



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 620 OF 2009

SATPAL SINGH JOWHAL.....PLAINTIFF

VERSUS

AAKIF VIRANI.....1ST DEFENDANT

ARROW HIFI (E.A LIMITED)2ND DEFENDANT

RULING

1. Classical cars are rare and are said to be without ready replacement. Satpal Singh Jowhal (the plaintiff or Jowhal) seeks the immediate delivery up of 3 vehicles which he claims are classical from Aakif Nizarali Virani (Virani or the 1st Defendant) and Arrow HI.F (E.A) Limited (Arrow or the 2nd Defendant). Jowhal describes himself as a vintage and classical cars collector and enthusiast.

2. There is also a request for a 4th vehicle which does not fall in that category. This entreaty is in the form of an application of a mandatory order in the Notice of Motion of 17th November 2016 for the following orders:-

1. THAT the Plaintiff be granted leave to amend the Plaintiff herein in terms of the draft Amended Plaintiff annexed hereto.

2. THAT pending the hearing and determination of this suit the Defendants jointly and severally whether by themselves or by their servants, agents or otherwise howsoever do forthwith deliver up to the Plaintiff the following motor vehicles;

- i. Mercedes Benz Coupe 200 SE registration number KGA 888.
- ii. Mercedes Benz 190SL Coupe/Cabriolet registration No. KAY 632.
- iii. Mercedes Benz 300 Adenaur registration No. KAK 180V.
- iv. Audi A3 Saloon Car registration No. KAP 330C.

3. THAT the costs of and occasioned by this Application be in the cause.

3. Shorn of detail, the three classical vehicles were placed in the custody of Arrow for repairs and refurbishment. This would be sometime in the year 2007. The circumstances under which the 4th motor vehicle being registration KAP 330C (hereinafter also the Audi) got into the hands of Arrow are somewhat less clear.

4. Nizar is the Deceased father of Virani. Jowhal's case is that sometime in 2004, the Audi was involved in an accident and was written off. Jowhal's insurers agreed to sell the vehicle at KShs. 782,000/= representing the pre-accident value thereof. Nizar agreed to buy it and on the basis of a friendly arrangement, Jowhal paid for it. The understanding being that Nizar would purchase it from him.

5. The understanding did not hold and Jowhal accuses Nizar of renegeing. In the changed circumstances Jowhal agreed that the Audi be sold to one Koge Ghai at KShs.500,000/=, not minding the loss of KShs. 200,000/= to Jowhal. Jowhal is unhappy about what he said happened to the vehicle in the meantime and while in the hands of the Defendants. Jowhal avers that the Defendants cannibalized, dismantled and removed parts therefrom. Consequently Ghai declined to purchase the vehicle. Jowhal seeks damages for conversion of the said vehicle.

6. As for the more cherished vintage vehicles, Jowhal states that it has without success demanded for their return.

7. In the end the Plaintiff prays for the following orders:-

(i) An order that the Plaintiff be given immediate access to the Plaintiff's said cars registration Nos. KGA 88, KAY 632 S, KAK 180 V and KAP 330 C in order for the Plaintiff's experts to do and prepare an assessment report on their respective conditions and current values of the said cars and to submit a valuation report to Court.

(ii) An order that the Plaintiff's said cars registration Nos. KGA 888, KAY 632S, KAK 189V and KAP 330C be ordered to be immediately placed in the custody of the Plaintiff or any other person/s as the Court shall appoint to preserve them from deterioration and waste.

(iii) The Defendants be ordered to immediately return the said soft and hard interiors and all component parts accessories and fittings, the seats, door panels and interiors of the said cars or their value as may be ascertained by the Plaintiff's experts.

(iv) General damages.

(v) The sum of Kshs.782,000/= in respect of car registration number KAP 330C.

(vi) Immediate return of the said interiors of the said cars.

(vii) In the alternative to Prayers No.(iv),(vi) and (vii) above a sum of Kshs.30,782,000/= as per paragraph 17 hereabove.

(viii) Costs and interest at Court rates.

(ix) Any other further alternative or other relief that may be just.

8. The Defendants filed separate Defences but took a similar position. Arrow admits that the vehicles were taken to their premises. It asserts that initially the vehicles were not repaired because of a dispute between Jowhal and the family of Virani who is its Director. Later Arrow was unable to work on the vehicles due to a dispute between it and Kenya Revenue Authority in which the later restricted access to its premises. Just like Virani, Arrow denies cannibalising or converting the Audi.

9. On his part, Virani denies ever agreeing to restore motor vehicle KAK 180V. In much a similar way to Arrow, he asserts that KRA was to blame and in fact avers that Jowhal should seek recourse from KRA.

10. Although this suit was filed 10 years ago, it has taken the Plaintiff upto the year 2016 to seek the current prayers. Jowhal seeks to explain this. That in November/December 2014, the Defendants requested him to take delivery of the vehicles and certain components lying in their Industrial Area premises. With that invitation came a second request that Jowhal pays a sum of Kshs. 200,000/= to KRA to free the premises from KRA customs bonded part of the premises, so as to move the cars to the non-bonded part. Jowhal paid as requested but the Defendants did not do their part. Instead the vehicles have been moved to a place unknown to him.

