



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 238 of 2006

GEORGE OGGAWA OGUTU..... PLAINTIFF

VERSUS

PETER NJAGIH1ST DEFENDANT

ROMEO TOURS SAFARIS LTD.....2ND DEFENDANT

R U L I N G

On 5.5.2006 the plaintiff instituted these proceedings by way of a plaint seeking two primary reliefs as follows:-

(1) A permanent injunction compelling the defendants to return to the plaintiff Motor Vehicle Registration No.KAS 886F in good condition as stipulated in Clause 10 of the Agreement and to pay outstanding hire charges.

(2) Loss of user and business of the said motor vehicle from the date of termination of the said contract upto the date the defendants shall return the said motor vehicle to the plaintiff in good condition as stipulated under Clause 10 of the contract and the same to be calculated at the rate of KShs.35,000.00 p.m.

The foundation of the plaintiff's claim is pleaded in paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13 of the plaint. In a nutshell the 2nd defendant through its director the 1st defendant hired the plaintiff's Motor Vehicle Registration No.KAS 886F (herein "***the Suit Vehicle***") at a monthly hire rate of KShs.35,000.00 of which only KShs.12,000.00 was paid. Because of persistent breach the plaintiff terminated the contract by giving the defendant a one month written notice. But despite the termination the defendant has refused and/or ignored to put the plaintiff into possession of the suit vehicle and has never attempted to pay the hire charges which as between 17.9.2005 and 17.3.2006 amounted to KShs.197,700.00 which the plaintiff claims in this suit together with the other reliefs stated above.

Simultaneously with the filing of the plaint, the plaintiff lodged an application by way of Chamber Summons for the same reliefs sought in the plaint. The same reasons given for the claim in the plaint are the same ones used as the foundation of this application. The application is supported by an affidavit sworn by the plaintiff on 5.5.2006 which affidavit elaborates the said grounds.

The application is opposed and there is a replying affidavit sworn by the 1st defendant on his own behalf and on the authority of the 2nd defendant. The 1st plaintiff deposes inter alia as follows:- That

pursuant to the car hire agreement (herein “*the agreement*”) it was the responsibility of the plaintiff to apply for Statutory Licenses and on 11.10.2005 the plaintiff instructed one David Kuria Mwangi to take the suit vehicle to the plaintiff to facilitate issuance of licenses; that the suit vehicle was involved in an accident on the way to the plaintiff and the matter was reported to Industrial Police Station. That on 12.10.2005, the 1st defendant learnt from the plaintiff that the suit vehicle had been taken to a garage called Malinga Autocare; That the suit vehicle was repaired on the basis of an assessment made on the instructions of Geminia Insurance Company Limited which insurance company had insured the suit vehicle under the plaintiff’s wife Irene Oggawa; the said Irene Oggawa was paid the KShs.176,598.00 by the said Insurance Company for the purpose of repairing the suit vehicle but the plaintiff has refused to pay the said garage which has refused to release the suit vehicle. To the said affidavit are annexed several exhibits including, the Car Hire agreement of 17.1.2005, a Police Abstract dated 12.10.2005, Geminia Insurance Company Limited, Motor Vehicle accident report form, Estimate and Assessment form by Allied Assessors Limited, correspondence between Miran Insurance Brokers and Geminia Insurance Company Limited, a discharge voucher dated 27.12.2005 signed by Irene Oggawa for KShs.176,598/= and Geminia Insurance Claims disbursement voucher dated 30.12.2005. In the premises, the 1st defendant deposes that the plaintiff cannot claim payment for the period from 11.10.2005 to date as he has possession of the suit vehicle.

In a further affidavit filed on 21.8.2006, the plaintiff deposes inter alia that indeed the suit vehicle was insured by M/s Geminia Insurance Company but he is not aware that the said sum of KShs.176,598.00 was paid to Mulinga Autocare Garage or paid to Irene. He also deposes that there was no contractual relationship between Irene Oggawa and Mulinga Autocare and neither was there a contractual relationship existing between the said insurance company and Mulinga Autocare garage but the contract to repair appears to be existing between Mulinga Autocare garage and the defendants without the plaintiff’s instructions. The plaintiff further deposes that, he was never given money to repair the suit vehicle and even if he was given, the defendants should have returned the suit vehicle to the plaintiff for him to shop for a garage of his choice if indeed major repairs were to be done.

