



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL AND ADMILARLY COURT

CIVIL CASE NO 328 OF 2016

AUTOMOTIVE SOLUTIONS (NAIROBI) LTD.....PLAINTIFF

VERSUS

BUSINESS PARTNERS INTERNATIONAL (K) LTD.....DEFENDANT

RULING

1. This ruling relates to a Notice of Motion dated 12th August 2016, brought under 40 Rules 1,2 & 3 of Civil Procedure Rules, Section 63(c) and (e) of the Civil Procedure Act and all other enabling Provisions of Law.

2. The Applicant is seeking for orders that:

(a) Spent

(b) spent

(c) That the Honourable Court be pleased to grant an injunction restraining the Defendant whether by itself, its agent or servants from repossessing the Plaintiff's business machinery or in whatsoever manner interfering with the Plaintiff peaceful operation of its business situated at Kay salt Go-downs complex along Mombasa road Nairobi until hearing and determination of the suit.

(d) That the Defendant be ordered to render accounts of the money paid by the Plaintiff in regard to alleged Royalty charges.

(e) Any other or further relief this Honourable Court may deem fit to grant.

(f) Cost of this Application be provided for.

3. The background facts of the case are that, in the month of November 2013, the Applicant applied for a business finance loan from the Respondent. The Application was successful and they were granted a loan of Kshs 12 Million in the month of February 2014, repayable within a period of five years. The loan was to be secured by a fixed Asset Debenture in favour of the Respondent over the Applicant's workshop equipment and be registered by the Respondent.

4. The Applicant averred that, at the time the loan was granted they was operating its business along

Mombasa Road A, off Enterprise road but had to re-locate after the Landlord disposed of its property. That this affected its business and the repayments of the loan which fell into arrears. This was brought to the knowledge of the Respondent through exchange correspondences. However, although the Respondent agreed to accommodate the Applicant, the Applicant was shocked on the 6th March 2016 to receive a letter demanding payment of loan arrears of Kshs. 1,777,547 and sum of Kshs 615,132 on Royalty account.

5. That the Applicant wrote to the Respondent indicating its inability to pay the loan facility stating that it could not pay Royalty charges, as no income was earned, and pleaded for time to make the payments.

6. Following correspondence between the Applicant and the Respondent's Director based in South Africa, the Applicant offered to make payment of Kshs.1, 600,000 by June 2016, and the offer was accepted. As payment was not made the Auctioneer was instructed to proclaim and reposes the Applicant's machinery. The Applicant laments that the Auctioneers refused to give a copy to them of the instructions or explain the basis of the repossession but merely gave a proclamation notice to carry away the Machinery if the sum of Kshs. 2,814,174 loan arrears, outstanding sum of Kshs.10,134,524 and the Auctioneer's fees of Kshs. 153,064 is not paid within seven (7) days.

7. The Applicant argues that the Respondent introduced other charges referred to as Royalty charges and made the Applicant to sign an Agreement to pay a 1% of the projected turnover of its business forthwith. According to the Applicant's records Kshs. 8, 242, 858 has been paid and the outstanding loan is Kshs. 8,948,012. It is therefore important that the Respondent provide reconciled accounts.

8. The Applicant further avers that the Respondent is not allowed to carry out repossession over the loan secured by a Debenture since it is a Charge on the company and the Defendant's action is thus illegal and should be restrained by way of an injunction.

9. The application was further supported by the grounds on the face of it and Annexed Affidavit sworn by Joseph Mbaabu Inoti. He averred that instruction to Garam Auctioneers to proclaim and repossess its business machinery to recover business loans is unlawful as the alleged arrears in the sum of Kshs.2, 814, 174. 47, is erroneous as aforesaid. Further, there is no provision under the loan agreement or in Law to repossess its machinery in the recovery of the loan and even then the Respondent has not served the mandatory notice required under the Law, therefore as the Applicant stands to suffer irreparable loss, injury and damages if the Respondent is not restrained from carrying away the proclaimed machinery. The Applicant argued that it demonstrated a prima facie case with a very high probability of success, and is ready to give any undertaking as the Court may direct.

10. The Application was however opposed based on the Replying Affidavit sworn by Sally Gitonga, the Country Manager at the Respondents Company. She deposed that, on or about February 2014, the Respondent advanced the Applicant a loan of Kshs 12,000,000 on terms set out in the Loan Agreement dated 3rd February, 2014 and the General Terms set out thereto on the even date.

