REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERICIAL AND ADMIRALTY DIVISION

CIVIL CASE NO. 390 OF 2018

VEHICLE AND EQUIPMENT LEASING LIMITED……PLAINTIFF

VERSUS

COMMERCIAL BANK OF AFRICA LIMITED……DEFENDANT

RULING

1. A question that the Trial Court herein will have to grapple with is the effect, if any, that the Agreement of 15th February 2018 between Vehicle and Equipment Leasing Limited (V and E Leasing) and Commercial Bank of Africa (CBA) had on a Deed of Assignment executed between the parties on 20th March, 2014.

2. For now, this Court is asked to determine the Notice of Motion of 15th October 2018 with the following multiple prayers:-

1. Spent.

2. Spent.

3. That this Honourable Court be pleased to issue preservatory orders preserving the funds in the Applicant's Bank A/C No.72080440014 domiciled at the Respondent's Upperhill Branch and restraining the Respondent from unlawfully interfering, withdrawing, debiting or charging the principal debt or additional interest contrary to the terms of the Restructuring Agreement dated 15th February 2018 and pending the hearing and determination of this suit.

4. That a mandatory injunction be issued compelling the Defendant to furnish and provide the applicant with a complete proper and accurate statement of account in respect of account No. A/C NO.7208040014 in the name of the Applicant.

5. Spent.

6. That this Honourable Court be pleased to issue a mandatory injunction compelling the Respondent to grant the Applicant unlimited and unshackled access to its account and the funds held therein in its Bank A/C No.7208040014 domiciled at the Respondent's Upperhill Branch pending the hearing and determination of the suit.

7. That pending the hearing of the suit this Honourable Court be pleased to issue an order of mandatory injunction directing the Respondent to reverse all unlawful debit entries made to the Applicant's Bank A/C No.7208040014 in breach of the Restructuring Agreement dated 15th February 2018 and reinstate and reimburse the said account in sum of Ksh.384,233,278.00 being the funds unlawfully debited on diverse dates between 31st January 2018 to 11th October 2018 for the principal debt and additional interest charged to the Applicant's account.

8. That pending the hearing of the suit, a mandatory injunction be issued compelling the Respondent to recompute time for the Restructure of the Asset Finance Facility and time to start running form the date of compliance with Prayer (6) above.

9. That pending the hearing of the suit, this Honourable Court be pleased to issue an order of mandatory injunction directing the Respondent to dispose of all the 291 financed motor vehicles that's held by the Respondent's employees, agents and servants, at the market value for purposes of crediting the funds to the Applicant's loan account.

10. Any other orders the Court may deem fit.

11. That the Defendant bear the costs of this application.

3. The facts that constitute the Dispute herein are not involved. V and E Leasing employs a business model in which it seeks and obtains Credit facilities from Financiers for purposes of purchasing Assets such as Vehicle and Equipment for lease to third parties for rental income. In 2014 V and E Leasing sought and obtained an Asset Finance facility from CBA for purchase of Vehicles from Toyota Kenya Limited for onward leasing to Tshusho Capital Kenya Limited. The facility was twofold. Asset finance 1 was for a sum of USD 3,400,000/= to finance the purchase of Factory Equipment and Motor Vehicles for onward leasing to Athi River Mining Limited. Asset Finance 11 was for the sum of Khs.2,100,000,000/= to finance the purchase of Motor Vehicles for onward leasing to the National Police Service through a sublease from Tshusho Capital. Under this latter arrangement V and E Leasing purchased 291 Motor Vehicles.

4. Asset Finance ll which is the controversial Facility herein was procured under certain conditions which included;-

a. A Deed of Assignment of receivables duly executed by the V and E Leasing in favour of CBA to assign to CBA all rental payable to it.

b. An undertaking by Tsusho Capital to remit to the Bank quarterly rental payment owed to V and E Leasing.

c. A letter of comfort by Toyota Kenya Ltd.

5. As would be common knowledge, the National Treasury has lately not kept up in paying Government Contractors and Service providers. The effect on this matter was that due to delays in payment of Rent, V and E Leasing fell in arrears and default of payment of its facility to CBA. In the face of this reality, the parties got talking and both facilities were restructured on 15th February 2018. V and E Leasing sees the following as the highlights of that reorganized arrangement:-

a. AF-l, now Restructured Asset Finance-l (RAF-l), was restructured to a sanctioned limit of USD 1,754,128.00.

b. AF-l, now Restructured Asset Finance-ll (RAFF-ll), as restructured to sanctioned limit of Khs.792,318,207.00.

c. The purpose of the restructuring was to facilitate rescheduling and rebooking of all existing past due loans as at 31st January 2018 which loans had facilitated the purchase of factory equipment and motor vehicles for leasing to Athi River Mining Ltd and the Government of Kenya, National Police Service respectively.

d. That the Restructured Asset Finance I and ll was to be repaid in a bullet payment after 12 months from the date of restructure.

e. The residual loan was to be repaid in 6 months.

f. Interest on the Asset Finance Facilities was to be debited and payable monthly.

g. That the existing Letters of Offer was to be varied by the terms of the restructure and in the event of conflict the terms of the restructure shall apply.

6. V and E Leasing understood a key component of the new arrangement as being grant of a 12 month moratorium of the principal debt running from 31st January 2018 to 30th January 2019 when it was expected to make a lumpsum/bullet payment on the principal debt. V and E Leasing complains that, in breach of this agreement, CBA unilaterally debited its account without its consent and utilized the amount towards the following:-

a. Principal Debt Repayment

b. Additional interest Repayment

c. Interest on the principal Debt

V and E Leasing asserts that this is a violation of its Contractual Rights and legitimate expectation as the repayment of the principal debt is not due and that the account is not in arrears and cannot therefore attract penalty or default charges. V and E Leasing argues that it has not waived its Contractual Rights in the Restructuring Agreement so as to give its consent to this state of affairs.

7. The Banks answer to this complaint is that it was an express term of the Letter of 15th February 2018 that save as expressly stated in that letter, all other terms and conditions of the existing letters of offer remained unchanged and would continue to apply. One of which was the provisions of the Deed of Assignment dated 20th March 2014 in respect of all receivables from Tsusho Capital Kenya Limited. CBA asserts that since 2014 all the receivables into Account No. 7208040014 from Tsusho Capital belong to the Bank pursuant to Deed of Assignment and these payments did not start after the date of the Restructured Agreement.

8. The Orders sought by V and E Leasing at this Interlocutory session are both preservatory and mandatory in nature. For the former the well-known principals set out in Giella Vs. Cassman Brown would be relevant and applicable. In respect to an Interlocutory mandatory Injunctions the Law has always been that they should be granted with reluctance and sparingly and only in very special and exceptional circumstances (see for example, The Despina Pontikos [1975] EA. 38).

9. The letter of 15th February 2018 restructured the Facilities granted to V and E Leasing through the Letters of offer of 23rd February 2015 and Supplemental letters of 15th October 2015 and 20th September 2016. By express terms of the Restructuring Agreement, the parties declared that in the event of any inconsistency between the terms and conditions as contained in the said Agreement and the terms and conditions contained in the Bank's General Terms and Conditions, then the Terms and Conditions in the Letter of 15th February 2018 would prevail. That said, the Restructured Agreement had this important proviso:-

> "Save as hereby expressly varied, all other terms and conditions of the existing Letters of Offer remains unchanged and will continue to apply".

10. It is out of this saving proviso that it may not be incorrect to hold that the terms of the Deed of Assignment dated 20th March 2014 (which was executed as one of the conditions precedent to the terms of the Letter of Offer of 2nd January 2014) survived the Restructuring arrangement but would only be applicable subject to any amendments that may have been made by the subsequent Letter of Offer.

11. The crux of the argument by V and E Leasing, if I understand it correctly, is that while under the Deed of Assignment, the Bank had the Right to receive all Contract proceeds from Tsusho Capital, its Right to repayment of the loan (under the restructure) was limited to interest on the principal during the moratorium period and a lumpsum payment after the 12 months moratorium. This is the argument that needs to be scrutinized more closely but with a caveat that any evaluation of it should not lead me to make hard and fast findings which could embarrass the Trial Court.

12. Clause 2 of the Deed of Assignment is the Covenant to pay made by V and E Leasing in the following terms:-

> "2. In pursuance of this agreement and in consideration of the premises the Assignor hereby covenants with the Bank as follows:-
>
> a. To pay to the Bank on demand the Secured Obligation.
>
> b. To pay to the Bank interest (as well after as before any demand of judgment or the liquidation, insolvency or judicial management of the Assignor or the cessation or closure of any account) on principal, commission, fees, charges, costs, expenses and all other moneys and liabilities from time to time owing or payable to the Bank at such rates per annum as stated in the Facility Letter or at such other rate as the Bank may determine from time to time and calculated with monthly, annual or such other periodic rests as may be specified under the terms relating to any banking facility granted by the Bank, from the due date until full payment is received by the Bank; and
>
> c. To perform, observe and be bound by the terms and conditions set out in the Finance Documents and to comply with the terms of all contracts relating to the Secured Obligations to which it is a party".

13. What then is the secured obligation? This is defined in the Definitions and Interpretations clause of the Deed to mean as follows:-

> Secured Obligation – means the aggregate of all sums (including principal, interest, fees, commission, costs, legal costs on a full indemnity basis, charges duties, expenses, taxes or otherwise):-
>
> i. Which are now or shall from time to time be due, owing or incurred by the Assignor to the Bank whether alone or jointly and severally with any other person and whether present, future, actual or contingent and whether as principal, surety or otherwise under or in connection with or arising out of any Finance Documents or otherwise agreed to be paid by the Assignor including any amount due under any indemnity given to the Bank in respect of any matter whatsoever.
>
> ii. Which the Assignor may be or become liable to pay to the Bank whether in Kenya or elsewhere on any account or otherwise or in any manner howsoever and whether in respect of moneys advanced or paid to or for the use of the Assignor on, before or after the execution of this Assignment or in respect of cheques, bills, notes or other negotiable instruments signed, drawn, accepted or indorsed by or on behalf of the Assignor and discounted, paid or held by the Bank in the course of business or otherwise or for any other payments, credits or advances made to, or for the use or accommodation of or on behalf of the Assignor pursuant to or in respect of or under any letters of credit, trust, receipts, guarantees, indemnities or other documents or other documents or instruments established, opened, given or made by the Bank for the Assignor and held by the Bank and all moneys or liabilities whatsoever whether present or future, actual or contingent; and
>
> iii. Which the Assignor shall incur or shall be liable to the bank in any manner howsoever and whether as principal, surety or otherwise including (but without prejudice to the generality of the foregoing) all usual and customary commission discount and banker's charges, stamp duty, legal costs, charges and expenses howsoever incurred by the Bank in relation to the preparation, execution, completion, perfection, registration preservation, realization or enforcement of this Assignment (or any other Finance Document), such legal costs, charges and expenses to be paid on a full indemnity basis together with interest in all cases aforesaid from the due date up to the date of full payment, both before and after judgment.

It would seem that the secured obligation is all the sums owed by V and E Leasing to the Bank whether or not due or already called up for payment. It is an aggregate of all sums owed and outstanding from V and E Leasing to CBA. This may therefore include the principal sum which would be payable after the 12 months moratorium period.

14. One could understand the arrangement between V and E Leasing and Bank as being an arrangement in which the Bank would not insist on the payment of the principal during the moratorium period but because of the terms of the Deed of Assignment, any receivables from Tsusho, in the interim, would be assigned to the Bank. On the face of it, there is nothing contradictory about the Bank retaining whatever it

received from Tsusho in the moratorium period but not insisting on full payment of the principal sum until the end of that period. It does not seem to be an insensible commercial bargain that CBA may have negotiated and obtained.

15. Yet even if I was wrong in my understanding of the true effect of the Contract, the Court must wonder why V and E Leasing delayed in raising the current complaint. It is explained by V and E Leasing that the Bank unlawfully debited its account for purposes of part repayment of the principal debt. In the statements the entries in this respect are referred to as the "PD principal Debit". Looking at the statements, I see such debits on 22nd February 2018, 23rd February 2018, 15th April 2018, 13th Aprl 2018, 27th April 2018, 30th April 2018 and 6th June 2018. These are just but examples. Now, this suit was filed on 17th October 2018. Given that the moratorium would end on 31st January 2019, it has not been explained why V and E Leasing did not act earlier and why it had to wait until just about three months before the end of the moratorium. The relief sought by the Applicant is a relief in equity and it is a well travelled path that Equity aids the vigilant and agile.

16. There is another limb to the case by V and E Leasing. The Leasing Agreements between it and Tsusho Capital has run its life and expired. That contrary to clause d(af) to the Letter of offer, CBA has directed Toyota Kenya Limited to repossess all the 291 Vehicles from Tsusho. That the arrangement contemplated by the Agreement was that the role of Toyota Kenya was simply to hold the Vehicles in their yard and to assist in the disposal of the Assets if asked by V and E Leasing. That as a result of breach, V and E Leasing has not been able to sell the Vehicles notwithstanding various Offers. V and E Leasing making the point that Proceeds from the Sales would have been utilized towards repayment of its dues to the Bank. In addition V and E Leasing grieve that the Vehicles are wasting away and depreciating.

17. The Bank denies that it has repossessed the Assets. It asserts that the Vehicles have been returned to Toyota Kenya Limited to hold on their behalf and if required to assist in their disposal. It is averred that V and E Leasing has access to the Vehicles and the Bank is happy for the Vehicles to be sold and Proceeds applied towards paying the outstanding debts.

18. Condition precedent d (af) require the giving of a:-

> "Letter of comfort by Toyota Kenya Limited confirming that they shall hold the Vehicles in their yard upon the expiry of the Lease and assist the Borrower to sell them incase of need".

19. That Letter of comfort was provided by Toyota Kenya on 27th February 2014 as follows:-

> 27 February 2014
>
> Credit Documentation Unit
>
> Commercial Bank of Africa Limited
>
> NAIROBI
>
> Dear Sir,
>
> RE: LETTER OF COMFORT FOR THE NATIONAL POLICE SERVICE LEASE VEHICLES.
>
> We refer to the vehicles specifically leased from Vehicle and Equipment Leasing Limited to Tsusho Capital Kenya Limited for the National Police Service.
>
> The Return Conditions spelt out in the Master Lease Agreement between the National Treasury and Toyota Kenya Limited, provide for the vehicles to be returned to Toyota Kenya Limited as the end of the lease period.
>
> We as Toyota Kenya Limited will hold the vehicle on your behalf and if required assist you in their disposal, on terms to be agreed as the said end of lease.
>
> Yours sincerely,
>
> *Signed*
>
> PETER WANJALA
>
> GM, Business Planning
>
> For: Toyota Kenya Limited

20. Noteworthy is that although clause d (af) required Toyota Kenya Ltd to assist the Borrower (V and E Leasing) to sell the Vehicles "in case of need" the comfort given by Toyota was that it would hold the Vehicles on behalf of the Bank and assist the Bank in their disposal.

21. Yet the Condition precedent d(ab) required V and E Leasing to execute a Deed of Assignment of all the Rights under the Motor Vehicles to be financed to the Bank. While neither of the Parties told Court whether that Deed of Assignment was taken, Counsel for V and E Leasing, while arguing the Motion, informed Court that the Vehicles were registered in the name of the Bank. Presumably in the joint names

of V and E Leasing and the Bank as required by Condition precedent d(al). It also being conceded that there is an outstanding debt, the Bank still has an interest in the Vehicles and it may not be untoward that Toyota Kenya holds the Vehicles to the Order of the Bank. Indeed prayer 9 of the Motion which seeks an Order to compel the Bank to sell the Vehicles pending the disposal of the main suit can be construed as a tacit acknowledgment by V and E Leasing that the Bank has Rights over the Vehicles. Yet again V and E Leasing have an interest over them as they are the owners.

22. The issue, therefore, need not be vexing because Counsel for the Bank acknowledged that the Vehicles can be sold in an orderly manner as agreed by the parties. It would benefit both sides if this was done sooner rather than later. For that reason this Court shall grant Prayer 9.

23. Save for Prayer 9 of the Motion of 15th October 2018 which is granted as prayed, the rest of Motion is hereby dismissed with ¾ costs to the Defendant.

Dated, Signed and Delivered in Court at Nairobi this 25th day of January, 2019.

...……..

F. TUIYOTT

JUDGE

PRESENT;

Fraser for Defendant

Muraguri for Plaintiff

Nixon - Court clerk