



**Kaarichei Traders Limited v Mayfair CIB Bank Limited (Commercial Case E486 of 2022)
[2023] KEHC 24609 (KLR) (Commercial and Tax) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 24609 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E486 OF 2022
MN MWANGI, J
SEPTEMBER 29, 2023**

BETWEEN

KAARICHEI TRADERS LIMITED PLAINTIFF

AND

MAYFAIR CIB BANK LIMITED DEFENDANT

RULING

1. This ruling is in relation to two applications. The first application is the plaintiff's Notice of Motion dated 7th December, 2022 brought under the provisions of Sections 3, 3A, & 63(c) of the [Civil Procedure Act](#), Cap 21 Laws of Kenya, Order 40 Rules 1 & 2 & Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all enabling provisions of the law. The plaintiff seeks the following orders –
 1. Spent;
 2. Spent;
 3. This Honourable Court be pleased to issue a temporary injunction restraining the defendant/respondent whether by itself, agents, auctioneers, servants or employees or howsoever otherwise, from advertising for sale, selling through a public auction or howsoever transferring or disposing of and/or dealing in any manner whatsoever with all those motor vehicles registration numbers KDD 008A, KDD 031A and KDD 032A pending the hearing and determination of this suit;
 4. This Honourable be pleased to issue an injunction restraining the defendant whether by itself, agents, auctioneers, servants or employees or howsoever otherwise, from repossessing motor vehicles registration numbers KDC 653E, KDC 655E, KDD 047B, KDD 001K, KDD 009H presently in possession of the plaintiff pending the hearing of this application/suit;



5. The Honourable Court be pleased to issue an order compelling the defendant to provide a current loan statement for the facility to inform a Court mandated independent audit and determination of the plaintiff's/applicant's true level of indebtedness by an auditor jointly appointed by the parties or the Honourable Court; and
 6. Costs.
2. The application is premised on the grounds on the face of the Motion and is supported by an affidavit sworn by Mohammed Adan Quresh, the plaintiff's director on 7th December, 2022. In opposition thereto, the defendant filed a replying affidavit sworn on 21st March, 2023 by Nicholas Karanja, a Senior Legal Officer with the defendant.
 3. The second application is the defendant's Notice of Motion dated 14th February, 2023 brought pursuant to the provisions of Sections 1A, 1B, 3 & 3A of the *Civil Procedure Act*, Order 51 Rule 1 of the Civil Procedure Rules, 2010 and Article 159(2)(d) of *the Constitution* of Kenya. The defendant seeks the following orders–
 1. Spent;
 2. Spent
 3. That pending the hearing and determination of this suit an order do issue compelling the plaintiff either by itself or through its employees, agents, servants or any person acting under their direction to deliver to the defendant, surrender and/or hand over Motor Vehicles Registration Numbers KDC 653E, KDC 655E, KDD 047B, KDD 001K and KDD 009H currently in the possession/custody of the plaintiff or its employees, agents, servants or any person acting under their direction;
 4. That the Officer Commanding Police Division, Parklands Police Station do supervise compliance with Orders 2 and 3 above; and
 5. That the costs of this application be provided for.
 4. The application is premised on the grounds on the face of it and is supported by an affidavit sworn on 14th February, 2023 by Nicholas Karanja, a Senior Legal Officer with the defendant. In opposition thereto, the plaintiff filed a replying affidavit sworn on 18th May, 2023 by Mohammed Adan Quresh, the plaintiff's director.
 5. The two applications were canvassed by way of written submissions. The plaintiff's submissions were filed on 9th June, 2023, by the law firm of Wachira and Mumbi Advocates, whereas the defendant's submissions were filed by the law firm of Kimondo, Gachoka & Company Advocates on 9th June, 2023.
 6. Mr. Wachira, learned Counsel for the plaintiff cited the provisions of Order 40 Rule 1 of the Civil Procedure Rules, 2010 and submitted that the suit motor vehicles are in danger of being repossessed by the defendant and there is nothing that prevents it from doing so. He relied on the case of *Mary Wambui Kabguo v Kenya Bus Services Limited* [1997] eKLR and stated that the defendant has not tendered any evidence in support of the allegation that the plaintiff has switched off the trackers of the suit motor vehicles. In submitting that the plaintiff has met all the conditions to warrant this Court to grant it an order of injunction, Counsel relied on the case of *Giella v Cassman Brown & Co. Ltd* [1973] EA 358.
 7. On whether the plaintiff has established a prima facie case with a probability of success, Mr. Wachira referred to the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR, where



