



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. E135 OF 2019

HFC LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

MULTIPLE HAULIERS (E.A.) LIMITED.....1ST DEFENDANT/APPLICANT

RAJINDER SINGH BARYAN.....2ND DEFENDANT/APPLICANT

MANVIR SINGH BARYAN.....3RD DEFENDANT/APPLICANT

TARLOCHAN SINGH CHAJJA SINGH.....4TH DEFENDANT/APPLICANT

AND

GARAM INVESTMENTS AUCTIONEERS.....INTERESTED PARTY

RULING

1. This ruling is in respect to three applications, namely; the plaintiffs' application dated 17th May 2019 wherein the plaintiff seeks orders that:

1. Spent

2. Spent

3. The honorable court do issue an order for directing the defendants to deliver up to the plaintiff the motor vehicles described as MAN PRIME MOVERS REGISTRATION NUMBERS KCJ 531M, KCJ 532M, KCJ 533M, KCJ 534M, KCJ 535M, KCJ 536M, KCJ 537M, KCJ 538M, KCJ 539M, KCJ 540M, KCJ 838A, KCJ 839A, KCJ 840A, KCJ 841A and KCJ 842A and RANDO TIPPER TRAILERS REGISTRATION NUMBERS ZF 5181, ZF 5182, ZF 5183, ZF 5184, ZF 5185, ZF 5187, ZF 5189, ZF 5190, ZF 5197, ZF 5198, ZF 5199, ZF 5200, ZF 5201, ZF 5202 and ZF 5204.

4. The defendants/respondents do pay the costs of this application

2. The application is supported by the affidavit of the plaintiff's Head of Collections, **Mr. Geoffrey Mwaura**, and is premised on the grounds that the plaintiff granted the 1st defendant a loan facility for which the 2nd, 3rd and 4th defendants acted as his guarantors. The said loan facility was secured by the motor vehicles enumerated in the application.

3. The plaintiff's case is that the 1st defendant defaulted in making the loan repayments thereby prompting the plaintiff to engage the services of an auctioneer to repossess the suit motor vehicles. The auctioneer was however only able to trace a few of the suit motor vehicles at a yard in a neighbouring country thus triggering the institution of this application in order to recover the debt.

4. In the 2nd application dated 14th June 2019, the defendants seek the following orders:

1. Spent

2. There be a stay of execution by attachment of the movable properties described in the Proclamation dated 10th June 2019 by Garam Investments Auctioneers pending the hearing and determination of this application.

3. This Honourable court be pleased to issue a temporary injunction restraining the plaintiff's/respondent by themselves, their employees, servants or agents from alienating, attaching, advertising sale, selling or enforcing the proclamation by the interested party on 10th June 2019 until the hearing and determination of the instant application.

4. This application be heard alongside the plaintiff's application dated 17th May 2019 which is coming up for hearing on 8th July 2019; and

5. Costs be provided for.

5. The application is supported by the affidavit of the defendant's Managing Director, **Mr. Dave Shreyesh** and is premised on the grounds that:

a) The plaintiff is in attempt to frustrate the defendants/applicants and the court process, the plaintiff has instructed the interested party herein to proclaim against the property which form part of the subject matter before this court.

b) The intended execution through the proclamation notice dated 10th June 2019 is ill motivated and made in bad faith with total disregard to the court process;

c) The proclamation is illegal and unlawful as it purports to execute the movable goods and property without giving the defendant an opportunity to redeem its property;

d) The court had on 22nd May 2019 granted Order 2 of the plaintiff's application 17th May 2019, which relate to the motor vehicles described in the proclamation notice dated 10th June 2019 and are a subject of the court process which application is scheduled for hearing on 8th July 2019;

e) Unless the orders sought are granted and the impugned proclamation stayed and/or set aside, the defendants/applicants property will be alienated and sold without having followed due process.

f) It is in the interest of justice that orders sought be allowed.

6. The plaintiff opposed the application dated 14th June 2019 through the Grounds of Opposition dated 5th July 2019 in which it listed the following grounds:

1. The application does not lie.

2. There is no claim in the suit upon which this application is grounded.

3. The defendant is in breach of contractual obligations to the plaintiff and cannot seek the court's assistance to avoid its obligations.

7. In the last application dated 10th July 2019, the plaintiff seeks orders that:

1) Spent

2) Pending hearing and determination of this application, the orders made on 17th of June 2019 be varied so that they continue in force, subject to the 1st defendant paying arrears and continuing to pay monthly installments for the facilities extended to it by the plaintiff.

3) The orders made on the 17th of June 2019 be set aside and be wholly discharged.

4) The court do issue such further and other orders as may be in the interest of justice.

5) Costs of this application be awarded to the plaintiff.

8. It is not clear if the defendants responded to any of the plaintiff's applications. Be that as it may, this court is still obligated to determine the merits of the applications.

9. Parties filed written submissions to the applications which I have carefully considered.

10. At the hearing of the applications, **Mr. Ogunde**, learned counsel for the plaintiff submitted that it was not disputed that the plaintiff financed the 1st defendant's purchase of the suit motor vehicles and that the defendants defaulted in making the repayments. It was submitted that one of the security instruments for the said loan was a debenture that contemplated an automatic right of repossession of the assets in the

event of a default in the repayment.

