



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 45 OF 2004

(Being an appeal from the Ruling/Orders of Hon. S. Muketi, SRM, Nakuru delivered on 19th February, 2004 in Nakuru CMCC No. 270 of 2004)

LULE AUTOSPARES LTD.....APPELLANT

VERSUS

RIFT VALLEY AGRICULTURAL CONTRACTORS LTD.....RESPONDENT

JUDGMENT

1. This appeal arises from the decision of the lower court made on 19th February 2004 in relation to the Chamber Summons dated 5th February 2004 wherein the Plaintiff (Respondent herein) had sought, inter alia, the following orders, that -

(1) ...

(2) *pending the hearing and determination of this application the Plaintiff/ Applicant be allowed to repossess the earth moving machines registration numbers X-GK 8061 engine No. 96F 1119 and KUH 332 engine No. 99 E7750,*

(3) *pending the hearing and determination of this suit the defendant by itself, its servants and or agents be restrained by way of an injunction from holding, using or in any other manner interfering with the Plaintiffs quiet and peaceful possession of the machines mentioned in paragraph 2 hereinabove)*

(4) *the officer commanding Nakuru) Molo) Busia or any other Police Stations in the whole area of command the said machines may be do provide security,*

(5) *the costs of the application be provided for.*

2. The synopsis of the Plaintiffs (Respondent) case was that by an Agreement dated 8th April 2002, it hired 2 graders of Caterpillar to the Defendant (Appellant) for a period of 7 months commencing on 1st January 2002 and ending on 30th July 2002. It was agreed by the parties that upon expiry of the lease period or completion of its project, the Appellant would return the machinery to the Yard at Nakuru. However, the Respondent alleged that despite written requests, by letters dated 19th December 2003 and 2nd January 2004, the Appellant refused to return or deliver the said machinery as agreed. Therefore, the Respondent sought a declaration that retention of its machinery by the Appellant was unlawful, general damages for conversion and costs of the suit.

3. The Respondent also sought interlocutory reliefs in the Chamber Summons dated 5th February 2004, who's Ruling is the subject of this appeal. The Summons aforesaid, was heard ex-parte in the first instance and allowed in terms of prayers (2) and (4) thereof. Upon being served, the Respondent filed Grounds of Opposition dated 9th February 2004 and a Replying Affidavit of Nashon Oluoch sworn on 10th February 2004. It contended that the application was pre-mature under the agreement, that the court lacked jurisdiction to determine matters outside Nakuru, the application had not satisfied the requirements for grant of an interlocutory injunction set out in **GIELLA Vs. CASSMAN BROWN & COMPANY LIMITED [1973] E.A. 358** and the orders granted ex-parte are premature as they were conclusive and condemned the Appellant without being heard.

4. The Appellant further contended that the spirit of the agreement was that it would retain the machinery until completion of the projects assigned to it by the then Ministry of Roads, Housing and Public Works. Thus after the 7 months period stipulated in the agreement lapsed the two continued working together and the Appellant annexed payment vouchers of cash advances to the Respondent.

5. However, the Appellant alleged that at the time when it acquired the machines, they were not in good working condition. It repaired and reconditioned them at its own expense pursuant to an oral agreement with the Respondent that the costs would be deducted from the moneys to be paid for the hiring. As these costs had not been reimbursed, the Appellant was holding the machinery as lien.

6. In her Ruling, the learned Magistrate found that she had territorial jurisdiction as the cause of action arose in Nakuru where both parties carry on business. She however declined to make a finding on the claim that the subject matter exceeded her pecuniary jurisdiction as the issue was raised for the first time during submissions and the claim that the machinery was worth Kshs. 8 million was made from the bar. In any event had the issue been properly raised, the court had jurisdiction to determine the matter as the dispute was not one of ownership and had nothing to do with the value of the property.

7. The court further held that the contract was for a period of 7 months. However, as the Respondent had by its conduct indicated that they still recognized the contractual relationship, they could not repossess the machinery without notice. Therefore, as the machines had been repossessed by the Respondent pursuant to the ex-parte order issued on 6th February 2004, she ordered the Respondent to release the machines to the Appellant, at the Appellant's costs. She further directed the parties to operate under the terms of the agreement in relation to the daily charges and costs of repairs and that the Appellant shall hand over the machinery, in good working condition, to the Respondent within 30 days.

8. Aggrieved by the finding of the court, the Appellant has appealed to this court on four grounds set out in the Memorandum of Appeal dated 22nd March 2004, that-

(a) the trial magistrate erred in law and fact in failing to consider that she had no monetary jurisdiction to entertain the suit before her,

(b) that the trial court erred in law and in fact when she failed to take into account that by making an order that the Respondent do repossess the Caterpillars, she concluded the suit before her,

(c) that the learned magistrate erred in law and fact when on her own motion she made an order determining the contract between the Appellant and the Respondent,

(d) that the learned magistrate erred in law and fact when she directed the Appellant to return the Caterpillars to the Respondent after 30 days in good working condition without any knowledge of each caterpillar's mechanical condition.

