



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 105 OF 2017

MOSES MALAKWEN A. ROTICH.....PLAINTIFF

VERSUS

1. DIAMOND TRUST BANK LTD

2. THE CO-OPERATIVE BANK OF KENYA.....DEFENDANTS

R U L I N G

1. On 27/11/2017 this court granted to the plaintiff, an *ex parte* interim injunction to stop the defendants from seizing and selling the suit motor vehicles pending interpartes hearing on terms that the Application, pleadings and order duly extracted would be served upon the Respondents within 24 hours from the date of issue to enable the matter be heard within 14 days.

2. It would appear no date was taken till the 13/12/2017 and matter listed for 12/2/2016. Came the date scheduled, the plaintiff appeared in person without the advocate and requested for another date saying he only needed a period of one week to pay the arrears in full. That request was resisted by the 1st defendant/respondent on the basis that as at that day her client had only been served with the order and not the pleadings. She sought that the plaintiff be ordered to serve and then interim orders be vacated.

3. On his side, the 2nd defendants adopted the position taken by the 1st defendant only adding that the *ex parte* orders were valid for only 14 days and had therefore lapsed. On the request for one week to pay the outstanding arrears the advocate promised not to take any steps provided the plaintiff kept his promise to pay.

4. On that day, the court ordered that the defendants be served within 72 hours and in default the suit would stand dismissed. On request to pay, the court implored the defendants to make a business decision without the need for a court order. However, the orders issued on 27/11/2017 were declared lapsed and incapable of extension. The matter was then stood over to the 19/3/2018 for mention and further orders.

5. When the matter came back to court as ordered, the suit against the 2nd defendant had been withdrawn and the court awarded costs to the said defendant. The 1st defendant's advocate however did not appear even though the plaintiff's advocate informed court that they had been served. The counsel in those circumstances pleaded with the court to give his client orders in terms of prayer 2, in the Application dated 27/11/2017 because the same had remained unopposed. He added that the plaintiff had sold his property was waiting payment to settle the 1st defendant's debt and only needed limited time to do so.

6. I have looked at the Application dated 27/11/2018 and in fact noted that the 1st defendant did not at all file any responses to the Application. Under Order 51 Rule 14(4) where no response is filed to an application, the court has the discretion to have the same heard *ex parte*. That is the route the court took when it allowed Mr. Mathare to proceed with the Application.

7. That a matter proceeds *ex parte* is not by itself an automatic gear that the same be allowed. The court is at all times, whether a matter be opposed or unopposed, duty bound to ensure that the orders being sought meet the legal thresholds. I understand the thresholds to remain those set by the court in *Giella vs Casman Brown*. The court must be convinced and satisfied that the plaintiff has established a prima facie case with probabilities of success and that damages would not be an adequate remedy in lieu of injunction.

8. The relationship between the parties as pleaded is that of a banker and a customer engaged in an asset finance by hire purchase agreement. In that regard, the plaintiff pleaded at paragraph 4 & 5 that it was in arrears of Kshs.638,734.60 due to the 1st defendant occasioned by lack of business due to the economic situation brought about by the election process.

9. Clearly, the plaint as crafted establishes no wrong alleged against the 1st defendant. Instead it is the plaintiff who acknowledge being in default and breach of the contract between the parties.

10. Therefore, I see no prima facie case at all, and the very foundation of grant of a temporary injunction is totally lacking for the court cannot grant an injunction for the sake of granting same. There being no prima facie case disclosed, the application fails in its entirety and is dismissed with costs.

11. However, it was submitted from the bar that the plaintiff had sold an asset and was only requesting for a limited time to pay. On that account alone, and even after dismissing the Application, I direct that the current status quo prevailing, if no seizure or sale has taken place, be maintained for a period of upto the 21/4/2018 to enable the plaintiff meet its obligations to the 1st defendant.

12. If he shall not have paid by that date to the satisfaction of the 1st defendant, let the 1st defendant be at liberty to proceed in terms of the law applicable and contract between the parties.

Dated and delivered at **Mombasa** this **22nd** day of **March 2018**.

P.J.O. OTIENO

JUDGE