



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT 547 OF 1999

KENYA BUS SERVICE (MSA) LTD.....PLAINTIFF

VERSUS

CMC MOTORS GROUP LTD.....DEFENDANT

RULING

The plaintiffs, hereinafter referred to as KBS, came rushing to this Court on 6.12.99 and filed suit against the defendants, hereinafter CMC. They alleged that some 17 buses which had been purchased from CMC had been unlawfully taken from them by CMC. There was another 64 which were also in danger of being similarly unlawfully taken. All 81 buses, they alleged, had been purchased by KBS from CMC between 1997 – 99 and they were registered in the name of KBS. CMC had a joint registration in trust and was merely interested in the unpaid balance of their money. There was no written agreement between the parties let alone one authorising CMC to exercise any *lien* or repossess the buses. It was clear to KBS therefore that when CMC instructed M/S Marchet Auctioneers through their advocates to take the buses, and they took the 17, it was a blatantly unlawful act which they met with an equally unlawful and forceful act of breaking into the premises of CMC and retaking 13 of those buses, leaving four which were said to be disabled. That was on 4.12.99. They then came to Court to seek an order for return of the remaining 4 buses and to prevent the repossession of the 13 rescued ones and the 64 at large.

On the basis of that pleading KBS sought interlocutory orders in a Chamber Summons filed on the same day. They seek a mandatory injunction for return of the 4 buses and a prohibitory injunction in respect of all 81 buses.

That application came before the vacation Judge Hon Commissioner Shah who made the following order:

“Chamber Summons adjourned to a date to be fixed at the Registry. Status quo to be maintained until *inter partes* hearing. Defendant to file the requisite papers by 10.12.99”

That order was made in the presence of Mr Mogaka of Mogaka Omwenga Advocates for KBS and Ochuka advocates who had not filed any Notice of Appointment or other paper work for any party. It was stated by Mr Mogaka that they had just served the defendants at 2.30 pm the same day and it had been agreed that the status quo would be maintained. What the status quo was at the time was not stated.

Mr Ochuka does not appear to have filed any papers by the time the plaintiff’s advocates took an *ex parte* date for the hearing of the application on 9.12.99. They fixed it for hearing on 20.12.99. Summons to enter appearance was served on 8.12.99 and the defendants entered appearance through M/S Ngatia & Associates; on 15.12.99; on 15.12.99. They also filed a defence and counterclaim. The defence averred that there was a deliberate concealment and distortion of material facts with intent to mislead the Court. The non-disclosures were that there were written terms; executed by the parties of the deferred payment

relating to the 81 buses and the property in those buses remained with CMC until final payment. There were also executed transfers in their favour. In addition there was an agreed term of repossession. CMC further asserted that the retaking of the 13 vehicles after their lawful repossession was illegal, callous and riotous. An injunction did not therefore lie. The counterclaim enjoined the directors of KBS who had executed guarantees in respect of the buses. Orders are sought for payment of all outstanding amounts by KBS and its directors.

In a lengthy affidavit in reply to the interlocutory application, CMC exhibited numerous documents to show how the indebtedness of KBS arose and details of unpaid amounts. In respect of each of the 81 buses is exhibited three documents executed by KBS:-

1. Declaration of *lien*
2. Delivery/Acceptance Certificate
3. Blank transfer form

The declaration of *lien* contains the typical clauses:

“4. We confirm our undertaking that in the event of or default in the payment terms herein stated we shall freely release the subject vehicle to CMC or to their authorized agent.

5. We confirm our understanding and give express authority that in the event of our default in the payment of the said Kshs (stated) on our part CMC will have the right hereby given, to seize the said vehicles, after 10 working days dispose of it by private or other sale at the best price obtainable from the market of the day to recover their expenses and this debt, and we shall be liable for the shortfall that may arise therefrom”.

And the acceptance certificate:

“Notwithstanding any provision or circumstance to the contrary it is hereby expressly agreed between the parties that property in the motor vehicle shall not pass unto the purchaser until full purchase price is paid.

In the event that full purchase price is not paid or promissory note, cheque, bankers order, or bill is not honoured within the stipulated period, the purchaser hereby grants unto CMC unlimited power of repossession, seizure and sale of the motor vehicle and the purchaser hereby agree to pay the difference arising from resale.....”

It is further expressly agreed that prior to receipt of full purchase price.....the owner shall have unfettered right to *lien* on the motor vehicle.

It was on the strength of such provisions that CMC instructed its lawyers to issue repossession authority to the auctioneers and they believed the instructions were lawful.