11. That Pursuant to clause 6 of the Loan Agreement, the Applicant was required to repay the facility and loan advanced in thirty four (34) equal instalments and consecutive monthly instalments of Kshs.304,721.13, each commencing 1st April 2014 to 1st January 2017. The parties agreed that, each instalment and any amounts owing was due and payable on the 1st day of each month. Further it was agreed at clause 5 of the Loan Agreement that, the rate of interest payable on the loan shall be 18% per annum, variable from time to time as provided for in the General Terms and Conditions thereon. Clause 5.3 of the Loan Agreement provided that any unpaid instalments shall accrue default interest as set out at clause 7.4 of the General Terms and conditions. The Loan interest rate was however later decreased to 14% per annum effective from 20th September 2016 pursuant to the clause 5.3 of the General Terms and Conditions.

12. The Respondent argued that the Applicant has failed to disclose that, the Parties also entered into a Royalty Agreement, wherein the Applicant agreed to pay royalties to the Respondent as stated in the Loan

and the Royalty Agreements. Therefore the purported denial of the Terms of the Royalty Agreement and or the debt arising therefrom is an afterthought and a misrepresentation, as the Applicant voluntarily executed the Royalty Agreement and even gave a separate Acknowledgement of the terms thereof. That the Applicant agreed under at clause 2.1 of the Royalty Agreement to pay the Respondent royalties at the rate of 1 % on the projected monthly turnover of the Applicant commencing 1st April 2014, until the amount disbursed in the loan Agreement is fully paid or for the full term of the loan as provided in the clause 6 of the loan Agreement, whichever period is the longest.

13. The Respondent further averred that the directors of the Applicant Company created a Charge in form of a Debenture over the assets of the Company in favour of the Respondent as a security for the loan advanced, which was consequently registered by the Registrar of Company.

14. However the Applicant stopped making regular payments as required by the Loan Agreement in August 2015 and as at 9th March 2016, the outstanding debt under the Loan and Royalty Account was Kshs.10,516,124.58 and 615,132.00 respectively. That the Respondent served a demand dated 9th March 2016 for the outstanding amount which the Applicant acknowledged and promised to pay but failed to make payments. The payment made of Kshs.1,600,000 in June 2016, was credited towards the accrued interest in accordance with clause 5.3 of the loan Agreement, Clause 1.2 of the Royalty Agreement and Clauses 7.1, 7.2 and 7.4 of the General Terms and Conditions. Therefore the allegation that the Respondent did not take into account the said payment is therefore an afterthought and baseless.

15. That the Applicant was at all material times informed of the outstanding debt by the Respondent but defaulted or reneged on its contractual obligation under the Loan Agreement to pay, and the Respondent never consented to or allowed rescheduling or deferred payment of the loan contrary to the written Agreements by the Parties herein as alleged by the Applicant. That despite promising to regularize the debt Account, the Applicant however failed to make any payments towards the Loan and Royalty arrears consequently falling into heavy arrears.

16. That on or about 10th August 2016, the Respondent commenced debt recovery processes to realize it's security pursuant to fixed Debenture Agreement. The instant suit and the Application disputing royalty charges or the debt are an afterthought and frivolous, as the Applicant has never at any time disputed the debt and or its contractual obligations under the Loan, Royalty and/ or fixed Debenture Agreement. The debt is subsequent to the failure to regularly service the debt accounts and it is legal and recoverable against the Applicant until the full payment.

17. That on or about 30th August 2016, the Applicant offered to pay a sum of Kshs 8,000,000.00 subject to terms of a consent order recorded in Court on that date. The Applicant was to engage the Respondent on payment of the balance of the debt as a condition to forestall the repossession or realization of the security herein. Both Parties were required to execute a formal tripartite agreement which was to be prepared by the Respondent's Advocate. The Tripartite Agreement was prepared and forwarded to the Applicant's Advocate for execution but to date the Applicant has neglected to execute the said Agreement despite numerous reminders, and has failed and or refused to give any proposal on the payment of the balance of the outstanding Loan.

18. Therefore the Applicant is merely seeking further protection of the Court to circumvent, escape, avoid and or breach the terms of the Agreement, as well as the consent order recorded in the Court on 30th August 2016. The belated allegation that the outstanding amount or interest thereof is questionable is not only false but also an afterthought, approbation and reprobation and waste of Judicial time, by the Applicant, as the Debt has never been disputed nor the Respondent invited to compare statements at any time before as alleged or at all.

