



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 332 OF 2000

BETWEEN

KENYA BREWERIES LIMITED 1ST APPELLANT

TEMBO CO-OPERATIVE SAVINGS &

CREDIT SOCIETY LIMITED2ND APPELLANT

AND

WASHINGTON O. OKEYO RESPONDENT

JUDGMENT OF THE COURT

This is an appeal by the two defendants, now the appellants, from the decision of the superior court (Mbaluto, J.) given on 21 November 2000 whereby the learned judge issued a mandatory injunction compelling the second appellant to release motor vehicle registration No. KAE 284J (the vehicle) to the respondent, the plaintiff in the suit, and an interlocutory injunction restraining the appellants from selling or in any way interfering with the same.

The facts of this litigation are not much in dispute. In 1990, the respondent purchased the vehicle with a loan facility made available to him by the Standard Chartered Bank. It was guaranteed by the first appellant pursuant to its executive car loan scheme set out for its employees. The first appellant claims that when he left the employment in 1998, the balance outstanding on the facility was K.Shs.457,314.95. That sum was repaid by the first appellant who was the guarantor of the loan whereupon it requested the respondent to re-imburse it. The respondent, however, claims that he fully redeemed and discharged the liability pursuant to the request. On doing so, the respondent expected that the first appellant would transfer to him the vehicle. However, that was not to be: according to the respondent, the first appellant transferred the said motor vehicle to the second appellant thereby occasioning this suit and this subsequent appeal. The respondent avers that the first appellant's action in transferring the said vehicle to the second appellant was unlawful and did amount to trespass upon the respondent's property. That averment is denied by the first appellant who claims that a sum of K.Shs.151,335/= remains due and owing by the respondent to it.

The material presented before us reveals that there are two contracts involving the parties. The first one was between the respondent and the first appellant relating to the car loan and, secondly, between the respondent and the second appellant relating to the borrowing of K.Shs. 930,000/= by the respondent for the purpose of purchasing a property. In the loan application form duly signed by the three parties to the suit the respondent offered all his investments and savings with the second appellant as security for the loan offered by it. He further authorised the first appellant to recover any outstanding loan from his wages, salary and other dues from the first appellant. It is manifestly clear that whatever loans, either car

or property, the respondent had to service, they had to come from his salary with the first appellant. Also, the second appellant looked to the first appellant for security and payment of the loan. Further, the purport of the loan agreement was that the car would be transferred to the respondent only upon full settlement of his account with the second appellant.

The test whether to grant a mandatory injunction or not is correctly stated in Vol. 24 Halsbury's Laws of England 4th Edn. para 948 which reads:

"A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff a mandatory injunction will be granted on an interlocutory application".

Also in *Locabail International Finance Ltd. V. Agroexport and others* [1986] 1 ALL ER 901 at pg. 901 it was stated:- "A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction."

The principles of law enunciated by these decisions have received full approval by the courts within our jurisdiction. See the cases of *Belle Maison Limited vs. Yaya Towers Limited* H.C.C.C. 2225 of 1992, per Bosire, J. (as he then was) and *The Ripples Limited vs. Kamau Mucuha* H.C.C.C. No. 4522 1992 per Mwera, J. Mr. Onsando Osiemo, for the appellant, has submitted that the learned Judge ought not to have granted a mandatory injunction against the second appellant and thereby compelling him to release the vehicle at the interlocutory stage as no exceptional circumstances existed, and moreover, the respondent was indebted to the second appellant, a fact not disputed by the respondent.

The respondent did not dispute his obligation to the second appellant and the fact that the loan owed to it is serviced and channeled through the first appellant. The obvious resultant effect, therefore, of the mandatory injunction granted by the superior court is to relieve the respondent of his obligation to pay his just debt. He should not be allowed to steal a march by avoiding his just obligations. Moreover, it would certainly be inequitable. It is trite that a contracting party who fails to perform his part of the contract cannot obtain an injunction to restrain a breach of covenant by the other party. In the circumstances, we think that there was nothing to justify the grant of a mandatory injunction on the interlocutory application that fell for consideration before the learned Judge and in that respect the learned Judge erred in granting it.

We allow the appeal and set aside the ruling dated 21st November, 2000. We order that the application dated 6th October, 2000 be dismissed with costs. The appellants shall also have the costs of this appeal.

Dated and delivered at Nairobi this 31st day of May, 2002.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR