



**Ng'ang'a t/a Mwandunga Commercial Agencies v Equity Bank (Kenya) Ltd & another
(Civil Appeal 64 of 2018) [2023] KEHC 18043 (KLR) (26 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18043 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 64 OF 2018
JRA WANANDA, J
MAY 26, 2023**

BETWEEN

**SAMMY NG'ANG'A T/A MWANDUNGA COMMERCIAL
AGENCIES APPELLANT**

AND

**EQUITY BANK (KENYA) LTD 1ST RESPONDENT
PETER OKOTH OLOO T/A INDOMITABLE AUCTIONEERS ... 2ND
RESPONDENT**

JUDGMENT

1. This Appeal arises from the Ruling delivered on 24/05/2018 in Eldoret Chief Magistrate's Court Case No. 19 of 2018. By the said Ruling, the Appellant's Notice of Motion dated 11/01/2018 was dismissed.
2. By the said Motion, the Appellant, through Messrs Wambua Kigamwa & Co. Advocates, sought the following orders:
 - i. [Spent]
 - ii. That an order of injunction be issued against the defendants by themselves, their servants and/or agents restraining them from selling or transferring the tractor registration no. KTCB 696 P make Massey Ferguson pending the hearing and determination of this application in the first instance and thereafter pending the hearing and determination of the suit.
 - iii. That the tractor registration no. KTCB 696 P make Massey Ferguson be released unconditionally pending the hearing and determination of this application in the first instance and thereafter pending the hearing and determination of the suit.
 - iv. That the costs of the application be sourced by the defendants.



3. The grounds of the Application were that the Appellant has a prima facie case against the Respondents, damages shall not be an adequate remedy, if in doubt, the balance of convenience tilts in favour of the Appellant, the act to be carried out is of summary nature and simple, the Respondents have attempted to steal a match against the Appellant and the Appellant's case is clear.
4. The Application was supported by the Affidavit of the Plaintiff, Sammy Ng'an'ga Ndungu who deponed that he trades under the name Mwandunga Commercial Agencies, he is a customer of the 1st Respondent at its Eldoret Branch, in the year 2015 he applied for an asset finance facility from the 1st Respondent to enable him acquire the tractor referred to in the prayers, he applied for a facility in the sum of Kshs 4,500,000/- and was to repay the loan by a monthly sum of Kshs 75,000/- for a period of 4 years (48 months), the 1st Respondent approved the credit facility, the Appellant deposited the sum of Kshs 450,000/- in October 2015 towards part of the purchase price of the tractor and the 1st Respondent paid the sum of Kshs 4,500,000/-, the 1st Respondent opened Account No. 0300566xxxxxxx for the purposes of the transaction and on 17/12/2015 caused to be made an entry of the amount it had financed towards acquisition of the tractor as a loan in the sum of Kshs 4,500,000/-, the Appellant took possession of the tractor towards the end of the month of December 2015 and commenced to engage it at Narok in the business of commercial ploughing, planting and spraying on a seasonal basis between the months of January to April in each year, the 1st Respondent caused a joint registration of the tractor in its name and that of the Appellant on 29/01/2016, he paid to the 1st Respondent between 15/01/2015 and December 2016 the sum of Kshs 751,000/- towards the credit facility, he applied for restructuring of the facility in January 2017, he placed a written application in February 2017 to the 1st Respondent to seeking to reduce the monthly repayment sum to Kshs 45,000/- as he was also servicing another loan in respect of a product known as Kilimo, the 1st Respondent did not give any response to the Application and instead devoid of notice and without following the law, proceeded to instruct the 2nd Respondent to seize the tractor and which the 2nd Respondent unlawfully did on 18/12/2017.
5. The Appellant further deponed that the acts of the Respondents are unlawful for the reason that the 1st Respondent acted in breach of the law entitling the Appellant to the protection of his economic interests in failing to respond to the application for loan restructuring, the Respondents are acting in breach of the Appellant's rights by seeking to recover a debt that is in excess as the notification of movable property indicates that the sum due is Kshs 7,848,748.90 while the certified bank statement indicates the outstanding debt as Kshs 4,852,604.94 as at 22/12/2017, the Respondents did not give the Appellant an opportunity to rectify any default by informing him as to the amount required to normalize the account but instead they have opted to demand the alleged full loan sum before the expiry of the repayment period, no written demand or any alleged indebtedness was issued prior to repossessing the tractor, no valid instruction letter has been issued to the 2nd Respondent as required by the Auctioneer's Rules, 1997, no proclamation was issued and served as required by the Auctioneers Rules, the 1st Respondent has acted in an unfair and unconscionable manner by without notice, on 16/3/2017 converting the balance indicated in the account as Kshs 4,302,012/- into a non-performing loan and in breach of the law continues to charge interest on the same as indicated in the entries dated 16/3/2017 to 22/12/2017, the Respondents have lumped up unlawful costs of recovery onto the account while no proclamation or demand for the loan was given, the 1st Respondent has also acted illegally by charging unapproved sums of money contrary to Section 44 of the *Banking Act* without the approval of the Cabinet Secretary, the 1st Respondent has breached Section 31A of the *Banking Act* by demanding the sum of Kshs 7,848,748.90, the 1st Respondent has acted in a manner inconsistent with the Banking practice and the law by varying interest rates without notice and failing to allow an adequate cooling off period as required, the 1st Respondent has no right to seize the tractor in