19. The Respondent argued that the Applicant will not suffer irreparable loss, as the subject matter can be compensated by damages. Further, no prejudice will be suffered by the Applicant if they are ordered by the Court to settle the remaining debt, discharge parties and stop further accruals of interest, whereby accruing debt will eventually outstrip the security herein prejudicing the Respondent.

20. Therefore the balance of convenience tilts towards disallowing the Application to restrain realization of the security herein as the Applicant is seeking Court's assistance to continue breaching contracts voluntarily entered by parties without lawful excuse.

21. However the Applicant filed a further Affidavit sworn by Joseph Mbaabu arguing that they have at Paragraph 7 of the Complaint, disclosed that Royalty charge was payable but it is unlawful to pay the said Royalty charges on projected monthly turnovers, when the actual turnovers were below the projected turnovers. That the Respondent should not have been charging the said Royalties on non-existent turnovers, aggravated by the financial situation of the Plaintiff. The fact that the Plaintiff entered into Royalty Agreement to pay the Royalties does not mean that an Agreement between two Parties to perform an illegal act is binding in law.

22. That under Clause 5 of the Royalty Agreement, the Respondent was under duty to appoint a mentor in event the Applicant failed to attain its budget objectives and despite having been aware and being informed of the same, the Respondent failed to appoint the mentor and comply with Clause 31 of the Agreement whereby it was supposed to give technical assistance, therefore the Respondent should not be claiming any Royalty charges on non-existent turnovers.

23. The Applicant argued that the Respondent authorised the sale of the machinery at a price of Kshs. 8, 000, 000 and after the sale the money was paid directly to the Respondent as per terms of the consent order, leaving a balance of Kshs 948,012.01 which is due and owing as to date. There was no condition for the Respondent's Advocate to prepare the sale Agreement as alleged.

24. The Applicant reiterated that the Respondent has failed to provide a comprehensive statement of account reflecting all the payments made and that the account statement annexed to the Replying Affidavit, do not show the payments made from the date of the loan. To the contrary, the scheduled payment produced by the Applicant, which is not disputed or challenged is comprehensive. The Applicant denied the argument that the order sought for taking account is misconceived, an afterthought or frivolous and reiterated that the Respondent's refusal to give accounts is calculated to rob the Applicant the true picture of the payments and therefore the Court should order that accounts be taken.

25. The Parties agreed to dispose of the Application by filing submissions, which I have taken them into account, in this Ruling I note that two issues arise for consideration.

- (i) Whether the Plaintiff has satisfied the requirements for grant of an order of injunction as prayed.
- (ii) Whether the Court should order for the taking of accounts as prayed.

26. I shall first deal with the issue of injunction. The celebrated case of; **Geila Vs Cassman Brown & Co. Ltd. (1973) EA 358**, sets down the conditions to be satisfied before an order of injunction is granted namely;-

- (i) The Applicant has demonstrated a prima facie case with high probability of success;
- (ii) The Applicant will suffer irreparable injury which cannot adequately be compensated by an award of damages; and
- (iii) The balance of convenience tilts in favour of the Applicant.

27. In the same vein, the case of; **Mrao Limited Vs First American Bank Ltd. & 2 Others (2003) KLR 137**, defines a prima facie case as follows;-

“a prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is 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 later.’

28. The question that arises is whether, the Applicant has established a prima facie case with high chances of success. The Applicant's case in a nutshell is that, the Respondent is demanding a sum of money which is uncertain. The Applicant avers in the submissions as follows:-

“.....without taking of the account, the actual amount outstanding cannot be ascertained as royalty was being charged on the projected turnover which turnover was gained from the machines and already the machines have been disposed of.”

29. But the Respondent replied that, it is trite law that, outstanding amount is not a ground to grant an injunctive relief and relied on the cases of; **Esther Njeri Komu Vs Consolidated Bank Ltd & Another (2013) eKLR** and **Koileken Ole Kipolonka Ourmoi Vs Mellech Engineering & Construction Limited & 2 Others (2015) eKLR**, to argue that, a dispute as to accounts is not a basis for grant of an injunction.

