



Brick & Mortar Holdings Limited v Stanbic Bank Kenya Limited & another (Civil Case E216 of 2021) [2022] KEHC 13425 (KLR) (Commercial and Tax) (23 September 2022) (Ruling)

Neutral citation: [2022] KEHC 13425 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E216 OF 2021
EC MWITA, J
SEPTEMBER 23, 2022**

BETWEEN

BRICK & MORTAR HOLDINGS LIMITED APPLICANT

AND

STANBIC BANK KENYA LIMITED 1ST RESPONDENT

PHILLIPS INTERNATIONAL AUCTIONEERS 2ND RESPONDENT

RULING

1. Brick & Mortar Holdings Limited, (Brick & Mortar), has brought two applications dated April 26, 2021 and July 22, 2021, the first and second applications respectively.

First application

2. The first application is a notice of motion brought under article 159 of the *Constitution*, sections 1A, 1B and 3A of the *Civil Procedure Act*, and order 40 rule 2 of the *Civil Procedure Rules*. The motion seeks orders restraining Stanbic Bank Kenya Limited (Stanbic Bank), from repossessing, or disposing of motor vehicle Registration Numbers KCC 410G, KCC 411G, KCC 414G, KCC 413G and KCH 713B; an order restoring possession of a motor vehicle whose registration number has not been given; an order for a joint inspection to ascertain the conditions of the vehicles held by Stanbic Bank or its agents; an order for accounts and appointment of a joint consultant to prepare and file a joint account report in respect of the credits and debit balances outstanding, if any.
3. This application is supported by the grounds on its face and affidavit sworn on the same day by Tengeri Osoro. No written submissions were filed despite directions to that effect. Brick & Mortar states that by a deed dated November 5, 2014, Stanbic Bank agreed to finance purchase of motor vehicles KCC



410G; KCC 411G; KCC 412G; KCC 413G and KCC 414G, which were registered in the joint names of Brick & Mortar and Stanbic Bank.

4. Brick & Mortar later approached Stanbic Bank for restructuring of the debts following the adverse effects of the COVID-19 on its business and a suit is pending in court (No E338 of 2019) on the issue.
5. Although Stanbic Bank agreed to restructure the loan facility and Brick & Mortar charged Office Suite No. 4, First floor, Spring Court, Watermark Business Park, erected on L.R No. 30449 valued at Kshs. 46 Million on April 9, 2021, Stanbic Bank recalled the facility and instructed Phillips International Auctioneers (Philips International) to repossess the trucks. On the same day April 9, 2021, Philips International served notice of repossession of the trucks and Subaru Legacy Registration Number KCH 713B, but only motor vehicle KCC 410G was repossessed.
6. Brick & Mortar takes the view that Stanbic Bank's actions were in bad faith given that negotiations were ongoing on servicing the facility, save for the hardship occasioned by the Covid 19 pandemic. Brick & Mortar also asserts that the facility is sufficiently secured given that the amount demanded is Kshs. 28 Million against the value of the securities of over Kshs. 126 Million. Brick & Mortar maintains that it will suffer irreparable loss if the orders sought are not granted.

Response

7. Stanbic Bank opposes the motion through of a replying affidavit sworn on May 6, 2021 by Amos Mugambi, Stanbic Bank's Business Support and Recoveries manager. Stanbic Bank's case is that there were two distinct facilities, ID and Hire Purchase agreement (HP), both in Kenya Shillings (Kshs) and US Dollars(USD) under different terms. The ID facilities were subsequently converted to term loans and both the ID and HP facilities are in arrears amounting to USD. 287,739.12 and Kshs. 2,301,590.56 respectively.
8. Stanbic Bank contends that Brick & Mortar is in breach of the obligations to pay the loans which fell into arrears even before COVID 19 pandemic despite opportunities given to do so. Stanbic Bank argues that the charge was in relation to the ID facilities which were previously unsecured and not the HP facilities whose security was the vehicles that were registered in the joint names of the parties. Moreover, the HP agreement allowed repossession of the vehicle without prior notice or demand in the event of default, even though Brick & Mortar was served with notice; admitted the debt and promised to pay but to no avail.