9. The appeal was canvassed by way of written submissions; the Appellant's were filed on 22nd June 2011 while those of the Respondent were filed on 14th November 2011. The issues for determination in this appeal are-

(a) Whether the trial court had jurisdiction to entertain the matter before her; and

(b) Whether the trial court erred in granting the order issued on 19th February 2004.

Of whether the court had the requisite jurisdiction

10. The Appellant objected to the territorial and pecuniary jurisdiction of the lower court. Jurisdiction was defined by the case of **OWNERS OF THE MOTOR VESSEL "Lillian S Vs. CALTEX OIL (KENYA) LIMITED [1989]**, quoting an excerpt from **Words and Phrases Defined- Vol3: I-N, Page 113-**

"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the Statute, Charter or Commission under which the court is constituted, and may be extended or limited by the like means. A limitation may either be as to the kind and nature of actions and matters of which the particular cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics....Where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."

11. The first limitation to the jurisdiction of the Resident Magistrate's court is found under the Civil Procedure Act, which provides for the places where suits may be instituted, thus providing for the territorial jurisdiction of the Subordinate Courts. **Section 14** thereof provides that a suit for compensation for a wrong against the Plaintiff or movable property may be filed where the cause of action arose or where the defendant resides or ordinarily carries on business. The Plaintiff is given an option to choose the forum in which he wishes to be heard.

12. I have perused the pleadings herein and note that the Appellant's address is listed as P.O. Box 13945 Nakuru. Therefore it appears that the Appellant carries on business in Nakuru. Further it was not disputed that the cause of action herein arose in Nakuru. Consequently, I find that the trial magistrate had the requisite territorial jurisdiction to determine the matters herein. The fact that one of the machines is located in Busia, outside the territorial jurisdiction of the court had no bearing on the place of filing the suit.

13. The pecuniary jurisdiction of the Resident Magistrate's Court in civil matters is provided for under Section 5 (1) of the Magistrates Courts Act, (*Cap 10, Laws of Kenya*) as follows-

"S. 5(1) Subject to any other written law the Resident Magistrate's Court shall have and exercise jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter in dispute does not exceed Provided that the Chief Justice may, by Notice in the Gazette increase the limit of jurisdiction."

14. Accordingly, the court can only deal with proceedings of a civil nature whose subject matter has a value falling within the monetary limit set out in Section 5(1). The Respondent contended that the term subject matter refers to the value of the Plaintiffs claim. As such, where the claim was for an injunction or enforcement of a contract as is in the present case, it was not possible to place a monetary value to the claim. Therefore the court should find that the subject matter of the suit to be the relief sought.

15. The term "subject matter" has the three possible meanings. In **Black's Law Dictionary, Ninth Edition:** the term means either "**the issue presented for consideration, or the thing in which a right or duty has been asserted, or the thing in dispute.**" Under the above definition the two machines leased out to the Appellant also constitute the subject matter of the suit contemplated by Section 5 of the Magistrate's Court Act. Any orders whether of repossession or injunction are pegged on their monetary value falling within the court's jurisdiction. The fact that ownership thereof was not

contended did not in my view have any bearing to this issue, and the court erred in finding otherwise.

16. The Appellant contended that their value exceeded the pecuniary jurisdiction of the lower court. Although there was no evidence submitted on their value, Counsel submitted that the two graders or earth-moving machines are not cheap and the court ought to have taken judicial notice of their monetary value. I disagree with the submissions of Counsel in this regard as the value of the machines was not a matter that the court could take judicial notice of under Sections 59 and 60 of the Evidence Act, Cap 80.

17. The court must therefore decide the issue based on the facts and evidence before it, no matter how scanty or limited as once raised, it is a question that must be determined forthwith. It is therefore my view that without evidence as to the value of the machines, the court could not determine this question. The challenge on the jurisdiction of the lower court is dismissed as there was no basis laid to challenge the same.

Of whether the mandatory injunctive orders of 19th February were properly issued

18. The purpose of an interlocutory injunction issued under Order 40 of the Civil Procedure Rules, 2010, is to preserve the property in dispute or the rights of the parties pending the hearing and determination of the suit. It is intended to preserve the status quo pertaining as at the time when the cause of action arose pending the final declaration of the rights of the parties.

19. The principles for granting an interlocutory injunction as per the celebrated case of **GIELLA Vs. CASSMAN BROWN [1973] E.A 358**, are that the Plaintiff must demonstrate a prima facie case with a probability of success, that he stands to suffer irreparable damage unless the orders sought are granted and where the court is in doubt, it will decide the application on a balance of convenience.

