



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**HC. COMM NO. 47 OF 2016**

**GREEN GOLD PETROLEUM LIMITED ..... PLAINTIFF**

**VERSUS**

**CFC STANBIC LIMITED ..... 1<sup>ST</sup> DEFENDANT/RESPONDENT**

**CREDIT REFERENCE BUREAU**

**AFRICA LIMITED..... 2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. There are two applications before me for consideration and determination. The first one is dated 17<sup>th</sup> May, 2016 it seeks the following prayers:-

i. Spent;

ii. That this Honourable court be pleased to grant the applicant a temporary injunction restraining the 1<sup>st</sup> respondent from repossessing the applicant's vehicles registration Nos. KBY 264A, KBY 265A, KCB 266B and KCB 267B pending the hearing and determination of this application/suit;

iii. That this Honourable court be pleased to grant the applicant a temporary injunction restraining the 1<sup>st</sup> respondent from forwarding the applicant's name to the Credit Reference Bureau (the 2<sup>nd</sup> respondent herein) pending the hearing and determination of this application/suit;

iv. That the costs of this application be in the cause.

The application is supported by the grounds on the face of it and the affidavit of Mohammed Saidi dated 17<sup>th</sup> May, 2016. The 1<sup>st</sup> respondent's deponent, Ann Kaswii Muli filed a replying affidavit on 7<sup>th</sup> July, 2016 in response to the above application.

2. The second application is dated 15<sup>th</sup> June, 2016. It has been brought under the provisions of order 40 rule 1 of the Civil Procedure Rules and all other enabling provisions of the law. It seeks the following orders:-

i. Spent;

ii. That this Honourable court be pleased to issue mandatory injunction (sic) that the 1<sup>st</sup> respondent and/or his agents Thaara Auctioneers be compelled to return the motor vehicles to the plaintiff/applicant. Numbers from repossessing (sic) the applicants vehicles registration numbers KBY 264A, KBY 265A, KCB 266B and KCB 267B pending the hearing and determination of this application/suit;

iii. That this Honourable court be pleased to grant a temporary injunction restraining the 1<sup>st</sup> respondent from repossessing the applicant's vehicles registration numbers KBY 264A, KBY 265A, KCB 266B and KCB 267B and interfering with the operations of its business known as ICON Bus.

iv. That the costs of the application be in the cause.

The application is supported by the affidavit of Mohammed Saidi dated 15<sup>th</sup> June, 2016 and the grounds on the face of the application. The 1<sup>st</sup> defendant/1<sup>st</sup> respondent filed its grounds of objection on 22<sup>nd</sup> June, 2016 in respect to the application.

The applications were heard contemporaneously.

### **APPLICANT'S SUBMISSIONS**

3. Dr. Khaminwa, Senior Counsel, submitted that there was a contract between the applicant and the 1<sup>st</sup> respondent with respect to money advanced on loan. The contract bore a provision for repossession in the event of default. In his view, the provision for repossession does not bestow validity in law because the defaulter is not given an opportunity to give an explanation on the alleged default, thus rules of natural justice were not complied with in accordance with article 40 of the Constitution which relates to the protection of the right to property.

4. Counsel informed the court that the amount allegedly claimed does not add up with the amount outstanding according to his client's records. It was submitted that the applicant had obtained proprietary rights over the motor vehicles and that they cannot be taken away from him without a valid order of the court being obtained. It was further submitted that in the instant case there were no orders from the court. Counsel informed the court that since the applicant filed the suit herein, he remitted Kshs. 400,000/= in June, 2016 and Kshs. 200,000/= in August, 2016 to the 1<sup>st</sup> respondent. On 1<sup>st</sup> September, 2016 the applicant remitted Kshs. 200,000/= to the 1<sup>st</sup> respondent. Dr. Khaminwa interpreted the remittance of payment as being an acknowledgement that the agreement to remit money is still valid. He added that the applicant has long distance buses and although the times are economically hard, it continues to make monthly payments to the bank. Counsel prayed that the applicant be allowed to make payments and for its motor vehicles to be returned to it. He prayed for the orders sought as one cannot repossess a person's property without orders of the court.

### **1<sup>ST</sup> RESPONDENT'S SUBMISSIONS**

5. Mr. Sitonik, Learned Counsel for the 1<sup>st</sup> respondent submitted that he was relying on the replying affidavit and grounds of objection on record. He informed the court that there were two contracts governing the applicant and the 1<sup>st</sup> respondent. One of the terms of the contracts was that the 1<sup>st</sup> respondent would remain the owner of the motor vehicles after advancing money to the applicant. The applicant would take ownership of the vehicles legally after full payment in accordance to clause 3(b) of the agreements. It was submitted that the applicant undertook to make all payments and that the 1<sup>st</sup> respondent could repossess the said vehicles if there was a default.