the absence of a duly executed and registered chattels transfer instrument as required by the Chattels Transfer Act, the 1st Respondent cannot apply the terms of a term loan contract to an asset finance contract, the tractor was being used for commercial hire for ploughing, planting and spraying during the season between January to April in each year and in every 4 months period of the said activities, he was making an average daily income of Kshs 13,644.25. He prayed for relief as the ploughing and planting season was ongoing.

6. The Respondents opposed the Application and through Messrs D.L. Were & Were Co. Advocates, filed the Replying Affidavit sworn by one Timothy Biwott who described himself as the Credit Manager of the 1st Respondent, Eldoret Branch. He deponed that the Application is an abuse of the Court's process and is grossly defective as it is premised on the wrong provisions of the law, the Appellant is also guilty of material non-disclosure thus rendering the prayers incapable of being granted, vide a letter dated 24/11/2015 the bank financed the Appellant with Kshs 4,500,000/- for purchase of the tractor, the security for the credit facility was a joint registration and chattel mortgage over the subject tractor, the loan was disbursed on 17/12/2015 to loan account 0300566065885 and was outstanding at Kshs 4,885,090.94 as at 15/01/2018 and which amount continues to attract interest at the rate of 12%/ per annum with an additional rate of 6%, subsequently after the loan had been disbursed, the Appellant defaulted in payment of the loan prompting the 1st Respondent to commence security realization process, thereafter the bank sent demand letters on 7/7/2017 and 29/08/2016 to the Appellant and which letters were ignored by the Appellant, the Plaintiff continued to default in his loan repayment obligation and which default made the 1st Respondent to recall the whole facility, the bank thereafter issued instructions to its Auctioneers on 1/12/2017 to repossess the subject tractor, the Appellant indeed did apply for a restructure of the loan facility, the restructure was on condition that he clears the loan arrears, he however failed to do so and hence the bank declined to restructure the loan facility, it is worth noting that the 2nd Respondent allowed the Appellant ample time to pay the outstanding amounts which he failed and as such claims to the contrary are malicious and aimed at misleading the Court, as a result of the aforementioned facts, the bank's right to repossess the tractor had rightfully accrued and the Appellant ought not to be allowed to fetter this power by employing delaying tactics and obtaining orders by misrepresenting facts, the Applicant is not entitled to the equitable remedy he seeks as he has not done equity and has approached the Court with unclean hands, grant of the orders sought would greatly prejudice the 1st Respondent for the reason there is a likelihood that the debt may outstrip the value of the tractor bearing in mind that it depreciates and which debt continues to grow and hence imperative for the 1st Respondent to be allowed to salvage what it can, the stoppage of the intended sale would result in continued growth of the debt and thus exposing the Respondent to potentially substantial irreparable losses.
7. The 1st Respondent subsequently filed a Further Affidavit in which it deponed that the credit facility was secured by a joint registration and chattel mortgage over the tractor, the chattel mortgage agreement clearly and unequivocally states that the agreement incorporates all covenants, agreements and obligations set out in the 2nd, 3rd and 4th Schedules thereof, one of the implied terms is that when there is default, the grantee without consent or notice of the grantor may take possession of the property in question and may dispose of such property by private or public auction, the Appellant therefore has no grounds whatsoever to claim against the Respondents.
8. In response, the Appellant filed a Supplementary Affidavit in which he deponed that he has noted that the signatures of the deponent in the Further Affidavit and in the Replying Affidavit are at great variance leading to an inference that the latter Affidavit is a forgery, no valid proclamation was ever served upon him as required by the Auctioneer's Rules as the proclamation indicates that it was given to an undisclosed driver who allegedly refused to sign, the obligation under the law is to serve the



proclamation upon the debtor, the proclamation is not accompanied with a certificate as required as required under the Rules to demonstrate the mode of service by the Auctioneer, no statement on oath has been tendered by the Auctioneer on the validity of the service, the realization of the security must be in accordance with the law and in this case the proclamation was mandatory as the instructions were given pursuant to the Auctioneers Rules and the Auctioneers' Act, no valid chattels mortgage instrument has been evidenced as the Affidavit attached to it has blank dates including the date of swearing it which offends the Chattels Mortgage Act.

9. By the Ruling delivered on 11/01/2018, the trial Court, upon considering the Application and the responses thereto, found that the Application lacked merits and dismissed it.

Grounds of Appeal

10. Being aggrieved by the Ruling, the Appellant instituted this Appeal vide the Memorandum of Appeal dated 8/07/2022. The grounds of the appeal are as follows:
- i. That the Learned magistrate erred in law and fact in failing to find that the appellant had established a prima-facie case in-tandem with the law applicable and the respondents had failed in the legal duty to rebut the same.
 - ii. That the Learned magistrate erred in law and fact in failing to find that the appellant would suffer irreparable harm by the denial of the interlocutory relief sought as the respondents had breached a legion of legal provisions in total disregard of the appellant's rights and the same could not be compensated in damages.
 - iii. That the Learned magistrate erred in law and fact in failing to find that if the court was in doubt on the first two principles governing the grant of an interlocutory injunction, he was obligated to decide the motion on the basis of the balance of convenience which would tilt in favour of maintaining the status-quo.
 - iv. That the Learned magistrate erred in law and fact in failing to find that the appellant had established the preconditions for the grant of an interlocutory mandatory injunction for the release of the tractor.
 - v. That the Learned magistrate erred in law and fact in misdirecting himself as to the facts and the law on the application more so to the effect that a creditor under a chattels mortgage has a right to seize property without notice to the debtor and in breach of the *Auctioneers Act*, 1996 and the Auctioneers Rules, 1997 which set out the procedure to be followed while carrying out repossessions involving proclamation and notification of sale.

Hearing of the appeal

11. It was then directed that the Appeal be canvassed by way of written Submissions. Pursuant thereto, the Appellant filed his Submissions on 16/01/2023 and the Respondents filed theirs on 7/03/2023.

Appellant's Submissions

12. Counsel for the Appellant submitted that the Appellant established the conditions for the grant of an interlocutory injunction based on the tenets well settled in the case of *Giella v Cassman Brown & Company Limited*. (1973) E.A. 358. He argued that the Appellant established that several of his rights have been breached by the Respondents by seeking to recover a debt that was way in excess as the notification of sale indicated that the sum due is Ksh 7,898,748.90 while the certified bank statement indicated the outstanding debt as Ksh 4,852,604.94 as at 2/12/2017, the Respondents did not give



