



**Adrian Kenya Limited v Rentco Africa Limited & another (Civil Case E067 of 2024)  
[2024] KEHC 9869 (KLR) (Commercial and Tax) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9869 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E067 OF 2024  
JWW MONG'ARE, J  
JULY 25, 2024**

**BETWEEN**

**ADRIAN KENYA LIMITED ..... PLAINTIFF**

**AND**

**RENTCO AFRICA LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**PHILLIPS INTERNATIONAL AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. On 23<sup>rd</sup> August 2021, the parties entered into a Master Lease Agreement (“the Lease Agreement”) where the 1<sup>st</sup> Defendant leased out various equipment to the Plaintiff for a consideration of lease instalments at the prescribed rate from time to time, payable quarterly in advance. It was a term of the Lease Agreement that the 1<sup>st</sup> Defendant could sell, transfer or assign any of its rights therein to its financiers, who would in turn, re-assign any such rights and as such, on 20<sup>th</sup> August 2021, the 1<sup>st</sup> Defendant notified the Plaintiff of its exercise of the right to assign these rights to Stanbic Bank (“the Bank”) which was effected through a Sale of Receivables and Assignment Agreement executed between the 1<sup>st</sup> Defendant and the Bank (“the Assignment Agreement”) on 9<sup>th</sup> September 2021. As per the Assignment Agreement, the Plaintiff, as the Lessee, was to pay to the Bank all amounts due and payable to the 1<sup>st</sup> Defendant under the Lease Agreement.
2. In due course, the Plaintiff fell behind on its obligations due under the Lease Agreement and failed to make the requisite payments expected from it to the Bank, as required by the Assignment Agreement. This prompted the 1<sup>st</sup> Defendant to issue inter alia a Proclamation Notice through the 2<sup>nd</sup> Defendant seeking to repossess and or sell the leased equipment and attach such properties of the Plaintiff, while alleging that a decretal amount of Kshs.50,675,158.05/= was due as at January 2024. This intention to repossess the leased equipment and attach the Plaintiff’s property precipitated the filing of the



instant suit by the Plaintiff on 15<sup>th</sup> February 2024. To forestall the repossession and attachment and contemporaneously with the Plaintiff, the Plaintiff also filed the Notice of Motion dated 15<sup>th</sup> February 2024 seeking to restrain the 1<sup>st</sup> Defendant from repossessing, attaching and interfering with the Plaintiff's possession of an assorted Equipment pending the determination of the suit. The application is supported by the grounds on its face and the supporting affidavit of the Plaintiff's director, Benard W. Njoroge, sworn on 15<sup>th</sup> February 2024. It is opposed by the 1<sup>st</sup> Defendant through the replying affidavit of its Company Secretary and Head of Legal, Margaret Mucheru sworn on 11<sup>th</sup> March 2024. In addition, the parties filed written submissions, which I have considered, and will make relevant references to in my analysis and determination below.

