



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

CIVIL SUIT NO.24 OF 2002

LEISURE CAR HIRE TOURS & SAFARIS LTD.....APPLICANT/PLAINTIFF

=V E R S U S=

IMPERIAL BANK LTD.....RESPONDENT/DEFENDANT

R U L I N G

The Applicant in this application is the Plaintiff. He filed this application on 28th January, 2002 under this suit which was also filed the same day. Reliefs sought included:-

2. That service herein be dispensed with in the first instance and later the application be heard inter partes.

3. That an interim injunction be issued to restrain the defendants by itself, its servants or agents or otherwise whatsoever from repossessing, selling, disposing of and or dealing in any manner with motor vehicles registration Nos. KAG 156U, KAG 157U, KAG 15 8U, KAK 749J, KAG 205Q, KAG 206Q, KAG 037Q, KAG 176P, KAG 748N, KAG 261R and KAG 316R, pending the determination of this suit.

The Applicant obtained an interim ex parte order in the terms of the above prayers on the same day. Later the application came before me for a hearing, inter partes and I promised to deliver the ruling on notice. It was a lengthy application which was heard on 17th April, 2002 and on 18th April, 2002. When I perused this file I noticed that when the Applicant appeared before Hon. Commissioner Omwitsa ex parte and obtained the interim orders, it did not through its counsel, disclose to the court that there was another similar application before it which had been withdrawn the same day together with a main suit which was similarly withdrawn. The truth however, was that Civil Suit No.545 of 1999 had been filed in this court in 1999 and the Applicant/Plaintiff in an application brought under that case and the Respondent was similarly the Respondent/Defendant herein. What is important about this information, which should have made the Applicant under the rules of the game make a disclosure to the court of Commissioner Omwitsa, is that the prayers sought under this application and the main suit are exactly similar as the ones sought and obtained before Commissioner Omwitsa ex parte. To this scenario, I will revert later in this ruling.

The second matter that I noticed is that this court granted an interim injunction to the Applicant under the first application in 1999 but the Applicant did not after the consented 30 days proceed to fix the application to be argued inter partes, although it served the interim orders upon the Respondent, thus restraining them from any interfering with the motor vehicles. The actual effect of this was that Applicants used the interim orders beyond 30days, with a result that the Respondent may have been prevented from realizing its rights under the mutual contracts between the parties while the Applicant continued, on the other hand, reaping benefits using the court order. The information in the affidavits confirms that this remained the position until the Applicants were threatened by a fresh repossession

attempt in January, 2002. When Respondent attempted a fresh repossession the Applicants moved first to file a fresh application under HCCC No.545 of 1999. The January 2002 application was also similar to the earlier one seeking similar reliefs but widened to cover more vehicles which were not included in 1999 application. The January 2002 application was on the 4th January, 2002, stayed by Commissioner P. Tutui, on the ground that it was res Sub Judge the HCCC No.545/99 application under S.9 of Civil Procedure Act and was so stayed until the earlier one could be heard and determined. This must have thwarted the Applicants intentions of continuing to reap benefits under the earlier interim orders. Of the further interest to this court is the Hon. P. Tutui's comment. She stated :-

“In filing the same application and obtaining same orders that had been denied before is to say the least mischievous on the part of the counsel. In the circumstances I order a stay of the proceedings in the Chamber Summons dated 6 th January, 2002, together with any subsequent orders obtained until the determination of the Chamber Summons dated 6 th December, 1999”

Clearly the court was concerned that the Applicant through its counsel was misconducting itself. She termed the conduct mischievous. The events that followed however will confirm that the Applicant's counsel Mr. Sifuna, either did not appreciate the court's clear warning or was reckless about it in that three weeks thereafter on 28th January, 2002, he proceeded to withdraw the earlier case of 1999 together with the application under it and on the same day filed a fresh suit under which he also filed a fresh application now under consideration. As earlier stated hereinabove, the application I is exactly similar as the two earlier ones. He succeeded in Hon. Commissioner Omwitsa's court to obtain the interim orders which he now wishes to confirm. And as I have stated hereinabove, he failed to disclose all the above facts to enable the Commissioner to exercise her discretion having considered all the relevant facts.

I turn now to the grounds upon which the Applicant seeks a temporary injunction. He argued that the Respondent had no right to move to repossess the listed motor vehicles because he failed to give a breakdown of the amount of payment it has so far received from the Applicant, specifying when it was received, how much it was and in respect of which motor vehicle it was accounted. The Applicant further stated that it was incumbent upon the Respondent being a Financier, to give full accounts. That the financier generally claimed that the Applicant was in arrears but failed to state the actual sums and the relevant details thereof. I have considered this ground and do not hesitate to reject it. The Applicant was unable throughout the prosecution of its application to establish what amount it has ever paid to the Respondent, when and in respect of which vehicle, and the receipts given. They clearly kept no records or if they did, they chose not to produce same to their detriment. They failed to seek accounts as provided under the Act. On the other hand the Respondents through various documents including annexures such as SN5 and the affidavit in reply sworn by Sujay Khataw on 6th February, 2002 makes an adequate attempt to specify the moneys received in respect of which vehicle and how much is the balance still due in respect of each motor vehicle as at the time. It also states the total sum outstanding for all the motor vehicles.

