



**Finance Access Commerce & Trade Services (Kenya) Limited & 2 others v  
By Grace Farm Feeds Limited & 2 others (Commercial Case E891 of 2021)  
[2023] KEHC 19337 (KLR) (Commercial and Tax) (25 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 19337 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E891 OF 2021  
DO CHEPKWONY, J  
APRIL 25, 2023**

**BETWEEN**

**FINANCE ACCESS COMMERCE & TRADE SERVICES (KENYA)  
LIMITED ..... 1<sup>ST</sup> PLAINTIFF  
FACTS ADVANCE B.V ..... 2<sup>ND</sup> PLAINTIFF  
JOHNSTONE WAMULA T/A WAMULA AUCTIONEER SERVICE .... 3<sup>RD</sup>  
PLAINTIFF**

**AND**

**BY GRACE FARM FEEDS LIMITED ..... 1<sup>ST</sup> DEFENDANT  
PATRICK KITHUKA MAILANG'A ..... 2<sup>ND</sup> DEFENDANT  
FRACHIAH MAILANG'A ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. Vide a Notice of Motion dated April 28, 2022, the Applicants seek the following orders:-
  - a. Spent;
  - b. Pending the hearing and determination of the application, an order suspending, lifting and or staying the order of Milimani Chief Magistrate’s Court issued in Misc Application No E469 OF 2022 on April 7, 2022.
  - c. Pending the hearing and determination of the application, an injunction order restraining the Respondents whether by themselves, their agents their servants their assigns or such other



persons instructed by them from selling, transferring, advertising for sale, auctioning or in any way disposing of Motor Vehicle Registration No xxxx Mitsubishi Truck.

- d. Pending the hearing and determination of the application an order do issue for the return of the Motor Vehicle Registration No xxxx Mitsubishi Truck to the applicant currently in the possession of the Respondents at their costs and expenses following the illegal possession of the same by the Respondents.
  - e. Pending the hearing and determination of the application, an injunction order restraining the Respondents whether by themselves, their agents their servants their assigns or such other persons instructed by them from repossessing, selling, transferring, advertising for sale, auctioning or in any way disposing of or interfering with the applicant's proprietary rights in and usage and or utilization of the Motor Vehicle Registration No xxxx Toyota Pick- Up.
  - f. An order to set aside the orders of the Chief Magistrate's Court issued in Chief Magistrate's Application No E469 of 2022 on April 7, 2022.
  - g. An order for the return to the applicant of the Motor Vehicle Registration No xxxx Mitsubishi Truck currently in the possession of the Respondents herein following the illegal repossession of the same pursuant by the Respondents.
  - h. An injunction order restraining the Respondent whether by themselves, their agent, servant, assigns or such other person instructed by them from repossessing, selling, transferring, advertising for sale, auctioning or in any way disposing of or interfering with the Applicants proprietary rights in usage and utilization of the Motor Vehicle Registration No xxxx Toyota Pick- Up and xxxx Mitsubishi Truck.
  - i. Costs of the application be provided for.
2. The application is premised on the grounds that the 1<sup>st</sup> Applicant sought some financial accommodation of Kshs 30,000,000/= from the 1<sup>st</sup> Respondent/ Plaintiff for the purchase of goods and services vide a Supply Chain Finance Credit Facility Agreement. The 1<sup>st</sup> Applicant provided various guarantees collateral and security for the full payment and performance of the 1<sup>st</sup> Defendant's/ Applicant's obligations and liabilities. A security agreement under the moveable Property Security Rights Act was executed where the 2<sup>nd</sup> Respondent was granted the rights over the assets provided as security in the Scheduler to the Agreement which included animal feeds, molasses, maize germ, wheat Bran and pollard, soya cake and sunflower cake. The motor vehicles were never given as security under the security agreement and the 1<sup>st</sup> Respondent had no right to instruct the 3<sup>rd</sup> Respondent to repossess the same. The ex-parte orders obtained by the 3<sup>rd</sup> Respondent from the Chief Magistrate's Court were illegal. The 3<sup>rd</sup> Respondent failed to disclose the existence of the current suit. The outstanding loan amount is disputed. The Applicant sort stay orders in the Magistrate court but the same were declined. Motor Vehicle xxxx is in the Possession of the 3<sup>rd</sup> Respondent and continues to attract auctioneer's fees and storage fees. The orders of the Chief Magistrate are still in force, the applicant is apprehensive that the 3<sup>rd</sup> Respondent may proceed and dispose off the motor vehicle.
  3. The application is supported by the annexed affidavit of Patrick Kithuka Mailangá reiterating the grounds of the application.
  4. Opposing the application Michael Muwonge filed replying affidavit sworn on May 30, 2022, he deponed he is the Director of Financial Access Commercial & Trade Service (Kenya). The 1<sup>st</sup> Applicant executed the letter offer to which the 1<sup>st</sup> applicant was to deposit 20% security deposit equal to the loan facility and any such collateral or guarantee as the lender may from time to time require. The 1<sup>st</sup>



Applicant offered the subject motor vehicle as collateral for the loan facility. The 2<sup>nd</sup> and 3<sup>rd</sup> Applicant executed a deed of guarantee and indemnity and committed to pay the advanced credit facility together with the accrued interest, commission, and penalties, but failed to make payments. Despite several attempts to recover the same they have amicably solved the Plaintiff instituted the suit in an attempt to recover Kshs 66,233,007.51/=.

5. By virtue of the joint registration of the motor vehicle the Plaintiffs validly perfected the security and are entitled to recover the outstanding loan facility. Urged the court to find the application as filed lacks merit and dismiss the same.
6. The application was canvassed by way of written submissions. Only the Applicant's submissions are in the court file.

### **Applicant's Submissions**

7. Counsel for the Applicant filed submissions dated June 15, 2022, in which it was submitted that the current application is not defective, it reveals the law within which it is anchored. The court ought not to sacrifice substantive justice at the altar of procedural technicalities.
8. The Applicant has met the threshold of granting injunction as per the *Giella –vs- Cassman Brown & Co Ltd [1973]EA 358*. On the issue of prima facie case the applicant has demonstrated it has a legal right that requires protection. The failure by the Respondents to prove a registered chattels mortgage for the motor vehicles in dispute amounts to illegal possession of the motor vehicles. Cited the case of *Kenya Commercial Bank Ltd –vs- Francis Odera Majengo [2022]eKLR*, where the court held:-  
  
' Accordingly, it is my opinion that the trial magistrate was right in holding that failure to prove that the chattel document was registered went to the root of the issues between the parties therein and was relevant in deeming the repossession of the subject motor vehicle as illegal.'
9. Counsel submits that unless the injunction orders are granted it will suffer irreparable loss which cannot be compensated by way of damages. The motor vehicles are used by the Applicant as the daily tool for the transportation in the business operations and the illegal repossession of the motor vehicle has paralyzed the 1<sup>st</sup> Defendant operations.
10. Counsel submits the balance of convenience tilts in favour of the Applicant.  
  
The Respondent are in the process of selling the motor vehicles which are the tools of trade of the Applicant. If the injunction orders are issued there is no prejudice to be suffered by the Respondents.
11. Counsel urged the court to grant the injunction orders and order for the return of the Motor Vehicle xxxx Mitsubishi Truck which was illegally repossessed and which has caused a paralysis of the Applicants' business.
12. Counsel urged the court to allow the orders sought,

### **Analysis and Determination.**

13. I have considered the application, the affidavit in opposition and the submission by the Applicants the issues before the court for determination are:-
  - a. Whether the court should grant the interim reliefs as sought.