the Appellant an opportunity to rectify any default by informing him as to the amount required to normalize the account but instead, they opted to demand the alleged full loan sum before the expiry of the repayment period, no written demand of indebtedness was issued prior to repossessing the tractor, no proclamation and notification of sale were issued and served as required by the Auctioneers Rules, 1997, these facts could only be confirmed by the Auctioneer who never swore any Affidavit, the Respondents lumped up unlawful costs of recovery onto the account while no proclamation or demand for the loan was given, they had no right to seize the tractor in the absence of a duly registered chattels transfer instrument as required by the Chattels Transfer Act, the response by the 1st Respondent did not amount to a rebuttal of the matters raised by the Appellant, he gave the example of the chattels instruments annexed to the further Affidavit where according to him, it was clear that the Affidavit accompanying it did not relate to it as it did not contain the date of the instrument, it did not contain the date when the Advocate who swore it was present and saw the grantor execute the instrument, it did not contain the date when it was sworn, the chattels mortgage would amount to an act of past consideration since the loan was disbursed on 17/12/2015 while the chattels instrument is indicated to have been signed on 3/10/2016, the same could not act retrospectively to support advances already made.

13. Citing the case of Joseph Siro Mosiomo v Housing Finance Company Limited, Nairobi HCCC No. 265 of 2007 [2008] eKLR, Counsel submitted that monetary compensation should not have been taken as a substitute for an accrued remedy of injunction. He also cited the case of Waithaka v Industrial and Commercial Development Corporation, (2001) KLR 374.
14. On the balance of convenience, Counsel invited the Court to be guided by the authority in Amir Suleiman v Amboseli Resort Ltd. (2004) KLR 589. Counsel submitted that the order for the release of the tractor was in the nature of an interlocutory mandatory injunction and as such the tenets that govern the same were satisfied, he urged that the conditions for the grant of the order were laid down in Halsbury's Laws of England, Volume 24, 4th Edition at paragraph 948, the Appellant's case was simple and clear, the acts to be carried out were of a summary nature and the Respondents had attempted to steal a match from the Appellant. He reiterated that no valid proclamation was ever served upon the Appellant as required by the Auctioneers Rules as the proclamation indicated that it was given to an undisclosed driver who allegedly refused to sign, the 2nd Respondent did not swear any Affidavit to demonstrate that he did serve as required, the proclamation filed accompanying an Affidavit by the 1st Respondent was not accompanied with a certificate as required by Auctioneers Rules to demonstrate the mode of service by the Auctioneers, the realization of a security that is the subject of a chattels mortgage had to be in accordance with the law, in this case the proclamation was mandatory as the instructions were given pursuant to the Auctioneers Rules and the [Auctioneers Act](#). He cited the case of Lakeland Motors Limited v Harbahajan Singh Sembi. (1998) eKLR.
15. Counsel submitted that the conclusion of the Learned magistrate that the Respondents could take possession of the tractor without notice while relying in the decision in John Ouko v National Industrial Credit Bank Ltd (2013) is to be faulted since in this matter there was no valid registered chattels mortgage that was placed before the Court by the Respondents. He stated that the decision of the Court of Appeal in Lakeland Motors Limited v Harbahajan Singh Sembi (supra) required that notice be served in all instances and there be compliance with the [Auctioneers Act](#) and the Rules thereunder. Maintaining that the repossession was a nullity, Counsel submitted that the Appellant was entitled to its unconditional release. He prayed that the decision of the trial Magistrate be set aside and the Appellant's application in the trial Court be allowed with costs.



