



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL CASE NO. E026 OF 2021**

HATIMY INVESTMENT LIMITED.....1<sup>ST</sup> PLAINTIFF/APPLICANT

HADIA KHAMIS RAMADHAN.....2<sup>ND</sup> PLAINTIFF/APPLICANT

**-VERSUS-**

ABSA BANK KENYA PLC.....1<sup>ST</sup> DEFENDANT/RESPONDENT

ANTIQUE AUCTIONS AGENCIES.....2<sup>ND</sup> DEFENDANT/RESPONDENT

**RULING**

1. This case was commenced by a **Plaint** dated 9<sup>th</sup> March, 2021 wherein the Plaintiff has sought for:-

a. A declaration that the 1<sup>st</sup> Defendant's action to cause the attachment of Motor Vehicles KCU 373 ZF 9070, KCU 380W ZF 0793, KCU 508W ZF6936, KCU 489W ZD4570, KCU 491W ZC9654, KCQ 193V ZF6591, KCQ 011W ZF4325 Mombasa registered in the name of the 1<sup>st</sup> Plaintiff without proper cause is unlawful;

b. A permanent injunction to issue restraining the 1<sup>st</sup> Defendant either by itself, its agents, employees and any other person whomsoever and howsoever from. Trespassing unto, attaching, advertising, offering for sale selling, transferring and or dealing or in any way whatsoever and howsoever, interfering with the Plaintiff title, quiet possession and enjoyment of Motor Vehicles KCU 373 ZF 9070, KCU 380W ZF 0793, KCU 508W ZF6936, KCU 489W ZD4570, KCU 491W ZC9654, KCQ 193V ZF6591 and KCQ 011W ZF4325;

c. A declaration that the purported exercise of the power of sale by way of unilateral attachment without proper Notice under a proclamation is in the circumstances unlawful and a further declaration that until expiry of the agreed term of the loan, no such statutory power of sale can and should be exercised by the Respondent.

d. An unconditional return of Motor Vehicles KCU 373 ZF 9070, KCU 380W ZF 0793, KCU 508W ZF6936, KCU 489W ZD4570, KCU 491W ZC9654, KCQ 193V ZF6591 and KCQ 011W ZF4325 or any thereof that may be attached.

e. The Plaintiff be ordered to pay Kshs.1,000,000/= as repayment of the loan per month till full repayment.

f. Costs of and incidental to this suit.

2. Simultaneously, the Applicant filed a **Notice of Motion** application seeking for orders that:-

a. That the matter herein be certified as urgent, service upon the Defendants be dispensed with and the same be heard exparte at the first instance.

b. That pending the hearing interpartes an order of injunction to issue restraining the 1<sup>st</sup> Defendant's action to unilaterally attach and repossess Motor Vehicles KCU 373 ZF 9070, KCU 380W ZF 0793, KCU 508W ZF6936, KCU 489W ZD4570, KCU 491W ZC9654, KCQ 193V ZF6591 and KCQ 011W ZF4325 and/or in the alternative pending the hearing and determination of this application and or suit an order of injunction does issue restraining the 1<sup>st</sup> Defendant either by itself, its agents, employees and any other person whomsoever and howsoever from trespassing unto, attaching, advertising, offering for sale selling, transferring and or dealing or in any way whatsoever and howsoever, interfering with the Plaintiff

title, quiet possession and enjoyment of Motor Vehicles KCU 373 ZF 9070, KCU 380W ZF 0793, KCU 508W ZF6936, KCU 489W ZD4570, KCU 491W ZC9654, KCQ 193V ZF6591 and KCQ 011W ZF4325.

c. The Plaintiff to be at liberty to pay Kshs.1 Million per month in repayment of the loan to the Defendant to issue monthly statements.

d. That unconditional return of Motor Vehicles KCU 373 ZF 9070, KCU 380W ZF 0793, KCU 508W ZF6936, KCU 489W ZD4570, KCU 491W ZC9654, KCQ 193V ZF6591 and KCQ 011W ZF4325 to the Plaintiff.

e. That cost of this application be provided.

3. The court granted the injunction as sought for under Prayer No.2 of the application by restraining the Defendants from selling the Motor Vehicles, ordered service of the application and directed that the matter be heard on **22<sup>nd</sup> March, 2021**.

4. The Defendants, through the Directors filed a **Replying Affidavit** dated **18<sup>th</sup> March, 2021** in which they opposed the application. However, the parties opted to engage in an out of court settlement which culminated into a decree of this court dated **6<sup>th</sup> August, 2021** which had a raft of orders which the Applicant consented to comply. The said orders are as follows:

1. That the **1<sup>st</sup> Plaintiff** acknowledge that it is in arrears of Kshs.6,565,875.35 as at **15<sup>th</sup> March 2021**.

