

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 1766 OF 2017

JOHN KIHARA TIMANI NJIHIA.....CLAIMANT/APPLICANT

VERSUS

XPLICO INSURANCE COMPANY LIMITED.....RESPONDENT

RULING

1. The Claimant/Applicant seeks through his Notice of Motion application dated 6th September 2017 for orders to restrain the Respondent from taking possession of a motor vehicle he holds and over which he claims a lien for unpaid salary and dues now unpaid since April 2017 to date. The Claimant/Applicant seeks further that the matter be heard on priority basis for the balance of the claim. The application is supported by his affidavit sworn 6th September 2017 and a further affidavit of 26th September 2017. The application was opposed by the Respondent who filed a Replying Affidavit sworn by Nelson Chege on 20th September 2017.

2. The Respondent in Reply stated that the Claimant was an employee of the Respondent as pleaded but that the prayers sought were founded on material misrepresentation and non-disclosure of all facts relevant to the contractual relationship that prevailed between the Claimant and the Respondent. The Respondent asserted that the Claimant resigned by whatsapp message on 7th August 2017 and wrote an official resignation letter on 14th August 2017 without a hand over of his operations and the assets and tools of trade in his possession. The Respondent asserted that the Claimant even asserted that the vehicle was at the Mombasa branch which would amount to the theft of M/v KCA 472H if he took possession of it after his resignation. The Respondent asserted that the Claimant would be paid his dues subject to the complete handover of the outstanding issues of the company. It was asserted that the Claimant was responsible for driving strategic and business growth of the Respondent's and his failure together with that of previous management of the Respondent had led to a complete rundown of the Respondent, loss of profitability and customer base leading to inability to meet obligations including salary arrears to the Claimant and other employees. The Respondent's principal officer deponed that the Claimant was suspected of malpractices that led to loss of funds for insurance certificates unaccounted for or unpaid for. The deponent stated that the Respondent is willing and ready to prepare and settle the terminal dues that will be due and owing to the Claimant on such terms and conditions as may be directed by this Honourable Court or agreed between them.

3. The parties urged and opposed the application on 18th October 2017 and ruling reserved for today. The Claimant urged through his counsel Mrs. Matata that the orders were fit to grant. She submitted that the Claimant/Applicant was lawfully employed by the Respondent and that the Respondent had refused to pay his salary for the months of April, May, June and July forcing him to resign in August in circumstances that in his view amount to constructive dismissal. She submitted that the Claimant was living financial difficulties due to the non-payment of his dues resulting in his hold of the Respondent's M/v KCA 472H a Toyota Crown as lien for his salary. She placed reliance on the case of **Max Masoud Roshanker & Another v. Sky Aero Ltd [2015] eKLR** where the court made an order for payment at interim stage and asserted that the Court has the power and authority to grant the orders sought. The Respondent objected to the grant of the orders sought by the Claimant/Applicant and its counsel Mr. Githinji urged the Court to dismiss the motion and instead order the release of the subject vehicle to the Respondent. He submitted that the vehicle was undisputedly not assigned to the Claimant and that the vehicle was used for operations in Mombasa. He submitted that the lien claimed is unknown in law and equity. He stated that he had gone through the **Halisbury's Laws of England** as and in particular the paragraph on lien as well as the authorities cited and had not come across a situation where an employee who voluntarily resigned can take possession of the employer's assets. He submitted that this is unlawful and would open the jurisdiction to endless illegalities by employees who resign from their positions. He stated that the Respondent had not refused to process and settle the Claimant's dues and all it was saying as that it has the responsibility to complete the handover process. He submitted that a forensic audit is underway and initial findings suggest malpractices by the Claimant. He stated that the potential counterclaim would in his view, be in excess of the arrears being claimed by the Claimant. He submitted that the Respondent was being placed in the awkward position of having the possibility of claims being lodged against it due to the accidents or claims that may arise while the vehicle is in possession of the Claimant/Applicant. He submitted that the arrears are not unique to the Claimant and the Respondent had made efforts and created measures to revive the company. He submitted that the Claimant's conduct as his salary fell into arrears amounted to estoppel in law against the demand for immediate payment of all his arrears. He cited the case of **Unibuilt (K) Ltd v Mukhi & Sons [2012] eKLR** specifically citing page 2 of the authority and **Halisbury's Laws of England 4th Edition** paragraph 502. He submitted that the right of lien is based on common law and it allows one to retain that which was rightfully and continuously on his possession. He urged that the application be declined as the vehicle was not rightfully and continuously in the Claimant/Applicant's possession. In her brief reply, Mrs. Matata submitted that the Respondent had erroneously interpreted the expression 'the car is still in Mombasa' to mean that the vehicle was still in Mombasa with the Respondent. She submitted that the vehicle was in the Claimant/Applicant's possession lawfully and there was no evidence to the contrary. She stated that the Claimant had a right to a salary per Section 17 of the Employment Act and that justice should not unduly be delayed and the Court should apply the overriding principles and Article 159 alongside Sections 1A and 1B of the Civil Procedure Act. She urged the Court to find that there is a lien.

