

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT 674 OF 2005

DAVID M. KINYUA.....PLAINTIFF

VERSUS

PAUL KIMANI.....DEFENDANT

RULING

The Applicant in his application of the 3rd June 2005 seeks a mandatory order that goods taken by the Respondent in pursuance of two agreements of the 20th April 2005 and 28th April 2005 respectively be returned. The Respondent was to inspect the goods and ascertain their condition and value and as a result a price was to be agreed.

The Applicant got cold feet and tried to retrieve the goods and eventually sought an ex parte order from this court for the return of the goods. As an interim measure I ordered the goods be held by a third party where they now are.

On the 30th May 2005 before the ex parte order the Respondent through his advocates rescinded the contract and made demands for monetary amounts.

It is clear that the property in the Applicant's goods never passed to the Respondent. Section 21 (1) of the Sale of Goods Act provides that in a contract for the sale of specific goods, where the seller has by the terms of the contract reserved the right of disposal of the goods until certain conditions are fulfilled; and notwithstanding the delivery of the goods to the buyer, the property in the goods does not pass to the buyer until the conditions by the seller are fulfilled.

Indeed the Respondent received the goods as a bailee as the Applicant's agents.

The Respondent says the Applicant failed to make full and frank disclosure to the court of his efforts to retake the goods including getting an order from court to repossess the same.

A court will decline to make orders in favour of an applicant who has failed to disclose a relevant and material fact. The fact, however must be relevant and material to the decision which is being made.

In my view, the non disclosure of the materials relied on by the Respondent are not relevant matters to the decision as to whether or not to grant an interlocutory mandatory order.

There are a number of issues for decision between the parties, however, these cannot be dealt with in an interlocutory application as they can only be determined at a full hearing of the suit. Indeed the disputes are not yet finalized in the pleadings. The Respondent also submitted that there was no jurisdiction to make a mandatory order as sought. Mr. Jaoko relied on the case of **Yego Vs Tuiya (1986) K.L.R** in which the Court of Appeal reviewed a decision of the High Court in which the judge had ordered delivery up of vacant possession of the premises the subject matter of that suit when the Applicant before him merely sought an injunction to restrain the other party from ploughing, fencing or taking possession of the land.

I would refer to my ruling in **Gitutu Coffee farmers Cooperative Growers Cooperative Society Vs A.G & 32 others** in which I ordered an ex parte mandatory injunction but set out the principles upon which a mandatory order can be made.

However, in my view it is just that the goods held by the auctioneer are released to the Applicant. I will make the order sought for in prayer 1 of the Chamber Summons of the 3rd June 2005 but the same is conditional upon the Applicant refunding to the Respondents the sum of Kshs 500,000 paid by him pursuant to the Second agreement. The parties will bear the Auctioneers charges equally.

The parties are thus left with their disputes including as to what goods were taken and whether some of those goods belong to the Respondent on the one hand and on the other hand what goods still remain unaccounted for with the Respondents as alleged by the Applicants and other matters. These matters will be determined when the suit is heard in due course unless the parties agree to some speedier mode of resolution of the dispute before the hearing. I order that costs will be in the cause both in this application and the application of the 2nd August 2005 which was filed by the Respondent.

DATED and DELIVERED at NAIROBI this 3rd day of October, 2005

P.J. RANSLEY

JUDGE