REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL CASE NO. 16 OF 2016

CAESAR WAGANAGWA.....PLAINTIFF/APPLICANT

-VERSUS-

CHASE BANK (K) LIMITED.....1ST DEFENDANT/RESPONDENT

MAMU AUCTIONEERS.....2ND DEFENDANT/RESPONDENT

R U L I N G

The application dated 29th July, 2016 seeks the following orders;

1. ***Spent***

2. ***Spent***

3. ***That pending hearing and determination of this suit the defendants, their employees, servants and/or agents be restrained from attaching machines PAVONI BLOCK CUTTING MACHINE MODEL NUMBER F81413F and WHEEL LOADER MODEL NUMBER LG956, until the hearing and determination of this suit.***

4. ***THAT costs for this application be provided for.***

The application is supported by the affidavit of **Mr. Ceaser Waganagwa** sworn on the same date. The defendants filed a replying affidavit sworn by **Mr. Robert Wachira** sworn on 21st October 2016.

M/s Wanja & Kibe advocates appeared for the applicant. Counsel submit that on 27th July, 2016, the 2nd defendant served the plaintiff with a proclamation dated 14th July 2016. Soon thereafter the defendants started taking away the plaintiff's stone cutting machines model number F8L413F and a wheel loader model number LG956. The plaintiff's position is that the 1st defendant did not issue the plaintiff with the requisite notice prior to the said attachment.

It is further submitted that the plaintiff does not deny that he was in arrears of the loan granted to him by the 1st defendant. The machines are the security for the loan. The main complaint is that the attachment is illegal as it was done without following due process. In view of the fact that there was no statutory notice, the attachment is illegal. Counsel submit that the applicant has fulfilled the conditions for the granting of injunctions as laid out in the case of ***GIELLA -V- CASEMAN BROWN & CO. [1973] E.A. 358.***

M/s Robson Harris & Co. Advocate appeared for the 1st defendant, Counsel maintains that the applicant has not established a *prima facie* case. Counsel relies on the case of ***MRAO -V- FIRST AMERICAN BANK OF KENYA & TWO OTHERS [2003] KLR 125*** where the court defined 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".***

The 1st defendant maintains that the plaintiff has failed to discharge that burden of establishing a *prima facie* case. According to the 1st defendant, his right over the machines supersede those of the plaintiff.

The 1st defendant advanced the plaintiff kshs.31,200,000,00. That amount was to be repaid in 60 months and was secured by a chattels mortgage over the three machines. The plaintiff failed to abide by the terms of the agreement and is not entitled to the equitable reliefs being sought.

It is further submitted that no irreparable damage or loss will be suffered by the plaintiff. Counsel relies on the case of ***Kenya Commercial Finance Ltd -V- Afraha Education Society [2001] I E.A. 80*** where the court held as follows;.

> ***The sequence of granting interlocutory injunctions is first that an applicant must show a prima facie case with a probability of success if this discretionary remedy will inure in his favour. Secondly, that such an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury; and thirdly, where the court is in doubt it will decide the application on a balance of convenience. See Giellla -vs- Cassman Brown and Co. Ltd [1973] EA 358 at page 360 Letter E. These conditions are sequential so that the second condition can only be addressed if the first one is satisfied and whether court is in doubt then the third condition can be addressed.***

In his supporting affidavit, the applicant states that he borrowed **kshs.31,200,000/=** from the first defendant on 19th October 2015. He was to repay the loan at a rate of kshs.1,100,000/= monthly. He faithfully paid the loan until April 2016 when the 1st respondent was placed under receivership. The plaintiff accumulated three months arrears totaling **kshs.3,600,000/=**. By the time of filing the suit, the arrears were outstanding.

The proclamation by the 2nd defendant dated 26/7/2016 indicate that the amount in arrears was **kshs.5,200,000/=.** The replying affidavit indicate that the applicant was loaned **kshs.31,200,000/**= on 19/10/2015. Before then, the plaintiff had an existing liability of **kshs.7,109,179/=.**

The main issue for determination is whether the repossession of the machines by the 1st defendant is unlawful due to lack of a statutory notice. The applicant admits that he is in arrears of the loan granted to him by the 1st defendant. What is being sought is an order of injunction to restrain the defendants from proceeding with the repossession.

The 1st defendant annexed the letter of offer for the loan dated 19th October, 2015. **Section 8** of letter of offer indicate that the security for the facility is the three machines namely, two block cutting machines and a wheel loader. The chattels mortgage document was not annexed. It is clear that the only document which secured the loan is the letter of offer. That letter of offer is not the chattels mortgage. **Section 2** of the **Chattels Transfer Act, Chapter 28 Laws of Kenya** defines chattels as follows;

> ***"chattels" means any movable property that can be completely transferred by delivery, and includes machinery, stock and the natural increase of stock as hereinafter mentioned, crops and wool, but does not include;***
>
> ***a) title deeds, choses in action or negotiable instruments***
>
> ***b) shares and interests in the stock, funds or securities of any government or local authority***
>
> ***c) shares and interests in the capital or property of any company or other corporate body; or***
>
> d) ***debentures and interest coupons issued by any government, or local authority, or company or other corporate body.***

The plaintiff's main contention is that no statutory notice was issued by the 1st defendant. The letter of offer does not provide for a statutory notice. Further, the security for the loan does not include land. There is no requirement that a statutory notice must be issued before the lender exercises its right to repossess the security chattels. The arrangement is quite risky as the security can be dismantled, grounded or even taken far away to unknown hiding place. The lender becomes exposed if the loan is not repayed as agreed. All what can be done is to allow the lender to take back the property and auction it so as to recoup its losses.

From the facts of the case, I do find that the plaintiff has not established a *prima facie* case with a probability of success. The machines were financed by the loan. The 1st defendant is entitled to repossess the machines so as to recover the loan. The plaintiff admits his indebtedness to the 1st defendant. It is not alleged that the computation of the interest is wrong. The placement of the 1st defendant under receivership did not stop the plaintiff from honoring his obligation under the letter of offer.

I do find that no irreparable loss will be suffered. The machines were bought with money provided by the 1st defendant. It is only the 1st defendant that is likely to suffer loss and not the plaintiff.

In the end, I do find that the application dated 9/7/2015 lacks merit and the same is dismissed with costs.

Dated and signed at Marsabit this.....day of July 2017.

SAID CHITEMBWE

JUDGE

Dated, signed and delivered at Malindi this 17th day of October, 2017

WILDON KORIR

JUDGE