Second application

9. The second application is a notice of motion dated July 22, 2021, brought under article 159 of the [Constitution](#), section 80 of the [Civil Procedure Act](#), and orders 45 rules 1,2,3 and 51 rule 1 of the [Civil Procedure Rules](#). The motion seeks stay of repossession orders, sale of the motor vehicles; review and set aside of the ruling delivered on May 7, 2020 and issued on July 14, 2021 and substitute it with an injunction restraining repossession and sale of the vehicles.
10. Brick & Mortar's concern is that even though the impugned order was conditional on payment of outstanding arrears, the order had become incapable of compliance because the question of whether there are outstanding arrears is appending determination; that parties have been negotiating and that Kshs. 10,500,000 had already been credited into the loan account. It is worth of note, that the affidavit filed in support of this motion is for a different case, namely, Misc. Application No. E1039 of 2020 Prof. Tom Ojienda v Music Copy Right Society of Kenya and is sworn by Prof. Tom Ojienda. The application is, therefore, not supported by affidavit evidence.



Response

11. Stanbic Bank has filed a replying affidavit sworn on July 27, 2021 by Amos Mugambi, maintaining that the order of May 7, 2021 required Brick & Mortar to settle outstanding arrears by close of business of that day failing which the order would automatically lapse. The order was not complied with. The present application has been brought to seek favourable orders despite failure to comply with court order; that repossession of motor vehicle registration No. KCC 410 G was properly done and the vehicle was sold and proceeds of Kshs. 8,500,000 credited into the loan account.
12. Stanbic Bank maintains that Brick & Mortar is in breach of obligations to pay and relies on section 176 of the *Evidence Act* to support its position. Stanbic further relies on clause 5 of the HP Agreement to argue that it was within its right to realize the securities once there was default.
13. Several decisions are cited to urge that the applications be dismissed because Brick & Mortar is in breach of obligations to repay the loan. These are *Leisure Car Hire Tours & Safaris Ltd v Imperial Bank Ltd* [2002] eKLR and *Amicabre Travel Services Limited v Alios Kenya Finance Limited* [2014] eKLR.
14. Stanbic Bank again relies on *Gatobu M'ibuutu Karatho v Christopher Muriithi Kubai* [2014] eKLR and *Pius Kimaiyo Langat v Co-Operative Bank of Kenya Ltd* [2017] eKLR, to argue that the Court cannot rewrite a contract between the parties, and *Kitur v Standard Chartered Bank & 2 others* [2002] eKLR for the proposition that a plaintiff having offered the property as security, cannot claim that irreparable loss will be suffered.
15. Regarding the balance of convenience, Stanbic Bank argues that the balance tilts in its favour as Brick & Mortar is unable to repay the loan and for that reason, Stanbic Bank is likely to suffer more damage than Brick & Mortar which can be compensated by way of damages.
16. On the second application (for review), Stanbic Bank argues that the motion is incompetent without a supporting affidavit, and that Brick & Mortar did not comply with the conditions set by the court.

Determination

17. The two applications seek injunction and review respectively. First to restrain Stanbic Bank from repossessing or selling the vehicles purchased through HP and given as security and, second; a review of orders issued on May 7, 2021 requiring Brick & Mortar to pay the outstanding arrears. The two applications have been opposed, thus this consolidated ruling. The court will deal with the applications sequentially.

First application

18. The motion seeks an injunction to restrain Stanbic Bank from repossessing and or selling the vehicles and release of one vehicle already repossessed. By deed dated November 5, 2014, Stanbic Bank agreed to finance Brick & Mortar purchase trucks for transport business. The trucks were purchased through HP and registered in joint names of the parties. Brick & Mortar fell into default and approached Stanbic Bank for restructuring of the facility which Stanbic Bank agreed to.
19. Brick & Mortar argues that Stanbic Bank acted contrary to the understanding on restructuring of the facility while Stanbic argues that restructuring had been done prior to the Covid pandemic but Brick & Mortar has been in arrears thus the move to repossess the vehicles.
20. This being an application for interlocutory injunction, the law is settled that Brick & Mortar must demonstrate a prima facie case with probability of success; irreparable loss that cannot be adequately



compensated by damages or that the balance of convenience is in its favour. (*Giella v Cassman Brown & Company Limited* [1973] EA 358.)

