**REPUBLIC OF KENYA**

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

**COMMERCIAL & TAX DIVISION**

**HCCC NO. E 129 OF 2020**

**ASL CREDIT LIMITED.....PLAINTIFF**

**VERSUS**

**JOYCE WANGUI WACHIRA T/A PADDY DISTRIBUTORS.....1ST DEFENDANT**

**PATRICK NTHIGA MVUNGU.....2ND DEFENDANT/APPLICANT**

**RULING**

1. This Court is asked to consider the Defendant's Application of 9th November 2020 for the following main prayer:-

> *2. THAT a temporary injunction be issued restraining the Plaintiff/Respondent and/or its agents and/servants and/or representatives and/or employees from attaching, advertising for sale, alienating, disposing and/or in any other manner whatsoever from adversely dealing with motor vehicle registration numbers ZF 1909(Bhachu trailer), ZF (Bhachu trailer), KAQ 761R (Mitsubishi fuso), KBH 118Q (Mitsubishi FH), KAY 752X (Nissan Club450, KBD 358G (Mitsubishi FH), ZP 0044 (Bhachu trailer), F0045 (Bhachu Trailer), ZF 0046 (Bhachu trailer), ZF 0047(Bhachu trailer), KCE 645W(Mercedes Actos 3340), KCF 353J (Mercedes Actos 3340, KAQ 068R (Mitsubishi FH), ZF 3637 (Bhachu trailer), ZF 3639(Bhachu trailer), ZD 8771 (Bhachu trailer), and ZD 8772 (Bhachu trailer) and all those parcels of land situate North of Gilgil township in the Naivasha District being Land Reference Numbers 3777/1164 and 1169 containing by measurement 15.00 hectares (37 acres) and 2.017 hectares (5 acres) respectively including the stay of the purported statutory notice issued by the auctioneer on 21st October 2020 pending the hearing and determination of this application interparties.*

2. At all material times to this suit ASL Credit Limited (the Plaintiff or ASL) and Joyce Wangui Wachira t/a Paddy Distributors (the 1st Defendant) had a lender/borrower relationship. Through seven (7) Hire Purchase Agreements, the lender advanced to the borrower facilities in the total sum of Kshs.661,359,941/=. In support of these financial accommodation, the 2nd Defendant executed personal guarantees and indemnity in favour of the Plaintiff and it is the Plaintiff's case that the 2nd Defendant guaranteed the 1st Defendant's repayment obligations under the Hire Purchase Agreements and undertook to indemnity the Plaintiff against any default by the 1st Defendant.

3. The lender alleges default in repayment of the facilities and brings this suit to recover the sum of Kshs.153,045,549/= against the Defendants jointly and severally. It also seeks late payment charges on the outstanding sum at 5% per month from 1st April 2020 until payment in full. Costs of the suit are also prayed for.

4. In a joint Statement of Defence dated 1st July 2020, the two Defendants do not deny default. Instead, they aver that having substantially repaid the facility, any remaining sums ought to have been fully recovered by the lender when it repossessed and sold security motor vehicles. Their joint defence is that if the Plaintiff did not make full recovery then it only has itself to blame for, inter alia, failing to sale the vehicles at their true value.

5. On another front, the Defendants aver that they did not agree on the interest rates and penalties applied by the Plaintiff and allege them to be high, unjustified and illegal.

6. The trigger to the application now before Court is an attempt by the lender to sell some vehicles held as security for the facility and two parcels of land namely LR 3777/1164 and 1169 charged in its favour. Other than the issues raised in the Defence, a substantial argument by the Defendants is the Plaintiff should have exhausted its rights under the Hire Purchase Agreements and its statutory power of sale before instituting this suit. They decry what they perceive as a multiplicity of actions. They think it to be harassment and seek this Court's protection.

7. In addition, the Defendants state that Plaintiff intends to proceed with the sale of the land on the basis of undervaluation of the landed properties.

8. The Plaintiff confronts the Application through an affidavit of Daniel Wandera in which he raises various legal issues which were rehashed by its counsel in the arguments. I leave those for now. On the facts, the Plaintiff deposes that upon default on agreement was entered between it and the Defendants in which the Defendants were granted authority to sell some of the vehicles. That upon the sale, the Defendants owed the Plaintiffs Kshs. 198,299,453/= as at 7th November 2018.

9. As a preliminary issue the Court needs to consider whether or not the Defendants, who have no counterclaim, can mount an application for injunction. I would think that, unlike what counsel for the Plaintiff submits, the language of Order 40 Rule 1 (a) contemplates that possibility. It reads:-

> "Cases in which temporary injunction may be granted.
>
> 1. 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."

10. The provisions are open to either the Plaintiff or the Defendant to seek the intervention of the Court to protect any property in dispute in a suit from waste, damage or alienation pending disposal of the suit. It is not the preserve of the Plaintiff and the Defendant need not to have a counterclaim. It is sufficient that what is sought to be protected is a property in dispute in a suit.

11. Yet the Defendants herein may not benefit from the generous wording of those provisions. The suit by the Plaintiff is for recovery of money. Neither the vehicles nor the charged properties are the subject matter of the suit. The Defendants themselves in their Defence do not purport to bring them within the ambit of the matters in litigation. In the strict sense the subject matter of the suit is a debt supposedly owed by the Defendants to the Plaintiff. Whether or not the debt is truly due may very well be the single issue to be eventually determined by the Trial Court.