The replying affidavit and grounds of opposition were served on the advocates of KBS on 15.12.99 but they were not prepared to proceed with the *inter parte* hearing of their Chamber Summons when it came before vacation judge Hayanga J on 20.12.99. They applied for adjournment and an order was made thus:

“By Consent”

“1. Application dated 6th December, 1999 be stood over generally until 15th February, 2000.

2. Defendant’s replying affidavit filed on 15th December, 1999 be deemed as duly filed and served.

3. Plaintiff be at liberty to file and serve an affidavit in reply on or before 31st December, 1999.
4. Plaintiff hereby undertakes not to alienate the subject motor vehicles.
5. Status quo as ordered on 6th December, 1999 be extended until the next hearing date 15th February, 1999. Estimated hearing time shall be 2 hours”.

Two days later on 22.12.99 KBS filed an affidavit in reply owning up to the misleading information and non-disclosures contained in their earlier affidavit as pointed out by CMC. They admitted that there was a right of repossession by CMC. They say however that the power to repossess is conditional. There is further admission that KBS had some difficulties in keeping up with agreed terms of payment and they negotiated with CMC for rescheduling of the debt. Arrears of payment are also admitted as at 6.11.99. They attributed their inability to pay in part to questionable serviceability and durability of the buses supplied by CMC. They appreciated the rescheduling of the repayment but said they will not remit any more money to CMC. They instead counterclaimed for such losses.

The die appeared to have been cast culminating in CMC’s advocates’ letter which triggered of the chain of events which brought the parties to Court.

As the Chamber Summons dated 6.12.99 is already scheduled for *interparte* hearing on 15.2.99, I say no more about it. But the background information extracted above was relevant to the application argued before me on 18.1.2000 and the subject matter of this ruling.

It is a Chamber Summons filed a day after the filing of the replying affidavit of KBS. It seeks two substantive orders:

- “2. That plaintiff be restrained from using the defendants 81 motor vehicles as per the list annexed to this application and marked “A” and the vehicles be kept at the defendant’s yard pending further orders.
4. That the officer in charge, Mombasa Central Police Station do supervise the full implementation of this order.

It was taken out under order 39 of the Civil Procedure Rules and although the relevant rule is not specified, learned Counsel Mr Ngatia for CMC clarified that they were not intending to interfere with the orders on record for maintenance of the status quo until the *inter parte* hearing in February 2000. CMC was ready to withhold the enforcement of its right of *lien* and repossession until then. It was imperative however that their security which is the property in those buses be preserved on neutral ground until the rights of the parties are determined. That was the wording of rule 2 of order 39, he submitted. As for the status quo, it cannot be any other than that existing before KBS riotously and unlawfully invaded CMC premises to retake 13 of the buses.

The affidavit in support of the application highlights the urgency of the application. It is that no spare parts are being purchased from CMC and it is suspected that the vehicles are not being maintained. The amount secured is substantial as it is in the region of Shs 150 million, and the nonmaintenance of the buses depletes the security. No action is being taken by KBS to alleviate that situation by payment of any part payments and they have paid nothing since August 1999 while they continue to utilize the buses for their own gain. The vehicles are being wasted and need to be preserved. Indeed they are exposed to attachment by other creditors as shown by KBS itself in one of its annexures.

Mr Ngatia referred to the amended plaint filed on 13.1.2000 admitting the agreements and terms under which the buses are held by KBS. This, he submitted, was a radical departure from the position initially taken when mandatory and prohibitory injunctions were sought. The counterclaim filed by CMC sought neither repossession orders nor injunction. They are both unnecessary to seek as the former is contractually available while the latter need not be pleaded before it is granted. It is on the basis of the counterclaim filed that the orders for preservation of the security fare predicated. The prayer for

liquidated sum does not preclude CMC from seeking injunctory relief purely for preservation of the subject matter of the suit. Mr Ngatia cited three unreported cases in support of his submissions. HCCC 316/99 *Ngugi –vs- Credit & Finance Commerce- Ltd* to illustrate that the filing of a counterclaim does not estop a defendant from exercising other rights available to him; CA Nai 186/92 (Nai 77/92) (UR) *Kamau Mucuha –vs- The Ripples Ltd* to define the limits of “status quo”; and CA NAI 285/98 *Diamond Trust Bank (K) Ltd –vs- Jaswinder Singh Enterprises* (UR) for the proposition that where contractual obligations are established it cannot be unconscionable for the parties to proceed in terms of the contractual terms.