the Court defined what constitutes a prima facie case. He contended that the plaintiff experienced difficulty in repaying its loan arrears owing to the effects of the Covid-19 Pandemic hence it decided to dispose of some of its vehicles to settle its loan arrears with the defendant. It was stated by Counsel that the defendant has produced bank statements to show that the plaintiff is in arrears of Kshs.4,736,440.67. Counsel indicated that the plaintiff is in the process of selling one of the suit motor vehicles at Kshs.8,000,000/= and NCBA Bank had confirmed that it is ready to issue a bank-to-bank professional undertaking to deposit the said Kshs.8,000,000/= into the plaintiff's loan account so as to settle the plaintiff's outstanding loan arrears.

8. Counsel further stated that the plaintiff had even offered to substitute the suit motor vehicles with Land Reference No. 12596/30 (Original No. 12596/2/29) as security for the sums owed to the defendant in view of the fact that the value of the suit motor vehicles is constantly depreciating, but the defendant is still intent on repossessing the suit motor vehicles. Mr. Wachira stated that from the above, it is clear that the plaintiff is willing to continue performing its part of the loan agreement but the defendant is keen on rendering futile all the plaintiff's efforts. Counsel submitted that the plaintiff has established a prima facie case with a high probability of success.
9. On whether the plaintiff shall suffer irreparable harm in the event the application dated 7th December, 2022 is not allowed, Mr. Wachira relied on the case of Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR and submitted that the plaintiff uses the suit motor vehicles in its business and if they are repossessed its business will be greatly affected. He stated that for the said reason the plaintiff stands to suffer irreparable harm that is incapable of being compensated by an award of damages in the event the injunction sought is not granted. He stated that if the defendant is allowed to repossess the suit motor vehicles, it will be tantamount to violating the plaintiff's right to property guaranteed under Article 40 of *the Constitution* of Kenya, 2010. Counsel referred to the Court's holding in the case of Joseph Siro Mosioma v Housing Finance Company of Kenya Limited & 3 others [2008] eKLR.
10. In submitting that the balance of convenience tilts in favour of the plaintiff, Mr. Wachira relied on the case of Paul Gitonga Wanjau v Gathuthis Tea Factor Company Ltd & 2 others [2016] eKLR. He contended that in the event the injunction sought is not granted, the plaintiff's business will experience a sharp downturn since it relies on the suit motor vehicles to run its business, yet the defendant on the other hand stands to lose nothing in the event the application dated 7th December, 2022 is granted since it will receive the outstanding loan amounts once the pending Kshs. 8,000,000/= vehicle sale transaction is completed.
11. Ms. Mburu, learned Counsel for the defendant relied on the case of Giella v Cassman Brown & Co. Ltd (supra) and the Court of Appeal holding in the case of Mrao Ltd v First American Bank of Kenya Ltd & 2 others (supra) and submitted that the plaintiff having failed to comply with the conditions imposed by the Court on 7th December, 2022 is undeserving of this Court's equitable discretion. She further submitted that the statements of accounts annexed to the defendant's replying affidavit are proof that the plaintiff is indebted to the defendant. She referred to the case of Francis Ngarama Kiratu v Equity Bank Limited & another [2016] eKLR and stated that the conditions governing the relationship between the plaintiff and the defendant did not require the defendant to serve the plaintiff with a notification of sale prior to repossession and sale of the motor vehicles since the defendant was at all times entitled to repossess and sell the vehicles in the event of default by the plaintiff.
12. Counsel for the defendant contended that if this Court was to hinder the repossession and subsequent sale of the suit motor vehicles, then the debt in issue would continue to accrue interest and grow into insurmountable amounts hence outstripping the value of the properties held by the bank as security, which properties depreciate in value over time. Counsel for the defendant averred that the valuation report relied on by the defendant was prepared by an independent and professional firm of valuers thus



the plaintiff's allegation that the motor vehicles were undervalued is false, and no evidence of the said undervalue had been tendered by the plaintiff.