4. The law on lien is captured in various legal writings. In the **Halisbury's Laws of England 4th Edition**, the various types of lien are discussed. A legal lien is in general an entitlement to a person in possession of chattels to retain them until all claims or accounts the person in possession against the owner of the chattel are satisfied (paragraph 716 **Halisbury's Laws of England 4th Edition** at pages 369 to 360). In

addition the holder of a lien, being voluntarily in possession of the chattel which belongs to another is a bailee of the chattel and owes the normal duty of care owed by the bailee towards the owner. On possession, no legal lien can arise until possession has been obtained by the person claiming the lien. (see paragraphs 721 and 722 Halisbury's Laws of England 4th Edition at pages 362 and 363). The wrongful act of the person is generally insufficient to found a legal lien. The possession necessary to sustain a lien must be lawful and additionally there must be continuity in possession (see paragraphs 723 and 724 Halisbury's Laws of England 4th Edition at pages 364 and 365). The law on estoppel is also settled. Estoppel is defined in Halisbury's Laws of England 4th Edition at paragraph 951 as follows:- *there is said to be an estoppel where a party is not allowed to say that a certain statement of fact is untrue, whether in reality it is true or not*. In another legal definition **Black's Law Dictionary Ninth Edition** defines estoppel as *a bar that prevents one from asserting claim or right that contradicts what one has said or done before or what has been legally established as true*. In this case, the Respondent asserts there is an estoppel on the arrears sought by conduct of the Claimant. This when reflected against the conduct of the Claimant in abiding payment from April, May, June and July 2017 culminating in the resignation in August 2017 in my view cannot be stated to be an estoppel against claiming the salary due. If that was the case any debtor would be estopped from claiming payment. In my view, an estoppel would arise if the Claimant had pledged not to claim the funds from the Respondent for either a time or until the satisfaction of a condition. There is no estoppel in my view that has arisen from the delay in the Claimant seeking payment through the Court after a lapse of a few months. Nothing presented to court suggests any intention by the Claimant to forego his dues. As regards the lien claimed, the case law cited shows clearly that the doctrine of election would not apply where a party decides to use a suit to enforce a proprietary lien – see **Unibuilt (K) Ltd v Mukhi & Sons** (supra).

5. The Claimant holds the Respondent's M/v KCA 472H Toyota Crown and asserts that he has a lien over it. In the circumstances, it seems the debt owed being salary dues is what has prompted the continued detainer of the vehicle whose ownership is undisputed. The Claimant claims salary arrears that the Respondent concedes that it will pay either on order of the Court or if parties agree. In my view, the continued retention of the vehicle by the Claimant amounts to what in law is a lien. However, as it is in respect of a contract of employment, can it amount to a legal lien as defined above? In my view, in employment relations, the conduct of parties can broaden the scope of the attachment of the equitable lien. In this case, was the vehicle assigned to the Claimant? It has not been demonstrated to this Court that the vehicle has been so assigned. Did the Claimant acquire the vehicle or retain it in suspicious circumstances that would deny him the right to retain it? The Court is of the firm view that the circumstances in which the vehicle was moved by the Claimant were not illegal as it was indicated to be for the use of the Mombasa staff. It therefore is disingenuous to suggest that the Claimant was not entitled to have the vehicle. The only difficulty in my view is allowing the continued detention of the vehicle absent any other cause. As it is currently the insured property of the Respondent, the Claimant has an obligation to hold the vehicle safe from any harm or loss and ensure the Respondent does not suffer any loss as a result of the Claimant's retention. Since the claim is monetary and the Court has been moved to expedite the process, it is clear that the Claimant is interested in recovering his dues. As the sums in dispute are finite as far as the wages for April, May, June, July and days worked in August, it is meet and just that an order issues for the immediate payment of the salary for April 2017, May 2017, June 2017, July 2017 and upon the payment being made the vehicle be released forthwith. The Respondent to make the payments within 7 days of today. The parties to confirm to Court on the payment on 31st October 2017. The wages for August will be an issue for trial as to the quantum of days worked. In the premises, the application is partially allowed and therefore the Claimant will recover costs of Kshs. 10,000/- for the same. The reason of capping the costs is because of the unyielding nature of the parties. This was something the parties could have agreed on rather than drawing it out in a full-fledged legal dispute given the exchanges in the matter.

It is so ordered.

Dated and delivered at Nairobi this 23rd day of October 2017

Nzioki wa Makau

JUDGE