2. That the Plaintiff will pay the arrears in instalments as follows:-

a. Kshs.1,500,000/- on or before **26<sup>th</sup> March, 2021**.

b. Kshs.500,000/= on or before **10<sup>th</sup> April, 2021**

c. Kshs.1,000,000 on or before **20<sup>th</sup> April, 2021**

d. The balance of the arrears, being Kshs.3,565,875.35 will be paid within six(6) months commencing **May 2021** and ending in **October, 2021**.

3. That in addition to payment of the arrears in (2) above, the Plaintiffs will, for the next six (6) months commencing **May, 2021** pay monthly instalments of Kshs.1,200,000/= towards reducing the loan with the **1<sup>st</sup> Defendant**.

4. That the payment in (3) above will commence on **28<sup>th</sup> May, 2021**, and thereafter, on or before the **28<sup>th</sup> day** of each succeeding month.

5. That at the end of the six(6) months period referred in (2), (3) & (4) above, the **1<sup>st</sup> Defendant** may, at its absolute discretion, review the repayment terms, in which case the monthly instalments payable will be advised by the **1<sup>st</sup> Defendant**.

6. That the Plaintiff shall, upon settling the storage charges and auctioneers' costs due as at the date of making the payment, have the repossessed Motor Vehicles released to them or to their authorized agents.

7. That the Plaintiffs shall, on or before **31<sup>st</sup> May, 2021** pay the legal fees incurred by the **1<sup>st</sup> defendant**, which may be paid either by the Plaintiffs making direct payments to the **1<sup>st</sup> Defendant's Advocates** or by the **1<sup>st</sup> Plaintiff's account**.

8. That if the Plaintiffs default in complying with any of the conditions in any of the Clauses (2), (3), (4) and (7) above, whether notice of that default is given or not, the **1<sup>st</sup> Defendant** will be at liberty to repossess the financed Motor Vehicles with or without notice to the Plaintiffs.

9. That save as varied hereinabove the parties' contractual relations shall continue to be governed by the various contracts and security agreements executed by the parties and nothing herein shall be construed as amending, revoking or waiving any provision of those contracts or security agreements.

10. That the suit is hereby marked as settled in the terms above.

5. The application that is now for determination is dated **4<sup>th</sup> August, 2021** and it seeks to review the decree which the Applicant failed to comply with. The Applicant is seeking a variation of the said orders by praying for orders that:-

a. Spent;

b. Judgment entered by court vide a Consent dated **25<sup>th</sup> March, 2021** and filed on **26<sup>th</sup> March, 2021** be set aside/valid or be reviewed at paragraphs 4,5,6,7 and 8.

c. That pending the hearing and determination of this application, the Honourable court be pleased to issue an order of injunction restraining the 1<sup>st</sup> Defendant either by itself, its agents, employees and any other person whomsoever and any other person whomsoever and however, interfering with the Plaintiff title, quiet possession and enjoyment of Motor Vehicles KCU 373 ZF 9070, KCU 380W ZF 0793, KCU 508W ZF6936, KCU 489W ZD4570, KCU 491W ZC9654, KCQ 193V ZF6591 and KCQ 011W ZF4325.

d. That there be a conditional return of Motor Vehicle Registration Nos. KCU 373 ZF 9070, KCU 380W ZF 0793, KCU 508W ZF6936, KCU 489W ZD4570, KCU 491W ZC9654, KCQ 193V ZF6591 and KCQ 011W ZF4325 to the Plaintiff upon terms imposed by the court in the event of any repossession in the intervening period pending the hearing and determination of this application;

e. Costs of the application be provided for.

6. The Applicant has listed eleven (11) grounds in support of the application. The crux of the main grounds are that the business environment in Uganda was hampered by the total lockdown in **June 18<sup>th</sup> 2021**.

7. Further, the Applicant claims that it complied with the Decree and paid until the business environment was foiled by the Corona-virus Pandemic popularly referred to as Covid-19. The Applicant alleged that its customer base is in Uganda which accounts for 90%. It then offered to pay Kshs.700,000/= instead of Kshs.1,200,000/=.

8. The Applicant has supported the application on the grounds through a sworn affidavit of 2<sup>nd</sup> Plaintiff's, Director of the 1<sup>st</sup> Plaintiff. A new matter which has been brought forth is that it engaged the 1<sup>st</sup> Defendant to be granted a further accommodation due to the changed environment in Uganda and annexed the response by the Defendant as expressed through threads of emails.