21. There is no denial that Brick & Mortar obtained a financial facility from Stanbic Bank that was secured by the vehicles. Brick & Mortar does not expressly or openly deny default. Brick & Mortar however states that the facility was to be restructured but as soon as registration of the charge for this purpose was done, Stanbic Bank recalled the outstanding balance and moved to repossess the vehicles which was irregular.
22. I have gone through this application, supporting affidavits and the response. there is no dispute that the vehicles were given as security and that Stanbic Bank could repossess the vehicles in the event of default without notice. The law requires Bick & Mortar to show a prima facie case with a probability of success in order to persuade the court to grant an interlocutory injunction in its favour.
23. In *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR, the Court of Appeal stated:

The principles which guide the court in deciding whether or not to grant an interlocutory injunction are well settled. In *Giella v Cassman Brown* to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner he was considering, which was in relation to the pleadings that had been put forward in that case....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.
24. In *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR, the Court of Appeal again stated that the party on whom the burden of proving a prima facie case lies, must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.
25. In *Leisure Car Hire Tours & Safaris Ltd v Imperial Bank Ltd* [2002] eKLR, the court rejected the assertion by the applicant that the respondent had not shown how much was paid, stating that the applicant was unable to establish what amount had been paid to the respondent, when and in respect of which vehicle, and the receipts given. They kept no records or if they did, they chose not to produce the same to their detriment.
26. In that case, just like the present application, one of the terms of the hire purchase agreement was that the financier could, without more, set in motion the process of repossession if the hirer defaulted in repayment. The default gave Stanbic Bank the right to assert its rights as provided in the contracts which had been properly executed by Brick & Mortar.
27. In *Amicabre Travel Services Limited v Alios Kenya Finance Limited* [2014] eKLR, the court dealt with a similar issue and stated:

The court requires tangible evidence when considering an application for interlocutory injunction pending the hearing and determination of the suit. It is therefore incumbent upon an applicant to submit a cogent case during the interlocutory stage to show that it has an arguable case. This is important because at this time, the court would not have had an opportunity to listen to all the evidence in support of each party's case. This is a burden that lies on the applicant. Having failed to rebut the defendant's assertions, the only inference the court can make is that the said instalment remained unpaid.



28. Brick & Mortar was required to show that a right is being violated or is likely to be violated by Stanbic Bank to shift the burden to Stanbic Bank to explain or rebut that claim. It is not enough for Brick & Mortar to merely state that it has a prima facie case with a probability of success. That alone will not bring the matter within the meaning of a prima facie case as required by law.
29. I have considered the material placed before this court, the basis of which Brick & Mortar seeks an interlocutory injunction. As it is, this court is not conducting a mini trial of the case. The task at this stage is to determine on the material placed before it, whether Brick & Mortar has put forward a case requiring intervention to restrain Stanbic Bank from exercising the right to repossess the vehicles given as security; show that the irreparable injury that cannot be compensated by way of damages or that the balance of convenience tilts in their favour.
30. Brick & Mortar has not shown that payment has been made as required under the contracts. On the other hand, Stanbic Bank argues that Brick & Mortar has been in default notwithstanding the opportunity to pay given and that no payment has been made even after notices were served. Stanbic Bank has also shown that the HP allowed repossession of the vehicles, a right that had been invoked.
31. On the basis of the above facts, I am not persuaded that Brick & Mortar has satisfied the test for granting a temporary injunction. That is to say, Brick & Mortar has not demonstrated a prima facie case with a probability of success. Brick & Mortar has not denied the default and it is clear that Stanbic Bank issued notices calling for payment which was not done.
32. On whether Brick & Mortar will suffer irreparable injury which cannot be compensated by damages, I am not also persuaded that this will be the case. Stanbic Bank is a financial institution that would easily compensate Brick & Mortar were the suit to eventually succeed. The value of the vehicles is known or can be ascertained and, therefore, Brick & Mortar can recoup the value of those vehicles if the suit succeeded.
33. Regarding the balance of convenience, there is no doubt that the loan amount continues to attract interest and could easily outstrip the value of the vehicles. This means that if an injunction is granted until the suit is heard and determined, it may not be able to recover the outstanding loan amount and interest by the time the suit will be determined and it cannot be guaranteed that the value of the vehicles would be sufficient to cover the amount outstanding then. In that respect, I find the balance of convenience tilts in favour of Stanbic Bank which can, in any case, pay the value of the vehicles if the suit succeeded.