6. Counsel contended that the applicant did not comply with the terms of the agreements and this is borne by paragraphs 2, 5, 7 and 9 of the applicant's supporting affidavit where it admits default. It was argued that the 1<sup>st</sup> respondent exercised its right to repossess the motor vehicles under the contract and therefore

article 40 of the Constitution cannot work in the applicant's favour as the applicant deviated from the contract by not meeting its obligations. Counsel asserted that a party who is in default of the terms of a contract cannot be granted orders by the court. He referred to the cases of **Kenya Breweries Limited vs Okeyo** [2002] 1 EA 109 and **Mrao Ltd. vs First American Bank of Kenya** [2003] KLR which articulate the above submission. Counsel also cited the case of **John Edward Ouko vs National Industrial Credit Bank Ltd** [2013] eKLR, where the court was faced with a similar situation where a defaulting party was seeking injunctive orders. This court was further referred to the case of **Peter Aswa & 42 Others vs National Housing Corporation** [2014] eKLR where the court found that agreements entered into between the applicants and the respondents to be certain and ascertainable and the court declined to grant an injunction. Counsel also cited the case of **Khunaif Trading Co. Ltd. vs Equity Bank Ltd. & Another** [2015] eKLR where the court stated that matters not provided for in a contract would not come to the aid of the applicant.

7. Mr. Sitonik argued that since the applicant filed the application, it has been making sporadic payments and has paid about Kshs. 1 Million. He submitted that the 1<sup>st</sup> agreement required monthly payments of Kshs. 910,002.00 and the 2<sup>nd</sup> agreement monthly payments of Kshs. 904,186.00, yet where there are no vitiating factors, the court should enforce a contract. In reference to this submission, Counsel cited the case of **Competition Commission vs Computicket** (853/13) [2014]; ZA SCA 185. Counsel informed the court that section 3 of the Hire purchase Act is not applicable herein and the intervention of the court is not required before repossession. He cited the case of **Amicabre Travel Services vs Alios Kenya Finance Limited** [2014] eKLR to support the foregoing submission. Counsel closed his arguments by submitting that the second application was an abuse of the court process.

#### **APPLICANT'S RESPONSE**

8. Dr. Khaminwa submitted that the court will have to look into the contract and determine who the owner of the motor vehicles is and that substantial amounts of money have been paid towards satisfaction of the loan. He submitted that although the provisions of section 3 of the Hire Purchase Act do not apply in this case, article 40 of the Constitution applies and he prayed for equitable intervention. He submitted that the authorities cited can be distinguished from the present case as some were decided before the Constitution of Kenya 2010 came into force.

#### **ANALYSIS AND DETERMINATION**

The issues for determination are:-

- i. If the applicant has made out a case for grant of an interim injunction;
- ii. Whether a mandatory injunction can issue in the circumstances of this case; and
- iii. Whether the 1<sup>st</sup> respondent should be restrained from forwarding the applicant's name to the Credit Reference Bureau, (the 2<sup>nd</sup> respondent herein);

9. It is not disputed by the parties herein that the applicant and the 1<sup>st</sup> respondent entered into two hire purchase agreements namely, hire purchase No. MB/51684 commencing on 14<sup>th</sup> April, 2014 whereby the 1<sup>st</sup> respondent advanced a credit facility of Kshs. 25,900,000/= to the applicant for purchase of motor vehicle Registration Nos. KBY 264A and KBY 265A. The said amount was payable in the sum of Ksh. 910,002.00 monthly as from 14<sup>th</sup> April, 2014 with the final payment of Ksh. 916,001.00 being payable on 18<sup>th</sup> May, 2017.

10. The second hire purchase agreement No. MB/51783 was entered into on 8<sup>th</sup> December, 2014 whereby a credit facility of Kshs. 25,900,000/= was advanced to the applicant to be used to purchase two motor vehicles registration Nos. KCB 266B and KCB 267B. The applicant was to effect monthly payments in the sum of Kshs. 904,186/= from 2<sup>nd</sup> February, 2015 to 12<sup>th</sup> April, 2018. The foregoing

details are captured in the 1<sup>st</sup> respondent's replying affidavit. The applicant in its affidavits dated 17<sup>th</sup> May, 2016 and 15<sup>th</sup> June, 2016 admitted owing the applicant money.

11. In paragraph 6 of the 1<sup>st</sup> respondent's replying affidavit, it is deposed that the amount owed by the applicant in respect to hire purchase agreement No. 51684 was Kshs. 3,180,506.85/= as at 18<sup>th</sup> May, 2016 and Kshs. 3,830,850.85/= for the second hire purchase agreement, as at 12<sup>th</sup> May, 2016. Dr. Khaminwa's submission in respect to the above is that the amount allegedly claimed does not add up with the amounts outstanding according to the applicant's records. The applicant attached a copy its account details to show the amounts due to the 1<sup>st</sup> respondent in the first account as Kshs. 2,167,977.75 and for the second account as Kshs. 3,796,317.50. The copies of the account details attached as annexure SH M-1 to the applicant's affidavit dated 17<sup>th</sup> May, 2016 do not however give the date when the said account details were obtained. Suffice to say that the 1<sup>st</sup> respondent at paragraph 6 (c) of its replying affidavit deposes that the arrears are still outstanding and continue to accrue interest and other bank charges and incidentals as provided under the hire purchase agreement, until paid in full.