Finally Mr Ngatia submitted that the balance of convenience tilted in favour of preserving the subject matter of the suit to the party who wins the case, even if it be the plaintiff. The Court may chose the safest venue although CMC has offered its own yard and security. Police assistance is sought because of the demonstrated capability of the plaintiff to use brute force.

On his part, learned counsel, Mr Mogaka submitted on the second prayer, and I agree with him, that the use of the police in purely civil matters ought to be deprecated. Indeed it was declared illegal in “*The Ripples” case*” cited by Mr Ngatia and I am not inclined to consider the prayer. There are empowered court bailiffs who have the full force of the law behind them to enforce any court orders.

Secondly Mr Mogaka submitted, that the application was misconceived because there is an existing consent order made on 6.12.99 and extended on 20.12.99 on both occasions with the consent of the parties. The status quo existing was therefore that obtaining on 6.12.99, that is to say, after the forceful retaking of the buses from CMC yard. That status quo must therefore persist and KBS should not be asked to make any payments until the application is heard. As there was no fraud or misrepresentation the consent order should be honoured.

At any rate, as pleaded in the amended plaint, the buses were supplied in batches and there was a separate agreement on each one of them. On the evidence, the first batch of 16 buses has been paid for in full and those buses should not have been repossessed. Even if it was accepted, as CMC itself says, that there is still Shs 20,000 remaining on principal and an interest of about 1.9 million, why was it necessary to repossess all 16 buses? One bus was worth Shs 1.9 million only. The letter of repossession does not indicate what is unpaid on each bus but lumps them up together.

As for the second agreement, it supplied 65 buses in 4 batches of 7, 15, 19 and 24 units. Substantial repayment have been made on those units and the remaining balances were rescheduled. CMC merely says the balance on all the units is Shs 173,021.500 without showing which vehicles are unpaid for. There was no agreement that in default of paying for one bus the balance due the others would become immediately due and payable forthwith. It was therefore because of CMC’s grabbing of all buses that KBS retaliated with force. They made no consideration for the sum of Shs 86 million paid so far on the vehicles.

Thirdly Mr Mogaka submitted, CMC had now filed a counterclaim seeking the balance of the money. They have also sought to enforce the personal guarantees of the directors. By electing to sue for the money, CMC had waived their rights of repossession under the contracts and were estopped from proceeding. The counterclaim is nevertheless denied and there is indeed a counterclaim to the counterclaim to the tune of over Shs 240 million.

Mr Mogaka cited authorities to support the view that an injunction will not be granted where damages are adequate. [1973] EA 118, *Ibrahim -vs- Sheikh Bros Investments Ltd*, *Giella -vs- Cassman Brown & Co Ltd* [1973] EA 358, HCC 531/96 *Timami Homes -vs- Burkhardt & anor* and *Remo Lenzi & others –vs- Cozzi Corado & others* HCCC 260/96.

There were therefore no merits in the application made and it should be dismissed as frivolous and vexatious.

On the submission that each bus had a separate contract, Mr Ngatia admitted that was indeed so until

KBS defaulted and started renegotiating terms on all the buses. The rescheduling agreed on was in respect of all units and a global sum was to be paid daily to CMC. It made good commercial sense that all units be paid for together. But KBS admitted that it was unable to pay. The directors have not entered appearance and have said nothing about their ability to pay anything. Where does that leave CMC? The counterclaim made was merely an afterthought meant to confuse issues since it was not made in the original plaint.

I have anxiously considered the application, the documents on record and the submissions of counsel to whom I am grateful for their incisive arguments and research.

I was at first tempted to wholly find favour with the forceful submission by Mr Mogaka that the application brought before me did not lie in view of the consent order recorded by the parties preserving the status quo until the *interparte* hearing of the earlier application, and was therefore misconceived. I did not see why a party would consciously enter into a consent and then suddenly and without alleging fraud, misrepresentation or other act or omission which would impeach on ordinary contract, seek to renege on that consent. On perusal of the record however, I see no express statement on what the status quo preserved by the parties was understood to be. It did not help matters that the original plaint as it stood, presented an unassailable case of wrong doing against CMC who on the face of it were proceeding to disrupt a substantial investment of KBS without any colour of right for so doing. All that was undone by KBS's admission in subsequent affidavit and amended plaint that material statements made in the original plaint and affidavit in support of the application were erroneous. One may be tempted to say, and it is indeed alleged by CMC, that there was a deliberate attempt to prevaricate and mislead the Court. That however is not a matter I can usefully debate at this stage.

