REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 8 OF 2021

FLAMCO LIMITED.....PLAINTIFF/ APPLICANT

VERSUS

BANK OF BARODA KENYA LTD.....1ST DEFENDANT/RESPONDENT

MUGANDA WASULWA T/A KEYSIAN AUCTIONEERS...2ND DEFENDANT/RESPONDENT

RULING

1. This is a ruling on application dated **31st March 2021**. It seeks the following orders:

   a. Spent

   b. Spent

   c. That pending the hearing and determination of this suit, this honorable court be pleased to grant a temporary order of injunction restraining the defendants either by themselves, agents, or servants from trespassing on the plaintiff premises, selling, disposing of, transferring, wasting, alienating or in any other manner interfering with the plaintiff's goods and motor vehicles including but not limited to KAZ 645G, KBZ 406J, KAV 565Q, KAQ 406U, KBP 565V, KCG 625V, KCE 406W, KCE 40Z, KCE 565Z, KAM 565L, KAY 228X, KBY265U, KAZ 154L, KCF 514H, KAS 775Q, KBZ 565L, and ZC 7028 attached on 9th December 2020.

   d. That the auctioneer's notification of sale dated 9th December 2020 is defective, unlawful, and illegal for failure to comply with the law hence null and void as per the auctioneer's Act 1997.

   e. That pending the hearing of the suit this court be pleased to order and direct the 2nd Respondent to unconditionally deliver the attached motor vehicles to the applicant and in default the applicant be ordered to repossess them through the assistance of the commanding Officer Commanding station (O.C.S), Nakuru Police Station.

2. Grounds on the face of the application are that: -

   i. That he applicant applied for and was granted various facilities by the 1st Respondent.

   ii. The applicant did offer several of its motor vehicles among other assets, as securities for the said facilities.

   iii. That before the said loan was repaid, the borrower-lender relationship that existed between the applicant and the respondent became strained where the 1st respondent returned all the post-dated cheques that had been issued by the applicant to its suppliers for purchase of goods of trade.

   iv. That as a result, the applicant fell into debts with some its suppliers and creditors forcing one of its creditor to commence insolvency proceedings against the applicant in Nairobi in an insolvency cause serialized as Nairobi Commercial and Tax Division Insolvency Notice No.E.47 of 2020, where the 1st respondent is a party thereon as one of the secured creditors. The said proceedings are still pending in court and are set to be heard on 28th April, 2021.

   v. That on the 19th December, 2020, the 2nd respondents who are agents of the 1st respondents attached the applicant's motor

vehicles in an effort to recover the outstanding facility amount of Kshs. 826,137,170.82.

vi. That consequently and following the applicant being served with the notice of attachment and sale and the items thereon having been repossessed and/or seized by the 2nd respondent, the applicant obtained an order of stay of execution in Kisumu Misc. App. No.129 of 2020.

vii. That the 1st respondent raised a preliminary objection touching on the pecuniary jurisdiction of the magistrate court which objection was upheld and the entire proceedings struck out.

viii. That no proclamation notice was ever served upon the applicant prior to the said notice of sale and attachment as required by law hence.

ix. Following the said proceedings being struck out, there is nothing protecting the applicant from the illegal and unlawful sale of its motor vehicles as the said motor vehicles are set to be sold without any further notice to the applicant as per the letter dated 26th March, 2021.

x. That despite the applicant being in arrears and offering the subject motor vehicles as securities, the 2nd respondent is bound by law to issue all the prerequisite notices required under the law before proceeding to seize and sell the applicant's properties.

xi. That the process sought to be relied on by the respondents in an effort to recover the loan arrears is legally flawed and if allowed to go unrestrained will allow the respondent to perpetuate an illegality.

xii. The applicant continues to suffer irreparable damage if the unsanctioned actions of the respondents are not restrained forthwith.

xiii. That it is in the interest of justice and fairness that the orders sought be allowed.

3. The application is supported by Affidavit sworn by **SANJAYVSHAH.**The Court issued interim orders ex-parte on 31st March 2021.

4. In response, the 1st respondent filed replying affidavit sworn by **JUSTUS PAUL MUGA** the Branch Credit Manager on 21st April 2021.

5. He averred that the plaintiff was accorded credit facilities by the 1st respondent in the year 2009 and over the years the Plaintiff sought more credit facilities and as of 30th November 2020, the credit facility was to the tune of kshs. 862,137,170.82/=.

6. He further averred that in various credit facilities, the plaintiff requested the 1st defendant to finance purchase of the following motor vehicles: KAZ 645G, KBZ 406J, KAV 565Q, KAQ 406U, KBP 565V, KCG 625V, KCE 406W, KCE 40Z, KCE 565Z, KAM 565L, KAY 228X, KBY265U, KAZ 154L, KCF 514H, KAS 775Q, KBZ 565L, and ZC 7028 which were registered jointly in the names of the applicant and the 1st respondent.

7. The 1st respondent averred that the plaintiff was to repay the credit facility advanced to it before the vehicle ownership was transferred but he defaulted in the repayment of the credit facility resulting in instructions being given to the 2nd respondent to repossess the vehicles.

8. The respondent averred that there is no injunction in place stopping the actions of the respondents and the plaintiff cannot benefit from insolvency proceedings filed by a third party.

9. Further that the 1st respondent is exercising its proprietary rights as it is a joint owner of the vehicles in question and is merely exercising the statutory power of sale for the defaulted credit facility by the plaintiff.

10. The 2nd respondent filed a replying affidavit on 21st April 2021, sworn by **Muganda Wasulwa** on 19th April 2021. He averred that he is a licensed auctioneer trading in the name of **Keysian Auctioneers** and it received instructions from the 1st respondent to repossess the subject motor vehicles on account of the plaintiff's failure to service the colossal credit facility granted by the 1st respondent.

11. He averred that they did proclamation and gave a 7-day proclamation notice to the managing director **Mr. Sanjay Shah** on 2nd December 2020 who acknowledged and signed their copy.

12. He further averred that on 9th December 2020, they proceeded to attach the motor vehicles, but plaintiff refused to release the vehicles an act that necessitated the 2nd respondent to seek orders of repossession through Kisumu Misc App No. 129 of 2020 and the orders were granted on 11th December 2020. They proceeded and attached 13 vehicles.

13. He averred that the applicant sought stay orders in the same file which were granted but later vacated by the Court on 26th March 2021 for want of jurisdiction; and on 29th March 2021, it proceeded to attach 2 vehicles and a trailer.

14. The respondent stated that the application by the applicant is frivolous, vexatious, and misleading as the proclamation notice was served.

15. The plaintiff/applicant filed a further affidavit on 26th April 2021, where he averred that the proclamation notice attached as evidence by

the respondents is a fabrication and repossession on 31st March 2021, was done in violation of the injunction issued in Kisumu Misc App No. 129 of 2020.

16. He averred that the proclamation notice was prepared after the seizure of 13 motor vehicles and only 3 vehicles were seized after a proclamation notice had been issued which the respondent alleges to have his signature.

17. He averred that the seizure and intended sale are unlawful and illegal for failure to issue a proclamation notice; and the plaintiff continues to suffer huge losses and damages as the respondents remain in illegal possession of the vehicles.

18. The 2nd respondent filed a supplementary affidavit to make clarifications on issues raised in the replying affidavit filed.

19. He deponed that the first repossession of 13 motor vehicles was done in compliance with the Court Orders issued on 14th December 2020 for repossession and thus the proclamation notice was not mandatory.

20. He averred that the application is overtaken by events as repossession has been carried out and the 2nd respondent has acted in the confines of the law.

21. The application proceeded by way of written submissions.

PLAINTIFF'S SUBMISSIONS

22. The plaintiff filed submissions on 27th April 2021. He submitted that the only issue is whether the applicant/plaintiff is entitled to orders sought and cited the case of **Giella vs Cassman Brown** which set out the principles for granting temporary injunctions as follows:-

a. Whether there is a prima facie case with a probability of success

b. The applicant will suffer irreparable loss or injuries not adequately compensated by damages if the injunction is not granted.

c. Decide matter on a balance of convenience.

23. On the issue of a *prima facie* case, the plaintiff submitted that the Court only gauges the strength of the case and does not adjudicate the main suit and cited the case of **Mrao Ltd vs First American Bank of Kenya Ltd & 2 others (2003) KLR 125** defined *prima facie* to mean: -

"…… there exists a right that has been infringed by the opposite party to call for an explanation or rebuttal from the other party."

24. The plaintiff submitted that procedure of issuing the plaintiff with a proclamation notice prior to the proclamation violated **Section 12 of Auctioneer's Act Cap 526** by failing to issue a proclamation notice and for failure to indicate the value and condition of the motor vehicles proclaimed. Further that the 2nd respondent failed to sign any certificate of service as required where a party refuses to sign on the proclamation notice.