9. The application is opposed by a **Replying Affidavit** sworn by **Mr. Muli** who is the Defendant's Corporate Recoveries Manager, dated **17<sup>th</sup> August, 2021**. The same challenged the merits of granting an injunction and the setting aside of a consent order. There is admission that there was an effort made by the parties to deescalate the matter.

10. The parties agreed to ventilate the matter by way of written submissions. The 1<sup>st</sup> Defendant filed its submissions on the **28<sup>th</sup> September, 2021** pursuant to its authorities filed earlier on **17<sup>th</sup> August, 2021**. The Plaintiff filed their written submissions on **12<sup>th</sup> October, 2021** and relied on the authorities cited being; **Ndathi Mwangi & 3 Others -vs- Benson Lubumba Ndiro[2017]eKLR** and **Munikah & Co. -vs- Webuye Estates Ltd [1952] 19EACA 131**.

#### **DETERMINATION**

11. To determine the application before me, I have read through the same, the affidavits in support and rebuttal and considered the cited statute and awl in the written submissions by the respective parties. I find that the court has already determined prayers (1) and (3) and what is left for it to consider are prayers No.(2) and (4).

12. In prayer No.(2), the Applicant is seeking for the court to set aside or vary or review the consent orders vide a letter dated **25<sup>th</sup> March, 2021** which gave rise to the Decree of its court issued on **6<sup>th</sup> August, 2021**.

13. The reasons advanced for this prayer are that the applicant has failed to perform his part of the bargain because of the compromised business environment as a result of the Corona-virus Pandemic. Also, that because of this, the market in Uganda where the Applicant derives 90% of his income was shut down and that had a direct impact to its operations hence the diminished earning. This frustrated its efforts to pay hence the breach.

14. The Applicant then engaged the 1<sup>st</sup> Defendant and displayed a thread of emails which demonstrate efforts made to obtain a cushion to jump-start its operations and resume payments. For instance, the email of **20<sup>th</sup> July, 2021** confirmed the meeting thus:-

**“Dear Mohamed,**

**I trust you are well.**

**I take note of your email dated 26<sup>th</sup> July, 2021 whose contents we have noted. As per our meeting held on 26<sup>th</sup> June, 2021, the issue of repayment holiday was to be considered after clearance of June, 2021 payment which was supposed to happen by 30<sup>th</sup> June, 2021 but this did not happen. Therefore I am not able to obtain necessary approvals”.**

And after lengthy exchanges, the Applicant replied thus:

**“Hello.**

**Due to the order of President Museveni on Nationwide Lockdown that will last 42 days, we are requesting a moratorium of 3 months, our invoices were due for collection from our customers as we normally work from 1<sup>st</sup> of the month to the 25<sup>th</sup> and collect payments from 28<sup>th</sup> to end-month from the work done during that period”.**

16. The Respondent responded through its affidavit at paragraph 5 at which is annexed a thread of emails that demonstrate the robust engagement between the parties to ensure performance of what they had agreed. The emails of 30<sup>th</sup> July, 2021 refutes payment of legal fees which position was defended by the Defendant in its email dated 2<sup>nd</sup> August, 2021.

17. The court has gleaned through the documents on record and in its view or opinion find that the nature of review sought is one based on unusual and or unfortunate circumstances which have befallen a party that has good intention to perform a positive act, but its efforts to do so have been hampered by circumstances as a result thereof.

18. The law on review is set out at Section 80 of the Civil Procedure Act (Cap 21) as follows:-

**“Any person who considers himself aggrieved— (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit”.**

19. The statute gives parties the right to apply for review and simultaneously gives the court a free latitude to do justice since the remedy under review is residual and as a last resort, it opens a window of escape where all others have closed. In doing so, the court would have in mind the provisions of Section 1B(1)(c) of the Civil Procedure Act which states as follows:-

**“(1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—**

**(c) the efficient use of the available judicial and administrative resources;**

20. The procedure for review is provided for by Order 45 of the Civil Procedure Rules while Order 45 Rule (2) Sub-rule(1) of the same Rules provides for the nature of application in the instant application before this court. It states in part as follows:-

**2(1)An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed”.**

21. The justice principle and the triviality principle were extensively discussed in the contested case of Taylor & Another –vs- Lawrence & Another [2002]2ALL E.R 353, where the Court of Appeal of England stated that:-

**“Had a residual jurisdiction to re-open an appeal which it had already determined in order to avoid real injustice in exceptional circumstances”.**

22. In accepting the fact that courts have in built particular jurisdictional powers it resorts to in order to do justice, this principle is entrenched in our own court’s system.

