



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

Civil Suit 94 of 2008

MATHEWS T. OKETCH PLAINTIFF

VERSUS

KENNETH ODHIAMBO OJWANG DEFENDANT

RULING

The application dated 9th October 2008, by the plaintiff is essentially for a temporary injunction to issue against the defendant by himself his agents, and/or employees restraining them from taking possession of a motor vehicle Registration Number KBA 636W pending the hearing and determination of this suit.

The plaintiff's prayer in the suit is not for a permanent injunction but for the court to grant the authority under the Disposal of the Uncollected Goods Act Cap 38 (L.O.K.) for the disposal by sale of the subject vehicle. The cause of action arises from a loan agreement entered between the plaintiff and the defendant with possession of the subject vehicle being handed over to the plaintiff as collateral for the repayment of the loan amounting to KSh.250,000/= by the defendant. A delay in the repayment of the loan was to attract an interest of KShs.30,000/=. The plaintiff contends that the defendant has failed to repay the loan as agreed yet he continues to incur storage and security charges which may soon surpass the vehicle's value of KShs.700,000/=.

The present application is thus grounded on the main fact that the defendant intends to repossess the motor-vehicle yet has defaulted in the repayment of the loan.

The plaintiff contends that he shall suffer irreparable damage if the motor-vehicle is repossessed by the defendant.

The defendant did not file any response to the application and did not even appear for the hearing despite indications in the affidavit of service dated 10th November 2008 that he was duly served with the appropriate hearing notice.

Nonetheless, even in the absence of the defendant, the burden lays on the plaintiff to establish that he is entitled to a temporary order of injunction against the defendant.

The conditions for the grant of a temporary injunction were clearly set out in the famous case of **Giella VS. Cassman Brown & Co. Ltd.** [1973] E.A. 358 and these are:-

[i] An applicant must show a prima-facie case with a probability of success.

[ii] An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury.

[iii] When the court is in doubt, it will decide the application on the balance of convenience.

With regard to the first condition and considering the prayer sought by the plaintiff in his plaint in the light of the circumstances giving rise to the cause of action it is, in the opinion of this court, doubtful whether a prima facie case with a probability of success has been set out.

Either the plaintiff enforces the agreement under the given terms and conditions or enforces it under the Disposal of the Uncollected Goods Act but not both.

In any event, the annexed agreement dated 3rd August 2008, does not provide for enforcement through the Disposal of the Uncollected Goods Act. It is also specific that if the defendant defaults as agreed, a further agreement would be made (See paragraph 4 of annexure marked "MTO").

With regard to the second condition for the grant of an injunction, consideration must be given to the fact that the damage likely to be suffered by the plaintiff is capable of being quantified in monetary terms and may therefore not be treated as irreparable.

The plaintiff would thus be adequately compensated by an award of damages.

Having said all the foregoing, the third condition for the grant of an injunction may not be necessary for consideration by this court.

Consequently, the application generally lacks merit. It must and is hereby dismissed with costs.

Read and Signed this 23rd day of January, 2009.

J. R. KARANJA

JUDGE

JRK/mo