REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAKURU
Civil Appeal 295 of 2001

CMC MOTORS GROUP LTD.

EVANS KAGECHE BORO. ……. APPELLANTS

AND

EVANS KAGECHE BORO …….....…… RESPONDENT

(An appeal from the ruling of the High Court of Kenya at Nakuru (Rimita J) dated 23rd March, 2001

in

NAKURU H.C.C.C. NO. 472 OF 2000)

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JUDGMENT OF THE COURT

The appellants are aggrieved by the ruling of the superior court (Rimita J) dated 23rd March, 2001 wherein the superior court allowed an application for interlocutory injunction made by the respondents herein and restrained the appellants from, inter alia, disposing of a tractor registration No. KAK 967T Fiat and in addition granted in effect a mandatory injunction enjoining the appellants to release the tractor to the respondent on condition that the respondent would not deal with it in any manner detrimental to the appellants pending the determination of the suit.

The respondent's case as pleaded in the amended plaint was as follows: In or about August 1998, the respondent negotiated with CMC MOTORS GROUP LTD, the 1st appellant for the purchase of the tractor registration No. KAK 967T Fiat and the purchase price was agreed at Kshs.1,925,000/=. In the same month (i.e. August 1998), the respondent paid Kshs.1,310,070/= in cash and the remaining balance was paid by post-dated cheques payable within six months (6) from the date of the sale agreement to the 1st appellant and the respondent took possession of the tractor. It was agreed between the respondent and 1st appellant that the tractor was sold in cash and at no time did the 1st appellant disclose to the respondent that the 1st appellant was the 2nd appellant's agent. On 20th June, 2000, the appellants unlawfully repossessed the tractor. At the time of the repossession, the respondent did not owe the appellants any money and no demand for payment had been made. The respondent in addition deposed in paragraphs 3, 4 and 11 of the affidavit accompanying the application for interlocutory injunction thus:

"***3. That initially, I intended to purchase the said tractor under Hire purchase terms but I changed my mind due to interest payable and decided to purchase the tractor in cash.***

4. That I informed the Defendant's Nakuru Branch Manager, that I intended to purchase the tractor in cash and the purchase price was agreed at Kshs.1,925,000/=.

11. That the sale agreement of the tractor did not either expressly or impliedly empower the respondent (s) to repossess the tractor as the agreement was oral".

The appellants by the amended defence denied that the tractor was sold to the respondent on cash basis and averred that, on the contrary, the tractor was sold on Hire Purchase terms in accordance with the Hire Purchase Agreement dated 30th September, 1998 between the respondent and CMC Holdings Limited (2nd appellant). The appellants pleaded the hire purchase terms and averred that the tractor was to remain the property of the 2nd appellant until full payment and that the respondent owed the 2nd appellant Shs.396,700/= as at 31st May, 2000 of which Shs.234,750/= represented 5 months arrears. According to the schedule to the Hire Purchase Agreement annexed to the replying affidavit of Harun Kabiru, the Nakuru Branch Manager of the 1st appellant the transaction was as follows:

- *Cash price - Kshs.1,925,000*
- *Deduct deposit - Kshs.1,310,000*
- *Balance - Kshs. 615,000*
- *Add Hire charge - Kshs. 356,700*
- ***Hire Purchase Balance Kshs. 971,700***

The hire purchase balance was to be paid by 24 equal monthly instalments of Shs.40,487/50 each with effect from 29th October, 1998 until September, 2000.

The superior court in a short ruling said in the relevant part:

"***The applicant has raised the issue of privity of contract. Although appointment of agency is provided for under the High Purchase Agreement no letter of such appointment was ever served upon the applicant. This makes it difficult for the court to decide who among the defendants dealt with the applicant and whether the applicant's claim that he had paid the agreed purchase price in full is correct. The court and the parties need the benefit of cross – examination. Meanwhile I allow the application".***

That is the sole basis on which the application for injunction was granted.

There are four grounds of appeal, thus:

"***1. The Learned Judge erred in finding that the lack of a letter of appointment of an agent entitled the Respondent herein to interlocutory orders of injunction when on the face of the contract the agent's appointment was expressly provided for.***

2. The Learned Judge erred in failing to find that the Respondent's claims that he had paid the purchase price in full were clearly disproved by the documents availed to the court at the hearing of the application.

3. The Learned Judge erred gravely in law in issuing an interlocutory mandatory injunction in favour of the Respondent in ordering the release of the suit tractor to the Respondent without any grounds having been established for such an order and without considering the severe prejudice the

order would cause to the Appellants' interests nor the fact that it would be impossible to supervise the condition attached to the order that the Respondent will not deal with the tractor in any way detrimental to the Appellants.

4. The Learned Judge erred in giving the order of injunction restraining the sale in the light of the available facts which clearly dictated against the grant of such an order and the Appellants urge that the Learned Judge's decision herein was based on the Learned Judge's failure to consider material facts and/or misinterpretation of material facts".

In granting the injunctive reliefs, the superior court was exercising equitable jurisdiction which is discretionary. The principles upon which a Court of Appeal can interfere with the exercise of discretion of a judge are well known to require repetition (see ***Mbogo v. Shah*** [1968] EA 93; ***Mrao Ltd v. First American Bank of Kenya Ltd & 2 Others*** [2003] KLR 125; ***Giella v Cassman Brown & Co. Ltd*** [1973] EA 358. In this appeal, this Court can only interfere with the judicial discretion of the learned Judge if it is satisfied that the learned Judge did not exercise his discretion judicially and in accordance with the principles for granting interlocutory injunction enunciated in ***Giella's*** case (supra) and the principles for granting mandatory injunction as stated in the case of ***Kenya Breweries Limited & Another v Washington O. Okeyo***, *Civil appeal No. 332 of 2000* (unreported) relied on by the appellants.