### **Analysis and Determination**

3. I have carefully gone through the application and the parties' depositions and written submissions filed before this court. Before dealing with the substance of the application, I will first deal with the issue raised by the Plaintiff that the 1<sup>st</sup> Defendant ought to have proceeded in the manner provided for dispute resolutions under the Master Lease Agreement including arbitration. Whereas I am alive to the dictates of Article 159 of the [Constitution](#) that enjoins the court to promote alternative dispute resolution mechanisms, and where possible give it full effect, it is trite that parties are also bound by the terms of the contracts they submit themselves to and this court cannot re-write a contract between parties. I agree therefore with the 1<sup>st</sup> Defendant that Clause 32.1 of the Lease Agreement expressly states that "...We both agree to submit to the jurisdiction of the Courts of the Republic of Kenya." Clauses 32.2. Clause 32.3 of the Master Lease Agreement then go on to state that parties shall use their best efforts to negotiate in good faith and settle amicably any dispute that may arise out of or relating to the Lease Agreement and that any dispute arising thereto was to be referred to arbitration. These Clauses clearly grant the parties various non-obligatory options including approaching the court. The Plaintiff cannot therefore expect the court to force the parties into an arbitration process that is not mandated on the parties in the Lease Agreement. In any event, the fact that the Plaintiff itself filed its grievance with the court means that it submitted itself and acquiesced to the court's jurisdiction and is now estopped from ousting it. I find therefore that the court has the requisite jurisdiction to hear and determine this matter.
4. Turning to the substance of the application and as submitted by the Plaintiff, I note that the court is being called upon to determine whether it can grant the injunctive reliefs sought by the Plaintiff. The parties agree that in order to succeed, the Plaintiff must demonstrate that it has a prima facie case with a probability of success, demonstrate irreparable injury which cannot be compensated by an award of damages if a temporary injunction is not granted, and if the court is in doubt, show that the balance of convenience is in its favour ( *Giella v Cassman Brown* [1973] EA 358).
5. In [Nguruman Limited v Jane Bonde Nielsen and 2 Others](#) NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR the Court of Appeal reiterated the three conditions to be fulfilled before an interim injunction is granted as set out in *Giella v Cassman Brown* (*Supra*) and further clarified that they are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. This means that if an applicant does not establish prima facie case, then irreparable injury and balance of convenience do not require consideration. On the other hand, if a prima facie case is established, then the court will consider the other conditions sequentially. As to what constitutes a prima facie case, the Court of Appeal in [Mrao Ltd v First American Bank of Kenya Limited and 2 Others](#) [2003] eKLR explained as follows:-

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly



directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

6. A prima facie case flows from what is pleaded in the Plaintiff. The Plaintiff contends that the 1<sup>st</sup> Defendant overlooked the terms of the Assignment Agreement, illegally instructing auctioneers to issue a proclamation notice, blatantly disregarding the available dispute resolution mechanisms espoused in the Master Lease Agreement, failure to issue rectification notices to the Plaintiff and failure to undertake logical valuation of the Plaintiff's property. At this stage, let me point out that the court is not required to conduct a mini trial but must nevertheless determine whether there is a prima facie case at least based on the material before it (See *Nguruman Limited*(supra). In the Plaintiff, the Plaintiff admits that it is indebted to the 1<sup>st</sup> Defendant but avers that the 1<sup>st</sup> Defendant did not indulge it with a view to restructuring the terms of repayment owing to the harsh economic times. Whereas I can empathize with the Plaintiff about its financial position and the economic situation in the country, this court has always stated that it cannot force a creditor to accept a proposal or request for restructure of a facility as this would amount to re-writing the parties' contract and bargain (see *Muigai Enterprises Limited v Kenya Commercial Bank Limited* [2016] eKLR).
7. The fact that the Plaintiff is admittedly indebted to the 1<sup>st</sup> Defendant means that the 1<sup>st</sup> Defendant is entitled to pursue repayment of the debt. Proclamation and attachment of property is one of the ways a debtor can pursue its debt and the 1<sup>st</sup> Defendant cannot be faulted for instructing the 2<sup>nd</sup> Defendant to issue the proclamation notice. On the 1<sup>st</sup> Defendant going against the Assignment Notice it issued to the Plaintiff, the Plaintiff stated that with this assignment, the 1<sup>st</sup> Defendant lost its right to pursue the Plaintiff and that this was transferred to the Bank who had the right to enforce this right on behalf of the 1<sup>st</sup> Defendant. In essence, the Plaintiff stated that it is the Bank, rather than the 1<sup>st</sup> Defendant that had the right to pursue the debt. On this issue, the 1<sup>st</sup> Defendant stated that it had been given authority by the Bank to pursue the debt and it annexed a letter from the Bank dated 26<sup>th</sup> September 2023 in its deposition as proof. I have gone through the said letter and find that on a prima facie basis, the Bank granted the 1<sup>st</sup> Defendant “Authority To Institute Claim For Recovery of Outstanding Claim Due and Owing Under The Sale of Receivables and Assignment Agreement And Under Master Lease Agreement Between Rentco Africa Limited And Adrian Kenya Limited” as per the subject heading of the letter. At the penultimate paragraph, the Bank authorized the 1<sup>st</sup> Defendant to:-
  - a. Recover the Assets and dispose the same; b) Institute suit for the recovery of the balances due and owing to the bank and yourselves under the Agreements; c) Exercise any right to recover the sums on account of the Agreements noting to Keep us posted on any development; d) Indemnify the bank or court of any losses; e) Update us on any action required of the bank to realize the balances due.
8. The above settles the Plaintiff's contention that the 1<sup>st</sup> Defendant had no authority from the Bank to pursue the debt. It is clear that the 1<sup>st</sup> Defendant had authority to pursue the same in as much as it had assigned such right to the Bank as per the Assignment Agreement. On the allegation that the Plaintiff did not receive the rectification notices or such demands from the 1<sup>st</sup> Defendant, I am in agreement with the Plaintiff that such notices must be served on the Plaintiff in order to give it an opportunity to remedy the breach or otherwise redeem the subject repossessed and attached property. In *Nyagilo Ochieng & Another v Fanuel Ochieng & 2 Others* [1995-1998] 2 EA 260, the Court of Appeal held that the burden of showing that the statutory notice has been served is on the Chargee. Once the Chargor alleges non receipt of the statutory notice, it is for the Chargee to prove that such a notice was in fact served. The 1<sup>st</sup> Defendant stated that these notices were actually served upon the Plaintiff via email through the Plaintiff's representatives who included the Plaintiff's deponent. The 1<sup>st</sup> Defendant