12. Emerging from the material before Court is that there is a letter dated 1st November 2018 from the Defendants in which they admit a debt of Kshs.198,299,435/= prior to the proposed sale of certain vehicles and a reduction to 115,299,435/= after the sales. The Plaintiff's allegations that there is still a debt owing may not be trivial when one also considers that even in the application before Court the Defendants state that they have continued paying a monthly sum of Kshs.1,000,000/= even after the presentation of the suit.

13. So, even if the exact amount due is disputed still the Plaintiff would be entitled to pursue recovery through realization of the securities because there seems to be evidence that a substantial sum is owing.

14. What is however up for debate is whether the Plaintiff is entitled to pursue recovery of the securities held when its action for recovery of the debt is subsisting and pending. The Defendants submit that a multiplicity of recovery actions amounts to harassment. The Plaintiff takes a contrary view.

15. On the party of the Court, the issue is whether the multipronged action by the Plaintiff is frowned upon or barred in equity, the law or by the contract between the parties. The onus was always on the Plaintiff to demonstrate as much. The Plaintiff makes the argument but has not backed it with any legal basis. The Court will nevertheless make its observation.

16. In respect to the relationship between the parties as regards the vehicles sought to be attached and sold would be the Hire Purchase Agreement recognized by both sides. Copies of those agreements do not seem to have been placed before the Court although they are in the list of documents of 9th April 2020 to be relied on by the Plaintiff.

17. I would nevertheless think that the Defendants bore the responsibility of producing the agreements and pointing out which provisions therein, if any, bar the Plaintiff from pursuing multiple avenues for recovering its debt.

18. As to the charged property, although not argued by the parties, the provisions of section 91 of the Land Act may assist resolve the matter. But first I point out that Section 90 provides the various remedies available to a chargee. Subsection (3) reads:-

> "(3) If the chargor does not comply within two months after the date of service of the notice under, subsection (1), the chargee may —
>
> (*a*) sue the chargor for any money due and owing under the charge;
>
> (*b*) appoint a receiver of the income of the charged land;
>
> (*c*) lease the charged land, or if the charge is of a lease, sublease the land;
>
> (*d*) enter into possession of the charged land; or

(*e*) sell the charged land."

19. In the matter before the Court, it does seem that by the terms of the charge document dated 5th May 2016 the 1st Defendant as chargor was personally bound to repay the debt. The Plaintiff was therefore entitled to sue the 1st Defendant as chargor for the money secured. The provisions of Section 91 then read:-

"Chargee's action for money secured by charge.

91. (1) The chargee may sue for the money secured by the charge only if—

(a) the chargor is personally bound to repay the money;

(b) by any cause other than the wrongful act of the chargor or chargee, the security is rendered in sufficient and the chargee has given the chargor a reasonable opportunity to provide additional sufficient security and the chargor has failed to provide that additional security; or

(c) the chargee is deprived of the whole or part of the security through or in consequence of, a wrongful act or default of the chargor.

(2) The court may order the postponement of any proceedings brought under this section until the chargee has exhausted all other remedies relating to the charged land, unless the chargee agrees to discharge the charge."

20. Pre the amendment introduced by section 66 of Act No. 28 of 2016, subsection 2 of section 91 read as follows:-

"(2) The court may order the postponement of any proceedings brought under this section until the chargee has exhausted all other remedies relating to the charged land, unless the chargee agrees to discharge the charge."

21. Prior to the amendment, the Court could postpone any proceedings brought under subsection (1) (a), 1(b) or 1(c) until the chargee had exhausted all remedies relating to the charged land. But changes were made by the amendment. The effect of the amendment was that the power to postpone proceedings was only limited to the situation of subsection 1(c). It is not alleged or argued that the circumstances of this matter fall in that category.

22. This Court would take it therefore that the amendment to section 91(2) was an acknowledgment that a chargee could sue a personally liable chargor for recovery of the money and could at the same time pursue other remedies available to it under Section 90.

23. This Court is not persuaded that the Defendants have made out a case to entitle it to the order of injunction sought.

24. And perhaps I should add this. On the argument that the Plaintiff intends to sell the charge property at an undervalue, in support of this argument, the Defendant have produced evidence that on 9th November 2015 the joint values of the two charge properties were:-

Open market value …… Kshs.190,000,000/=

Force sale value ….…….. Kshs.130,000,000/=

This Court was asked to compare these with values conducted on 20th September 2020 by a valuer commissioned by the Bank.

Open market value …….. Kshs.80,000,000/=

Reserve value ……..…… Kshs.64,000,000/=

25. Regarding, the drops in value, the Plaintiff simply retorts that the valuation of the property was conducted by a registered valuer and the allegations of undervaluation are unsubstantiated.

26. Now, the second valuation of 2nd September 2020 was taken about 5 years after the first. It is not for this Court to speculate whether the land values of the property has appreciated or drastically dropped as suggested by the second valuation. What I find curious is that the Defendants who complain about the undervaluation have not themselves brought a valuation which is as contemporary as that of the Plaintiff's second valuation for this Court to make a comparison. How then is this Court to agree with the assertion that the second valuation is an understatement of value?

27. The Notice of Motion of 9th November 2020 is without merit and is dismissed with cost.

**DATED, SIGNED AND DELIVERED IN COURT AT NAIROBI THIS 19TH DAY OF MAY 2021**

**F. TUIYOTT**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17TH April 2020, this Ruling has been delivered to the parties through virtual platform.

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

No appearance for the Plaintiff.

No appearance for the Defendants.