



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 1735 OF 1998

MICHEL BAGARAGAZA.....PLAINTIFF

VERSUS

NATIONAL CEREALS & PRODUCE BOARD.....DEFENDANT

R U L I N G

At the centre of these proceedings is a motor vehicle registration No. KAJ 158F Trailer Number ZB6691, make lorry, which is said to have been seized by the defendant on the basis of a sum of Ksh. 850,000 owed to the defendant by the plaintiff. The said motor vehicle is owned and registered in the name of the plaintiff.

It is the plaintiff's case that the seizure of the said motor vehicle was wrongful as he does not owe the defendant any money. As a result of the defendant's actions, the plaintiff says he has suffered loss and damage. He therefore prays for general damages a sum of Kshs. 125,000/- interest and costs.

Alongside the plaint filed on 5th August, 1998, there was filed an application by way of Chamber Summons under order 39 Rules 1,2, 3 and 9 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act for orders that the defendant be restrained from committing any damage, waste, abuse, sale and/or transfer of the suit property, that the defendant be ordered to hand over and the plaintiff be put in possession of the suit property and all the title documents.

The application is opposed and grounds of opposition together with a replying affidavit have been filed. I have also heard the submissions of both learned counsel on the matter.

Before addressing the issues canvassed by both learned counsel I have to observe that, none of the orders sought in the interlocutory application are contained in the prayer set out in the plaint. Effectively therefore even if the plaintiff were to succeed in this suit he will only be entitled to the orders prayed for in the plaint because the court cannot award what has not been prayed for.

Be that as it may, both parties have referred to an affidavit sworn by the plaintiff and which has been annexed to both the application by the plaintiff and reply by the defendant.

The said affidavit which was sworn by the plaintiff on 31st March, 1998 reads as follows:

"1 THAT I am a registered transporter owner of motor vehicle registration number KAJ 158 F Trailer ZB 6692.

2 THAT on around July, 1997 my above motor vehicle was used without my knowledge

and consent to transport 570x90 kg bags of maize belonging to National Cereals and produce Board which maize got lost.

3 THAT I hereby admit liability for the loss of 570x90kg bags of maize valued at Kenya Shillings Eight Hundred and Fifty Thousand (Kshs. 850,000/-)

4 THAT I propose to pay the board for the loss in seven equal instalments of Kshs. 100,000 payable on or before the 30th day of each successive month with effect from 30th April, 1998 and the final instalment of Kshs. 150,000 payable on or before 30th November, 1998. 5 That I further give my authority to national Cereals and Produce Board to take possession of my said lorry and dispose of the same in the event of default of any one instalment and hereby deposit the original logbook together with a signed blank transfer form.

6 That the facts deponed to herein are true and within my knowledge information and belief.”

Based on the foregoing affidavit the defendant exercised the right to seize the said motor vehicle and has taken steps to have the same sold.

The plaintiff now says he was coerced to sign the said affidavit. He swore the affidavit under duress as the defendant had resolved to withhold the said motor vehicle until he admitted and undertook to pay the said sum of money.

For the plaintiff to succeed in obtaining the injunction orders sought he must show a prima facie case with a probability of success, that damages would not be adequate compensation and in case of doubt the court will decide the matter on a balance of convenience.

The disputed affidavit was sworn on 31st March, 1998. The allegations of duress were made in the affidavit sworn by the plaintiff on 5th August, 1998. For over 4 months he never complained to any authority that he had been coerced to swear the affidavit of 31st March, 1998. He did not even write to the defendant to raise the complaint. In the intervening period, he made a payment of Shs. 100,000/- to the defendant in part settlement of the admitted liability. Again he did not make the payment under protest neither did he complain of any intimidation.

Affidavit evidence is under oath and it is an uphill task for any litigant to discount his own oath especially when such evidence is clear and unambiguous.

My literal reading of the affidavit in dispute is that it was an unequivocal admission of liability by the plaintiff to the defendant. What the defendant has done is in accordance with the plaintiffs own instructions as contained in the said affidavit. With respect I set no prima facie case with a probability of success. Even if there were to be such a case ultimately the plaintiff would be entitled to damages which he has pleaded and, it has not been shown the defendant will be unable to satisfy any decree that may be issued against it.

Accordingly this application must fail. The same is hereby dismissed with costs.

Order accordingly.

Dated and delivered at Nairobi this 25th day of August, 1998

A. MBOGHOLI MSAGHA

JUDGE



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