Suffice it to say that on admission by KBS that they forcibly trespassed into the premises of CMC and riotously took possession of the 13 buses earlier repossessed was an unlawful act. The status quo in such circumstances has been circumscribed in decided cases and in particular the Court of Appeal decision cited to me more popularly known as "*The Rippled case*", per Hancox CJ;

".....it is alleged that the defendant has taken the law into his own hands and taken direct action instead of going through the legally prescribed procedure. In other words he has by his own act, disturbed the status quo. Is it to be said that the plaintiff may not go to the Court to seek an order which is mandatory in the sense that it compels the other party to do some act which restores the status quo?"

Per Kwach JA:

"As Goddard LJ said in the case of *Thompson vs Park* [1994] 2 All ER 477 "Having got back into the house with strong hand and with a multitude of people, he has established himself in the house and, he then says:

"I ought not to have an injunction given against me to make me go out because I got back here and got my boys back and therefore I want the status quo preserved".

The status quo that could be preserved was the status quo that existed before these illegal and criminal acts on the part of the defendant. It is a strange argument to address to a Court of law that we ought to help the defendant who has trespassed and got himself into these premises in the way in which he has done and say that would be preserving the status quo and that it would be a good reason for not granting an injunction".

And finally Cockar JA (as he then was):

"A party as far as possible ought not to be allowed to retain a position of advantage that it obtained through a planned and blatant unlawful act."

I would be flying in the face of such forceful authorities if I condoned the admitted unlawful activities of

KBS and its agents or servants who I believe intended to steal a march on CMC before seeking endorsement of its activities from the Court. On this KBS was wrong and ought to have followed the procedure of obtaining a court order to restrain CMC before taking the law into their own hands. It now transpires and KBS shamelessly admits it, that CMC had *prima facie* a contractual basis for proceeding in the manner they did. The actions of KBS in those circumstances cannot be condoned by a Court of law otherwise it would be sanctioning anarchy and setting a dangerous precedent. In my view, and I so find, the status quo to be maintained until the *interparte* hearing of the pending application is that prevailing before KBS forcibly took away 13 repossessed buses from the security of CMC yard. Whether the Court hearing the main application will order their release or sanction the further repossession of the remaining fleet of 65 is not for me to decide here. I order that those 13 buses be returned to the CMC yard within 24 hours of this ruling under the supervision of the court bailiff on this honourable Court who may employ such personnel as may be necessary to assist him. KBS shall bear the costs of the court bailiff.

In seeking an order for preservation of the entire fleet of 81 buses until the hearing of the application, the applicant in my view appears to appeal more to the inherent powers of this court than on the wording of order 39 rule 2 of the Civil Procedure Rules. That is because rule 2 relates to an injunction to restrain repetition or continuation of breach, but on admission by counsel for CMC, the counterclaim was neither seeking repossession nor an injunction, mandatory or otherwise. Only the preservation of the subject matter of the suit.

I do not trivialize the claim by CMC that they have a substantial claim to make and their desire to secure it. The counterclaims made by KBS may well be afterthoughts merely meant to buy time and to obfuscate issues. On the authorities cited, which I agree with, CMC is not precluded from pursuing its contractual rights the filing of their counterclaim notwithstanding.

But I cannot, with respect, turn a blind eye to the order recorded with the consent of the parties herein on 20.12.99. The consent order is not signed by the parties as it should but then again it is not denied. For all intents and purposes, it is a lawful court order until it is either set aside, reviewed or otherwise dispensed with. It must be assumed that the consent was consciously recorded with the full knowledge by the parties and their advocates of the ensuing consequences. The counterclaim by CMC and the replying affidavit of KBS were on record when the consent was recorded. With that order, CMC withheld its right to enforce its contractual rights and accepted an undertaking that the subject matter will not be alienated. The status quo would otherwise be maintained until 15.2.2000.

It is my considered view that the matters adumbrated before me will be the selfsame matters rehashed at the *interparte* hearing of the plaintiff's application on 15.2.2000. That Court may or may not, after considering the application, grant the orders sought by KBS. Granting the orders sought in the application made before me would impinge on the existing court order and would be unprocedural. I so find.

The applicant has partly succeeded in redressing an unlawful act. To that extent only the application dated 23.12.99 will succeed but is otherwise dismissed. There will be no order as to costs.

Dated and Delivered at Mombasa this 27th day of January 2000.

P.N.WAKI

JUDGE