Second application

34. The second application seeks, in principle, a review to set aside of the order of May 7, 2020 and substitute it with an injunction restraining Stanbic Bank from repossessing and selling the vehicles.
35. The motion is premised on the ground that the injunction order of July 7, 2021 was conditional on payment of outstanding arrears but it had become incapable to comply with it because the question of whether there are outstanding arrears is an issue pending determination in another suit. It is important to point out here, that the affidavit filed in support of this motion is in respect of a different matter, namely, Misc. Application No. E1039 of 2020, Prof. Tom Ojienda v Music Copy Right Society of Kenya. This application is therefore not supported by any evidence.
36. Stanbic Bank has nonetheless filed a replying affidavit stating that the impugned order required Brick & Mortar to settle the outstanding arrears by close of business of on that date, failing which the order would automatically lapse. Brick & Mortar admits that the order was not complied with. Stanbic Bank



further states that due to failure to comply with that order, Motor vehicle KCC 410 G was repossessed, sold and the proceeds of Kshs. 8,500,000 credited into the loan account.

37. As already pointed out, this application is not supported by evidence. That notwithstanding, the only ground on the face of the motion why review is sought is that the order that outstanding arrears be paid by close of business had become incapable of being complied with.
38. Section 80 of the *Civil Procedure Act* allows a party to apply for review while order 45 of the *Civil Procedure Rules* lays down grounds for review. The grounds include discovery of new and important matter or evidence which, despite exercise of due diligence, was not within the knowledge or could not be produced at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason. The application for review must also be made without unreasonable delay.
39. In *National Bank of Kenya Ltd v Ndungu Njau* [1996] KLR 469 (CAK), the court of Appeal stated that:

A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.
40. The argument put forward by Brick & Mortar is that the order has become incapable of compliance because the question of whether any arrears are outstanding, the precise amount and whether there is obligation to pay are still pending for determination in another suit. This argument, in my respectful view, is not discovery of new or important evidence, error or mistake apparent on the face of the record. Brick & Mortar moved this court in this suit while fully aware that the same issue was pending in another suit and instead of approaching the court dealing with that suit, Brick & Mortar opted to file the present suit. Brick & Mortar has also not shown when it discovered that the impugned order had become incapable of compliance.
41. Flowing from what has been stated above, it is clear that Brick & Mortar did not comply with the order of the court within the time required and that order lapsed at the close of business that day. The order having lapsed, there is no order capable of being reviewed. In any case, Stanbic Bank states that one of the vehicles was repossessed and sold, a fact Brick & Mortar acknowledges.

Conclusion

42. Having considered the two applications, it is plain that Brick & Mortar has not satisfied the threshold for granting an interlocutory injunction and review respectively. The argument by Brick & Mortar that it is not clear how much is due to Stanbic Bank has been rebuffed, with Stanbic Bank correctly arguing that a dispute on the outstanding amount is not a ground for granting an injunction to restrain it from exercising the right to repossess the vehicles.
43. The argument by Stanbic is supported by the Court of Appeal decision in *Giro Commercial Bank Limited v Halid Hamad Mutesi* [2002] eKLR, that a mortgagee cannot be restrained from exercising his power of sale because the amount due is in dispute or that the mortgagee has commenced a redemption action or because the mortgagor objects to the manner in which the sale is being arranged.



Where the debt is admitted as due and the loan is not being serviced, the court should not grant an injunction.

44. There is no discovery of new evidence, error or mistake apparent on the face of the record to call for review. In the end, having considered the motions, responses submissions and the decisions relied on, I am not persuaded that Brick & Mortar has made a case for granting any of the applications.
45. Consequently, the applications dated April 26, 2021 and July 22, 2021 are dismissed with costs

DATED SIGNED AND DELIVERED AT NAIROBI THIS 23RDND DAY OF SEPTEMBER 2022

E C MWITA

JUDGE

