 10% of the successful purchase price of every vehicle. We look forward to a successful auction, sale and also doing more business with you in future.

Thank you !

Yours faithfully

Robert Cullens

Managing Director”

The letter dated 3rd May, 2010 reads as follows;

“ATTN Mr. Henry Kuria

RE: SALE OF MOTOR VEHICLES

We acknowledge receipt of your letter of 16th April, 2010 and the attached cheques.

As per the Telecon conversation (sic) between yourselves and Mr. Torbert Murimi, we had agreed the price for KAR 271 would be Kshs. 4.1 Million less 5% your commission. Please note that we will recover this amount of commission due from the 3 (three) TZ Cruisers which you are yet to

remit payment.

We also would wish to advise that the said TZ Cruisers should not be used by the buyer until final documents are finalized by Mr. William of Willies and Lilies Company and payments are remitted to us in full.

On the other two (2) Vans, kindly advise the status. If the said cars are not sold by mid May 2010, we shall collect them for our normal usage.

Thank You.

Yours faithfully

Tolbert Stevenson Murimi

Director

Paws Africa Safaris Ltd”

Upon receipt of the instructions given under cover of the applicant’s letter of 17th February 2010, the 1st Respondent proceeded to advertise the motor vehicles as instructed. The conditions of sale were stated in the advertisement “**HKK2**” as follows:

- 1. Viewing will be done on 24th and 25th February 2010**
- 2. Interested bidders are requested to pay a refundable deposit of Kshs. 50,000/= by bankers cheque to obtain a bidding number.**
- 3 The declared purchaser must deposit 25% of the purchase price at the fall of the hammer and the balance cleared within seven (7) days from the auction date failure to which the money received including the deposit is forfeited”**

I see nothing in the letter of instructions to suggest that the subject motor vehicles were to be sold otherwise than on as “**as is**” basis. Even if the same not expressly stated, the requirement that the advertisement should indicate “their makes and registrations” cannot be interpreted otherwise than as an indication that every vehicle listed would be auctioned “**as is**”.

In his letter of 3rd March 2010, in which he raised the issue of misrepresentation as to the age of the motor vehicles, with the 1st Defendant, the 2nd Defendant did not say anything about the expectation that the applicant would have the motor vehicles registered locally. He challenged the 1st Defendant as having lied to him when he made a statement at the auction that the vehicles were of the same age as one locally registered motor vehicle, number KAR 331S.

The reference to the finalization of final documents by Mr. William of Willies & Lilies in the letter of 3rd May 2010, does not confirm the 1st Defendants deposition in paragraph 12 of his Replying Affidavit, since the same does not say that the final documentation was in regard to local registration as suggested. It would appear that the 1st Respondent may have made certain unauthorized representations at the auction, leading to the present predicament, hence his vigorous support of the 2nd and 3rd Defendants’ opposition to the application. I am unable to see the basis of the Respondents claim that the subject motor vehicles were sold otherwise than on “**as is**” basis. The Respondents’ contention that the applicant undertook to have the same registered locally is not supported by the evidence placed before the court. I am not persuaded, therefore, that the Applicant failed to perform its part of the contract herein, as to disentitle it from the remedy of injunction as sought. The contract herein was concluded at the fall of the hammer. The 1st and 2nd Respondents taking of possession of the motor vehicles and paying for the same confirms that they considered that to have been the case. They have not denied having converted the motor vehicles to suit their use and their suggestion that they be refunded their expenses for so doing, as a condition for returning the vehicles to the applicant, in lieu of the purchase price, is to say the least, rather absurd. Restitution, in the circumstances is not possible in view of the conversion of the motor vehicles which, in my view has altered the position of the contracting parties substantially.