annexed emails its stated that the Plaintiff through the said representatives had been served the said demands and notices. The Plaintiff has not disproved this deposition by the 1<sup>st</sup> Defendant and I thus find that indeed, the Plaintiff was served with the demand and rectification notices.

9. On the 1<sup>st</sup> Defendant's failure to conduct a valuation of the Plaintiff's properties, this court has always held that the fact that valuation has not been conducted or property has been sold at an undervalue does not entitle a party to an injunction. Any loss suffered by the Plaintiff as a result of an undervalue represented by the difference in valuation is a finite value which represents damages that the Plaintiff have not shown that either the Bank or the 1<sup>st</sup> Defendant is incapable of paying. (see *Omega Foundation v Chase Bank of Kenya* KSM HCCC No. 69 of 2018 [2018] eKLR). It should also not be lost that a valuation is based on the professional and expert opinion of a duly qualified valuer who assesses the value of properties based on accepted parameters. In order to displace a professional valuation, the Plaintiff must produce clear evidence as to the actual valuation of the subject properties or that the valuation presented is wrong or at least doubtful. Mere assertions or statements that a valuation has not been conducted will not do (see *Palmy Company Limited v Consolidated Bank of Kenya Limited* ML HCCC No. 527 of 2013 [2014] eKLR).
10. From the above, I think it is now clear that the Plaintiff has not made out a prima facie case with a probability of success and its quest for an injunction comes to a grinding halt in line with the dicta in *Nguruman Limited* (supra). In any event, since the Plaintiff is claiming breach of the Assignment Agreement and the Lease Agreement, a temporary injunction is not available to it and the only redress available is an award of damages for the alleged breach as was stated by the Court of Appeal in *Esso Kenya Ltd v Mark Makwata Okiya* KSM CA Civil Appeal No. 69 of 1991 [1992] eKLR. Such a determination can only be done at the full hearing at trial.

### **Conclusion and Disposition**

11. In conclusion I find and hold that the Plaintiff's application dated 15<sup>th</sup> February 2024 is not merited and the same is hereby dismissed with costs to the Defendant

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25<sup>TH</sup> DAY OF JULY, 2024.**

.....

**J.W.W. MONG'ARE**

**JUDGE**

**In the Presence of:-**

- 1. Mr. Obuli for the Applicant.**
- 2. Pamba for the Respondent.**
- 3. Amos- Court Assistant**

