



**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**CORAM: D. S. MAJANJA J.**

**CIVIL CASE NO. E090 OF 2020**

**BETWEEN**

**MOSS ENTERPRISES LIMITED.....PLAINTIFF**

**AND**

**NORERN AUCTIONEERS..... 1<sup>ST</sup> DEFENDANT**

**EQUITY BANK (K) LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

**Introduction**

1. There are three applications filed by the Plaintiff; the Notice of Motion dated 31<sup>st</sup> March 2020, 19<sup>th</sup> May 2020 and 2<sup>nd</sup> December 2020. They are all supported by the affidavits of the Plaintiff's director, Amos Kanyoi Muikia. In essence, the Plaintiff seeks the following orders:

*(a) Unconditional release of Motor Vehicle Registration Numbers KCG 825A and KBE 849P ("the motor vehicles") pending the hearing of the suit.*

*(b) An injunction restraining the Defendants from selling the following properties; LR. No. Nairobi/Block 144/2093, LR. No. Nyandarua/Melangine/973, LR No. Nyandarua/Ol Aragwai/4086, LR. No. Nyandarua/Ol Aragwai/4981, LR. No.77856(I.R. No. 57985), LR. No. 12715/10562, LR. No. 12715/10556, LR. No. 12715/10558, LR. No. 12715/10559, LR. No. 12715/10562 ("the suit properties") and all other securities of the overdraft agreement pending hearing and determination of this suit application dated 1/12/2020 and the suit.*

2. The Defendants oppose the application through the affidavit of Catherine Kanini Mbungu, the 2<sup>nd</sup> Defendant's Credit Manager sworn on 14<sup>th</sup> February 2020 and 18<sup>th</sup> January 2021. Both parties filed written submissions setting out their arguments.

3. At the time material to this suit, the Plaintiff was a distributor of alcoholic beverages produced by Kenya Breweries Limited ("KBL") and UDV (Kenya) Limited ("UDV") in the areas around Ol kalou, Gilgil and Nakuru. Under the distribution agreement, all proceeds from the distribution were deposited in a Collections Account negotiated with the 2<sup>nd</sup> Defendant ("the Bank"), KBL and UDV.

4. Further and in order to support its business, the Plaintiff applied for and was granted banking facilities as contained on the letter dated 30<sup>th</sup> August 2018 ("the Facility"). Under the Facility, the Plaintiff was granted an overdraft of KES 30,000,000.00 which was to expire 12 months from the date of drawdown. The Facility was secured by a First Legal Charge over LR No. 209/12678 (IR No. 68284) in favour of the Bank. The Plaintiff's directors, Amos Kanyoi Muikia and Salome Muthoni Mbichiri provided Directors' Personal Guarantees supported by charges over, inter alia, the suit properties.

**Plaintiff's Case**

5. The Plaintiff's case as set out in the Amended Plaint dated 12<sup>th</sup> October 2020 and the depositions in the support of the applications is that the Facility expired on 10<sup>th</sup> September 2019 and as at that date, the outstanding debt was KES 25,762,030.30. That within 7 days of expiry of the overdraft, it deposited a total of KES. 33,736,518.95 into the Collection Account maintained by the Bank. It asserts that from the date of

expiry to 14<sup>th</sup> January 2020, the Plaintiff had deposited a total of KES. 219,817,350.15 into the collection account.

6. The thrust of the Plaintiff's case is that statements from the collections account indicate that the Bank failed to apply deposits to regularize the account but instead allowed the account to be loaded with unauthorized debits and bank charges such that as at 14<sup>th</sup> January 2020, the account was overdrawn by KES 36,320,291.00.

7. The Plaintiff therefore contends that it is not indebted to the Bank as alleged. It accuses the Bank of negligence, breach of its duty of care and skill and fiduciary duties in the manner it operated the account. It states that the Bank allowed unauthorized debits and bank charges thereby causing the account to reflect a debit balance without the knowledge and authority of the Plaintiff.