After a careful analysis of the facts of this case and considering the documents filed and submissions made by counsel on both sides, I am of the opinion that the basic principles for granting an interlocutory injunction have been met. Firstly, the applicant has, in my considered view, established a prima facie case against the Respondents with a high probability of success. Secondly, having been denied both his motor vehicles and money, which the Respondents retain following an undisputed public auction, the applicant’s loss and damage is continuous. Considering the Respondents’ attitude in the

whole matter, it is unlikely that the applicant would be compensated at all, let alone adequately, in the event that the orders sought herein are not granted. The applicant has, in my considered view, demonstrated substantial loss within the requirements of GIELLA –VS- CASSMAN BROWN & CO. LTD (1973) E. A. 358.

The main question that presents itself then, is whether the applicant is entitled to the injunctive orders sought, which are in mandatory terms. The Respondents have submitted on the strength of KENYA BREWERIES LTD- VS- TEMBO CO-OPERATIVE SAVINGS & CREDIT SOCIETY LTD NBI C.A. NO. 332 OF 2000 and EARNEST ORWA MWAI –VS- ABDUL S. HASHID & VICTORIA ENTERPRISES LTD KSM C.A. NO. 39 OF 1995 that the applicants' case presents no exceptional circumstances to warrant the granting of the mandatory injunctions. In the words of Lord Goddard, CJ, in A. G. –VS- COLCHESTER CORPORATION [1955] QBD 207, cited in the East African Court of Appeal decision in A. G. –VS- BLOCK [1959] E.A. 180, it is not easy to be precise as to when equity will or will not grant a mandatory injunction. It is for the reason that equity will not suffer a wrong to be without a remedy that this court has been given the discretion to grant even mandatory orders when the situation so demands. The guiding principle in doing so is stated in Vol. 24 of Halsbury Laws of England 4th Edition at paragraph 948, cited in the KENYA BREWERIES case (Supra) which reads 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 act done is a simple and summary one which can be easily remedied, or if the Defendant attempted to steal a march on the Plaintiff --- a mandatory injunction will be granted on an interlocutory application”.

I see no other way of remedying the wrong done to the applicant which, as I have stated earlier is a continuing one. I am not at all persuaded that the Respondents can legally justify their holding onto the subject motor vehicles and the purchase price thereof at the same time, to their advantage and to the detriment of the applicant. Clearly that is stealing a march on the Plaintiff/Applicant, in circumstances where there is no basis to support the claim that the applicant is in breach of the contract, upon which the parties relationship is founded. The terms and conditions for sale at the auction were as per the instruction letter of 17th February 2010, and the advertisement carried out pursuant thereto. I am of the considered view that the same imposed an obligation upon the 2nd and 3rd Respondents to fulfill their obligations to the Respondent, irrespective of whatever verbal representations as may have been made to them by the 1st Respondent. That is what equity demands. Indeed counsel for the respondents did admit in his submissions that the contract was deemed to have been complete upon payment of the purchase price by the Respondents. The attempts by the Respondents to retract by way of letters written after the sale, to introduce conditions that they say were communicated to them by 1st Defendant, at the auction and the 1st Defendants' apparent support of such allegations appear to border on fraud.

I have considered the submissions made before court as regards the application of the Traffic Act (Cap 403) to these proceedings. With due respect to counsel, I do not consider the same to be relevant. Even if the same were relevant, I am of the view that the legal maxim that, Equity will not permit a statute to be a cloak for fraud, would apply as against the Respondents in this case.

The upshot of the matter, therefore, is that, I find that a clear case for granting the mandatory injunctions sought herein has been made out and therefore, the application succeeds. Accordingly the same is allowed; the previous orders granted on a temporary basis are hereby confirmed and the remaining prayers granted.

DATED, SIGNED and DELIVERED at NAIROBI this 3RD day of DECEMBER, 2010

M. G. MUGO
JUDGE

In the presence of :

Ms Babu

For the Applicant

Mr. Odoyo

For the 3rd Respondent

Mr. Odoyo holding brief for Mr. Onyamu

For the 2nd Respondent