30. Further the Respondent placed reliance was place on the case of; **Sammy Japheth Kavuku VS Equity Bank Limited & Anot. (2014) eKLR**, to argue that, “even if the borrower disputes the interest and charges levied by the lender, he should not stop repayment until the Court of law makes pronouncement as to the illegality or otherwise of the interest and charges”. Therefore, the Applicant herein should have continued making the payments despite disputing the amount claimed.

31. That the Applicant has admitted that it has not been serving the loan and even recorded a consent order for part payment and paid Kshs. 8,000,000. But misled the Court that, it is a 3rd Party who made the payment, so as to avoid realisation of the security. As such the Applicant has unclean hands and is not entitled to an equitable remedy. Reliance was placed on the case of; **Daniel Kamau Mugambi Vs Housing Finance Company of Kenya Ltd (2006) eKLR**. That the Applicant has not even made a proposal on how to deal with the balance sum owing. Hence the Court should not grant the orders sought.

32. The Respondent further submitted that, the Applicant will not suffer irreparable loss that cannot be compensated with damages as the debt is admitted. However to the contrary, the Respondent will suffer due to the continued accrual of interest, which may diminish the security. The case of; **Ann Wairimu Wachira Vs Jerioth Wangui Maina & 2 Others (2016) eKLR** was cited.

33. Finally the Respondent submitted that, the balance of convenience tilts in its favour as the debt is due and owing and therefore the Application must fail.

34. I have considered the rival submissions, the legal authorities cited and the factual matters herein and find that, there is no dispute that, the Applicant was advanced a business finance loan as deposed in the Affidavit in support of the Application. It is a fact the same was secured by inter alia fixed Asset Debenture registered in favour of the Respondent over the Applicant's workshop equipments

35. The Applicant has admitted that it experienced down turn operation in its business and it affected the repayment of the loan, which fell into arrears, whereupon the Respondent instructed the Auctioneers, to sell the security assets.

36. The issue in dispute is therefore the amount of arrears claimed and how it was arrived at. The Applicant has disputed the amount claimed mainly on the Royalty account which according to the Applicant, its not explained how it arose while the business was low and how a sum of Kshs. 8,242,858 paid was utilised. That the Respondent should have provided reconciled accounts. Equally, disputed is a sum of Kshs. 2,814,174 claimed by the Respondent and which the Applicant has disputed on the ground that, the amount of Kshs. 1,600,000 paid has not been accounted for, although the Respondent insists that money has been accounted for the same.

37. It is therefore clear that, the issue herein is more of accounts, than a dispute on the amount of the loan facility advanced and whether it is in arrears

38. Having regard to the aforesaid, I find that, for justice to be done and seen to be done, it is important that the parties deal with the disputed issue of accounts. That issue of accounts cannot be dealt with

through the issuance of an injunction order, but through statements of accounts.

39. The Applicant remains legally bound to service the undisputed outstanding sum. The Respondent on the other hand has a legal duty to provide the Applicant with proper and accurate statement of accounts. However, I realise that after the suit was filed, the Parties entered into a Consent Agreement for the sale of the machines the subject of the security. The machines were sold for a sum of Kshs. 8,000,000 and it was paid directly to the Respondent as per the consent order. In the same, the Parties further agreed to deal with the following issues;-

- (i) balance of the loan repayment;
- (ii) the Respondent's Advocates costs;
- (iii) auctioneers fees; and
- (iv) further directions on the suit and hearing dates.

40. Subsequently, on 24th October, 2016, the Parties informed the Court that the sale had taken place. Prayer (3) of the Application has been overtaken by events after the sale of the security assets, therefore it is not available for consideration.

41. I shall now deal with prayer (4). The Applicant seeks for a statement of accounts. I order that the Respondent should furnish the Applicant with a detailed updated statement of accounts giving full particulars of the facility advanced, the repayments made and the amount outstanding (if any), within **seven (7) days** of this order. The Applicant shall consider the said statement and file a response thereto within **seven (7) days** of service. The matter will be mentioned after, fourteen (14) days for confirmation of compliance and further orders.

42. The costs of the Application are awarded to the Respondent, in view of the fact that the Applicant paid the Kshs. 8,000,000 after the Auctioneer was instructed. The Applicant will also pay a Auctioneers' fees (if any).

43. Those then are the orders of the Court.

Dated, delivered and signed on this 18th day of September, 2017 in an open Court at Nairobi

G. L. NZIOKA

JUDGE

In the presence of:

Ms. Macheru for Mutinda for the Applicant

Mr. Kibet for Litiro for the Respondent

Court clerk - Teresia