



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISCELLANEOUS CIVIL APPLICATION NO.E002 OF 2019

A.O. BASID LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

ASL CREDIT LIMITED.....DEFENDANT/APPLICANT

RULING

1. Through the application dated 6th September 2019, the defendant/applicant seeks the following orders:

i. Spent

ii. Spent

iii. Spent

iv. Spent

v. Spent

vi. That pending hearing and determination of this suit, and any other proceedings in this matter, the plaintiff/respondent be ordered to immediately release motor vehicle registration number KAY 247F, ZD 0644, ZC 9751, ZD 0643, ZC 5936, ZD 848, ZD 3849, KBL 979Z, ZD 5403,ZD 5402, ZD 5400, ZD 5401, ZD 5398, KBP 333A, KBP 700A, ZD 5756, ZD 5757, ZD 4171, ZD 6340, KBQ 004C, ZD 6830, ZD 0891, ZD 0892, ZD 0888, ZD 0890, KBP 204M, ZD 5090, KBT 031 D, KBV 093J, KBP 008Y, ZC 8290, ZC 7890, KCG 440P and KCG 450P and deliver the security motor vehicles to the defendant/applicant and that Nairobi Police County Commander be and is hereby directed to assist in enforcement of these orders.

vii. That pending hearing and determination of this suit, and any other proceedings in this matter, the Honourable court be pleased to direct the plaintiff/respondent herein to forthwith deposit the admitted sum of Kshs 69,643,992/= in a joint interest earning account.

viii. That pending hearing and determination of this suit, and any other proceedings in this matter, the Honourable court be pleased to direct the plaintiff/respondent herein to forthwith give an undertaking for damages for the outstanding amount of Kshs 216,219, 615/= by depositing in court a bank guarantee of the outstanding amount.

ix. That in the alternative to prayer (vi, vii and viii) above, that pending the hearing and determination of this suit, the Honourable court be pleased to set aside , vary and or discharge the order issued on 12th February, 2019 vacating the injunctive orders restraining the defendant/applicant from repossessing and or selling the plaintiff's motor vehicle registration numbers KAY 247F, ZD 0644, ZC 9751, ZD 0643, ZC 5936, ZD 848, ZD 3849, KBL 979Z, ZD 5403,ZD 5402, ZD 5400, ZD 5401, ZD 5398, KBP 333A, KBP 700A, ZD 5756, ZD 5757, ZD 4171, ZD 6340, KBQ 004C, ZD 6830, ZD 0891, ZD 0892, ZD 0888, ZD 0890, KBP 204M, ZD 5090, KBT 031 D, KBV 093J, KBP 008Y, ZC 8290, ZC 7890, KCG 440P and KCG 450P pending the hearing and determination of the suit.

x. That cost of the application and the suit be borne by the plaintiff/respondent.

2. The application is supported by the affidavit of the applicant's Group Head of Legal **Mr. Daniel Wandera**, and is premised on the grounds that there has been discovery of new and important matter which could not be produced by the applicant during the hearing of the

plaintiff/respondents application dated 23rd May 2019 being the admission, by the plaintiff, that it is indeed indebted to the defendant in the sum of Kshs 69,643,992/=. The applicant contends that there is sufficient reason to review the orders made on 12th February 2019 and that the special circumstances of this case makes it a proper case for this court to invoke the overriding objective of the Civil Procedure Act.

3. The defendant contends that on or about 23rd May 2018 the plaintiff herein obtained an ex parte order to restrain the defendant from repossessing the suit motor vehicles for sale which vehicles were held as securities pursuant to the Hire Purchase facilities advanced to the plaintiff by the defendant on 12th February 2019. The Chief Magistrates Court delivered the impugned ruling granting the plaintiff interim orders of injunction to restrain the defendant from repossessing the suit motor vehicles pending the hearing and determination of the suit.

4. It is the defendant's case that the plaintiff filed numerous applications, also seeking orders of injunction, but that the court found that the plaintiff was truly indebted to the defendant under the Hire Purchase Agreement.

5. The defendant states that the Hire Purchase Facilities are in arrears in the sum of Kshs 216,219,615/- as at 22nd August 2019 which amount continues to accrue late payment charges yet the charged property is valued at Kshs 60 million only and cannot satisfy the outstanding debt from the Hire Purchase Facilities.

6. The defendant contends that the suit motor vehicles continue to depreciate in value and that the injunctive orders granted to the plaintiff to restrain the defendant from repossessing the suit motor vehicles are not merited as the plaintiff is truly indebted to the defendant yet it continues to benefit from its wrong doings. It is the defendant's case that there is no corresponding order or undertaking for damages resulting from the said injunctive orders.

7. The defendant further states that the plaintiff has disregarded this court's orders of 15th August 2019 directing it to furnish the defendant with the full particulars of the exact location of the suit motor vehicles. It contends that such failure has resulted in genuine apprehension that the suit motor vehicles have been alienated or taken out the court's jurisdiction. The defendant's case that the principles of equity, justice and good conscience dictate that a defaulting party should not continue to benefit from such default.

8. The defendant maintains that the continued enjoyment of the interim orders, by the plaintiff, may cause it irreparable loss as they may not be able to recover their securities if the suit motor vehicles continue to depreciate in value as the debt continues to accrue.

9. The plaintiff/respondent did not file any response to the application despite proper service with the same and orders of 24th September 2019, granting the plaintiff 7 days to file its response. The application was listed for hearing on 30th October 2019 when neither the plaintiff/respondent, nor its counsel on record attended court and the defendant/applicant's advocate Miss Mwangi moved the court to grant the prayers sought in the application dated 6th September 2019 on the basis that the application is unopposed.

10. I have considered the application dated 6th September 2019 together with the supporting affidavit. I am satisfied that the application is merited as the averments made in the supporting affidavit have not been controverted.

11. Consequently, I allow the said application as prayed with orders that the costs of the application shall abide the outcome of the main suit.

12. It is so ordered.

Dated, signed and delivered in open court at Nairobi this 30th day of January 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Kenyariri for Miss Mwangi for defendant/applicant

Mr. Guya for Ongundi for plaintiff/respondent

Court Assistant – Sylvia