13. Ms. Mburu stated that the intended sale of the motor vehicles was advertised in a newspaper of nationwide circulation. She cited the provisions of Sections 107 and 109 of the *Evidence Act* and the case of *Samson S. Maitai & another v African Safari Club Limited & another* [2010] eKLR quoted by the Court in *Rosaline Mary Kahumbu v National Bank of Kenya Ltd* [2014] eKLR to show that the plaintiff has failed to discharge its burden of proof on the allegation that the suit motor vehicles were undervalued. She posited that the plaintiff has not demonstrated that it has a prima facie case with a probability of success.
14. On the issue of irreparable harm, Ms. Mburu was of the view that the plaintiff has not demonstrated that it stands to suffer any injury. She stated that the plaintiff understood and consented to the condition that the motor vehicles would be repossessed and sold in the event it defaulted in its loan repayments, hence no irreparable harm will be occasioned to the plaintiff in the event its application is disallowed. She stated that if this Court finds that the plaintiff stands to suffer loss, any loss is quantifiable by way of damages as the motor vehicles have been the subject of various valuation reports. She relied on the case of *Paul Muhoro Kihara v Barclays Bank Kenya Limited HCCC 33 of 2003*.
15. In submitting that the balance of convenience tilts in favour of the defendant as it stands to lose its end of the bargain by being barred from realizing its security yet the plaintiff has benefited from the loan and continues to default, Ms. Mburu relied on the case of *Development Bank v Hyundai Motors Kenya Limited* [2006] eKLR. She also cited the case of *Palmy Company Limited v Consolidated Bank of Kenya Limited* [2014] eKLR, where the Court quoted the Court of Appeal decision in the case of *Francis J. K Ichacha v Housing Finance Company of Kenya Civil Appeal No. 108 of 2005* and submitted that the plaintiff has not made out a case to warrant grant of the injunctive orders sought.
16. Ms. Mburu submitted that the defendant is entitled to repossess and sell the suit motor vehicles since it is not in dispute that the plaintiff is in default of its loan repayments. She claimed that the plaintiff has disabled or tampered with the tracking devices installed in the suit motor vehicles and concealed their whereabouts to avoid repossession and subsequent sale of the same by the defendant. Counsel stated that the type of security used to secure the credit facilities advanced to the plaintiff is one that continuously depreciates in value hence if this Court does not order immediate surrender of the suit motor vehicles to the defendant, the loan amount may outstrip the value of the vehicles and deplete the security held by the defendant.
17. Counsel contended that no cogent evidence has been tendered by the plaintiff in support of the allegation that it has engaged Berella Trading Limited to purchase motor vehicle registration No. KDD 047B. She made the observation that six months have since elapsed since the offer to purchase was purportedly received by the plaintiff. She stated that if at all the transaction was genuine, it ought to have been concluded by now. She contended that the defendant had not consented to the sale of any of the vehicles it owns in this transaction to Blue Sky Energy Limited or Berella Trading Limited and it is concerned that the plaintiff may part with possession of the suit motor vehicles and/or vandalize them thus compromising the only realizable security the defendant has.

ANALYSIS AND DETERMINATION.

18. Having considered the applications herein, the grounds upon which they are anchored and the affidavits filed in support thereof, the replying affidavits by the plaintiff and the defendant and the written submissions by Counsel for the parties, the issues that arise for determination are –
 - i. Whether an order for temporary injunction should issue against the defendant; and



- ii. Whether this Court should direct the plaintiff to surrender the suit motor vehicles to the defendant.
19. In the affidavit filed by the plaintiff in support of the application dated 7th December, 2022, it deposed that the suit motor vehicles were purchased on a hire purchase facility extended by the defendant to the plaintiff and released to the plaintiff for its personal and commercial use. The plaintiff averred that it has at all times been financing the loan arrears with lots of difficulty owing to the prevailing economic conditions that were worsened by the Covid – 19 Pandemic, hence its loan account fell into arrears.
20. The plaintiff further averred that to settle the loan arrears, it sold motor vehicles registration numbers KDC 654E, KDC 287F, KDC 937N & KDD 237A to Benson Wambugu and motor vehicle registration numbers KDC 653E, KDC 286A, KDD 233A, KDD 235A, KDD 234A & KDD 236A to Blue Sky Energy Limited with the concurrence and approval of the defendant. That thereafter, the proceeds from the aforementioned sales were expended towards settlement of the plaintiff's loan arrears due and owing to the defendant.
21. It was stated by the plaintiff that it communicated to the defendant its intent to substitute security of the motor vehicles with land which would be more viable noting that the motor vehicle securities were depreciating in value. It further stated that the loan arrears currently stand at Kshs.4,818,408.40 and that the plaintiff got into an agreement for sale of motor vehicle registration No. KDD 047A at a purchase price of Kshs.8,000,000/= with Berella Trading Limited, which proceeds shall be paid directly to the defendant and be used to clear all the outstanding loan arrears and the necessary payment instalment for the month of January, 2023.
22. The plaintiff claimed that NCBA Bank Limited has since offered Berella Trading Limited a hire purchase facility vide a letter of offer dated 1st December, 2022 to facilitate purchase of motor vehicle registration No. KDD 047A and it has also undertaken to issue a bank to bank professional undertaking to the defendant agreeing to deposit the said Kshs. 8,000,000/= directly to the defendant's account.
23. The plaintiff averred that the intended auction of the suit motor vehicles is unlawful, fraudulent and malicious since its being pursued by the defendant in bad faith and without reasonable cause, in so far as no service of notification of sale was effected upon the plaintiff, the defendant failed to undertake the necessary advertisement and accept the substitution of the security for the repayment of the outstanding loan arrears.
24. It was stated by the plaintiff that the forced sale value of the motor vehicles is way below the valuation conducted by the plaintiff on motor vehicle registration No. KDD 008A. It also stated that the defendant has failed and/or refused to furnish the plaintiff with a comprehensive statement of accounts so as to enable the plaintiff make the obligatory payments and to facilitate the substitution of the security.
25. The plaintiff undertook to pay any ensuing damages to the defendant for any legal prejudice occasioned by the orders it is seeking herein, should the Court find that the said orders ought not to have been issued in the first place.
26. The defendant in its replying affidavit deposed that vide a letter of offer dated 21st May, 2021 the defendant offered and subsequently advanced the plaintiff an Asset Finance facility of Kshs.35,550,000/=. That the said facility was secured by joint registration of the financed vehicles in the names of the plaintiff and the defendant and a guarantee by the plaintiff's director.