Respondents' Submissions

16. In opposing the Appeal, Learned Counsel for the Respondent submitted that the Appellant did not satisfy the first requirement of there being a prima facie case with a probability of success for the reason that the Appellant was indebted to the 1st Respondent having defaulted in the repayment of his loan, the Appellant had not shown the Court that it would suffer irreparable loss and damage that cannot be adequately cured by damages, once property is given as a security by a grantor, the same becomes a commodity and is subject to sale, accordingly, the value of the property in dispute is ascertainable and any loss suffered by the Appellant upon the sale of the property is remediable by an award of damages, the dispute in the amount of the debt owed is not sufficient to warrant grant of order of injunction as was observed in *Joseph Okoth Waundi Vs National Bank of Kenya (Ltd) Civil Appeal No. 77 of 2004 Mombasa*. He submitted that the balance of convenience tilted in the Respondents' favour, the Application be disallowed so that the bank realizes its security. On the issue of restructuring of the loan the Respondents reiterated that the terms of the offer letter were clear on the repayment schedule, the Court is not the appropriate forum to renegotiate the repayment schedule or period or any other terms of the charge as seems the suggestion by the Appellant, the Respondents produced the letter of offer, joint ownership and chattel mortgage instruments and loan application form which the Appellant had due regard to and agreed to its terms and conditions whilst applying for the loan, under paragraph 14 of the offer letter, conditions for default in repayment are pronounced explicitly, thus the Appellant could not argue that the Respondents' actions were illegal.
17. Regarding the issues of chattels and mortgages, Counsel submitted that the trial Court appreciated the holding in the case of *John Ouko -vs- National Industrial Credit Bank Ltd (2013)* and correctly disregarded the cases of *Joseph Siro Musiomo - vs- Housing Finance Company of Kenya (Nairobi Hcc No.265 of 2008)* and *Waithaka -vs- Industrial and Commercial Development Corporation (2001) KLR* which were relied on by the Appellant and found that if the Appellant succeeds in its claim it would easily be compensated by way of damages, in dismissing the Appellant's Application for grant of interlocutory injunction, the trial Court was properly guided by the relevant law and decided cases and therefore the trial magistrate's decision should not be disturbed.

Analysis & Determination

18. The duty of an appellate Court was set out in *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR*, the court stated as follows-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”
19. Upon perusing the record, the Memorandum of Appeal and the submissions filed by the parties, the following issue, in my view, is the one that arises for determination:

Whether the Appellant met the threshold for grant of an interlocutory injunction
20. The application sought an interlocutory injunction pending the hearing and determination of the main suit. The same was expressed to be brought under Order 40 Rule 1 of the Civil Procedure Rules which provides as follows;

Where in any suit it is proved by affidavit or otherwise—



- (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
 - (b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.
21. This is an Appeal arising from an Application for an interlocutory injunction pending hearing and determination of the suit. On how to handle such Appeals, the Court of Appeal in the case of *Said Almed vs. Mannasseh Benga & Another* [2019] eKLR gave the following guidelines:

“As appreciated by the parties, this is an interlocutory appeal, and so, like the trial court, this Court cannot make conclusive finding of fact as that would prejudice the proceedings in the main trial which is still pending. Our task is to determine whether the trial court properly exercised its discretion in granting the order for a temporary injunction. It is common ground that such discretion cannot be interfered with lightly by an appellate court unless it is shown that the discretion was clearly wrong because the judge misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. Those principles were stated in the ageless case of *Mbogo & Another vs Shah* (1968) EA 93. In the subsequent case of *United India Insurance Co. Ltd & 2 Others vs East African Underwriters (Kenya) Ltd* (1985) KLR 898 Madan, JA stated thus:

“The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

22. From the foregoing, it is clear that whether or not to grant an interlocutory injunction is a matter at the discretion of the trial Court. The mandate of an appellate Court in handling appeals arising from such applications is therefore limited to the areas mentioned above.
23. Further, in alignment with the additional cautionary statement made above, this Court will also as much as possible steer away from making any conclusive findings of fact as doing so may prejudice the proceedings in the main suit which is still pending.
24. The principles that guide Courts in determining applications for injunction were set out in the ageless case of *Giella v Cassman Brown & Co. Ltd* {1973} EA 358 in which the East African Court of Appeal stated as follows:

“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 harm which would not adequately be compensated by an award of



damages. Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.”

