REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI

Civil Case 227 of 2005

TREADSETTERS TYRES LIMITED……..…..……...….PLAINTIFF

VERSUS

KENYA BUS SERVICES LTD…….…….…….....1ST DEFENDANT

BUS TRACK LIMITED……..…….....……..2ND DEFENDANT

R U L I N G

By a chamber summons dated 29th April 2005 the plaintiff has come under OXXXIX Rules 1,2,3 & 9 of the Civil Procedure Rules. The plaintiff seeks both prohibitory and mandatory injunctions, relating to tyres supplied to the defendants under a service contract.

The information one gets form the plaintiff's supporting affidavit are as follows –

· That on 1st October 2001, the plaintiff entered into two distinct but similar in terms service agreements with the defendants for the provision of tyre management services.

· It was an express term of agreement that all the tyres of the agreement on all the vehicles as at the date of the agreement were the property of the plaintiff.

· The plaintiff performed its part of the agreement for provision of tyre management service, but the defendants fell into arrears of payment as per the agreement.

· That in view of the substantial amounts owed to the plaintiff the plaintiff terminated the aforesaid agreements.

· That following various meetings, an agreement was singed between the parties, on 28th October 2004, which agreement reflected an agreed amount of kshs 48, 342, 993. 00.

· It was a term of the latter agreement that the defendants were to pay the sum of kshs 575, 500 to the plaintiff every week.

· The defendants defaulted in those payments.

· That under clause 16 and 17 of those agreements, the tyres, stock of tyres or replacement tyres in

possession and in use by the defendants remains the property of the plaintiff.

· That the defendants are presently experiencing serious financial crisis, and have suffered attachments by various creditors.

· That the defendants have invoked the inherent jurisdiction of the court because the tyres are not likely to be in the same place.

In support of the application learned counsel for the plaintiff Mr. Mwaniki Gachoka said that the defendant paid the agreed instalments captured in the agreement dated 28th October 2004 and only stopped paying in April 2005 when an order of stay was granted to the defendant in the High Court, constitutional division. That stay, counsel said, was set aside by a subsequent ruling of Hon Jusitce Nyamu. Despite the setting aside of that order the defendants' have not resumed repayments and yet have continued to enjoy the use of the plaintiff's tyre. Counsel therefore submitted that the plaintiff seeks orders of injunction to recover their property, which the defendants were using for commercial purpose without paying for them. That the plaintiff has reserved the title in the said tyres. That the plaintiff was likely to suffer irreparable damage if an injunction is not granted since there were many creditors going after the defendant's properties. Counsel argued that the conduct of the defendant in filing the constitutional reference should be taken into consideration when the court considers the injunction application, in that the plaintiff was attempting to avoid to pay the plaintiff's debt in obtaining those exparte orders.

The plaintiff's counsel trivalised the defendants plea, that to allow the injunction would lead to the crippling of the defendant, and consequently the human traffic that uses its transport system would suffer. He summed it up by saying that the defendants failed to pay for goods supplied and it is unimportant that they play an important role in the society.

On the defendant's averments in their affidavit in reply that the agreements, aforesaid, were tainted, by the fact that the then, Managing Director, of the defendant has since gone to work for the plaintiff, thereby exposing the fact, that in entering into the agreements, aforesaid he was comprised and biased, and was not acting in the best interest of the plaintiff; the plaintiff counsel said that was irrelevant to the present case.

On the arbitration clause in the agreement plaintiff counsel argued that it can only come to play if there is a dispute, he said in this case there was no dispute.

Plaintiff counsel submitted that, the plaintiff was required to show a special case, deserving the exercise of the court's discretion in granting a mandatory injunction. Plaintiff relied on the case of THE DESPINA PONTIKOS [1975] E.A. 38 and CIVIL APPLICATION NO. 186 OF 1992 KAMAU MACHUA – VERSUS – THE RIPPLES LIMITED.

On the question of the loss likely to be suffered by the plaintiff, plaintiff's counsel argued that it was irreparable and in this regard relied on the case of MUIGAI – VERSUS – HOUSING FINANCE CO. OF KENYA LTD [2002] 2 KLR 332.

The learned counsel for the defendants Mr. James Singh opposed the application, and in so doing relied on the replying affidavit. The replying affidavit brings out the following: -

· That George Thuo was the managing director of the defendants as well as being an employee but his employment was terminated for amongst other things, for entering into illegal transactions without the defendants boards director's mandate.

· That the defendants after reconciliation have found that the said Geroge Thuo authorized incorrect and fraudulent readings so that the amount paid by the defendants to the plaintiff would be inflated.

· That the settlement agreement of 28th October 2004 was signed by the defendant on the mistaken

belief that the agreements were valid.

· That the agreement of 28th October 2004 passed the title of the tyres to the defendants and crystalised the defendant's liability to a debt liability.