25. The plaintiff further submitted that the proclamation notice marked as JMP 5 and MW2 is in respect to 4 motor vehicles and allegedly signed by the plaintiff yet the 2nd respondent has seized 17 motor vehicles belonging to the plaintiff.

26. Counsel further submitted that in Kisumu Misc Appl 129 of 2020, the respondents stated that they served the applicant with the proclamation notice but declined to signed yet in their replying affidavit filed before this Court they allege that the applicant was served and signed on the copy of the proclamation notice.

27. The applicant submitted that rights of the applicant to be served with a proclamation notice have been infringed by the respondents.

28. On the issue of damages, counsel submitted that since the applicant deals with the supply of various consumables and household commodities, it relies heavily on the subject motor vehicles as the tool of trade and without the said vehicles its business has been greatly hampered.

29. On the balance of convenience, plaintiff submitted that the actions of the respondents have occasioned grave damage to the applicant and the Court should restore the plaintiff to its previous position they were before the illegal and unlawful act of the respondents and urged the Court to allow the application as prayed.

1ST RESPONDENT'S SUBMISSIONS

30. 1st respondent filed submissions dated 18th May 2021 and submitted that the only issue for determination was whether the applicant has met the conditions for granting temporary injunctions as set out in the case of **Giella Vs Cassman Brown**.

31. The respondent submitted that plaintiff has not established a *prima facie* case and argued that the insolvency proceeding do not act as a stay order against other civil actions against a party and stated that attached motor vehicles are jointly co-owned by the applicant and the 1st respondent.

32. Further that the repossession was done in accordance with the law and proclamation notice was issued to the applicant director. Further that repossession of the 13 vehicles was done vide a Court Order in Kisumu Misc No. 129 of 2020, while the other 4 the repossession was done after the Court in Kisumu vacated its stay order for want of jurisdiction on 26th March 2021.

33. On the issue of irreparable damage, the respondent submitted that no damages or loss will be occasioned if the orders are not granted on the ground that the applicant had already closed its business due to financial constraints and therefore no business operations will be interfered with; that the 1st respondent is the one suffering huge losses due to non-repayment of the credit facility by the applicant.

34. On the issue of the balance of convenience, counsel submitted that the applicant has failed to prove that it was not served with the proclamation notice and the 1st respondent continues to suffer injustice due to the temporary order in place and will continue to be detrimental if the injunction is granted and cited the case of **Andrew Muriuki Wanjohi vs Equity Building Society Limited & 2 others (2006) eKLR** the Court held that: -

> **"….in my considered view if the 1st and 2nd Defendants are restrained from selling off the property until the suit was heard and determined, there is a very real risk that the debt may outstrip the value of the property as the borrower has not made payments for more than 3years."**

35. The responded stated that the applicant is indented to the 1st respondent to the tune of kshs 862,137,170.82/= and the 1st respondent being a co-owner of the vehicles should be allowed to exercise its proprietary rights.

2ND RESPONDENT SUBMISSIONS

36. The 2nd respondent submitted it acted upon instructions from the 1st respondent and followed all due and requisite procedure including issuing of notices to the applicant and the law was complied with at the time of issuing the notices and submitted that the repossession is in conformity with the law.

37. The 2nd respondent submitted that Court should allow the 1st respondent to redeem itself by selling the attached motor vehicles as the applicant is unable to repay the outstanding credit facility and is employing delay tactics. Counsel cited the case of a **Court of Appeal Civil Application No. 134 of 2008 (ur 86/2008)** and submitted that the applicant has not met the threshold of issuance of injunctions, the Court was urged to dismiss the application.

ANALYSIS AND DETERMINATION

38. I have considered averments by all parties and submissions filed;and wish to consider whether the applicant has demonstrated that it is deserving prayers sought. The applicant has a burden of proving that it has met the threshold for grant of injunction**.** It is also worth noting that granting of injunctions is a discretionary remedy by the Court based on the facts of each case.