27. The defendant averred that in breach of the agreement between the parties herein the plaintiff defaulted in repayment of the loan facilities advanced, and as at 4th January, 2023, the sum owing from the plaintiff to the defendant stood at Kshs.26,497,393.67. The defendant indicated that it instructed Messrs Philips International Auctioneers to repossess the financed vehicles with a view to selling the same to recover the outstanding loan facility.
28. The defendant averred that on 7th December, 2022 this Court issued a temporary injunction restraining the defendant from selling motor vehicles registration Nos. KDD 008A, KDD 031A and KDD 032A on condition that the plaintiff furnishes the defendant with a bank guarantee in the sum of Kshs.4,800,000/= within 7 days from 7th December, 2022, but the plaintiff did not comply with the said condition and the orders of injunction elapsed.
29. It was stated by the defendant that the averments on substitution of the vehicles as security are false and such substitution can only be done with the defendant's acquiescence which has not been sought and obtained. The defendant further stated that the plaintiff has never requested for its account statements from the defendant and been denied the same since all its customers are free to obtain any information relating to their accounts held with the bank upon request and receive account statements at the agreed intervals.
30. The defendant stated that it would be inequitable for the Court to grant the injunctive orders sought in view of the admitted default by the plaintiff.
31. In the affidavit filed by the defendant in support of the application dated 14th February, 2023 it deposed that it was an express term of the agreement between the plaintiff and the defendant that the credit facilities advanced to the plaintiff by the defendant would be repaid in 36 monthly instalments of Kshs.1,197,819.99.
32. It was deposed by the defendant that it was also an express term of the said agreement that in the event of default, the defendant would have a right to take possession of the vehicles and sell the same by way of public auction or private treaty to recover the sum owing.
33. The defendant averred that the plaintiff has since fallen into arrears and has refused to pay the monthly instalments as agreed. It further averred that under the agreement between the parties herein, the title to financed vehicles remain that of the defendant until the debt is paid in full, and since the plaintiff is still indebted to the defendant, the latter is entitled to take possession of the suit motor vehicles.
34. It was stated by the defendant that the plaintiff's conduct is grossly unjust and inequitable and in addition, the defendant has demonstrated special and/or unique circumstances to warrant grant of the orders sought.
35. The plaintiff in its replying affidavit deposed that it is currently in possession of the suit motor vehicles which the defendant seeks to repossess, and in the event the orders sought in the application dated 14th February, 2023 are granted, it stands to suffer irreparable loss and damage.
36. The plaintiff denied tampering with the tracking devices of the suit motor vehicles and stated that the said devices of the subject motor vehicles are in good shape and working perfectly well.
37. The plaintiff averred that with the indulgence of the defendant, all outstanding arrears owed by the plaintiff to the defendant can be settled from the sale of motor vehicle registration No. KDD 047B. The plaintiff stated that in the circumstances and noting that the suit motor vehicles are depreciating in value, this Court should make orders for substitution of the security of the motor vehicles with Land Reference Number 12596/20 (Original No. 12596/2/29) which is more viable.