25. It therefore follows that to succeed in the Application, the Appellant was required to satisfy the Court that first, it had a prima facie case with a probability of success, that if the orders sought were not granted it would suffer irreparable harm and that the balance of convenience would lie in granting the orders sought.
26. The Appellant admits that he obtained the loan of Kshs 4,500,000/-, that the same was disbursed on 17/12/2015, that it was repayable by monthly instalments of Kshs 75,000/- for a period of 48 months (4 years), that the tractor was to be the security for the loan, that as a result the tractor was registered in the joint names of the Appellant and the 1st Respondent and that he took possession of the tractor sometime towards the end of December 2015. It follows therefore that had the Appellant regularly and consistently serviced the loan, then he would have finalized the payments and liquidated the loan in full around December 2019.
27. To be granted the injunction, one of the areas in which the Plaintiff had the duty to demonstrate was that he had not been in default. I have looked at the Appellant’s Affidavits and I note that nowhere does he allege that he was not in default or that he had regularly paid his instalments. In fact, my assessment is that the Appellant was evidently evasive on this point. I however observe that the Appellant also states that he was not given time to settle the outstanding amounts. In my view, this statement is in fact a tacit admission that indeed the Appellant had accumulated arrears.
28. On its part, the 1st Respondent has expressly stated that soon after the loan had been disbursed, the Appellant began defaulting in his instalment payments, that the bank sent demand letters to the Appellant on 29/08/2016 and again on 7/07/2017, that the Appellant continued defaulting even after the demand letters and the 1st Respondent therefore made the decision to recall the whole facility. Indeed, the 1st Respondent produced copies of the demand letters together with the certificates of posting and also statements of Account for the period December 2016 – January 2018 to back up its claims. Indeed, a perusal of the statements reveal that initially, the Appellant religiously paid his instalments between January 2015 and May 2016. He however skipped the instalment for June 2016, paid the one for July 2016, skipped the payment for August 2016 and paid the September to December 2016 instalments with a little surplus on top, presumably in part-payment of the skipped months. He then never paid any other or further instalment between January 2017 and January 2018 (1 year period) when he filed the suit.
29. It is curious that the Appellant did not disclose all these matters in his Application and instead, gave the impression that he was up to date with his repayments. Further, the Appellant did not even produce the contractual documents that contained the terms and conditions under which the loan was disbursed. The documents, as revealed by the Respondents were the letter of offer, the chattels mortgage instrument and the loan Application Form. I have looked at the Appellant’s List of documents and noted that these documents, which are very material and crucial in the determination of this matter, are not even included or listed in the Appellant’s bundle of documents. Had the Respondents not produced the documents, the Court would not have had sight of them.
30. The Appellant also gave the impression that he was not served with any notices in respect of his indebtedness and that he was not given time to settle the outstanding amounts. When the 1st Respondent, in its Replying Affidavit, produced copies of the demand letters, the Appellant, despite filing a Supplementary Affidavit, did not deny the position stated by the Respondent. In fact, he never responded at all to the said matters. The presumption therefore is that the position given by the 1st Respondent was the correct one and the same was well known to the Appellant. To this extent, I



agree with the Respondents' Counsel that the Appellant was guilty of deliberate non-disclosure and suppression of material facts. The Appellant was fully aware that he was in default and that he was in arrears in his monthly instalments but still deliberately opted to give the Court a misleading impression. He did not even disclose that demand letters with 14 days notices to settle the arrears had been served upon him. I therefore find that the Appellant did not come to Court with clean hands

31. According to the Respondent, the amount outstanding as at 15/1/2018 was Kshs 4,885,090.94. Save for alleging that some entries made into the account were unlawful, the Appellant did not give his version of how much according to him was correct outstanding and how he intended to settle the same.

32. The Appellant obtained the loan under the terms and conditions expressly set out in the contract that he entered into with the 1st Respondent. As aforesaid, the contract is comprised in the letter of offer, chattel mortgage instrument and loan Application Form and all are clear that the 1st Respondent will be entitled to realize the security and recover the loan in the event of default by the Appellant. The Court cannot re-write that contract. Its role is only to interpret and apply it as executed. It is a longstanding principle of law that parties to a contract are bound by the terms and conditions thereof and that it is not the business of the Courts to rewrite such contracts. In *National Bank of Kenya Ltd vs. Pipe Plastic Samkolit (K) Ltd* (2002) 2 E.A. 503, (2011) eKLR the Court of Appeal stated as follows:

A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.