8. At paragraph 29 of the Amended Complaint, the Plaintiff states as follows in respect of the motor vehicles:

*On 26<sup>th</sup> March 2020, the 1<sup>st</sup> Defendant acting under the authority of the 2<sup>nd</sup> Defendant repossessed M/V Reg. Nos. KCG 825A and KBE 849P belonging to the Directors of the Plaintiff in the alleged execution of a debt of a debt of Kshs. 81,082,460 allegedly owed by the Plaintiff to the 2<sup>nd</sup> Defendant. The repossession was prima facie illegal and unlawful and amounted to trespass to goods because,*

*a. M/V Reg. No. KCG 825A is not part of the securities held by the bank*

*b. The repossessed vehicles belonged to the directors of the company and not the plaintiff.*

*c. The directors of the company (are) distinct and separate from the Plaintiff.*

*d. The 1<sup>st</sup> Defendant did not issue (a) proclamation and 7 days redemption notice prior to repossession contrary to Rule 12(b) & (c) of the Auctioneer Rules.*

*e. The vehicles were repossessed the same day without statutory notices.*

#### **Defendant's Case**

9. The Bank's position is that the Plaintiff is still indebted to the Bank to the extent of KES 37,492,492,027.40 as at 25<sup>th</sup> April 2020. It states that the default has been persistent and that it commenced the process of the realizing all the securities under the Facility by issuing the relevant statutory notices. It contends that based on the facts, the Plaintiff is not entitled to and has not established a case for an injunction.

#### **Determination**

10. The issue for determination is whether the Plaintiff is entitled to an injunction restraining the Bank from selling the securities under the Facility in exercising its statutory power of sale. This court is guided by the well-established principles in ***Giella v Cassman Brown [1973] EA 348***. The Plaintiffs have to satisfy three requirements; establish that they have a prima facie case with a probability of success, demonstrate irreparable injury which cannot be compensated by an award of damages if a temporary injunction is not granted, and if the court is in doubt show that the balance of convenience is in their favour.

11. A prima facie case is founded on the pleadings. In ***Mrao Ltd v First American Bank of Kenya Limited and 2 Others MSA CA Civil Appeal No. 39 of 2002 [2003] eKLR***, the Court of Appeal explained that a prima facie case 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 to call for an explanation or rebuttal from the latter."

12. The Amended Complaint dated 12<sup>th</sup> October 2020 set out the Plaintiffs' case as I have outlined above. I must point out that although the Plaintiff's applications referred to the immovable properties which were provided by the Plaintiff's directors as securities for the Facility, the Amended Complaint does not set out any case why the court should restrain the Bank from exercising its statutory power of sale.

13. It is also not in dispute that the suit properties are in the names of the Plaintiff's directors; Amos Kanyoi Muikia and Salome Muthoni Mbichiri. It is also trite law that a chargor is the proper party to sue the Bank as it is only a chargor who has a registered and proprietary interest in the land and who can complain that the statutory power of sale is being exercised unlawfully, wrongfully or oppressively. In ***Nairobi Mamba Village v National Bank of Kenya Ltd [2002] 1 EA 197*** the court held as follows:

*A party seeking to prevent alienation, wastage or damage to the property in dispute under Order XXXIX (now Order 40) of the Civil Procedure Rules had to establish that it had legal rights in such a property. In this instance, the Plaintiff could not properly seek to restrain the chargee from selling the charged property as the intended sale was to be carried out pursuant to the exercise of the contractual and statutory power of the chargee contained in a charge which the Plaintiff is not a party. The only person who could legitimately challenge the exercise of the power of sale was the chargor.*

14. Since the Plaintiff does not have any proprietary interest in the suit properties, it does not have a prima facie case with a probability of success on that account.

15. As regards the motor vehicles, the Plaintiff's case as I have outlined above, is they belong to the directors of the company. This raises the question whether a company can sue on behalf the directors in relation to the property of the directors. As the Plaintiff points out in the

Amended Plaint, the Plaintiff and its directors are separate entities. I do not see how the Company can agitate a cause of action belonging to third parties. In order to establish case for a mandatory injunction, the Plaintiff must establish a very strong case that its rights have been violated (see *Kenya Breweries Limited and Another v Washington Okeyo [2002] 1 EA 109*). Since the Plaintiff does not have a proprietary interest in the motor vehicles, it cannot establish a prima facie case with a probability of success.

**Disposition**

16. The Notice of Motions dated 31<sup>st</sup> March 2020, 19<sup>th</sup> May 2020 and 1<sup>st</sup> December 2020 are now dismissed with costs to the Defendants.

**DATED and DELIVERED at NAIROBI this 29<sup>th</sup> day of JANUARY 2021.**

**D. S. MAJANJA**

**JUDGE**

Court of Assistant: Mr M. Onyango

Mr Masila instructed by Ndegwa and Sitonik Advocates for the Plaintiff.

Ms Ochieng instructed by Makori and Karimi Advocates for the Defendants.