39. Principles for grant of injunction are set out in the case of ***Giella –versus- Cassman Brown and Company Limited (1973) E.A 385, at page 360*** *where* ***the court held as follows:-***

> ***"The conditions for the grant of an interlocutory injunction are now, I think, well-settled in East Africa. 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 injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."***

41.In the case of ***Mrao Limited –versus- First American Bank of Kenya and 2 Others (2003) KLR 125,*** the Court of Appeal in determining what amounts to a *prima facie* case stated as follows:-

> ***"A prima facie case in a Civil Case includes but is not confined to a "genuine or arguable" case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude 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."***

42. At this stage of trial, the Court is not expected to consider the merits of the case when determining whether or not a *prima facie* case has been established. This position was set out in **Nguruman Limited vs Jan Bonde Nielsen CA No. 77 of 2020** where the Court of Appeal stated as follows:-

> **"We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini-trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right that has been or is threatened with a violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case."**

43. I have considered averments herein and perused documents filed and find that it is not in dispute that the applicant was granted credit facility. From the 1st respondent's averments, Kshs. 862,137,170.82. has not been paid. The applicant averred that it is in some financial constraints and there is an insolvency proceeding filed against the company by another party and it is the applicant's argument that it should not repay the credit facility.

44. The applicant contends that service of the proclamation notice was not done and the 2nd Defendant failed to issue a notice as stipulated as per the Auctioneers Act. Having looked at the proclamation notice issued herein I note that the first proclamation dated 1st December 2020 was for all the 17 vehicles, it is indicated that the director refused to sign.

45. It was the evidence of the 2nd respondent that the proclamation was for 7 days, upon its lapse they moved to repossess the vehicles and the applicant prevented the same which prompted the 2nd respondent to file an application vide Kisumu Misc App No 129 of 2020 that granted the orders of repossession and they thereafter proceeded with the repossession. The said orders were served upon the applicant before the repossession was done.

46. At this point, only 13 motor vehicles were repossessed. In respect to the remaining 4 motor vehicles, there is evidence of a proclamation notice issued after the Court dismissed the application for an injunction by the applicant for want of jurisdiction;though the same has no date, it bears the signature of the director of the applicant. From the foregoing there is no doubt the applicant's argument of non-service of the proclamation notice cannot stand.

47. The amount owing continues to accrue interest and the applicant has not shown any efforts he has employed or is to employ to repay the loan thus the 1st respondent continues to suffer detriment and losses at the expense of the applicant.

48. On the second issue as to whether the applicant will suffer irreparable loss which would be adequately compensated through an award of damages,as much as the applicants enjoy the right to property as enshrined in **Article 40** of the **constitution of Kenya**, it's also important to protect the interest of the 1st respondent by securing security for credit advanced to the applicant who has not shown efforts to repay the loan advanced. I wish to associate myself with the case of **Andrew M. Wanjohi –v- Equity Building Society & 7 Another (2006) eKLR**, where the court held ***inter alia*** that: -

> **"……..by offering the suit property as security the chargor was equating it to a commodity which the chargee may dispose of, so as to recover his loan together with the interest thereon."**

49. The motor vehicles in the custody of the 1st respondent were given as security for various credit facilities advanced to the applicant and they became commodities for sale and are therefore subject for sale for default in repayment of the loan. The vehicles are jointly owned by the applicant and the 1st respondent and until the applicant fully discharges his duty and fully repays the credit facility the 1st respondent has a right to sell the property to recover its monies.

50. The circumstances under which a mortgagee and/or chargee may be restrained from exercising its statutory power of sale is set out in **Halsbury's Laws of England, Vol 32 (4th Edition) paragraph 725** held:-

> **"The mortgagee <u>will not</u> be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive."**

51. In the absence of any efforts by the applicant to rectify the default, I find that the applicant will not suffer any irreparable damage if the orders are not granted.

52. In respect of balance of convenience, the 1st respondent stated that it is in business and its core business is to hold other people's money for profit. The 1st respondent advanced its money to the applicant who has defaulted in the payment and even closed its business which it used to generate income to repay the loans;an insolvency proceeding is also underway which clearly shows that the applicant will not be in a position to repay the credit facility any time soon. From the foregoing, it is paramount to protect the interests of the 1st respondent. The 1st respondent hope of payment of debt owing is from the vehicles which are jointly registered in its name and plaintiff's name.

53. From the forgoing, I find that the applicant has failed to demonstrate that it is deriving orders sought.

54. <u>FINAL ORDERS</u>

1) **Application dated 31st March 2021 is hereby dismissed.**

2) **Costs of the application to the respondents**

RULING DATED, SIGNED AND DELIVERED VIA ZOOM AT NAKURU THIS 30TH DAY OF SEPTEMBER, 2021

.....

RACHEL NGETICH

JUDGE

In the presence of:

Miruka - Court Assistant

Gitau for Plaintiff/Applicant

No appearance for Respondents