To complete the state of the application, I should state that the defendants have filed a supplementary affidavit in which the averments in the replying affidavit are reiterated.

The application was canvassed before me on 29.9.2006 by Mr. Ngoge Learned counsel for the plaintiff and Mr. Gikonyo Learned counsel for the defendants. Counsel for the plaintiff restated the position of the plaintiff in his affidavits and maintained that the suit vehicle was in his view in the defendants’ possession and they should return it to the plaintiff with the assistance of the court.

Counsel for the defendants recited the averments in the affidavits sworn by the 1st defendant and submitted that the plaintiff had failed to establish any of the conditions precedent to the grant of the injunction sought and the application should be dismissed.

I have now considered the pleadings, the application, the affidavits, the annexures and the submissions of the counsels appearing. Having done so, I take the following view of the matter. The plaintiff in reality seeks by a Chamber Summons a mandatory injunction. An order of mandatory injunction is available to a litigant who can establish special and peculiar circumstances. The jurisdiction of the court cannot be invoked by way of Summons in Chambers under Order XXXIX of the Civil Procedure Rules. The court considers such an application under its inherent jurisdiction and should be moved by way of a Motion on Notice. In approaching the court by way of Chamber Summons, the plaintiff has committed a procedural lapses and his application is liable to be struck out.

In my view however, even if the plaintiff had properly invoked the court’s jurisdiction, I am not persuaded that he has shown special circumstances to warrant the grant of the mandatory injunction sought. The suit vehicle is currently at a garage called Mulinga Autocare Limited. The Abstract from Police on a road accident dated 12.10.2005 and exhibited by the defendants confirms that the suit vehicle was on 11.10.2005 involved in an accident. Geminia Insurance Company Limited’s Motor Accident Report Form completed by one Irene Oggawa and also exhibited by the defendants reveals that the suit vehicle was on 12.10.05 being driven by one David Kuria Mwangi on the instructions of the said Irene

Oggawa. The repairer's name is given in the said form as Mulinga Autocare. Prima facie therefore, it would appear that Irene Oggawa is the one who instructed the said garage to undertake repairs to the suit vehicles. In addition to the police abstract and the Motor Accident Report Form, the defendants have further exhibited a Discharge Voucher completed and signed by Irene Oggawa on 27.12.2005. This voucher is in respect of settlement claims involving the suit vehicle. The plaintiff has not denied that Irene Oggawa is his wife. In the face of the material availed by the defendants, the position taken by the plaintiff that possession of the suit vehicle is with the defendants or under their control appears untenable. In those circumstances, I am not persuaded that the plaintiff has laid sufficient basis for the grant of a mandatory injunction.

In **Malindi Air Services and Another –vs – Halima Abdinow Hassan: Nairobi C.A. Application No.2002 (UR)**, the Court of Appeal said

“A mandatory injunction at an interlocutory stage is rarely granted only when the plaintiff's case is clear and incontrovertible.”

AND in Locabail International Finance Limited – vs – Agro export and others [1986] 1 All E.R. 901 the court observed:

“A mandatory injunction ought not to be granted on an Interlocutory Application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a match on the plaintiff. Moreover before granting a mandatory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted that being on a different and higher standard than was required for a prohibitory injunction.”

As already stated above the plaintiff has not established the kind of circumstances discussed in the above case. The plaintiff in my view has not even shown a prima facie case with a probability of success at the trial.

In the result the plaintiff's application dated 5.2.2006 and filed on the same date is absolutely without merit and is accordingly dismissed with costs to the defendants.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF OCTOBER, 2006.

F. AZANGALALA

JUDGE

30.10.2006

Read in the presence of:-