Wadia Construction Co Ltd v Synergy Industrial Credit Ltd & another (Commercial Suit E604 of 2024) [2024] KEHC 16033 (KLR) (Commercial and Tax) (20 December 2024) (Ruling)

Neutral citation: [2024] KEHC 16033 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL SUIT E604 OF 2024

FG MUGAMBI, J

DECEMBER 20, 2024

BETWEEN

WADIA CONSTRUCTION CO LTD ..... APPLICANT

AND

SYNERGY INDUSTRIAL CREDIT LTD ..... 1ST RESPONDENT

PHILIPS INTERNATIONAL AUCTIONEERS ..... 2ND RESPONDENT

RULING

Introduction and Background

1. Before the court is the application dated 7th October 2024. It is brought under Order 40 Rule 1, Order 51 Rule 1 of the *Civil Procedure Rules* and Sections 1A, 1B, 3A and Section 63 (e) of the *Civil Procedure Act*. The application seeks the following prayers:

> That pending the inter parties hearing and determination of the main suit, this Honourable court be pleased to grant temporary injunction restraining the Respondents whether by themselves their servants or agents, employees, assigns or any person acting on their behalf from seizing, selling, moving, parting with possession and or transferring the ownership, disposing off, alienating or in any manner dealing with the Applicant's motor vehicles and from interfering with the Applicant' it right, title and interest in the Applicant's said motor vehicles.
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> That in the alternative, in event that the Applicant's motor vehicles have been seized, alienated from the Applicant's possession or advertised for sale, a mandatory injunction be issued compelling the Respondents and their agents to return the said motor vehicles to the Applicant.

The costs of this application be provided for.

2. The application is premised on the grounds on the face of it and supported by the affidavit of Shyam Wadia, sworn on even date. The applicant acknowledges having entered into a 'credit facility agreement' of Kshs. 50,000,000/= with the 1st respondent. Vide the agreement dated 29th August 2018 the applicant further confirms that it was supposed to repay the 1st respondent the amount of Kshs. 75,600,000/= in 36 monthly instalments. The applicant takes issue with the 1st respondent for illegally proclaiming the applicant's motor vehicles through the 2nd respondent, despite the applicant having repaid a total amount of Kshs.76,218,377/=.

3. The applicant further contends that the agreement offends the in duplum rule, as the 1st respondent has already recovered the principle amount together with charges but continues to demand further payments from the applicant.

4. The application is opposed by the respondents through a replying affidavit sworn by Jacob Mbae Meeme on 28th October 2024. The respondents confirm that the relationship between the parties was that of a hirer and finance company in a hire purchase relationship and not that of a lender and borrower. As such, the in duplum rule does not apply to the relationship.

Analysis and determination

5. I have carefully considered the parties' pleadings and submissions. The main issue for determination is whether the applicant has met the threshold for granting the injunction orders they seek. To succeed, the applicants must satisfy the conditions established in *Giella v Cassman Brown & Co Ltd*, [1973] EA 358. These conditions require the them to demonstrate a *prima facie* case with a probability of success, show that they would suffer irreparable harm that could not be adequately compensated by damages, and, if the court is in doubt, have the application determined on the balance of convenience.

6. These conditions are are applied as distinct, sequential hurdles which the applicant is expected to surmount sequentially. This means that if the applicant fails to establish a *prima facie* case, there is no need to consider irreparable harm or the balance of convenience (see *Nguruman Limited v Jan Bonde Nielsen& 2 Others*, [2013] KECA 347 (KLR)).

7. As to what constitutes a *prima facie* case, the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others*, [2003] KECA 175 (KLR) 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."

8. Turning to the dispute at hand, the offer letter dated 29th August 2018 confirms that the nature of transaction between the parties was that of a hire purchase facility financed by the 1st respondent. It is undisputed by the parties that the amount financed was Kshs. 50,000,000/=, with the facility costs amounting to Kshs. 25,600,000/=, to be repaid over the agreed period.

9. Clause 4 of the offer letter clearly stipulates that any missed or delayed installment would attract a late payment cost of Kshs. 2,101/= per day on a daily compounding basis. Additionally, unpaid cheques would incur a penalty of Kshs. 3,000/= per cheque per day until full payment was made. These terms were negotiated and mutually agreed upon by the parties.

10. This court has consistently held that where parties have freely entered into a contract with agreed terms, the court's role is limited to enforcing those contractual terms. From the statement of account provided, it is evident that the applicant has paid Kshs. 76,218,377/=, which covers the total facility amount, costs, and some late repayment charges. However, the statement also shows an outstanding balance of Kshs. 83,957,829/=, largely comprised of late payment charges as per the agreed terms.

11. The applicant does not deny that repayment delays began in January 2019. The respondent has demonstrated, in accordance with Clause 4 of the agreement, that the late payment charges accrued as a direct consequence of these delays. The correspondence attached to the respondent's bundle of documents further confirms that both parties intended to enter into a hire purchase agreement, and the applicant was well aware of the terms and defaults in repayment.

12. On multiple occasions, the applicant requested accommodation to clear outstanding amounts. For the applicant to now turn around and claim that the same contract, which it executed with full awareness of the terms, benefitted from and partly performed, is unconscionable or unjust is, in my view, an afterthought.

13. Having evaluated the evidence, I find that the applicants have failed to establish a *prima facie* case with a probability of success. Their claim for an injunction therefore fails at this first hurdle, consistent with the dicta in *Nguruman Limited v Jan Bonde Nielsen & 2 Others* (*supra*).

14. Even if I were to consider the other conditions, I am not convinced that the applicants would suffer irreparable harm. Any loss suffered can be adequately remedied by an award of damages. The applicants have not provided evidence to suggest that the 1st respondent is incapable of compensating such damages if awarded. Finally, the balance of convenience tilts in favor of the 1st respondent realizing its security at the earliest opportunity. This is to ensure that the value of the motor vehicles securing the facility does not depreciate further, outstripping the ballooning debt.

Disposition

15. Accordingly, the application dated 7th October 2024 is dismissed with costs. The interim orders are hereby vacated.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 20TH DAY OF DECEMBER 2024.

F. MUGAMBI

JUDGE