Whether An Order For Temporary Injunction Should Issue Against The Defendant.

38. The test for granting of an interlocutory injunction was considered in the case of *American Cyanamid Co. v Ethicom Limited* [1975] A AER 504 where three elements were noted to be of great importance namely:
- i) There must be a serious/fair issue to be tried;
 - ii. Damages are not an adequate remedy, and
 - iii. The balance of convenience lies in favour of granting or refusing the application.
39. What constitutes a prima facie case was considered by the Court of Appeal in the case of *Mrao Ltd v. First American Bank of Kenya Ltd & 2 others* [2003] eKLR, where the Court stated the following -
- “So what is a prima facie case” I would say that in civil cases it is a case in 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. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the Applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”
40. It is a fact that the defendant advanced credit facilities of Kshs.35,550,000/= to the plaintiff in terms of an Asset Finance payable in 36 monthly instalments of Kshs.1,197,819.99. The said facility was secured by joint registration of the financed vehicles in the names of the plaintiff and the defendant and a guarantee by the plaintiff’s director. It is not disputed that it was a term of the agreement that the financed vehicles would be fitted with tracking devices from a reputable company and in the event of default by the plaintiff, the defendant would be at liberty to take possession of the said motor vehicles and sell them by way of public auction or private treaty to recover the sum owing.
41. It is also not disputed that the plaintiff defaulted in its loan repayment obligations hence the loan account fell into arrears. The plaintiff contended that the defendant has produced bank statements to show that it is in arrears of Kshs.4,736,440.67, and that it has since got into an agreement for sale of motor vehicle registration No. KDD 047A at a purchase price of Kshs.8,000,000/= with Berella Trading Limited, which proceeds shall be paid directly to the defendant and be used to clear all the outstanding loan arrears and the necessary payment instalment for the month of January 2023. In response to the said allegation, the defendant averred that it did not consent to the said sale and in any event, six months have since elapsed since the offer to purchase was purportedly received by the plaintiff. The defendant observed that if all the transaction was genuine, it ought to have been concluded by now.
42. To demonstrate its willingness to fulfill its repayment obligations to the defendant, the plaintiff stated that it has offered to substitute the suit motor vehicles with Land Reference No. 12596/30 (Original No. 12596/2/29) as security for the sums owed to the defendant in view of the fact that the value of the suit motor vehicles is constantly depreciating. The defendant however stated that it had not received any such request from the plaintiff for its consideration. In its submissions, the plaintiff urged this Court to make an order for substitution of the suit motor vehicles with Land Reference No. 12596/30 (Original No. 12596/2/29) as security for the sums owed to the defendant.
43. Parties to an agreement are bound by the terms of their agreement and not even this Court can be seen to alter the terms of such agreement without the consent of the parties and/or unless fraud, coercion or



undue influence is pleaded. In this instance, it was a term of the agreement between the defendant and the plaintiff that the credit facilities advanced to the plaintiff would be secured by joint registration of the financed vehicles in the names of the plaintiff and the defendant and a guarantee by the plaintiff's director.

44. Fraud, coercion or undue influence has not been pleaded and the defendant has not consented to the substitution of the security offered to secure the loan facility, this Court can therefore not be seen to compel or direct the defendant to accept substitution of security. I am bound by the Court of Appeal decision in Civil Appeal No. 330 of 2003, *Hussamudin Gulamhussein Pothiwalla administrator, Trustee and Executor of the Estate of Gulamhussein Ebraihim Pothiwalla v Kidogo Basi Housing Cooperative Society Limited and 31 others* quoted by the Court in the case of the County Government of Migori v Hope Self Help Group [2020] eKLR, where it was held that -

“A court of law cannot re-write a contract between the parties. ... it is clear beyond peradventure that save for those special cases where equity may be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain.”