23. Our own Court of Appeal embraced this principle in the case of Benjon Amalgamated Ltd & Another –vs Kenya Commercial Bank Ltd [2014]eKLR. However, the Applicant therein did not meet the standard for review on other considerations.

24. Further, the court therefore answers the question:-

**“What is this other sufficient reason, apart from known considerations?”**

25. This was defined by Justice Mativo, J in his decision in the case of Auto Selection (K) Ltd & 2 Others –vs- John Namasaka Famba [2016]EKlr Pg 5 where it accepted the meaning to be:-

**“One which the Applicant cannot be blamed for. It is a question of fact and the court has to exercise its discretion in the varied and special circumstances in its case at hand”.**

26. What Section 80 of the Civil Procedure Act (Cap 21) and Order 45 of the Civil Procedure Rules, 2010 donate to court is this residual power and the forecast on special circumstances as envisaged at Order 45(2)(1) of the Civil Procedure Rules.

27. An analysis of the circumstances that were prevailing at the time the breach occurred normally assists the court to determine whether the Applicant is *bona fide* or not.

28. The court system does not operate in a superficial universe or vacuum, so perfect that the vagaries of nature do not affect it. It is worth noting that operations in Kenya were also affected by the closure of the economy for a extended period where digital media advanced and sessions now held virtually. Many business were affected by curfew restrictions which were recently lifted by His Excellency the President of the Republic of Kenya and also directed that banks go slow on its debtors so as to allow for a kick-start of the economy.

29. The lockdown of the economy in Uganda was ordered by His Excellency President Yoweri Museveni of the Republic of Uganda at the

pick of Covid-19, which had threatened the existence of mankind in that country as it had done to the rest of the world. It is worth noting that when people stay at home, there is nothing that happens in all other spheres of the economy.

30. The court is being asked to review the timelines that were set in the consent Judgment of **22<sup>nd</sup> March, 2021** and given reasonable terms as well as assist both parties to continue in business. The Applicant seeks for the intervention of the court to do justice.

31. I have gone through all the pleadings, annexures, authorities and submissions by the parties. I find that the Applicant has relied on the negative effects of Covid-19 to the economy in support of its application and pleaded that the reason for breach of the consent terms as directly arising from the Pandemic. This fact was not challenged by the Respondents who have opted to challenge the merits of the application based on the established principles of law.

32. With due respect to counsel for the parties, the authorities cited do not fit in this new circumstances. Accordingly, I proceed to accept the facts presented by the Applicant to the extent that it tried to negotiate for better terms of payment because it was negatively being affected and hence the alleged breach. The Respondent on the other hand were quiet on the issue and proceeded to attach/repossess the vehicles effectly throwing the Applicant out of business.

33. In the final analysis, I find that the application dated **4<sup>th</sup> August, 2021** has merit and is hereby allowed in terms of prayer (2) and (4) as follows:-

**a. The repayment of the loan arrears as at the date of the ruling be computed to be Kshs.6,565,875.35 and to be paid in monthly instalments of Khss.700,000/= to commence on 30<sup>th</sup> December, 2021 and continue on every 30<sup>th</sup> day or last date of each succeeding months till payment in full.**

**b. The Applicant to pay to the Respondent Kshs.1,000,000/= immediately plus costs of repossession and storage to date.**

**c. The normal terms of repayment of the balance of the loan to apply from 30<sup>th</sup> July, 2022, that is to say, Kshs.1,200,000/= per month till payment in full.**

**d. On compliance with order No.(2) above, the Respondent to release to the Applicant the attached Motor Vehicles KCU 373 ZF 9070, KCU 380W ZF 0793, KCU 508W ZF6936, KCU 489W ZD4570, KCU 491W ZC9654, KCQ 193V ZF6591 and KCQ 011W ZF4325.**

**e. Orders (1), (2), (3), (5), (7), (8) and (9) be and are hereby set aside/varied.**

**f. The suit be and is hereby marked as settled in the terms above.**

It is SO ORDERED.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT MOMBASA THIS 26<sup>TH</sup> DAY OF NOVEMBER, 2021**

**D. O. CHEPKWONY**

**JUDGE**

**In the Presence of:**

**Mr. Akanga counsel for Plaintiffs**

**Mr. Gikandi counsel for 1<sup>st</sup> Defendant**

**Court Assistant - Bancy**