20. The Respondent herein however did not seek to maintain the status quo of the matter or to restrain the Appellant from doing any act that may prejudice the suit and defeat the rights of the parties if not granted at that interlocutory stage. It sought to be allowed to repossess the machines which were at the time in the possession of the Appellant. The orders sought in the interlocutory application were similar to the final orders sought in the Plaintiff.

21. The orders sought being for a mandatory injunction, the Respondent had to demonstrate in addition to the principles in **GIELLA VS. CASSMAN BROWN** (supra), a clear case and special circumstances. The distinction between a mandatory injunction and the other types of injunctions was laid out by Megarry, J in the English case of **SHEPHERD HOMES Vs SANDHAM [1979] 3 W.L.R. 348**, cited with approval by the Court of Appeal in **KAMAU MUCUHA Vs THE RIPPLES LIMITED, Civil Application No. NAI 186 of 1992, (U/R)**, as follows-

"Whereas a prohibitory injunction merely requires abstention from acting, a mandatory injunction requires the taking of positive steps, and may (as in the present case) require the dismantling or destruction of something already erected or constructed. This will result in a consequent waste of time, money and materials if it is ultimately, established that the defendant was entitled to retain the erection."

22. Thus, in **HASSAN Vs. ADAN [2007] E.A. 178** the court held that the Plaintiff bears a much higher standard of proof than that set out in **GIELLA Vs. CASSMAN BROWN** (supra). The court was of the view that the principles applicable for the grant of a mandatory injunction, to be those set out in **LOCABAIL INTERNATIONAL FINANCE LIMITED Vs. AGRO-EXPORT & ANOTHER [1986] ALLER 901 -**

A mandatory injunction ought not to be granted in an interlocutory application, in the absence of special circumstances and then only in cases where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple summary act, which could easily be remedied or where the Defendant has attempted to steal a march on the Plaintiff.

Moreover, before granting a mandatory injunction the court has to feel a high sense of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard that was required for a prohibitory injunction."

23. I have carefully considered the affidavits of the parties herein and I find that the application the subject of the appeal herein did not meet the above threshold. Firstly it was not contended that the Appellant took possession of the machinery pursuant to the agreement by the parties. The dispute was essentially the duration for which the same had been leased. Although alleged by the Respondent to be for 7 months, the Appellant contended that under clause 6 of the Agreement, the contract was upon the expiry of the 7 months period to be extended until completion of the projects being undertaken by the Appellant.

24. The Appellant in addition contended that even after the expiry of the 7 months, there was evidence that the Respondent continued to accept payment from the Appellant as under the contract although the authenticity of some of the receipts were disputed by the Respondent. Thus by its conduct the Appellant intimated that the agreement was still in force,

25. From the above it is clear that this was not a clear and simple case for which the interlocutory mandatory injunction could be granted to the Respondent. Having demonstrated that it may have an interest over the machines which can only be determined after full hearing, the Appellant was entitled to retain possession of the machinery pending the final disposal of the suit. In addition the balance of probability tilted in favour of the Appellant as it was at the time undertaking projects pursuant to contracts issued by the then Ministry of Roads and Public Works. Any damage suffered by the Respondent could be properly compensated under the terms of the contract between the parties.

26. Further at this interlocutory stage, and having not had a chance to consider all the evidence or heard the submissions and arguments of the parties the court should refrain from making any findings on disputed facts or final orders. The correct approach is set out in **MBUTHIA Vs. JIMBA CREDIT FINANCE CORPORATION & ANOTHER [1988] KLR I -**

"...not to decide the issues of fact, but rather to weigh up the relevant strength of each side's proposition."

27. Consequently, it is my finding that the trial court erred when it made conclusive findings as to the duration and the rights of the parties under the contract. It erred when it made a finding that it could not have been the intention of the parties for the contract to be until the completion of the works given to the Appellant by the Ministry, without hearing the parties on the same and while their conduct demonstrated that it may have been the case and having found that their conduct demonstrated that the contract was still in existence after the expiry of the 7 months stipulated therein. I also agree with the Respondent that the court erred in directing the Appellant to hand over the machines to the Respondent in good working condition while it was not clear under what condition they were hired. The court in essence terminated the contract without affording the parties a chance to be heard.

28. For the above reasons, the appeal herein succeeds and the orders issued on 9th February 2004 are hereby set aside, and substituted as follows-

(a) the lower court has territorial and pecuniary jurisdiction to hear the suit,

(b) The application dated 5th February 2004 is dismissed

(c) The Appellant shall retain possession of the machines registration Nos. X GK 8061 engine No. 96 F and KUH 332 engine NO. 99 E7750 pending the hearing and determination of the suit

(d) the terms as to the costs of the lease and repair of the machinery shall be as per the agreement of the parties dated 8th April 2002

(e) The Appellant shall have the costs of this suit.

Dated, signed and delivered at Nakuru this 6th day of June, 2014

M. J. ANYARA EMUKULE

JUDGE