



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NO. 295 OF 2001**

**CABANAS AMUSEMENT PARK LTD.....PLAINTIFF**

**Versus**

**1. RAMBO COLOURCARE LTD**

**2. WHITESTONE AUCTIONEERS (K) Ltd.....DEFENDANTS**

**RULING**

On the 11th day of January 2001, the respondent's counsel issued a letter of demand for the sum of Shs.2,500,000 to one Mrs. Macharia of City Cabanas. By their said letter they intimated that the sum of money being demand and was owed to their clients, Rambo Colourcare Ltd. for furniture delivered, particulars of which were within the addresses knowledge.

It would appear that soon thereafter on 14th February 2001, an advocate by the name of Chris Mutuku instructed Whitestone Auctioneers (K) Ltd., the 2nd respondents (hereinafter called "the auctioneers") to proceed and repossess, several chair and tables from City Cabanas for a decretal sum of Shs.4,903,309.19.

The auctioneers proceeded and proclaimed the said several chairs and tables from City Cabanas on 15th February 2001.

However, on 22nd February 2001 Cabanas Amusement Park Ltd., who claim to carry on business under the style and name of City Cabanas filed their plaint against Rambo Colourcare Ltd. (hereinafter called 'Rambo') and the auctioneers. They simultaneously moved the court under order XXXIX rules 1, 2, 3 & 9 of the Civil Procedure Rules. It seeks for orders inter alia, to restrain the defendants, their agents or servants from or in any way interfering with their possession of their items of furniture, equipment and machinery howsoever, or from detaining, holding or depriving them of the use and possession of the said items, until the determination of their suit.

It is evident that the defendants' action of proclamation, with a view to repossession and sale of the items of furniture was allegedly founded upon a contract of sale of the said items. Rambo claims that though payment had not been made in full, it had however released the items to City Cabanas. Indeed, in paragraphs 4, 5 and 9 of his replying affidavit Barended Kalsi, the managing director of Rambo depones:

4. "That it is true that we instructed the 2nd defendant (auctioneer) to repossess our furniture supplied to the plaintiff in 1998 in exercise of our Reservation of Right of Disposal as provided by law....."

5. "That it is indeed true that the 1st defendant (Rambo) has supplied the furniture the subject of this suit and I annex hereto a bundle of delivery notes and receipts vouchers, signed for and on behalf of the plaintiff .....numerically numbered '1' to '40'."

9. "That the plaintiff issued two cheques for KShs.3,000,000.00 (each KShs.1,500,000.00) in part settlement of her indebtedness which cheques upon presentation, were returned with the remarks "not arranged for." Upon being shown the two returned cheque at the premises of the plaintiff company, snatched one cheque and refused to part with it....."

It is clear from the above that possession in the goods had passed to the plaintiff at least two years before Rambo sought to repossess them on account of unpaid moneys.

The issue that arises from this application is whether a supplier of goods, such as Rambo can move to repossess the supplied goods without a court order, whether it has a lien over the said items.

In support of his submission that Rambo was entitled to repossess the items of furniture due to non-payment. Mr. Mutuku, their learned counsel relied on a letter issued by Rambo, contents of which were confirmed by the said Mrs. Macharia on behalf of City Cabanas. It had been agreed between the parties (Rambo and City Cabanas) that deliveries of furniture to the plaintiff would only be made upon finalisation of payment for it. It categorically stated that the balances outstanding on the account of City Cabanas should be made in cash, and that before deliveries commenced, all goods would remain Rambo's property. The letter stated that "until payment in full" and "in the event of the cheque not going through we (Rambo) shall have every right to come and pick all our furniture". It is also noted therein that the plaintiff had issued two post-dated cheques dated 24th July 1998, and 24th August 1998. That letter is dated 2nd June 1998.

After the letter was issued but before the postdated cheque were paid by the bankers, Rambo seems to have had a change of heart and in fact delivered several items of furniture between 6th June 1998 and 13th July 1998.

I find that by delivering the furniture despite the fact that no payment had been receipted, Rambo acted contrary to the understanding of the parties, and contrary to the terms of the letter which formed the basis of their agreement. That amounted to a repudiation of the letter, and in my opinion, Rambo cannot now seek to fall back to its original position as had been laid down in that letter, and thereby attempt to rely on it having repudiated it in the first instance. That being the case then, and having repudiated that letter, it cannot be said that there was a contract in existence between the parties, and therefore Rambo cannot rely on section 21 of the Sale of Goods Act, whose basis is the existence of a contractual relationship.

Be that as it may, the position in law as regards Sale of Goods is very clear. An unpaid seller will only have a lien over the goods while he is in possession of them, in which instance, he has a right to withhold delivery of the same. Otherwise, once the seller has lost both his possession and his right of stoppage in transit and has transferred the property to the buyer, as is the case in this particular instance, he has no remedy against the goods themselves and his only remedy in a claim for the price or for damage under the contract.

The fact that the goods had been in possession of the applicant for a period of over two years clearly indicates that the respondent could only maintain an action against the applicant.

In the circumstances, I find that the action taken by Rambo was wrongful and irregular.

In any event, even if I am wrong in the above finding, I have taken into account the fact that, the proclamation indicated that a sum of Shs.4,903,309.19, was the sum payable. However this is not the sum that had been originally demanded. The amount originally demanded was much lower. No proof was furnished that a demand for Shs.4,903,309.19 had ever been made prior to the proclamation, contrary to the requirement that a demand should be made before taking any action. On that account, I do find that Rambo's action was not only premature, but that it was unlawful.

In the circumstances, I am of the view that the applicants have established that they have a prima facie case with a probability of success and for that reason, I do grant them orders to prayers numbers 2 and 3 of their application.

Costs of this application shall be in the cause.

Dated and delivered this 5th day of June 2001.

JEANNE W. GACHECHE

COMMISSIONER OF ASSIZE

Delivered in the presence of:  
Mr. Mutuku for the respondent

No appearance for the applicants.