· That the defendants carry 6, 000, 000 passengers a month, which constitutes 35% of the passenger traffic in Nairobi.

· That the claim against the defendant by General Motors was illegal.

Defence counsel in submission, argued that the plaintiff had failed to fulfill its part of the agreement, since some tyres were worn out, and appropriate complaint had been forwarded to the plaintiff. That the plaintiff had also failed to give the defendants credit for an amount of kshs 10 million and kshs 19 million. Counsel in raising these issues submitted that in considering the plaintiffs application for mandatory injunction the court should consider that such injunctions are granted sparingly and not where there are counter argument raised such of those raise by the defendants.

Counsel further argued that the earlier agreement was terminated, and in its place was the settlement agreement of 28th October 2004, and it was material to note that the latter agreement did not give the plaintiff the right to repossess in case of default. Defence relied on section 20 of the sale of Goods Act Cap 31, which he said requires an agreement to preserve title in the tyres on the plaintiff. In this regard defence relied on the case of GRINDLAYS BANK INTERNATIONAL (K) LTD – AND – BASF SYSTEM CIVIL APPEAL NO. 41 OF 1977 where Law J.A. stated: -

"**In my view the loss in this case must fall on the respondent, who parted with possession of the goods without reservation, and who did not resume possession so as to acquire a lien, or acquire any other right analogous to a lien such as to give him precedence over the receiver."**

Further defence counsel argued that the latter agreement did rescind/vary the earlier agreement. Counsel relied on the book CHITTY ON CONTRACT. That book states that if the contract is rescinded it is extinguished, if it is varied it continues to operate in the altered form.

If indeed the first agreement is operative, the defendants counsel argued that it is subject of the arbitration clause and accordingly this matter should be referred to arbitration.

Plaintiffs counsel in response argued that the plaintiff's injunction was limited to the goods supplied to defendant and therefore would have no consequence on the defendant's operations. On rescission, plaintiff's counsel argued that the terms of the original agreement were still intact; and relying on the defendant's authority, plaintiff counsel submitted that, where a party reserves a right of repossession it can only lose that right by an express provision canceling it.

Those are the parties arguments. In making my ruling I ought to have it in mind that what I am not called upon to make is final findings on the issues raised before me, because these are interlocutory proceedings. The case of MBUTHIA – V – JIMBA CREDIT FINANCE CORPORATION & ANOTHER [1988] KLR is useful to have in mind. It was stated in that case: -

"**The correct approach in dealing with an application for interlocutory injunction is not to decide the issue of fact, but rather to weigh up the relevant strength of each sides proposition. The lower court in this case had gone far beyond his proper duties and made final findings of fact on disputed affidavits**."

Bearing that holding mind, in considering the plaintiff's case, I will be guided by the case of KENYA BREWERIES LTD – VERSUS – OKEYO [2002] 1 EA 109. The holding of that is: -

"**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 summary act which could be easily remedied…."

In considering this application I will highlight what I find to be the weakness of the plaintiff's case. The plaintiff has two agreements signed between itself and the defendant. There is a very interesting argument raised by the defence that the signing of the second agreement was tantamount, to either rescinding, or varying, the former contract. Indeed it is arguable that the plaintiffs first agreement was extinguished, rescinded, by the second agreement, and the agreement now enforceable between the parties is the second agreement.

If that argument is correct the plaintiff failed to preserve title in the tyres in the second agreement, and accordingly the plaintiff would, in that case, not be entitled to the orders prayed.

Those two, very fundamental weaknesses, if I may call them that, leave doubt as to whether the plaintiff has proved that, it has a prima facie case against the defendant, with probability of success, limited only to repossession of the tyres.

The other issue is, if indeed the 1st agreement is operative, then there is an arbitration between the parties liable to arbitration process. The plaintiff argued that there is no dispute capable of being referred to arbitration; in response defence relied on the case: HALKI SHIPPING CORPORATION – VERSUS – SOSPEX OILS LTD [1997] 3 ALL ER 833. It was held in that case

"**Where the parties to a contract agreed to refer any dispute arising there from or in connection therewith to arbitration, any subsequent claim made by one of the parties in relation to the contract, which the other party refuses to admit or did not pay, was a relevant dispute which the claimant was both entitled and bound to refer to arbitration, notwithstanding the fact that the respondent did not have a sustainable defence to it**."

The issues I raise either as weaknesses or a bar to grant of the orders sought, go to show that the plaintiff has failed, to fulfill the high standard required when what is sought is a mandatory injunction.

In view of the afore said I find that the application cannot be granted as prayed.

The order of the court is: -

(1) That the plaintiff application dated 29th April 2005 is dismissed with costs to the defendant.

It is so ordered.

Dated and delivered this 22nd day of August 2005.

MARY KASANGO

JUDGE