

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE 51 OF 2007

JOSEPH C. CHEPKWONY.....PLAINTIFF/APPLICANT

VERSUS

KIPTAGICH TEA ESTATE LIMITED.....DEFENDANT/RESPONDENT

RULING

The plaintiff **Joseph Chepkwony** instituted this suit against Kiptagich Tea Estate Limited and simultaneously filed an application seeking for a mandatory order of injunction to compel the defendant to hand over motor vehicle registration KAC 073R Nissan Lorry. The application is supported by the grounds stipulated in the body of the application. These grounds are elaborated in further detail by the facts deposed to in the applicant's supporting affidavit sworn on 6th March 2007. The applicant contends that he is the registered owner of the lorry registration number KAC 073R Nissan. He annexed a copy of the log book which was registered on 26th January 2007 in his name.

On the 5th April 2005 the applicant states that he deposited the subject lorry with the respondent to work for the respondent under a contract for payment on monthly basis. The lorry worked up to the month of February 2007 after which the respondent has kept the lorry at unknown destinations. At one time it was spotted at Olenguruone Police Station. Another time the same lorry was spotted at Olenguruone District Officer's private residence. This prompted the applicant to write letters to the police and to the District Officer but he received no response. Letters also addressed to the respondent demanding the release of the motor vehicle were not responded to. The applicant has been prejudiced by failure of the respondent to release the lorry and he has been losing income on a daily basis for the period that the lorry remains under the custody of the respondent.

Counsel for the applicant argued that the facts before the court show that the applicant has been able to establish a prima facie case with a probability of success. The respondent has not denied being in possession of the motor vehicle and the applicant has been able to demonstrate to the court that due to the illegal deprivation of his motor vehicle by the respondent he continues to suffer irreparable loss.

The application was opposed on the basis of the respondent's affidavit sworn on 15th March 2007. Firstly, counsel submitted that the application is fatally defective as it seeks for a mandatory order of injunction and it is brought under the provisions of **Order XXXIX** of the **Civil Procedure Rules** which only deal with restraining orders or prohibitory orders. In the circumstances the applicant should have filed a notice of motion to seek for mandatory orders. This position is reiterated in the case of **Morris & Co. Limited vs. Kenya Commercial Limited & Others [2003] EALR 607** where it was held:

“Per Curium: Interlocutory mandatory injunctions are not contemplated by Order XXXIX of the Civil Procedure Rules. An application for a mandatory injunction can only be made pursuant to the provisions of section 3A of the Civil Procedure Act and the procedural mode is a motion on notice pursuant to Order L, rule 1 of the Civil Procedure Rules. In an application where the plaintiff seeks both interlocutory prohibitive and mandatory injunctions it is incumbent to do so on a motion on notice for under the procedural law it is established that where a matter partly falls within the scope of a summons in chambers and partly within a motion on notice, the motion is to be invoked.”

The second ground upon which this application is opposed is that the respondent has categorically denied being in possession of the lorry and stated that it is in possession of one Vitalis Keitani, thus the respondent is a stranger to the allegations and more importantly no contract has been annexed to the applicant's application to show that there was a contractual relationship. Mr. Murimi highlighted that the logbook annexed shows that it was registered in January 2007 while the applicant claims that he deposited the lorry in 2005. It is trite law that mandatory injunctions can only be issued in very clear cases where the court has a high degree of assurance and the tests to be applied is a higher standard than what is applicable in prohibitory injunctions. I respectfully agree with the above submission which is also articulated in **Volume 24 Halbury's Laws of England 4th Edition paragraph 948** which reads:

“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 attempts to steal a march on the plaintiff ... a mandatory injunction will be granted on an interlocutory application.”

Applying the above principles to the present case the first issue to consider is whether the plaintiff has demonstrated a clear case to enable this court make a summary decision which would not prejudice the parties who cannot go to trial. The plaintiff has not annexed a copy of the contract of work. The respondent has denied being party to any contractual arrangement with the plaintiff. More importantly it is the respondent's case that the lorry is in the custody of one Vitalis Keitani. At this interlocutory stage it is difficult to establish the truth of who has the applicant's vehicle and the terms under which the vehicle is being held. It was held in the case of **Mrao Ltd v. First American Bank of Kenya Ltd & 2 others [2003] KLR 125** the court of appeal held that:

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case 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 as to call for an explanation or rebuttal from the latter.”

In this case therefore there is no material before the court or special circumstances to show that the respondents are in possession of the plaintiff's vehicle and thus the applicant has not satisfied the first condition for granting the orders sought. Another matter that should be mentioned is this application was brought under the wrong provisions of the law. Although I would have not dismissed the application on this ground alone while bearing in mind that this perhaps did not cause prejudice to the respondents. Having found that the first condition has not been satisfied I would follow the decision in the case of **Kenya Commercial Finance Co. Ltd. vs. African Education Society & Others C.A. No. 142 of 1999 (unreported)**. The court of appeal stated the conditions of granting an injunction were that if a party failed to prove the first condition, the second condition need not be addressed.

“These conditions are sequential so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third one is addressed.”

In the circumstances the application fails and is hereby dismissed with costs to the respondents.

Ruling read and signed on 9th day of November, 2007

M. KOOME

JUDGE