- b. Whether this court ought to stay the orders of the Chief Magistrate Court of issued in Chief Magistrate's Application No E469 of 2022 on April 7, 2022.
14. The conditions for granting injunctive relief were laid down in the case of *Giella vs Cassman Brown* [1973] EA 358, where the court stated:-
- ' The conditions for the grant of an interlocutory injunction are now well settled in East Africa. First, an Applicant must show a 'prima-facie' case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.'
15. Counsel for the Applicants submits it has satisfactorily established the conditions as set out in the above case. According to counsel unless the orders are granted the applicant stands to suffer irreparable damage that cannot be compensated by way of damages. Counsel is apprehensive that unless the orders are granted the Respondents will proceed and sell the Motor Vehicles in dispute, and thus the balance of convenience tilts in favour of the Applicants.
16. The Applicants have not mentioned nor admitted being indebted to the Respondents. It is however not disputed that the Applicants sort a financial accommodation of Kshs 30,000,000/= from the Respondent and offered security for the same. From the pleadings despite the Applicants stating the amount claimed is disputed it has not demonstrated to the court the amounts already made towards repayment of the loan.
17. On the other hand, the 1<sup>st</sup> Respondent submits the amount due and owing 66,233,007.51/= a fact which has not been controverted by the Applicants. The 1<sup>st</sup> Respondent being a financial institution and holding other client's monies its operations would be crippled if customers are allowed to seek financial accommodation and fail to honour the end of the bargain in repaying the loan.
18. In my view, the Court should not be quick to grant an injunction restraining a financial institution from exercising its statutory power of sale where defaulter fails to repay the loan. The Applicants submits the motor vehicles attached by the Respondent did not form part of security for the loan amount, the security for the loan was provided under the schedule which included animal feeds, molasses, maize germ, wheat Bran and pollard, soya cake and sunflower cake. Counsel states the motor vehicles were not part of the collateral, and thus the repossession of Motor Vehicle xxxx Mitsubishi Truck is illegal.
19. I am guided by the Court of Appeal case of *Kenya Commercial Bank Ltd. -vs- Pamela Akinyi Ochieng, Civil Appeal No 114 of 1991*, where the Court held:-
- ' Before a Chargee, which the bank was in this case, can exercise its statutory power of sale, certain procedures must be complied with, which, in the case of registered land, are set out in section 74(1) of the Registered *Land Act* Cap 300. For instance, they must serve on the chargee three months' written notice of the default and require her to comply with the conditions broken before exercising the powers of sale or taking steps to recover the sums due. These safeguards are designed to prevent oppressive behaviour by banks in realising their securities over land, which often forms the only home of the chargor. The loss thereof would in many cases cause real hardship to the borrower and his or her family. The circumstances in which a chargee exercising its statutory power of sale can be restrained from doing so have been set out. The mortgagee will not be restrained from exercising his



power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged; but will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgage claims to be due to him, unless, on the terms of the mortgage, the claim is excessive; but where he was, at the time of the mortgage, the mortgagor's solicitor, the court will fix a sum probably sufficient to cover his claim... The Court should not grant an injunction restraining a mortgagee from exercising his statutory power of sale solely on the ground that there is a dispute as to the amount due under mortgage.'

20. From the evidence on record, I am not satisfied that the Applicant has demonstrated that indeed it has a prima facie case and neither am I convinced that the Applicants will suffer irreparable loss which cannot be compensated by way of damages. I find that the Respondent being a financial institution will be able to compensate the applicants by way of damages in case the suit is decided in the Applicant's favour.
21. On the issue of the balance of convenience I have stated that the Applicants have not demonstrated the efforts done in clearing the loan amount in arrears. In this case I find that the 1<sup>st</sup> Respondent stands to suffer much by the failure of the Applicants to honour the loan and in the upshot find that the balance of convenience tilts in favour of the Respondents.
22. In the circumstances thereof I am not satisfied that the Applicant has satisfied the conditions for granting injunctions. The upshot is the prayer for injunction fails.
23. On the issue of the return of Motor Vehicle Registration No xxxx Mitsubishi Truck. I have perused the annexures in the Replying Affidavit of Michael Muwonge. I note both motor vehicles the subject of this dispute have been jointly registered in the names of the 1<sup>st</sup> Applicant and the 1<sup>st</sup> Respondent. The joint registration is proof that the Applicants intended the Motor Vehicles xxxx Toyota Pick- Up and xxxx Mitsubishi Truck to act as further collateral for the loan facility, they are thus estopped from claiming the same was illegal as they have also failed to service the loan as and when it fell due, causing the same to attract huge interests.
24. It is important to note that he who comes to court must come with clean hands, the hands of the applicant are tainted it owes the Respondent money which it has failed to clear and it now seeks the indulgence of the court to prevent the 1<sup>st</sup> Respondent from exercising its statutory right.
25. Having found that the Applicants are not entitled to the interim reliefs, the next issue for of whether this court should stay the orders issued in Chief Magistrate's Application No E469 of 2022 on April 7, 2022, the same is in the negative.
26. The upshot is the application dated April 28, 2021 lacks merit and I dismiss the same with costs.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 25<sup>TH</sup> DAY OF APRIL, 2023.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

M/S Yala holding brief for Mr Nyaosi counsel for Plaintiffs/Respondents

No appearance for and by Defendants/Applicants