45. It was stated by the plaintiff that the intended repossession and sale of the suit motor vehicles is unlawful, fraudulent and malicious since its being pursued by the defendant in bad faith and without reasonable cause, in so far as no service of notification of sale was effected upon the plaintiff and that the defendant failed to undertake the necessary advertisement and accept the substitution of the security for the repayment of the outstanding loan arrears. The defendant submitted that the conditions governing the relationship between itself and the plaintiff did not require it to serve the plaintiff with a notification of sale prior to repossession and sale of the motor vehicles since it was at all times entitled to repossess and sell the vehicles in the event of default by the plaintiff, a fact which is not disputed by the plaintiff. Paragraph 3 of the defendant's letter of offer to the plaintiff reads in part as follows -

“Without prejudice to the above, the bank reserves the right to call up the Asset Finance Facility at its discretion, making the Asset Finance loan payable on demand PROVIDED THAT the facility shall be payable immediately on the occurrence of an event of default (as defined in the LTC)”

46. I am persuaded by the decision in the case of *Francis Ngarama Kiratu v Equity Bank Limited & another* (supra) cited by the defendant where Judge C. Kariuki, held as follows when dismissing an application for an injunction -

“In my view, notice of the sale of either the land in question and the Motor Vehicle must strictly conform to what was agreed upon by the parties bearing in mind the provisions of the Land Act and the Chattels Mortgage Transfer Act respectively. Since the issue in the present application touches on the motor vehicle, this court must assess the instrument used to create the Chattel Mortgage.

I have seen the Chattel Instrument dated 27th September, 2011. Specifically Clause 8, where it is stated that when there is a default in repayment of the installments by the Plaintiff the Defendant is entitled to take possession of the chattel in question without any previous or further notice or concurrence of the part of the Plaintiff and sell or dispose the same by way of public auction or private treaty. The issue of a Notice therefore does not arise.



In the foregoing, the Plaintiff having admitted being in default of the loan advanced, the Defendant was within its rights in trying to repossess the motor vehicle.”

47. This Court finds that since the plaintiff does not dispute being indebted to the defendant and that its loan account is in arrears, the defendant is within its right to repossess and sell the suit motor vehicles by way of public auction or private treaty without issuing any notices to the plaintiff prior to, or after repossession. In light of the foregoing, this Court finds that the plaintiff has not demonstrated a prima facie case with a probability of success against the defendant to warrant grant of an order for injunction.
48. On the issue of whether the plaintiff stands to suffer irreparable injury that cannot be adequately compensated by an award of damages in the event the orders sought are not granted, I am persuaded that this is not the case. This is because the value of the suit motor vehicles is ascertainable from the various valuations carried out on them as correctly submitted by the defendant’s Counsel hence if this Court finds that the said repossession and subsequent sale was illegal, damages would be an adequate remedy.
49. In addition, it has been held in numerous case law that a property offered as security becomes a commodity for sale in the event of default. See the decision in Joseph Gitai Gachau v Pioneer Holdings [2009] eKLR and the Court of Appeal case of Shimmers Plaza v National Bank Ltd [2009] eKLR. In this case, the plaintiff does not dispute that it defaulted in its loan repayment obligations to the defendant. As such, the defendant is within its right to repossess and sell the suit motor vehicles so as to recover money owed to it by the plaintiff.
50. It is my finding that the balance of convenience tilts in favour of the defendant since the plaintiff can always be compensated by an award of damages in the event this Court finds that the said repossession and subsequent sale was illegal.

Whether This Court Should Direct The Plaintiff To Surrender The Suit Motor Vehicles To The Defendant.

51. The plaintiff does not dispute that it defaulted in its loan repayment obligations to the defendant and as a consequence thereof, its loan account fell into arrears hence it is indebted to the defendant. Having found so, the defendant is not only entitled, but it is also within its right to repossess and sell the suit motor vehicles in order to recover money owed to it by the plaintiff in light of the plaintiff’s default. I hold that the defendant has made out a case to warrant grant of an order directing the plaintiff to surrender the suit motor vehicles to the defendant.
52. The upshot is that the application dated 7th December, 2022 is bereft of merit and the application dated 14th February, 2023 is merited. In the premise, I make the following orders -
 - i. That the application dated 7th December, 2022 is hereby dismissed;
 - ii. That pending the hearing and determination of this suit an order is hereby issued compelling the plaintiff either by itself or through its employees, agents, servants or any person acting under their direction to deliver to the defendant, surrender and/or hand over Motor Vehicles Registration Numbers KDC 653E, KDC 655E, KDD 047B, KDD 009H and KDD 001K currently in the possession/custody of the plaintiff or its employees, agents, servants or any person acting under their direction;
 - iii. That the Officer Commanding Police Division, Parklands Police Station do supervise compliance with order (ii) above; and



- iv. The defendant is awarded costs of the applications dated 7th December, 2022 and 14th February, 2023.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT NAIROBI ON THIS 29TH DAY OF SEPTEMBER, 2023.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Kiprotich h/b for Mr. Wachira for the plaintiff

Mr. Kibaara for the defendant