33. Further, in *Pius Kimaiyo Langat vs. Co-operative Bank of Kenya Ltd* (2017) eKLR the Court of Appeal again stated as follows:

“We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties, They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.”

34. On the above points alone, I would dismiss this Appeal. However, the Appellant has raised other matters. For instance, he has alleged that in January 2017, he submitted a written Application for restructuring of the loan so that the monthly instalments could be reduced from Kshs 75,000/- to Kshs 45,000/-. Strangely, he did not exhibit copies of the said written applications for restructuring but simply stated that the same were not responded to and that instead, without notice, the Respondents suddenly seized the tractor. However, from the evidence produced by the 1st Respondent, it turned out that the application for restructuring was in fact a knee jerk reaction by the Appellant to the demand letters served upon him in August 2016 and July 2017 after his consistent defaulting. Further, the 1st Respondent revealed that the Application was in fact accepted but on the condition that the Appellant first clears the accumulated arrears. These issues were never controverted by the Appellant in his Supplementary Affidavit and are therefore presumed to be correct. These are therefore further material facts that the Appellant tactfully concealed from the Court.

35. The Appellant has also alleged that the Respondents sought to recover a debt that is in excess as the notification of movable property indicates that the sum due is Kshs 7,848,748.90 while the bank statement indicates an outstanding debt is Kshs 4,852,604.94. He also stated that the 1st Respondent has lumped up unlawful costs of recovery onto the account, that the 1st Respondent has charged interest on a monthly compounded basis instead of annually, that the 1st Respondent has acted unlawfully by charging unapproved sums contrary to Section 44 of the *Banking Act* and that the 1st Respondent has acted in a manner inconsistent with the banking practice and law by varying interest rates without notice



36. While these may be arguable points, the fact is that they are matters of accounting which can only be determined after the full trial. As has been stated in a long line of cases, a dispute on accounting or on the amount outstanding per se cannot justify the grant of an interlocutory injunction to bar the realization of security. If it turns out after the trial that indeed the amount demanded is excess or unlawful, the trial Court will be entitled to make the appropriate orders, including but not limited to awarding damages. In the case of Priscillah Krobought Grant vs. Kenya Commercial Finance Co. Ltd and 2 Others, Court of Appeal at Nairobi, Civil Application No. Nai 227 of 1995 (108/95 V.R.) (unreported), the Court stated as follows: -

“Finally, it will bear repetition, we think if we were to state that a court does not normally grant an injunction to restrain a mortgagee from exercising its statutory power of sale solely on the grounds that there is a dispute as to the amount due under the mortgage – see Barmal Kanji Shah & Another Vs. Shah Depar Devji (1965) E. A. 91, 32 Halsbury’s Laws of England (4th Edition) paragraph 725 and Uhuru Highways Development Ltd. Vs. Central Bank Kenya and 2 Others, Civil Application No. Nai 140 of 1995 (unreported) per Kwach J. A.”

37. As aforesaid, the Appellant has accused the Respondent of seeking to recover a debt that is in excess. The basis of the argument is that while the notification of movable property dated 18/12/2017 indicates that the sum due is Kshs 7,848,748.90, the bank statement on the other hand, indicates the outstanding debt as Kshs 4,852,604.94 as at 22/12/2017. On this issue, I agree that the accusation raises an arguable point considering the huge discrepancy of the amounts stated in the two documents. I agree that the Respondents have not given a clear explanation. However, as I have already stated, disputes over the amount demanded cannot per se justify the grant of an interlocutory injunction. The Respondent is however put on notice that in the absence of a convincing explanation over the said discrepancy and should it be found that the same is irregular or unlawful, then the trial Court shall be entitled to order for appropriate compensation in favour of the Appellant amongst other possible penalties.

