



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**CIVIL SUIT NO. 82 OF 2019**

**EMPRESS TRADING LIMITED.....PLAINTIFF**

**- VERSUS -**

**GULF AFRICA BANK LIMITED.....DEFENDANT**

**RULING**

1. **Empress Trading Limited**, the plaintiff herein, has an account with **Gulf Africa Bank Limited**, the defendant hereinafter referred to as the Bank. It is not denied that the Bank extended to the plaintiff loan facility which facility is secured by various vehicles of the plaintiff. The plaintiff in filing this case against the Bank admitted to be in arrear in the repayment of that loan. The plaintiff pleaded as follows in its plaint:

*“The plaintiff is willing and ready to regularize the accounts with the defendant (the Bank) and the delay in payment was occasioned by delay in payment of the plaintiff (sic) invoices which are due for payment anytime and this will enable the plaintiff pay the facility as agreed.*

*The plaintiff has offered a payment plan to the defendant (the Bank) which has been partially honored but the defendant still wants to repossess and auction the Trucks and Trailers.”*

2. The plaintiff filed, simultaneously with the plaint, a **Notice of Motion application** dated **21st February 2019**. By that application the plaintiff sought restraining orders to stop the Bank from repossessing some vehicles and restraining orders to stop the Bank from auctioning some attached vehicles. That application was filed under certificate of urgency. The court, at ex parte hearing, ordered the inter parte hearing to be on 25th February 2019.

3. At the inter parte hearing, and in the presence of both counsels of the parties, a consent order was entered before court as follows:

*“By consent of the parties the auction slated for 26th February 2019 be and is hereby stayed on the following terms:*

- i. That the plaintiff applicant do clear the arrear of Ksh. 2,958,654 by 28th February 2019;*
- ii. The balance of arrears of Ksh. 12,579,273 to be paid on or before 15th March 2019;*
- iii. The plaintiff to make proposal on time needed to liquidate the remaining debt by 15th March 2019;*
- iv. That the plaintiff do pay auctioneers charges within 30 days from date of receipt of auctioneers invoice; and*
- v. The matter be mentioned on 27th March 2019 to confirm compliance.”*

4. What is before court for consideration is a **preliminary objection** dated 10th June 2019, filed by the defendant, and a **Notice of Motion application** dated 22nd May 2019, hereinafter **the application**, filed by the plaintiff. The plaintiff seeks by **the application** for orders for the Bank to release attached vehicle and for an order to restrain the defendant from auctioning those attached vehicles. By the **preliminary objection** the Bank seeks for dismissal of the application on the basis that the application is *res judicata* and on the basis that this court has no jurisdiction to entertain the application.

5. I will proceed to consider the preliminary objection first because if indeed that objection does succeed there will be no basis to consider the application.

6. In the Bank's view the application is *res judicata* because the plaintiff had previously filed the **Notice of Motion dated 21st February 2019** which was compromised by the parties consent reproduced here above. By the Bank's submissions it was stated that the plaintiff failed, refused and/or neglected to comply with the terms of the consent order which led the Bank to sell one of the plaintiff's vehicle for Ksh.9 million in order to reduce the plaintiff's indebtedness. The Bank argued that the plaintiff cannot be allowed to stop the auction of the other vehicles when it has failed to comply by the terms of the consent order. The bank relied on the case **Uhuru Highway Development Limited v Central Bank of Kenya & 2 others [1996] eKLR**. The court of appeal held in that case that a party can only file another application "if it is based on facts not known to him at the time he made the first application". The court of appeal in that case **Uhuru Highway** (Supra) further held:

***"The long and short of all this is that once an application for injunction within a suit has been heard and determined under the principles as laid down in Giella vs. Cassman-Brown, a similar application cannot be brought unless there are new facts, not brought before court earlier after exercise of due diligence, which merit a re-hearing and possible departure from the previous ruling. Such cases, of course, must be very few and far in between."***

7. The plaintiff in response to the preliminary objection argued that after the consent order was recorded by the parties, parties entered into further discussions whose effect was to amend the actions the parties were to engage in after the consent. The plaintiff also argued that the court has discretionary power to interfere with parties consent as was held in the case of **Contractor Ltd vs Margaret Oparanya (2004) eKLR**. The plaintiff further argued that the application was not *res judicata* because that doctrine only applies where a matter is heard and decided on merit which was not the case here because the main suit was still pending.

#### **ANALYSIS OF THE PRELIMINARY OBJECTION**

8. In my analysis I must begin by disproving the argument raised by the plaintiff. The plaintiff's argument is that because the main suit has not been heard to conclusion the application is not *res judicata*. I would respond by saying, far from it. One only need to consider what **Section 7 of the Civil Procedure Act, Cap 21**, provides. It provides:

***"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."***

9. The above prohibition, under Section 7 of Cap 21, to filing of a suit which was substantially in issue in a former suit and which was finally decided by a competent court equally applies to application. This was the holding of the court of appeal in the case **Uhuru Highway** (Supra) as stated above in this ruling.

10. The plaintiff erred in arguing that the court cannot consider the consent order because that consent was amended by the parties in their further discussions outside the court. The plaintiff erred because that further discussion is not part of an order of the court record at all. It therefore loses its binding effect on any of the parties before court. If any party wished to enforce the out of court discussion, which is denied by the Bank, they would have to make it part of the claim in this suit and they would need to prove it by evidence.

11. Unlike what is argued by the Bank I am of the view that the parties consent reproduced above, as it can be seen, did not compromise any application. The parties by that consent did not agree that the granting of the consent order did away with the consideration of the application of 21st February 2019. The terms of that consent, it would seem, when one looks at it closely, although it related to the application that was pending before court then, that is the Notice of Motion dated 21st February 2019, the consent did not however pronounce itself as having compromised that application. In my view that application of 21st February 2019 is still pending and is undetermined. The consent simply stayed the auction of the plaintiff's vehicles that was due to take place on 26th February 2019, on condition that the plaintiff would make payments to the Bank, as set out in the consent.

12. Further I find that the plaintiff's application (**the application**) is not *res judicata* because in the application of 21 February 2019 the plaintiff sought to restrain the Bank from attaching some of the vehicles and now by **the application** the plaintiff seeks for an order for the Bank to release those same vehicles. It would seem that in the intervening period, from when the consent was recorded, the Bank did attach those vehicles. The basis, therefore, on which the application of 21st February 2019 is based on, is not the same basis on which **the application** is based on. In other words the facts relied on in the application of 21st February 2019 are different to those in the application.

13. I therefore make a finding that the plaintiff's application dated 21st February 2019 is not *res judicata* and accordingly the preliminary objection fails and is dismissed with costs to the plaintiff.

#### **ANALYSIS OF THE APPLICATION DATED 22ND MAY 2019**

14. The application seeks mandatory injunction for the Bank to release vehicles it has attached. It also seeks an order to restrain the Bank from auctioning those attached vehicles.

15. The plaintiff seeks those orders on the ground that parties entered into further negotiations following the recording of consent before court. The plaintiff stated that it fulfilled the requirements of that amended consent but that the Bank failed to fulfill its obligation.

16. I have already pronounced myself on that further discussion which seemed to have taken place outside court. I have found that the terms of that discussion are not binding on any party in as far as it concerns this matter before court. A party who would wish to enforce such a discussion, just as in the case of a contract which is denied, would need to prove it before court. There is no evidence produced before court which in any way evidences such a discussion. Such a discussion cannot be a basis of granting the orders sought by the plaintiff.

17. It is also necessary to remind the plaintiff that a mandatory injunction cannot be granted absent special circumstances: see the case **Stephen Kipkebut t/a Riverside Lodge and Rooms v Naftali Ogola [2009] eKLR** thus:

***“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 attempts to steal a march on the plaintiff, such as where, on receipt of notices that an injunction is about to be applied for, the defendant hurries on the work in respect of which complaint is made so that when he receives notice of an interim injunction it is completed, a mandatory injunction will be granted on an interlocutory application.”*** (emphasis added)

18. The plaintiff has admitted being indebted to the Bank and much more has admitted to being in arrear of the the repayment of its facility with the Bank. As I have found above, the discussion with the Bank, if indeed it took place, is not binding on any party unless and until proved. Accordingly such a discussion also cannot be the basis of granting an injunction, let alone mandatory injunction.

19. The plaintiff in my view has not satisfied the principles of granting an injunction enunciated in the case **Giella –v- Cassman Brown & Company Ltd (1973) EA 358**. That is the Plaintiff must show that he has a prima facie case with a probability of success and that he stands to suffer irreparable damage. The plaintiff did not surmount those two principles, and because I do not entertain any doubt so as to lead me to consider the third principles of granting injunction, I find that there is no merit in the application. It is dismissed with costs to the bank.

**CONCLUSION**

20. In conclusion therefore I find that the **preliminary objection** dated **10th June 2019 fails and is dismissed with costs to the plaintiff**. The **Notice of Motion** application dated **22nd May 2019** is without merit and it is **dismissed with costs to the defendant**.

**DATED, SIGNED and DELIVERED at NAIROBI this 17th day of DECEMBER, 2019.**

**MARY KASANGO**

**JUDGE**

***Ruling read in open court in the presence of***

Court Assistant.....Sophie

.....for the Plaintiff

.....for the Defendant