11. Virani states that the payment related to Arrow Motors Limited which is a separate and distinct entity from the 2nd Defendant. On the attempted negotiations Virani blames their failure on Jowhal whom he accuses of being unreasonable and brash.

12. As earlier observed the application before Court is in the nature of a plea for mandatory injunction. This is notwithstanding that Jowhal does not set out the provisions of the law upon which the plea is anchored. This type of injunction will only be granted in clearest of cases where the Court feels sufficiently assured that it can make such drastic orders with a measure of confidence that full trial will vindicate the decision as one that was correctly made. It is one to be invoked sparingly.

13. As an equitable relief, an application for mandatory injunction must not run afoul the general proposition of such a relief. Equity frowns at unreasonable delay. The first challenge to the application is that it comes 7 years after the filing of the suit and cannot be deserving. The Applicant has however sought to explain the delay by stating that for purposes of the present matter the critical date is November/December 2014 when the discussion about the possible return of the vehicles was concretised by the following understanding:-

11th December, 2014.

I, Aakif Virani, have today received the sum of Kenya Shillings Two Hundred Thousand (Kshs.200,000/=) to release the four (4) cars of Satpal Singh Jowhal from K.R.A as per agreement between the Virani Family and Arrow Motors Limited of even date"

Signed

Aakif Virani

14. Let me for a moment agree that for the reason advanced by the Plaintiff, the period before late 2014 can be excused. What is to be said of the lapse of about 23 months thereafter as the application was filed on 24th November 2016? Were the negotiations still ongoing?

15. The answer to this can be found in numerous letters by Jowhal. See for example his letter of 21st July 2015 to Mr Greg Karungo who was

acting for the Defendants. In that letter, Jowhal expresses his frustration about the delay in reaching a settlement. He pens off by giving the Defendants a 10 day ultimatum to accept the offer contained therein. No agreement had been reached 4 months later when he fired off another letter of 9th November 2015 in which he makes it clear that *“If you want a settlement, it will be on my terms i.e. on the basis of proposed (offer) above AND NO OTHER”*. Still the impasse persists and then the stinger of 15th December 2015. For purposes of demonstrating whether there were real prospects of an amicable settlement at that stage the last 2 paragraphs of the letter are reproduced here below;-

“Let this be made very clear to you. There is to be no settlement come Hell, Hail or High Water. Come in the open and proceed with the cases. Do not make any “offers” to settle as such overtures and offers will be rejected out of hand. Your so-called offers of settlement are a laughing stock now and are insincere and an attempt by you to hide what you have done and intend to do with my cars over which your ill-designs are to usurp them.

You bet, in me you will find a tough customer. I am going to go for the whole hog (ie. a fat castrated male pig. I like its nyama) it will be sweet to have it when all the cases have been determined, I do not care which way they go. At least there will be a finality and I would have seen the back of you guys”.

16. An observation to be made is that by July 2015 the prospects of a settlement were slim. Can it therefore be said that the Plaintiff acted with the necessary agility to enforce the agreement of 11th December 2014, by bringing an application 18 months later after it was overtly clear that it was falling through? I think that delay is not well explained and must be held to be unreasonable. It is not one to be tolerated by equity in particular when the relief sought is one as drastic as a mandatory order.

17. That said, this Court observes that the argument made by the Defendants for holding the vehicles may be standing on weak footing this far. In the replying affidavit of Virani, the 2nd defendant contends that it holds the vehicles in exercise of its repairer’s lien over the unpaid charges. That may be so but that has not been pleaded by the Defendants in their statements of Defence. It is brought up for the first time in the response to the application.

18. One other matter. In the course of hearing the Application, the Defendants made an offer to return the vehicles but on condition that their claim for repair charges be guaranteed and Kshs. 14,600,000/= being storage charges to a 3rd party be paid. In respect to the former, I did not sense that this could not be worked out given that in the application before Court the Plaintiff was prepared to give an undertaking as to damages if the release order was made in his favour. The more problematic one would be the storage charges and in fairness to the Plaintiff he was correct in asserting that the issue was only raised from the bar without supporting proof.

19. I would think that the discussions that could lead to mitigation of losses in this matter are to be encouraged because the positions of the parties though a chasm for now may not be intractable. One side seeks release of vehicles and some damages and the other now sets up the right of a repairer’s lien. Of course the Trial Court will eventually settle the matter but the parties may consider it a common sense matter to reach an arrangement that moderates the losses as they pursue either an amicable settlement or Court resolution.

20. But for now the Notice of Motion dated 17th November 2016 is hereby dismissed with costs.

Dated, delivered and signed in open Court at Nairobi this 3rd Day of May, 2019.

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F. TUIYOTT

JUDGE

Present:-

Okula h/b Amollo for Plaintiff

N/A for Defendant

Nixon – Court Assistant