11. It was submitted that the court should not interfere with the contract made by the parties. Counsel conceded that the defendants had made intermittent repayments when an attempt to repossess the suit motor vehicles was made but that the defendants were still in default.

12. Counsel submitted that the plaintiff was compelled to file the instant suit after its efforts to repossess the suit motor vehicles bore no fruits as the vehicles were moving in and out of the court's jurisdiction. It was submitted that the defendant's applications for injunctive orders were made in a vacuum as the defendants had not shown that they had filed any substantive suit or counterclaim against the plaintiff.

13. In a rejoinder, **Mr. Kokebe**, learned counsel for the defendants submitted that the defendants had an equitable interest in the suit motor vehicles that the court needs to protect. Counsel conceded that even though the plaintiff has a right to repossess the suit motor vehicles the said right cannot be exercised whimsically.

14. I have carefully considered the three applications that are the subject of this ruling and the submissions made by counsel for all the parties together with the authorities that they cited. The twin issues for determination are whether the plaintiff has made out a case for an order directing the defendants to deliver up to it, the suit motor vehicles and conversely whether, the defendants have made up a case for the grant of orders of injunction.

15. It was not disputed that the 1st defendant obtained a loan facility, to the tune of USD 2,500,000 to enable it inter alia, purchase the suit motor vehicle. Annexure "**GM1**" to the plaintiff's affidavit in support of the application dated 17th May 2019 was a true copy of the Facility Agreement between the plaintiff and the defendant.

16. It was also not disputed that the Facility Agreement was subsequently secured by a Specific Debenture over the suit motor vehicles. Copies of the Specific Debenture and Certificate of Registration of Mortgage by the Registrar of Companies were attached to the plaintiff's affidavit as annexures "**GM2**" and "**GM3**" respectively.

17. It was also not disputed that sometime in August 2018, the 1st defendant defaulted in making the agreed monthly repayment thereby prompting the plaintiff to issue relevant prelisting notification with the Credit Reference Bureau and to issue several reminders to the 1st defendant to regularize its loan account.

18. It was further not contested that as at the time of filing the instant suit, the 1st defendant was indebted to the plaintiff to the tune of USD 19,637,730.27 as shown in the copy of Certified Asset Finance Account Statement as at 3rd April 2019 marked as annexure "**GM9**". The 1st defendant did not demonstrate, even as at the time of hearing the applications on 26th November 2019 that it had settled its accounts with the plaintiff.

19. Having regard to the above uncontested facts, I am satisfied that the plaintiff has made out a case for the delivery up to the plaintiff, the suit motor vehicles listed in the application dated 17th May 2019. I find that the plaintiff explained the reasons for its inability to repossess the said motor vehicles, which explanation was not controverted by the defendants.

20. It is trite law that the parties to an agreement are bound by the terms of their agreement and that the court cannot rewrite the agreement to the parties. I am guided by the decision in *National Bank of Kenya v Pipelastik Samkolit (K) Ltd & another* [2001] eKLR wherein it was held that a court of law cannot purport to rewrite a contract between the parties, the parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded.

21. The considerations for granting interlocutory mandatory injunctions were stated in the oft cited case of *Kenya Breweries Ltd & Another v Washington O. Okeyo* [2002] eKLR where the Court of Appeal said:-

"The test whether to grant a mandatory injunction or not is correctly stated in Vol.24 Halsbury's Laws of England 4th Edition paragraph 948 which read:-

'A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiffs ... a mandatory injunction will be granted on an interlocutory application.'

22. The principles of law arising from the above decisions is that a court considering an application for interlocutory mandatory injunction must be satisfied that there are not only special and exceptional circumstances, but also that the case is clear. Applying the above principles to the instant case, I find that the plaintiff's case satisfies the conditions for granting a mandatory injunction as this is a straight forward case where breach of express terms of an agreement has been established.

23. Having found that that the plaintiff's application for delivery up of the suit motor vehicles is merited, I do not find it necessary to consider the defendant's applications seeking orders of injunction to restrain the plaintiff from repossessing the suit vehicles as that was a clear provision under the Facility Agreement executed by the parties.

24. In sum, I find that the defendants' applications do not meet the three conditions for granting of orders of injunction as were enumerated in the *Giella v Cassman Brown & Company Ltd* [1973] EA 353.

25. My humble view is that the defendants have not approached this court with clean hands in seeking the equitable relief injunction. Consequently I allow the plaintiff's application dated 17th May 2019 and dismiss the defendants' application dated 14th June 2019. Having allowed the plaintiffs application dated 17th May 2019, I find that their application of 10th July 2019 is spent and does not require my consideration. The costs of the applications shall abide the outcome of the main suit.

Dated, signed and delivered in open court at Nairobi this 20th day of February 2020.

W. A. OKWANY

JUDGE

In the presence of:

Miss Abuya for Ogunde for the plaintiff.

Mr. Kokebe for the applicant

Court Assistant – Sylvia