REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. APPLI. 185 OF 2002 (OS)

LUDAVICUS OCHULA.....PLAINTIFF

VERSUS

HABARI ESSO SERVICES STATION.....DEFENDANT

Coram: Before Hon. Justice Mwera

Wandago for the Plaintiff

Jiwaji for the Defendant

Court clerk – Kazungu

RULING

By the Chamber Summons dated 25-9-04 and filed here on 27-1-05 the defendant sought orders under O.6 rr. 13(1) (b) (c) (d), 13(3), 16 Civil Procedure Rules and S.3A Civil Procedure Act, in the main:

1) That the suit (O.S) herein be struck out, on the grounds that it was bad in law, fact, procedure and substance. Mr. Jiwaji stressed the aspects on law to the effect that the basis of the claim was a motor vehicle sale agreement entered into on 9-8-94 and yet the cause here was filed on 29-5-02. That accordingly the cause was time-barred. It was added that the cause was a non-starter because of previous suits involving the same parties and the same subject matter (motor vehicle registration number KAA 962A TOYOTA HIACE matatu) which had been finally determined in the past. For example the court's attention was drawn to MBA HCCA 58/96 in which Waki J., as he then was, delivered a judgement on 11-1-99 dismissing the same. That this followed CMCC No. 44/95 where the present applicant sued the present respondent for a balance of shs. 250,000/= of the purchase price (of shs. 550,000/=). The present applicant got judgement in its favour. It had pleaded that it had received shs. 300,000/=initially but the present respondent (applicant in the Originating Summons) had not paid the balance. This far, it can be said that with the first payment of shs. 300,000/= plus the judgement sum of shs. 250,000/=, the applicant had the full purchase price of shs. 550,000/= for the matatu. But it transpired, as Mr. Wandago put it and Mr. Jiwaji seemed to accept, that the motor vehicle was at no time given/transferred to the respondent (Ochula). That in fact much later on it was sold by the applicant to recover his costs arising from the lower court case.

The other case warranting a plea of res-judicata, this court was told hinged on NRI HCCC (MIL) 182/2001, again involving the same parties and same subject matter. There the present respondent (Ochula) had asked the court to order the present applicant inter-alia to release the subject motor vehicle

or refund his sh. 550,000/=. Khamoni J. on 17-7-01 dismissed the suit as being res judicata. And that on 6-7-05 Maraga J. ruled, when Mr. Jiwaji sought security for costs, that the defence(s) in the matter did not seem frivolous. Lastly the court was told that O.36 r.5 Civil Procedure Rules did not avail the respondent because the sale agreement could not be construed as a "written instrument" under that provision of law.

Mr. Wandago gave the history of this dispute at length. He went over the suits referred to by Mr. Jiwaji and stressed that none of them touched on the respondent's right over the subject motor vehicle. That it was never transferred to him at any time and that is what he seeks now – a declaration that the motor vehicle was his property, despite the applicant deposing that it sold it in April 2003.

That despite all else the Originating Summons invokes S.3A Civil Procedure Act for this court to exercise its inherent and residual jurisdiction to do justice.

After all the above, this court is of the view that the parties concluded a sale agreement on 9-8-94 for motor vehicle registration number KAA 962A TOYOTA HIACE. That is not in dispute. It is also not in dispute that the respondent (Ochulo) paid shs. 300,000/= initially and in CMCC 44/95the applicant got judgement for the balance of shs. 250,000/=. It was not denied that this sum was paid and indeed what the applicant now chases are the costs in that cause.

So the fact is that the whole shs. 550,000/= (purchase price) was paid for the matatu. There is no question that this motor vehicle was never transferred to the respondent. It remained with the applicant until it sold it in April 2003. Or at least there is no evidence that this motor vehicle was ever transferred to the respondent. So all the time the applicant had the full sum paid for the motor vehicle and the motor vehicle itself. Then they went into protracted litigation.

In the initial case No. CMCC 44/95 the present applicant sought for prayers, inter alia, the balance of the sale price shs. 250,000/=. In turn the respondent (Ochulo) filed a counter claim seeking refund of his sh. 300,000/=. The judgement in the lower court was not made part of these proceedings but while the applicant succeeded the counterclaim appears to have been dismissed.

The respondent then filed MBA CMCC No. 365/1995 to recover his shs. 320,000/= paid to the applicant in instalment(s) for the motor vehicle, pleading the motor vehicle had defects and thus could not be a basis of a contract. The applicant pleaded res judicata in the light of CMCC 44/95. The court was not favoured with the outcome of that suit.

Then the respondent sued the applicant in HCCC 182/01 at NRI (see above) and prayers were, as gleaned from Khamoni Judge's judgment of 17-7-01, for:

> (a) the release and transfer of motor vehicle Registration number KAA 962A to the present respondent OR pay its value – shs 550,000/=
>
> (b) damages etc. The judge dismissed the suit on the basis that it was res judicata.

The present Originating Summons brought under O.36 r.5 Civil Procedure Rules is for:

> 1) a declaration that the plaintiff/respondent is a bonafide purchaser for value of motor vehicle no. KAA 962A.
>
> 2) a declaration that he paid full value for that motor vehicle and so
>
> 3) the plaintiff/respondent is entitled to its ownership, management and control
>
> 4) an order that the motor vehicle be released to him.

Having reviewed all the cases that were put forward in a plea of res judicata, all this court can say is that the parties were the same, litigating over the same subject matter – motor vehicle no. KAA 962A

TOYOTA HIACE, but the issues raised here were never the basis of those cases and they were never finally heard and determined in those suits, except the (4) prayer for an order to release the motor vehicle.

But that alone cannot make the whole Originating Summons subject to a bar by way of res judicata. And in case there is limitation as to time to sue on the sale agreement or whether or not it is a "written instrument" under O.36 r. 5 Civil Procedure Rules this court does not feel inclined to determine that here and now. No sufficient arguments were presented on that.

However this court is constrained to remark and it must remark, in the interest of justice and fairness that it is left with an impression that the applicant has acted very oppressively of the respondent. It got paid all the purchase price yet it did not release or cause the respondent to take his motor vehicle. Then protracted litigation went on, the applicant got costs here and there and then it decided to sell this motor vehicle which had always been in its possession to defray those costs! It has paid absolutely nothing back or over to the respondent of the full purchase price plus the sale proceeds in August 2003.

Amazing.

In sum this application is dismissed with costs.

Orders delivered on 16-6-05.

J. W. MWERA

JUDGE