38. The other issues raised by the Appellant were in regard to alleged non-compliance with the Auctioneers Rules and the Auctioneers Act. According to the Appellant, no valid instruction letter was issued to the 2nd Respondent-Auctioneer, no proclamation was served and the notification of sale issued was not valid. The Appellant has also argued that there is no registered chattels transfer instrument. I note however that the Appellant himself exhibited a copy of a notification of sale. On their part, in their Replying Affidavit, the Respondents exhibited copies of a letter of instruction to the 2nd Respondent and also a proclamation. In addition, in its Further Affidavit, the Respondents exhibited a copy of a Chattels Mortgage instrument. In light of these exhibits, although the Appellant still poked holes into the same, his allegation that the documents were never issued or served was therefore substantially answered. The issues that will therefore remain for determination at the trial will therefore not be whether the said documents or items exist or were issued and served, but only whether they were properly drawn and formalized in accordance with the law and whether they were then properly issued and served. In my view, these are not issues whose determination justifies a grant of an interlocutory injunction at this stage.

39. I believe I have now said enough to demonstrate that a prima facie case to justify grant of an interlocutory injunction was not established.

40. On whether damages shall be adequate compensation, I have already found that the Appellant has been shown to be in default and that his grievances are basically about computation of the amount



outstanding and also that, save for challenges on their validity and the procedure adopted in serving them, there were indeed a chattels mortgage instrument, a notification of sale and a proclamation. I therefore find further that the Appellant's loss, if any, is not irreparable and can be compensated by an award of damages.

41. On balance of convenience, the Respondents have submitted that the grant of the interlocutory injunction would greatly prejudice the 1st Respondent for the reason that there is a likelihood that the debt may outstrip the value of the tractor bearing in mind that it depreciates and yet the debt continues to grow since it is still accumulating interest. The 1st Respondent has therefore prayed that it be allowed to salvage what it can. I find this to be a valid argument since indeed, stoppage of the intended sale would result into the continued escalation of the debt and thus exposing the 1st Respondent to potentially substantial irreparable losses. In the circumstances, I find that the balance of convenience also favours refusal to grant the injunction at this stage.

42. On this principle, I associate myself with the decision in the case of *Andrew Ouko v Kenya Commercial Bank Ltd & 3 others* (2005) eKLR where F. Azangalala, J faced with a similar situation, held as follows;

“if the defendants were restrained from selling off until the suit was heard and determined, there is a very real risk that the debt may outstrip the value of the suit property. This persuades me that the balance of convenience is in favour of the said defendants. The stoppage of intended sale by the chargee would result in continuous growth of debt and thus expose them to irrecoverable losses.”

43. In the circumstances, I am not persuaded that the trial Magistrate misdirected himself in law or that he misapprehended the facts or that he took account of considerations of which he should not have taken account or that he failed to take account of considerations of which he should have taken account. I am also not persuaded that the decision, which is a discretionary one, was plainly wrong.

44. I may also mention that prayer 2 of the Application insofar as it sought the release of the tractor back to the Appellant pending determination of the suit is a prayer for mandatory injunction. It is trite law that such prayer, apart from the usual requirements in all injunction Applicants, must in addition, also establish the existence of special circumstances. Furthermore, an applicant for mandatory injunction must prove his case on a standard higher than the standard in prohibitory injunctions. In *Kenya Breweries Ltd & Another vs Washington O. Okeya* [2002] eKLR, the Court of Appeal stated as follows:

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

45. Further, in *Nation Media Group & 2 Others vs John Harun Mwau* [2014] eKLR, the Court of Appeal again stated as follows:

“It is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances ... A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted.



Besides existence of exceptional and special circumstances must be demonstrated, as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases.”

46. The above cited cases lay down the principles of law to be considered in an application for mandatory injunction. The condition that stands out is that the applicant must establish the existence of special and exceptional circumstances that warrant the granting of orders of mandatory injunction. In my view, in addition to the failure to demonstrate the existence of a prima facie case, that damages would not adequately compensate the Appellant in the event of success at the trial and the balance of convenience tilts in its favour, the Appellant has also failed to demonstrate that there exists any special or exceptional circumstances that would merit the grant of the mandatory injunction sought at prayer 2 of the Application.
47. In the premises, I find that this Appeal lacks merit. The same is accordingly dismissed with costs to the Respondents.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 26TH DAY OF MAY 2023

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WANANDA J. R. ANURO

JUDGE