Did the respondent establish a prima case with a probability of success in the superior court? The respondent's case as pleaded was mainly that he had entered into an oral agreement with the 2nd appellant for the purchase of the tractor on cash basis and that at the time the tractor was repossessed he had fully paid for the tractor. The appellants' case as pleaded, on the other hand, was that the tractor was sold to the respondent on hire purchase terms in accordance with the Hire Purchase Agreement dated 30th September, 1998 and that at the time of repossession the respondent was in arrears of instalments amounting to Shs.396,700/=. The learned Judge was required to make a finding whether or not the respondent had shown a prima facie case with probability of success that the tractor was sold on cash basis and that the respondent had fully paid for the tractor.

In ***Mrao Ltd*** case (supra) this Court held, among other things, that a *prima facie* case means more than an arguable case, that the evidence must show an infringement of a right and the probability of success of the applicant's case at the trial.

The appellants exhibited a Hire Purchase Agreement dated 30th September, 1998 executed by the respondent and a letter dated 9th October, 1998 by which the Hire Purchase Agreement was forwarded to the respondent. The respondent deposed in the supporting affidavit that initially he intended to purchase the tractor on Hire purchase terms but later changed his mind and informed the appellant's Branch Manager Nakuru that he intended to purchase the tractor in cash. The respondent did not deny signing the hire purchase agreement. In law the terms of a contract which has been reduced to the form of a document can only be proved by the document itself (see ***Section 97*** of the Evidence Act) and once the terms of the contract have been ascertained from the document no evidence of any oral agreement for purposes for contradicting, varying adding or substracting from its terms is admissible only if it is within the ambit of the proviso to ***Section 98*** of the Evidence Act. The respondent's case is not prima facie within the ambit of the proviso.

The superior court did not investigate whether or not the respondent had established a prima facie case with a probability of success on the substantive dispute which was pleaded. Rather, the superior court seems to have found that there was a prima facie case with a probability of success on the issue of privity of contract. There was no dispute and the documents verified that the agreement for the sale of the tractor was between the respondent on one hand and CMC Holdings Ltd. (2nd appellant) on the other hand. The respondent initially sued CMC Motors Group Ltd. (1st appellant) but later amended the plaint to add the 1st appellant as a party. The issue of privity of contract was raised by the 1st appellant in paragraphs 3 and 4 of the amended plaint wherein the 1st appellant pleaded to the effect that the suit could not be maintained against it since it did not transact with the respondent and that there was no privity of contract. By paragraph 10 A of the amended Defence, the appellants pleaded that the 1st appellant merely

acted as agent for the 2nd appellant in ordering possession as provided in the contract.

The Hire Purchase Agreement leaves no doubt that the agreement was between 2nd appellant as the "owner" of the tractor and the respondent as the "hirer". However, clause 17 of the Hire Purchase Agreement provided:

"**The owner may appoint any branch of CMC Motors Group Ltd and/or Dobie Cooper Motors Ltd to represent them in enforcing any of the rights herein contained".**

There is no dispute that it was the 1st appellant who authorized the repossession of the tractor. This is the party that the respondent claimed to have dealt with.

Firstly, the learned Judge misapprehended the pleadings when he found that it is the respondent who had raised the issue of privity of the contract. On the contrary, the respondent did not raise that issue either in the amended plaint, replying affidavit or in the submissions. The respondent could not have raised the issue because he is the one who sued both appellants.

Secondly, the issue of the 1st appellant's authority to repossess the tractor was raised by the respondents' counsel for the first time in his submissions. He submitted in the superior court that the appellants had not exhibited any letter to show the appointment of the 1st appellant as an agent of the 2nd appellant. That issue was not however, pleaded as a cause of action. Moreover, that submission contradicted the respondent's case that he dealt with the 1st appellant in the transaction. Thirdly, clause 17 of the Hire Purchase Agreement did not require that the 2nd appellant appoint an agent by a letter in writing.

In a nutshell, the superior court granted the injunction on an extraneous and peripheral issue which was, with respect, frivolous.

In addition, the superior court did not consider whether or not the respondent would suffer irreparable injury which cannot adequately compensated by an award for damages if the order of injunction was not granted.

Lastly, the respondent did not fulfill the conditions for granting a mandatory injunction. Indeed, the superior court did not make such a finding. There were no special circumstances in this case. In our view, the respondent did not demonstrate either that this was a clear case or that there was a high degree of assurance that the respondent's case could succeed after trial.

For the foregoing reasons, we have come to the conclusion that the learned Judge misdirected himself in material respects by, among other things, failing to apply the principles for granting both interlocutory and mandatory injunction and as a result reached a wrong decision.

In the result, we allow the appeal, with costs to the appellants, set aside the ruling and the orders of injunction and substitute therefore an order dismissing the respondent's application dated 1st November, 2000 and amended on 6th December, 2000 with costs.

Dated and delivered at Nakuru this 10th day of November, 2006.

S. E. O. BOSIRE

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JUDGE OF APPEAL

E. O. O'KUBASU

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR