



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL CASE NO. 37 OF 2017**

**GREEN ISLAND SHIP CHANDLERS (K) LIMITED.....PLAINTIFF**

**VERSUS**

**IMPERIAL BANK LIMITED (IN RECEIVERSHIP).....1<sup>ST</sup> DEFENDANT**

**ROSEMARY WAWERU T/A THAARA AUCTIONEERS....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The applicant through an application dated 3<sup>rd</sup> April, 2017 brought under the provisions of Order 40 rules 1(a), 3 and 9 of the Civil Procedure Rules, 2010 and Section 3A of the Civil Procedure Act, Cap 21 Laws of Kenya and all other enabling provisions of the law seeks the following orders:-

(i) Spent;

(ii) Spent;

(iii) That pending the hearing and determination of this suit, this Honourable court be pleased to grant an interim injunctive order restraining, barring and or stopping the defendants/respondents whether by themselves, their servants, agents, employees and or anyone acting on their authority from attaching, repossessing and/or collecting any vehicles belonging to or in possession of the applicants, being motor vehicles registration No.:-

(a) KBV 888D, Toyota Land Cruiser;

(b) KBW 958B, Mercedes Benz Axo P/Mover;

(c) KBW 999X, Nissan Murano; and

(d) KBQ 280K, Isuzu;

(iv) That a mandatory injunction do issue directing the 1<sup>st</sup> defendant/ respondent to furnish the applicant and the court with all the statements of the applicant's loan ref. Nos. 002HPLC131470001, 002HPLC133010001, 002HPLC132550001 and justify the interest loaded on the said loans;

(v) Spent;

(vi) That the Officer Commanding Central Police Station and any Police Station for that matter, do ensure compliance with this Honourable court's order; and

(vii) That the costs of this application be provided for.

2. The application is supported by the affidavit of Ahmed Bawazir sworn on 3<sup>rd</sup> April, 2017. The 1st defendant/respondent filed a replying affidavit sworn by Mohamud A. Mohamud on 15th August, 2017. The applicant's Counsel filed his written submissions on 3<sup>rd</sup> October, 2017 and Counsel for the respondent filed his on 12th October, 2017.

3. Mr. Khalid, Learned Counsel for the applicant submitted that he was seeking injunctive orders as prayed in paragraph 3 of the present application to stop the respondent from repossessing the motor vehicles in issue pending the hearing and determination of the suit. He referred to annexures 2, 3, 4 attached to the respondent's replying affidavit, which comprise hire purchase agreements for 3 vehicles. He stated that a facility for Kshs. 13 Million was granted in the year 2013. He indicated that the said agreements contain the mode of payment and default clauses.
4. It was submitted that on 22<sup>nd</sup> March, 2017 the respondent instructed an Auctioneer to repossess 4 motor vehicles allegedly for arrears of Kshs. 64,802,000/=. He made reference to annexures 2, 3 and 4 attached to the supporting affidavit where the applicant was informed by the respondent that the outstanding amount was Kshs. 5,366,755/=. Counsel stated that the applicant has been repaying the facility and has so far paid Kshs. 8,000,000/=. The court was further informed that the applicant has fixed deposits of Kshs. 11,460,000/= with the respondent as per annexure 6 of its affidavit.
5. It was argued that attempting to repossess the motor vehicles in issue was contrary to the hire purchase terms as clause 8 thereof provides that default attracts an interest rate of 40% per annum which only accrues on monthly installments due but not paid. He stated that the principle of a *prima facie* case is what needs to be ultimately determined and an attempt to repossess the motor vehicles was contrary to the hire purchase agreement, which issue the court needs to determine.
6. It was contended that the amount of Kshs. 64,802,000/= claimed is not outstanding and the respondent has not justified how the said amount came about as the statements that have been provided are incomplete.
7. Counsel for the applicant submitted that the hire purchase agreements signed do not conform to Section 5(4) of the Hire Purchase Act as they are not registered pursuant to the Registration of Documents Act. He stated that the said section prohibits the enforcement of a hire purchase agreement that is not registered, which means that the respondent is seeking to repossess contrary to the Hire Purchase Act.
8. Mr. Khalid further submitted that the applicant will be highly prejudiced if the application is not allowed for there is a likelihood that the suit will be rendered nugatory and there will be no issue left for the court to determine.
9. It was stated that the respondent will not be in a position to repay the applicant as it is in receivership and it is unlikely that any proceeds will be realized later by the applicant if the vehicles are sold.
10. Counsel relied on the case of **Flex Construction Solutions Ltd. vs Verandel Court Ltd** [2012] eKLR where Odunga J., cited the decision of **Suleiman vs Amboseli Resort Ltd** [2004] 2 KLR 584 where Ojwang AJ (as he then was) stated that it is the business of the court so far as possible to secure that any transitional motions before the court do not render nugatory that ultimate end of justice.
11. In his closing arguments, Counsel for the applicant stated that he had established a *prima facie* case as several rights have been infringed. It was his view that the rights and rebuttals can only be determined at a full hearing.
12. Mr. Mugambi, Learned Counsel for the respondent stated that his client and the applicant enjoy a customer/bank relationship and exhibited bank statements attached to the respondent's affidavit, as MAM8. He referred to paragraph 6 of the respondent's affidavit showing the outstanding bank facilities advanced to the applicant.
13. Counsel submitted that the respondent's remedy as per annexure MAM7 of the attachment to its affidavit, is a right of set off, which gives the respondent the right to realize its securities. It was further submitted that once security is offered to secure a loan, it becomes a commodity for sale and there should be no emotions attached to such security. He cited the case of **Amos Wangeera Njoroge and 9 Others vs Serah Wamuyu Muriuki and Another** [2014] eKLR.
14. It was argued for the respondent that no irreparable harm will be suffered by the applicant as it was agreeable to the terms of the realization of securities. He relied on the case of **Mrao vs First American Bank of Kenya Limited and 2 Others** [2003] KLR 125 on what constitutes a *prima facie* case.
15. Mr. Mugambi further submitted that it was unconscionable for the applicant to enjoy a loan facility that it was not servicing and then rush to court to get an injunction. He indicated that the bank (respondent) availed statements of accounts to the applicant and completeness of the same was not challenged.
16. It was stated that apart from the hire purchase facility, the applicant has an overdraft facility which constitutes the bulk of the debt at Kshs. 55,140,556.07. He indicated that although the applicant's Counsel has challenged the non-registration of the hire purchase instruments, they were not challenged by the applicant. He indicated that what was attached to the respondent's affidavit was the approvals for the hire purchase facilities.
17. Mr. Khalid in response to the respondent's submissions, indicated that due to the fact that Mr. Mugambi stated that the issue of whether the hire purchase agreement is valid or not can only be heard in the main suit, it should form the basis of an injunction. Counsel for the applicant stated that the respondent in paragraph 6 of its affidavit refers to hire purchase contracts but has not availed the same and that annexure MAM7 was not signed by the applicant to confer a right on the respondent to repossess the vehicles. He stated that the right of repossession does not emanate from the hire purchase agreement but from the document marked as MAM7.

## **ANALYSIS AND DETERMINATION**

The issue for determination is if this court should grant an interim injunction.

18. It is not disputed that the applicant entered into hire purchase agreements as follows:-

- (i) On 24<sup>th</sup> May, 2013 for the sum of Kshs. 4,000,000/=;
- (ii) On 3<sup>rd</sup> September, 2013 for the sum of Kshs. 3,000,000/=; and
- (iii) On 24<sup>th</sup> October, 2013 for the sum of Kshs. 7,000,000/=.

19. The respondent on 25th February, 2014 agreed to avail to the applicant a credit facility of Kshs. 14,000,000/= by revising an existing overdraft facility. The said facility was secured by specific debentures over the applicant's motor vehicles registration Nos. KBQ 280K, KBW 958B, KBV 888D, KBW 999X and KBJ 396W.

20. The respondent further deposed in its affidavit that the loan was secured by a pledge over fixed deposit accounts reference Nos. 002DEP3121350002 and 002DP121317900001 held in the name of Ahmed Salim Abud. The affidavit indicates that the applicant and two of its Directors executed a right of set off of accounts and securities on 18th March, 2014.

21. In paragraph 3 (vii) of the said affidavit, the respondent states that the applicant was servicing the loan until October, 2015 when the bank was placed under receivership and the plaintiff stopped servicing the loans despite several reminders from the bank, forcing the bank to commence recovery procedures.

22. Although the applicant deposed that motor vehicle Registration No. KBQ 280K had been paid for in full, the said motor vehicle, among others, were offered for a specific debenture for a maximum principal price of Kshs. 3,000,000/=. The applicant duly signed 3 blank transfer forms for each vehicle. As a result of the foregoing, it is the finding of this court that the said motor vehicle could be repossessed in default of payment of the overdraft facility by the applicant.

23. On 23rd February, 2016 the respondent wrote to the applicant informing it that the respondent had been placed under receivership from 13<sup>th</sup> October, 2015 and reminded it to continue servicing its loans/overdrafts and that arrears would continue attracting penal interest. The letter further stated that the outstanding loan balance as at 30<sup>th</sup> September, 2015 was Kshs. 1,615,135/= but the respondent was unable to give the applicant account statements since the system was not available.

24. The respondent attached annexure MAM-8 to its replying affidavit which shows that the estimated overdraft balance as at 13th October, 2015 on account 0340808002 was Kshs. 33,485,615.74 and in April, 2017 it was Kshs. 55,140,556.07. An offset was made through funds that were in transit in the sum of Kshs. 1,102,878.22. The estimated balance as at 13th October, 2015 on contract 002HPLC131470001 stood at Kshs. 1,488,176 and as at 30th April, 2017 the total estimated balance was 2,903,371.89. The statement indicates that no payment has been made since July, 2015. The estimated balance on contract 002HPLC132550001 as at 13th October, 2015 stood at Kshs.293,221/- and as at 30<sup>th</sup> April, 2017 it stood at Kshs. 558,734.21. No payment has been made since August, 2015. The estimated balance as at 13th October, 2015 on contract 002HPLC133010001 stood at Kshs. 3,579,579/- and as at 30th April, 2017 it stood at Kshs. Kshs. 6,678.813.01. The statement shows that no payment has been made since July, 2015.

25. Having perused the said accounts, it is apparent that the applicant has defaulted in payment of the overdraft and hire purchase facilities yet it continues to benefit from the motor vehicles it purchased through money advanced to it by the respondent. The applicant did not file a supplementary affidavit to controvert the allegation contained in paragraph 9 of the respondent's replying affidavit that it has not been paying monthly installments as required.

26. In **Giella vs Cassman Brown and Brothers Ltd.** [1973] EA 358 Spry J stated thus:-

***"Firstly, 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."***

27. The court notes that the applicant has fixed deposit account Nos. 002DEP3121350002 and 002DP12131790001 in the sum of Kshs. 11,460,000/= with the applicant. The said amount is however a far cry from the amount being claimed by the respondent from the applicant. I note that the motor vehicles which comprise the securities in this matter are depreciating in value. If I grant injunctive orders to the applicant but the respondent wins this case after a full hearing, the respondent will be unlikely to recover much from the sale of the said motor vehicles. Further, the applicant should have demonstrated good faith by servicing the facilities. The applicant has therefore failed to establish a prima facie case for the grant of injunctive orders.

28. On irreparable injury, although the respondent is under receivership, its death knell has not been sounded yet and the process to turn it around may be successful. If the applicant emerges victorious in the main suit, the respondent will be ordered to compensate it by way of damages. The case of **Mara North Holding Limited vs Sanaot ole Mesek & 4 Others** [2015] eKLR cited by Counsel for the applicant in his written submissions is not applicable to the circumstances of this case as the property in issue was not motor vehicles that depreciate in value. The case of **Suleiman vs Amboseli Resort Limited** (supra) cannot aid the applicant due to his non-payment of the monthly installments to service the facilities advanced by the respondent.

29. In **Amos Wangeera Njoroge and 9 Others vs Serah Wamuyu Muriuki and Another** (supra), the Court stated as follows:-

***"Once property is offered as security for a loan to a bank, such property becomes a commercial property which can be offered in the market for sale in case of default in the repayment of the loan and a chargor would be hard pressed to justify that damages"***

*would not be an adequate remedy to compensate the chargor in the event of what would be considered and/or found to be an irregular and/or unlawful sale by way of realization of the security by the chargee. In such cases an award of damages would be an adequate remedy."*

30. In similar light as the above decision, the applicant through its deponent on 18th March, 2014 pledged its common securities with the respondent on the understanding that the latter had the right to realize them and apply the proceeds for set off. The circumstances surrounding this case therefore reveal that the balance of convenience tilts in favour of the respondent in realizing the securities deposited with it, by the applicant.

31. In my considered view, issues appertaining to the applicability of the duplum rule and whether the hire purchase agreements are void by reason of non-registration are issues for deliberation in the main suit.

32. For reasons given in this ruling, I decline to grant a temporary injunction pending the hearing and determination of the case herein. Costs are awarded to the defendant/respondent.

**DELIVERED, DATED and SIGNED at MOMBASA on this 27th day of July, 2018.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

No appearance for the plaintiff/applicant

No appearance for the 1<sup>st</sup> defendant/respondent

Ms Caren Otene - Court Assistant