



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 795 OF 1998**

GEOFFREY NJENGA PLAINTIFF VERSUS

GODFFEY W. KARURI 1ST DEFENDANT

GATEWAY INSURANCE COMPANY LTD. 2ND DEFENDANT

JUDGMENT

By a letter dated 16.6.1995, 2nd defendant employed the plaintiff with effect from 1.8.1995 as its general manager at a monthly salary of Shs.100,000/= together with other benefits including a housing allowance, a suitable car or a car loan. Pursuant to the terms of the employment, the 2nd defendant lent to the plaintiff the sum of Shs.1,251,756/90 for the purpose of purchasing motor vehicle registration number KAC 596R, a Mercedes Benz Saloon. As security for the loan, the plaintiff executed an instrument under the Chattels Transfer Act which he now claims was defective and not enforceable. That claim comprises the basis of one of the two reliefs sought by the plaintiff in this suit and accordingly, I shall be reverting to the issue later in this judgment.

On 24.6.1998, the plaintiff resigned from the 2nd defendant's employment. I think it is common ground that prior to tendering his letter of resignation, the following was agreed:-

“(1) That the plaintiff would be paid all his terminal benefits.

(2) That the plaintiff will pay the defendants the balance on car loan.”

In this suit, the plaintiff claims that the 2nd defendant has not only unlawfully failed and/or neglected to provide a statement of his terminal dues and pension benefits but has instead threatened to seize the plaintiff's motor vehicle registration number KAC 596R under the alleged defective chattels instrument. The plaintiff therefore seeks (a) a declaration that the instrument is not a valid chattels mortgage and is null and void ab initio and (b) a permanent injunction to restrain the defendant from repossessing or in any way interfering with the plaintiff's motor vehicle registration number KAC 596R. A third prayer seeks the taking of accounts to determine the plaintiff's actual debt, if any, after taking into account his terminal benefits inclusive of pension benefits.

One of the issues raised in the pleadings which I think can be disposed of at the outset relates to the complaint by the 1st defendant that he has been improperly sued in this matter. The 1st defendant is the managing director of the 2nd defendant and he has been sued in his personal capacity. There is however no specific complaint that has been made against him in the plaint and no relief is sought against him. In the written statement of defence and counter claim, the 1st defendant prays that the suit against him be dismissed with costs.

In his written submissions, Mr. Mbigi for the plaintiff, attempts to justify the joinder of the 1st defendant in the suit by stating that, it is trite law that a defendant need not be interested in all the reliefs

sought for him to be joined in proceedings, which said statement is alright as far as it goes. What Mr. Mbigi however fails to state or appreciate is that no relief at all is sought against the 1st defendant. Mr. Mbigi also went on to say that it was necessary to join the 1st defendant because 'injunctions have to be enforced against individuals'. In my view, there is no such law for if it existed, it would mean that in every suit in which an injunction was sought against a body corporate, an individual would have to be joined. For those reasons, I find that the 1st defendant was improperly joined as a defendant in this suit and I would dismiss the suit against him with costs.

The next issue that has to be determined in this matter relates to the validity of the Chattels Transfer Instrument in respect of motor vehicle registration number KAC 596R executed by the plaintiff in favour of the 2nd defendant. It is common ground that the instrument was not registered; neither was there a proper affidavit in Form 1 in the First Schedule to the Chattels Transfer Act. Mr. Mbigi claims that the effect of non registration is to render the instrument ineffectual. With due respect, I do not agree with that contention. Section 13 of the Chattels Transfer Act provides that an unregistered instrument shall be deemed fraudulent and voidable as against certain persons who are specified in the section. Those persons do not include the 2nd defendant. It is therefore plain from the wording of the section that failure to register an instrument does not in any way affect the rights and obligations under the instrument of the grantor and the grantee as between themselves. Accordingly, I am of the opinion that the instrument is a valid document between the plaintiff and the 2nd defendant assigning the motor vehicle to the 2nd defendant who by virtue thereof is entitled to repossess it in accordance with the covenants and powers implied in the instrument. For those reasons, the plaintiff is not entitled to declaration sought in the 1st prayer of the plaint.

The rest of the plaintiff's claim relates to the 3 months salary in lieu of notice (which in principle is not disputed by the 2nd defendant), the claim for salary for the first 6 days of June when the plaintiff was no longer in the 2nd defendant's employment and retirement benefits, less of course, what the plaintiff owed the 2nd defendant by way of the car loan and other justifiable debts. These are straight forward matters which in normal situations would not lead to litigation but quite clearly the conduct of the parties in this matter has been clouded by such strong personal animosity, that simple issues that could have been easily resolved have become the subject of litigation. As a result, the parties have invited the court to undertake tasks which it is most ill suited to perform. As I am not prepared to be involved in such matters as the calculations of the tax due on the plaintiff's retirement benefits or his pension withdrawal benefits, I will confine my intervention in those matters to just a few observations which, it is hoped, will be treated by both the plaintiff and the 2nd defendant as the guidelines on the question of arriving at a just conclusion of the outstanding matters. These are:-

1. The plaintiff is entitled to 3 months salary in lieu of notice but he is not entitled to be paid for the last 6 days of June 1998 when he was out of the 2nd defendant's employment.
2. For the purposes of calculating what is due to the plaintiff under (1) above, salary includes house allowance.
3. The plaintiff is also entitled to be paid for any unutilised leave days at the rate indicated above.
4. As regards the plaintiff's pension withdrawal benefits, there is clear evidence that under rule 24 of the Staff Pension Fund Rules, the plaintiff, having resigned before completing 3 years of service, was entitled to only the whole of the benefit secured by his total contributions paid to the scheme and to no more. That is the position irrespective of whether, as he alleges, he was aware of the rules or not.

If I may say so, with all due respect, the claim by the plaintiff in his evidence that he was not aware of the Staff Pension Rules is not credible. If the plaintiff as the General Manager of the company did not know anything about the company's Pension Fund Rules, who else in the company did. Messrs Madison Insurance Company of Kenya Limited who are the insurer of the Pension Fund have computed the plaintiff's benefit at Shs.134,345/=. In the absence of any credible evidence to suggest that the figures they have arrived at are wrong, I am bound to accept what they say as representing the correct position. There certainly is no evidence from the plaintiff to show that the figure of Shs.134,345/= is wrong.

5. The amounts due to the plaintiff will be reduced by:-

(a) The sum he owes the 2nd defendant in respect of the car loan, interest on which will accrue at 15% calculated up to 30.6.1998.

(b) Any taxation that may be due on the lump sum payment. If the plaintiff is not satisfied with the manner the taxation is calculated by the 2nd defendant, his complaints should be directed to the Commissioner for Income Tax (and not to the defendant) as provided in the Employers Guide on the matter (See D. Exh. 8) by the Income Tax Department.

(c) The sum of Sh.175,791/= shown by Defence Exh. 6 to be owing in respect of insurance premium.

Regarding this aspect of the matter, I accept the evidence contained in the defendants said exhibit as there is nothing in what the plaintiff has told this court that discredits the particulars contained in the document.

In view of what I have stated above, I decline to grant the reliefs sought in prayers (a) and (b) of the plaint. However, I direct that the 2nd defendant to work out what may be due to either party from the other based on the above guidelines. The matter to be mentioned on 12.6.2000 when the plaintiff will have an opportunity to respond the 2nd defendant's calculations. The costs of this suit are reserved. Each party at liberty to apply

. Dated at Nairobi this 12th day of May, 2000.

T. MBALUTO

JUDGE