REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 84 OF 2017

NATIONAL INDUSTRIAL CREDIT BANK......1ST APPELLANT

VINTAGE AUCTIONEERS.................................2ND APPELLANT

VERSUS

GOLDEN TEA TRADERS LIMITED....................RESPONDENT

(*Being an appeal from Ruling and Order on an Application dated 17th March 2017 of Honourable Benson Khapoya, Senior Resident Magistrate in Kakamega CMCC Number 108 of 2017 delivered on 29th June 2017.*)

JUDGEMENT

1. The appellants, having been dissatisfied with the ruling of the trial court aforementioned lodged this appeal on 27th July 2017 seeking, *inter alia*, that the ruling and, or, order of the lower court be set aside and be substituted with an order dismissing the respondent's application dated 17th March 2017 based on the following grounds:

a) The learned trial magistrate erred in law and fact in misdirecting himself on the principles for grant of an order of injunction;

b) The learned trial magistrate erred in law and in fact in allowing the respondent's application dated 17th March 2017 in view of the issues raised in the appellant's replying affidavit and the submissions of the application;

c) The learned trial magistrate erred in law and in fact in granting an order for injunction to the respondent despite the respondent being and admitted defaulter;

d) The learned trial magistrate erred in law and fact in granting an order for injunction to the respondent when it had not established a prima facie case with probability of success;

e) The learned trial magistrate erred in law and fact in failing to hold that the respondent had not established that it would suffer any loss and or irreparable loss that could not be compensated by way of damages; and

f) The learned trial magistrate erred in law and fact in granting the Respondent an unconditional order of injunction without taking into consideration that the hire purchase agreement created a continuing obligation on the parties.

2. The respondent filed a civil suit against the appellants on 17th March 2017 stating that they own motor vehicle registration mark and number KCA 457, an Isuzu truck, which was purchased through financing by the 1st appellant under hire purchase terms. The purchase price of the said Isuzu truck was Kshs. 7,750,000.00 whereby the respondent paid Kshs. 1,550,000.00 as the deposit with the balance of Kshs. 6,200,000.00 being financed by the 1st appellant and was to be repaid in monthly installments for sixty (60) months. The respondent claimed that the said Isuzu truck was then seized by the 2nd appellant acting on the instructions of the 1st appellant without following due procedure and despite the respondent having paid two-thirds of the sum advanced by the 1st appellant.

3. The respondents, in the interim, filed a Notice of Motion Application under Certificate of Urgency on 17th March 2017 seeking for orders *inter alia* that:

a) an order do issue restraining the defendants/respondents (the appellants herein) their servants, agents or representatives from selling and/or advertising for sale motor vehicle registration number KCA 457T Isuzu truck pending the hearing of the application;

b) an order do issue restraining the defendant/respondents their servants, agents or representatives from selling and/or advertising the

sale of motor vehicle registration number KCA 457T Isuzu Truck pending hearing and determination of the suit;

c) The defendants/respondents do release motor vehicle registration number KCA 457T Isuzu truck to Ezekiel Besa Mage of I.D No. 24338428 on behalf of the plaintiff upon service of this order pending hearing of the application; and

d) The defendants/respondents do release motor vehicle registration number KCA 457T, Isuzu Truck to Ezekiel Besa Mage of ID No. 24338428 on behalf of the plaintiff upon service of this order pending hearing of the suit.

4. In a ruling delivered on 29th June, 2017, the learned trial magistrate allowed the respondent's application and ordered that:

a) an order do issue restraining the defendants/respondents, their servant, agents or representatives from selling and/or advertising for sale motor vehicle registration number KCA 457T Isuzu Truck pending hearing and determination of the suit; and

b) the defendants/respondents do release motor vehicle registration number KCA 457T Isuzu Truck to Ezekiel Besa Mage of I.D 24338428 on behalf of the plaintiff upon service of this order pending hearing of the suit.

5. It is the said ruling and order that form the basis of the instant appeal.

6. Firstly, as a first appellate court, this court has a duty to examine matters of both law and facts and subject the whole of the evidence to afresh and exhaustive scrutiny, drawing a conclusion from that analysis bearing in mind that this court did not have an opportunity to hear the witnesses first hand and test the veracity of their evidence and demeanor. This is captured by Section 78 of the Civil Procedure Act, Cap 21, Laws of Kenya, which espouses the role of a first appellate court which is to '… *re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions*.' This is buttressed by the Court of Appeal in *Peter M Kariuki vs. Attorney General* [2014] eKLR where court stated that -

'We have also, as we are duty bound to do as a first appellate court, reconsidered the evidence adduced before the trial court and revaluated it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence. See Ngui vs. Republic (1984) KLR 729 and Susan Munyi vs. Keshar Shiani, Civil Appeal No. 38 of 2002 (unreported).'

7. In *Ndung'u Dennis vs. Ann Wangari Ndirangu & Another* (2018) the court cited the case of *Selle & another vs. Associated Motor Boat Co Limited & others* (1968) EA 123 in stating the duty of the court in a first appeal as follows: -

'I *accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Saif vs. Ali Mohamed Sholan (1955) 22 EACA 270).'*

8. The court went further in reiterating that position by citing the Court of Appeal for East Africa in *Peters vs. Sunday Post Limited* [1958] EA 424 where it had been stated;-

'*It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt vs. Thomas (1) [1947] A.C. 484. "My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.'*

9. The issues that I am called upon to determine are whether the learned trial magistrate ought to have granted an order of injunction and whether the learned trial magistrate ought to have granted an injunction order against the appellants.

10. It was the appellants' submission that the respondent failed to meet the threshold for grant of the orders sought and the trial magistrate

erred in allowing the same. The appellants added that the conditions precedent to granting injunctive orders were well settled in the case of *Giella vs. Cassman Brown Co. Limited* (1973) where it was held -

> *'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.'*

11. The appellants submitted a *prima facie* case was defined in the case of *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 others* [2003] eKLR where the Court of Appeal held that –

> *'...a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.'*

12. It was the appellants' submission that the hire purchase agreement between the 1st appellant and the respondent was not in dispute and that Clause 7 of the said agreement gave the 1st appellant the right to terminate the agreement without notice and immediately take possession of the goods upon default by the respondent to pay any installment or other sums payable after expiry of 14 days of becoming due.

13. For avoidance of doubt and for ease of reference, Clause 7 of the said Hire Purchase Agreement provides *as* follows: -

> *'7. Termination by the owner*
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> a) The owner may, on the happening of any of the events specified in clause 7.2 below, without notice to the Hirer terminate the hiring of the goods in consequence of which the Hirer shall no longer be in possession of the Goods with the consent of the owner and the owner shall have the right to immediately retake possession of the Goods:
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> b) The following are the events referred to in clause 7.1 above -
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> > (i) Any installment or other sum payable hereunder by the Hirer remaining unpaid after the expiry of Fourteen (14) days of becoming due,
> >
> > (ii) …'

14. The appellants stated that there was nothing wrong in invoking the aforementioned provision as the respondent had already defaulted in making payments to the 1st appellant, a fact that was admitted by the respondent and noted by the trial magistrate. The appellants submitted that it was the respondent who breached the hire purchase contract and infringed on the right of the 1st appellant and not the other way round. The appellants added that the terms and conditions of the hire purchase agreement were binding upon the parties and cited the case of *National Bank of Kenya Ltd vs. Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR, where the Court of Appeal stated: -

> *'A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.'*

15. The appellants stated that the instant hire purchase agreement did not have the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the said clause. They urged that the court should not be used as an excuse for the respondent to evade performing its contractual duties and obligations or prevent the appellants from enforcing its contractual right.

16. The appellants stated that the learned trial magistrate erred in taking into account the reasons given by the respondent for defaulting. They rely on the case of *Joseph Chege Gitau vs. CFC Bank Limited* [2008] eKLR where it was held that: -

> *'From the pleadings and the evidence adduced before the trial court, it was not disputed that the appellant defaulted in the repayment of the hire installments for the motor vehicle. The appellant blames the respondent for repossessing the motor vehicle without taking into account that the appellant was unable to pay the rental installments because the motor vehicle had mechanical problems and the appellant could not therefore generate any income. However, the fact that the motor vehicle had mechanical problems did not absolve the appellant from his obligation to make the monthly payments, nor did it deny the respondent its right to repossess the motor vehicle. It is evident that the agreement provided the respondent the right to repossess the motor vehicle as long as there was default in payment of the monthly installments.'*

17. The appellants further relied on *Athman Mustafa Mohammed vs. Ecobank Kenya Limited & 2 others* [2015] eKLR where this court held that: -

> *'…the financial institution in this case has made available the statements of account, and the plaintiff has not raised any issues concerning the accuracy of the said statements…A perusal of the statement of accounts reveals that there were several months when Athman failed to remit the installments which were due and payable …Athman cannot have his cake and eat it. He cannot keep a car which he was not paying for...I therefore find that the plaintiff has not demonstrated any prima facie case with a probability of success.'*

18. The appellants submitted that the fact that the suit motor vehicle had been grounded for some time due to an alleged road traffic accident should not be consideration at least for an application for injunction. The appellants submitted that there was no evidence of irreparable loss that was demonstrated and/or established by the respondent. In the case *Hassan Zubeidi vs. Patrick Mwangangi Kibaiya & another* [2014] eKLR this court stated that: -

> *'I do not wish to re-invent the wheel. The primary legal dimensions for the grant of interlocutory injunctions were set in Giella vs. Cassman Brown but they have subsequently been developed by case law; a fact that has been recognized by many courts such as in the case of Jan Bolden Nielsen vs. Herman Phillipus Steyn also known as Hermannus Phillipus Steyn & 2 Others (2012) eKLR where Mabeya J remarked as follows: -*
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> > *'I believe that in dealing with an application for an interlocutory injunction, the court is not necessarily bound to the three principles set out in the Giella vs. Cassman Brown case. The court may look at the circumstances of the case generally and the overriding objective of the law. In Suleiman vs Amboseli Resort Ltd (2004) eKLR 589 Ojwang Ag. J (as he then was) at page 607 delivered himself thus: -*
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> > > *'…counsel for the defendant urged that the shape of the law governing the grant of injunctive relief was long ago in Giella vs. Cassman Brown, in 1973 cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel in that point, for the law as always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of Films Rover International made this point regarding the grant of injunctive relief (1986) 3 All ER 772 at page 780-781: "A fundamental principle of…that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong."*
> > >
> > > *Traditionally, on the basis of the well accepted principles set out by the court of Appeal in Giella vs. Cassman Brown the court has had to consider the following questions before granting injunctive relief.*
> > >
> > > *-Is there a prima facie case…*
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> > > *-Does the applicant stand to suffer irreparable harm…*
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> > > *-On which side does the balance of convenience lie? Even as those must remain the basis tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice…'*
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> > *The Court goes on to cite Ringera J (as he was then) in Waithaka vs. Industrial & Commercial Development Corporation (2001) KLR page 381, where he stated as follows: -*
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> > > *"As regard damages, I must say that in my understanding of the law, it is not inexorable rule that where damages may be an appropriate remedy an interlocutory injunction should never issue. If that were the rule, the law would unduly lean in favour of those rich enough to pay damages for all manner of trespassers. That would not only be unjust but it would also be seen to be unjust. I think that is why the East African Court of Appeal couched the second condition in very careful terms by stating that normally an injunction would not issue if damages would be an adequate remedy."*
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> > *By using the word "normally' the court was recognizing that there are instances where an injunction can issue even if damages would be an adequate remedy for the injury the applicant may suffer if the adversary were not injuncted. I think some of the considerations to be borne in mind is the strength or otherwise of the applicant's case for a violation or threatened violation of its legal rights and the conduct of the parties. If the adversary has been shown to be high handed or oppressive in its dealings with the applicant this may move a court of equity to say 'money is not everything at all times and in all circumstances and don't think you can violate another citizen's right only at the pain of damages...'*

19. The Court of Appeal, in the case of *Naftali Ruthi Kinyua vs. Patrick Thuita Gachure & another* [2015] eKLR stated that: -

> *'With reference to the establishment of a prima facie case, Lord Diplock in the case of American Cyanamid vs. Ethicon Limited [1975] AC 396 stated that "…if there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant's proposed activities that is the end of any claim to interlocutory relief.'*

20. In the case of *Vivo Energy Kenya Limited vs. Maloba Petrol Station Limited & 3 others* [2015] eKLR**,** the Court of Appeal stated that: -

> *'The granting of an interim injunction is an exercise of judicial discretion and as an appellate court, we shall not readily interfere with the exercise of discretion by the High Court, unless we are satisfied that the discretion has not been exercised judicially. In United India Insurance Co. Ltd vs. East African Underwriters (Kenya) Ltd [1985] EA 898, Madan JA (as he then was), aptly explained the essence of this approach as follows, at page 908:*
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> > *"The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established:*

first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

(See also Hasmukh Khetshi Shah vs. Tinga Traders Ltd, CA No 326 of 2002).

In Habib Bank Ag Zurich vs. Eugene Marion Yakub, CA NO. 43 of 1982 this Court considered the role of the court when determining whether or not a prima facie case has been made out. The Court expressed itself thus:

> *"Probability of success means the court is only to gauge the strength of the Plaintiff's case and not to adjudge the main suit at the stage since proof is only required at the hearing stage."*

The same caution was repeated in National Bank of Kenya vs. Duncan Owour Shakali & Another, CA NO. 9 of 1997 when Omolo JA stated:

> *"The question of finally deciding whether or not there is a contract between the parties and if there is what terms ought to be implied in the contract is not to be determined on affidavits. All a Judge has to decide at the stage of an interlocutory injunction is whether there is a prima facie case with a probability of success. A prima facie case with a probability of success does not, in my view, mean a case, which must eventually succeed."*

Yet again in Agip (K) Ltd vs. Vora [2000] 2 EA 285, at page 291, while reversing a grant of an order of injunction by the High Court, this Court stated:

> *"With reference to ground 19 of the appeal, it is as well to remember that the Commissioner had before him an application, which by law required him to consider whether on all the facts in support or in opposition, a prima facie case with a probability of success had been made out to justify the grant of an injunction. In our view, the Commissioner was not entitled to delve into substantive issues and make finally concluded views of the dispute. He was not at that interlocutory stage of the matter, to condemn one of the parties before hearing oral evidence that party being condemned had in opposition to the claims in the suit." (Emphasis added).*

More recently in Nguruman Limited vs. Jan Bonde Nielsen & 2 Others CA NO. 77 of 2012 this Court echoed the same sentiments in the following terms:

> *"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, which has been or is threatened with 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. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right, which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."*

21. From the outset, I must reiterate that this is an interlocutory appeal, the hearing of the suit on merits before the trial court is yet to take place. Accordingly, I will refrain from expressing concluded views on any issue which I think may arise in the pending trial.

22. It is well established that, in order to secure the injunctive relief sought, the appellant must first establish a *prima facie* case with a high chance of success. In this case, the respondent ought to have demonstrated that it had a valid claim that the repossession of the suit motor vehicle by the appellants infringed on the contractual rights of the respondent. It is not in contention that the appellant advanced financial accommodation to the respondent for purchase of the suit motor vehicle. The said financial facility was to be repaid in monthly installments until full redemption. It is also not in contention that the respondent had since defaulted in repaying the financed amount for various reasons.

23. The respondent stated in his application that he was not served with a repossession notice and that the applicants were in contravention of Sections 15 and 16 of the Hire Purchase Act, Cap 507, Laws of Kenya. The said sections provide as follows:

> *'15. Recovery of possession where two-thirds of price paid*
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> *(1) Where goods have been let under a hire-purchase agreement and two-thirds of the hire-purchase price has been paid, whether in pursuance of the agreement or of a judgment or otherwise, or has been tendered by or on behalf of the hirer or a guarantor, the owner shall not enforce any right to recover possession of the goods from the hirer otherwise than by suit.*
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> *(2) If an owner retakes possession of goods in contravention of subsection (1), the hire-purchase agreement, if not previously terminated, shall terminate and—*
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> > *(a) the hirer shall be released from all liability under the agreement and shall be entitled to recover from the owner by suit all sums paid by the hirer under the agreement or under any security given by him in respect thereof; and*

(b)guarantor shall be entitled to recover from the owner by suit all sums paid by him under the contract of guarantee or under any security given by him in respect thereof.

(3) This section does not apply where the hirer has terminated the agreement or the bailment by virtue of any right vested in him, or to the removal of goods under section 16(3)(b).

16.Provisions where suit instituted

(1) Where a suit is instituted in the circumstances described in section 15 of this Act, the owner shall not take any step to enforce payment of any sum due under the hire-purchase agreement or under any contract of guarantee relating thereto, except by claiming the sum in the suit.

(2) Subject to rules of court, all the parties to the agreement and any guarantor shall be made parties to the suit.

(3) Pending the hearing of the suit—

(a)the court shall have power, in addition to any other powers, to make upon the application of the owner such orders as the court thinks just for the purpose of protecting the goods from damage or depreciation, including orders restricting or prohibiting the use of the goods or giving directions as to their custody; and

(b)without prejudice to the powers of the court under paragraph (a) of this subsection, where two instalments of the hire-purchase price are due and unpaid the owner may remove the whole or any part of the goods to any premises under his control for the purpose of protecting them from damage or depreciation and retain them there pending the hearing of the suit, and the owner shall be liable to the hirer for any damage or loss which may be caused to them there after such removal but shall not be taken to have repossessed the goods for the purposes of this Act or of the hire-purchase agreement by reason of his having so done.

(4) On the hearing of the suit the court may, without prejudice to any other power—

(a)make an order for the delivery of all the goods to the owner; or

(b) make an order for the delivery of all the goods to the owner, and postpone the operation of the order on condition that the hirer or any guarantor pays the unpaid balance of the hire-purchase price at such times and in such amounts and fulfils such other conditions as the court thinks just; or

(c)make an order for the delivery of a part of the goods to the owner and for the transfer to the hirer of the owner's title to the remainder of the goods:

Provided that—

(I)an order shall not be made under paragraph (b), unless the hirer satisfies the court that the goods are in his possession or control at the time when the order is made;

(ii)an order shall not be made under paragraph (c) transferring to the hirer the owner's title to a part of the goods, unless the court is satisfied that the amount which the hirer has paid towards the hire-purchase price exceeds the price of that part of the goods by at least one-third of the unpaid balance of the hire-purchase price.

(5) Where the court makes an order under subsection (4) for delivery of the whole or part of the goods to the owner, it shall in the order confer on the owner a right of entry on any premises where the goods may be for the purpose of obtaining possession of the goods.

(6) Where damages are awarded against the owner in the suit, the court may treat the hirer as having paid towards the hire-purchase price, in addition to the actual amount paid, the amount of the damages or such part thereof as the Court thinks fit, and remit the damages accordingly.

(7)If at any time before the hearing of the suit the owner has recovered possession of a part of the goods, the references in subsection (4) to all the goods shall be construed as references to all the goods which the owner has not recovered, and, if the parties have not agreed upon an adjustment of the hire-purchase price in respect of the goods so recovered, the court may for the purposes of paragraphs (b) and (c) of that subsection make such reduction of the hire-purchase price and of the unpaid balance thereof as it thinks just.

(8) Where an owner has recovered part of the goods let under the hire-purchase agreement, and recovery was effected in contravention of section 15 of this Act, this section shall not apply in relation to a suit by the owner to recover the remainder of the goods.

(9) In this section, "order for delivery" in relation to goods means an order for the delivery of the goods to the owner without giving the hirer an option to pay their value, and "the price" in relation to goods means such part of the hire-purchase price as is assigned to those goods in the agreement, or if no such assignment is made such part of the hire-purchase price as the court may determine.'

24. I have perused the hire purchase agreement between the 1st appellant and the respondent and note without a doubt that the 1st applicant was entitled to repossess the suit motor vehicle at any time, the moment any one (1) instalment or payment remained unpaid fourteen (14) days after it became due and the 1st applicant was not required to give any notice to repossess the motor vehicle. The fact that the respondent admits default in repaying the outstanding amount makes it harder for them to establish a *prima facie* case from the onset. Looking at the loan statement marked 'EBM3,' at page 15 of the record of appeal, which is also annexed by the respondent, it is not correct that the respondent has paid two-thirds of the outstanding amount. The respondent appears to have paid just over Kenya Shillings One Million (Kshs. 1 ,280, 446.83) against the Kenya Shillings Six Million Two Hundred Thousand (6,200,000.00) which is just one third of the outstanding amount and without interest. Sections 15 and 16 of the Hire purchase Act are thus inapplicable in the current circumstances.

25. Further, the Hire Purchase Act is inapplicable in this case as can be seen in Section 3(1) of the Act which provides as follows: -

> *'This Act applies to and in respect of all hire-purchase agreements entered after the commencement of this Act under which the hire-purchase price does not exceed four million shillings or such other higher or lower sum as the Minister may, after taking onto account market forces from time to time prevailing, prescribe other than a hire-purchase agreement in which the hirer is a body corporate, wherever incorporated:*
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> *Provided that monetary limitation does not apply so as to affect the definition of hire-purchase business.'*

26. The suit motor vehicle is a depreciating asset that the 1st appellant is relying upon to redeem the financial facility extended to the respondent. If it is apparent that the respondent will fail to repay the outstanding amount, the faster they do it, the more likely it is for them to realize or redeem the debt owed to them by the respondent. It is much more convenient for the 1st appellant. The respondent has stated that the suit motor vehicle is income generating and that the said income was being used to offset the outstanding amount. I am in agreement with the appellants and also the authority they relied on, *Joseph Chege Gitau vs. CFC Bank Limited [2008] eKLR (supra)*, that the fact that the motor vehicle was detained and was not generating income did not absolve the respondent from its obligation of servicing their debt. There is nothing in the hire purchase agreement that states that the outstanding amount will only be redeemed if the suit motor vehicle is generating income.

27. As was held by this Court in the case of *Amicabre Travel Services Limited vs. Alios Kenya Finance Limited* [2014] eKLR: -

> *'…The Plaintiff and the Defendant voluntarily entered into a contract which regulated and continues to regulate their relationship. The discretion by the Defendant to vary its rates without notice to the Plaintiff was an express term in the Hire-Purchase Agreement. Restraining the Defendant from exercising its rights under the Agreement would be tantamount to the court infringing on the Defendant's rights of repossession of the vehicles when the Plaintiff had defaulted in the payment of the instalments as and when the same became due.*
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> *The Plaintiff cannot fail to meet its financial obligations to the Defendant and still expect to retain the said vehicles. It must either pay the monies as it still has the right of redemption or return the same. It cannot have its cake and eat it too…The court finds that granting an interlocutory injunction pending the hearing and determination of this suit would actually be prejudicing the Defendant's interests bearing in mind that there are accruing charges. The danger of granting an interlocutory injunction is that the outstanding amount could very well outstrip the value of the securities that the Defendant holds to its detriment.*
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> *While the subject matter of these proceedings are motor vehicles and not a suit property as was in the case of Andrew Muriuki Wanjohi vs. Equity Building Society Limited & 2 others [2006] eKLR, the court finds the holding in the said case to have been relevant in the circumstances of the case herein. In that case, Ochieng J stated as follows: -*
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>> *"… In my considered view, if the 1st and 2nd Defendants were 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 repayments for more than three years…"*
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> *Both parties were ad idem that the law is that an injunction is granted to an applicant to preserve subject matter pending the hearing and determination of an action. The applicant must demonstrate a prima facie case with probability of success, satisfy the court that it would suffer irreparable damage which would not be adequately compensated if the court did not grant the injunction and if the court is in doubt, then it should decide the case on a balance of convenience. These principles were clearly spelt out in the case of Giella vs. Cassman Brown (supra) in which it was held that: -*
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>> *"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."*
>
> *As the power to grant an interlocutory injunction is a discretionary one, it must be based on the law and evidence. So long as the Plaintiff defaulted in the payment of Hire-Purchase Price and the instalments remained unpaid, the Defendant was entitled to repossess the said vehicles as it remained the owner of the same until such time that the Plaintiff paid the entire Hire-Purchase Price. The court did not find that the Defendant was clogging or fettering the Plaintiff's rights of redemption of the said vehicles… Having considered the parties' affidavits, the written and oral submissions and the case law in support of their respective case and having applied the principles of granting interlocutory injunction pending the hearing and determination of the suit herein, this court has come to the conclusion that the Plaintiff was not able to demonstrate that it had a prima facie case with a probability of success at trial as was set out in the case of Giella vs. Cassman Brown (supra).*

> *This is therefore not an appropriate case for the court to exercise its discretion in favour of the Plaintiff herein. In view of the fact that the Plaintiff was not able to demonstrate a prima facie case with probability of success at trial, the question of compensation by way of damages if the interlocutory injunction was not granted would also not arise. The balance of convenience in this case tilts to the Defendant herein.'*

28. Similarly, I find that the respondent did not demonstrate a *prima facie* case with a chance of success and thus the question of compensation by way of damages, if the interlocutory injunction was not granted, would also not arise. The balance of convenience tilts to the appellants rather than the respondent.

29. In the foregoing, I find that the instant appeal is meritorious and hold that the ruling and order by Hon. Khapoya, Senior Resident Magistrate, delivered on 29th June 2017 be set aside in its entirety. The appellant's costs of this appeal be borne by the respondent.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 10TH DAY OF APRIL, 2019

W MUSYOKA

JUDGE