12. In paragraph 5 of the supporting affidavit dated 17<sup>th</sup> May, 2016 the applicant deposes that on 16<sup>th</sup> March, 2016 one of the vehicles was involved in an accident and the license was revoked rendering the applicant unable to remit funds to the 1<sup>st</sup> respondent promptly as agreed. The applicant attached a motor vehicle inspection report for the said vehicle marked as SHM 3 to its affidavit as proof the said deposition. In paragraphs 6 and 7 of the said affidavit, the applicant's deponent states that the applicant was forced to make mechanical and body repairs to all the four motor vehicles to ensure safety and well being of the public and passengers. The said deponent further states that the circumstances have improved and that the applicant is now able to furnish the loan facility as previously agreed.

13. The leading case on interim injunctions is undoubtedly **Giella vs Cassman Brown** [1973] EA 358, where the court held;

***“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, 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 be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”***

14. After an analysis of the affidavit evidence adduced herein and the submissions tendered by the counsel on record, it is clear that at the time of hearing of this application, the applicant had paid Kshs. 400,000/= in June, 2016, Kshs. 200,000/= in August, 2016 and Kshs. 200,000/= on 1<sup>st</sup> September, 2016. The foregoing was not controverted by the 1<sup>st</sup> respondent's counsel and it therefore holds true. The court however notes that the amounts paid by the applicant are way below the monthly payments of Kshs. 910,002/= for the first agreement and Kshs. 904,186.00 monthly payments for the second agreement. Although the payments that have been made by the applicant are a sign of goodwill, it is however evident that the applicant is not in a position to meet the conditions of the two agreements entered into and make good the payments stipulated therein.

15. I am persuaded by the authority of **Peter Aswa & 42 others** (supra) cited by counsel for the 1<sup>st</sup> respondent. In this instant, the terms of the agreement were certain and ascertainable. There was no ambiguity whatsoever on what would befall the applicant if it defaulted in payment of the monthly payments of the hire purchase. Under clauses 5(i) and (iv) of the said agreements, the 1<sup>st</sup> respondent had the right to terminate the hire purchase agreements and to repossess the subject motor vehicles without any notice or demand to the applicant upon default of the applicant. The 1<sup>st</sup> respondent also had the right to treat any non-compliance by the applicant as a termination of the hire purchase agreements. The rights of the applicant under the agreements were also very clearly articulated. I therefore do not see any violation of the rights of the applicant under the provisions of article 40 of the Constitution as the contract was freely entered into by the parties herein. I have said enough to show that the applicant has not met the principles for grant of an interim injunction. I therefore decline to grant the said orders. The application

dated 17<sup>th</sup> May, 2016 is hereby dismissed with costs to the 1st respondent.

16. It then follows that the prayer for a mandatory injunction for the release of the subject motor vehicles to the applicant as espoused in the application dated 15<sup>th</sup> June, 2016 is automatically extinguished by the dismissal of the prayer for an interim injunction.

17. The other prayer is for this court to grant a temporary injunction restraining the 1<sup>st</sup> respondent from forwarding the applicant's name to the Credit Reference Bureau (the 2<sup>nd</sup> respondent herein) pending the hearing and determination of this application/suit. In the case of **Rupa Cotton Mills (EPZ) Ltd. & 2 Others vs Bank of Baroda (Kenya) Limited** [2012] eKLR Justice Musinga (as he then was) held thus:-

*“..... if a borrower has defaulted on a loan, it is mandatory that the bank shares this information with all other banks. The plaintiff's assertion that they have been portrayed as bad, impecunious and doubtful debtors does not lie. The information that the defendant has provided falls within the ambit of the provisions of the banking Credit Reference Bureau regulations .....*”

18. This court in the case of **Cassian Ngotho Mwachanya vs Kenya Commercial Bank and another**, Mombasa High court civil case No. 111 of 2015 declined to issue similar orders and held that it would be a recipe for chaos if this court was to hold that either positive or negative information of a credit facility advanced to a borrower by financial institutions cannot be shared with credit reference bureaux. This would lead to an economic crisis in the banking sector with borrowers hopping from one bank to the next to take out loans whose repayments they would fail to honour due lack of information sharing with Credit reference bureaux. This court cannot encourage unscrupulous borrowers to engage undeterred in such activities. Regulation 18 of the Credit Reference Bureau regulations is aimed to cure such mischief from being perpetrated.

19. This court still holds the foregoing view. For the said reason, the application dated 15<sup>th</sup> June, 2016 is also dismissed with costs to the 1st respondent.

It is so ordered.

**DELIVERED, DATED and SIGNED at MOMBASA on this 28<sup>th</sup> day of October, 2016.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Dr. Khaminwa for the applicant

Mr. Sitonik for the 1<sup>st</sup> respondent

Mr. Muyala holding brief for Mr. Otieno for the 2<sup>nd</sup> respondent

Mr. Oliver Musundi Court Assistant