The 2nd issue raised by the Applicant is that the Respondent failed to register the Hire Purchase Agreements and cannot therefore rely on them since for non-registration the Agreements are null and void. But in this case the parties are both bodies corporate, particularly the Respondent. Section 3(1) of our Hire Purchase Act states:-

“This Act applies to and in respect of all hire purchase agreements entered into after the commencement of this Act under which hire purchase price does not exceed the sum of three hundred thousand shillings other than a hire purchase agreement in which the hirer is a body corporate, whether incorporated, but that monetary limitation does not apply so as to affect the definition of “hire -purchase business” in section 2(1).”

In this case every hire purchase agreement shows that the sum involved in respect to each motor vehicle was over Kshs.300,000/-. Secondly, the hirer herein, the Applicant, is a body corporate and this is not in dispute. For either reason therefore the Agreements are not covered or included under the Act to require registration under Section 5(1) which requires every hire-purchase agreement to be delivered for registration to the Registrar within thirty days after its execution. This also means therefore that the

parties herein were to be governed by the terms of their Hire-Agreements only and not the Act.

In this case one of the terms of the hire agreement was that the financier could without more set in motion the process of repossession if the hirer, the applicant here, defaulted in repayments. This is what the contract between them provided. There is evidence in the record before me that the Applicant received warnings of its default. There was even an attempt of repossession in 1999 which is the one that led to the earlier case being filed and injunction being obtained. The court and Respondent even gave a grace period of 30 days which the Applicant misused or failed to appreciate. This gave the Respondent a right to assert its rights as provided in the contracts which had been properly executed by the Applicant. I decline to uphold this ground. I also make a finding under the circumstances of this case that in view of the fact that the Hire Purchase Agreements were not registable, there was no need for stamping them as would be necessary if registration was a legal obligation. The Fourth ground raised was that some of the vehicles intended to be repossessed were already belonging to the Applicants by registration. I have read the affidavit of Suday Khataw and formed the opinion that the registration of the said motor vehicles done by the Applicant could have been done fraudulently. The truth can be explored during the full hearing of the case but I am persuaded on the balance of possibility that the said registration was done without the knowledge and voluntary participation of the Respondents.

Mr. Sifuna spiritedly agitated that the Respondent may unconscionably be charging high interest the result of which is the fact that the Applicant is not fairly put in a position to complete the repayments, however, hard he will try. This may be so or not. However, the Applicant voluntarily entered into the terms of the contract which the Respondent is now enforcing. This court will not wish to interfere, otherwise it will be seen to be making a fresh contract for the parties. The upshot of this canvassing is that the Applicant has not established a prima facie case with a probability of success as laid in the famous Giella case. Secondly, the Applicant has not also demonstrated that if the injunction will not be granted it will likely suffer loss or damages which will not be compensated in damages. The Respondent is a bank which is not shown to be in the brink of collapse. It is presumed to have adequate assets and will be in a good position to compensate in damages if need arises. The Applicant did not establish differently. And finally, even if the issue of balance of convenience, I would hold that it tilts in favour of the Respondents who for several months have not been paid the due installments and whose moneys are withheld by the Applicants who are under default persistently and consistently.

In conclusion, I now hold that even if the Applicant could have satisfied the principles laid down in the Giella case, I would still have refused to exercise this court's discretion in its favour. As demonstrated at the beginning of this Ruling, the Applicant has clearly demonstrated that it is not worthy of the court's respect. It obtained the discretion of this court in HCCC. No.545 of 1999 but used the relief to deny the Respondent its rights. The Applicant with a wide smile seized this court's generosity and the Respondent's good understanding in form of an injunction intended by court to last 30 days because it was granted with consent of the Respondent. However, the Applicant became greedy and malicious and decided to use the relief as a weapon instead of using it as a friendly tool. The Applicant, like a few others, ended up deliberately applying that very useful, friendly and handy civil procedures relief, wrongly and greedily. They now without shame once more fact the court seeking the court's smile when they have before, indeed, so recently, misused and abused this court's process. This court cannot accept to be so misused and when and where a suitable case presents itself, it will take the earliest opportunity to widely frown at those who undermine the ethics and the art of advocacy. I dismiss this application with costs to the Respondents/Defendants. It is so ordered.

Dated and delivered at Mombasa this 3rd day of June, 2002.

D.A.
JUDGE

ONYANCHA

Delivered in the present of:

Mr. Sifuna – for Applicants

