



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

**AT MOMBASA**

**CIVIL SUIT NO. 52 OF 2015**

**KHUNAIF TRADING COMPANY ..... PLAINTIFF**

**VERSUS**

**EQUITORIAL COMMERCIAL BANK LIMITED ..... DEFENDANT**

**RULING**

1. The plaintiff/applicant through a Notice of Motion dated 16<sup>th</sup> April, 2015 seeks the following orders:-
  - (i) Spent;
  - (ii) Spent;
  - (iii) That upon interparties hearing an order of injunction be issued restraining the defendant whether by itself, its agents or servants from selling the plaintiff's motor vehicles Registration Nos. KBW 663H and trailer ZE 4681, KBW 644H and trailer ZE 4680 and KBW 622H and from proceeding with the tendering process for the sale of the vehicles pending the hearing and determination of this suit;
  - (iv) That pending the hearing and determination of this suit the motor vehicles Registration Nos. KBW 633H and trailer ZE 4681, KBW 644H an trailer ZE 4680 and KBW 622H be released to the plaintiff; and
  - (v) That costs of this application be provided for.
2. The application is anchored on the provisions of Order 40 rules 1, 2, 3 of the Civil Procedure Rules, sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act and all enabling provisions of the law. It is supported by the affidavit of Nuru Ali Islam Jeizan dated 16<sup>th</sup> April, 2015. The defendant/respondent filed a replying affidavit on 21<sup>st</sup> May, 2015 to oppose the application.
3. At the hearing of the said application, Mr. Njenga, Learned Counsel, held brief for Mr. Mwawasi for the applicant. He informed the court that he was seeking orders for an injunction pending the hearing of the suit and for release of the motor vehicles to the applicant. He submitted that the parties entered into a facility agreement for a loan for the purchase of 4 motor vehicles. The respondent advanced the loan to the applicant. It was submitted that the applicant had been making payments to the said account but in the month of October, 2014, the respondent repossessed the motor vehicles. The applicant had before then sought restructuring of the facility and was in negotiations with the respondent when the four

vehicles were repossessed. That fact had not been denied by the respondent. Counsel referred to annexures attached to the applicant's supporting affidavit to show that the applicant has a prima facie case with a probability of success in line with the case of **Giella vs Cassman Brown**. Counsel submitted that if the orders sought are not granted, the applicant will suffer irreparable loss as it had been using the motor vehicles for its business.

4. Mr. Njenga cited the case of **Harveys Bar & Restaurant Ltd. Vs Fernando Vischo** [2002] eKLR where Judge O. Onyango held that a mandatory injunction can be granted in an interlocutory application as well as at the hearing ... if the defendant attempted to steal a match on the plaintiff ..... a mandatory injunction will be granted in an interlocutory application. A party as far as possible ought not to be allowed to retain a position of advantage that it obtained and through a planned and blatant unlawful act.

Counsel applied for the release of the said motor vehicles.

5. On her part, Ms. Mboku, Learned Counsel for the respondent informed the court that she was relying on the replying affidavit filed on 21<sup>st</sup> May, 2015 sworn by Kennedy Waititu. She submitted that it was not disputed that the applicant was advanced a facility of Kshs. 53,997,000/= to purchase motor vehicles. The applicant fell into arrears and was unable to service the loan. The parties attempted negotiations which culminated in the respondent allowing the applicant to reschedule the loan repayment. She referred to annexure NAJ 2 of the applicant's affidavit which contains the conditions that were to be met by the applicant before restructuring of the loan. The said letter dated 12<sup>th</sup> February, 2015 sought a personal guarantee and security. The said conditions were however not met.

6. Counsel further submitted that in April, 2015 the respondent advertised for the sale of the vehicles through a tender notice. She urged the court to consider if the tender was legal. It was her view that the applicant had not shown that it has a prima facie case with a probability of success. In addition, the applicant had not paid a single coin since the vehicles were repossessed. On whether the applicant will suffer irreparable loss if the orders sought are not granted, Ms Mboku argued that the loan advanced was not a start up and as deposed in paragraph 9 of the applicant's affidavit, the applicant is still able to finance the remaining instalments.

7. Counsel cited the case of **Zadrack Oyaro Achoke vs Consolidated Bank** [2013] eKLR, where the court held that the debtor either had to pay the loan or allow the bank to realize its security. She sought a deposit in court of the amount of Kshs. 58,017,590 in the event that the orders sought are granted. She closed her submissions by stating that the authorities cited by the applicant's Counsel were on mandatory injunction and not on temporary injunction. She prayed for the application to be dismissed.

8. In response to the above, Mr. Njenga submitted that the letter dated 12<sup>th</sup> February, 2015 for restructuring of the loan was received after the repossession of the vehicles and there was no requirement for the letter to be responded to within 21 days. He stated that when the respondent advertised the vehicles for sale, the applicant was in the process of getting a title deed to charge the property referred to in paragraph (e) of the annexure marked as NAJ 2 to the applicant's affidavit. He added that the said vehicles are still in the custody of the respondent but are wasting away. He opposed the proposal by counsel for the respondent that the applicant deposits the entire sum that it owes the respondent and urged the court to grant lenient orders that will not bring the applicant's business to a standstill.

## **ANALYSIS AND DETERMINATION**

The issues for determination are if:-

- (i) The respondent should be restrained from selling the applicant's motor vehicles; and
- (ii) If the said motor vehicles should be released to the applicant by the respondent.

9. It is not in dispute that the respondent disbursed to the applicant's two bank accounts a sum of Kshs. 43,757,000/= for 4 prime movers and a further sum of Kshs. 10,240,000/= for 4 trailers. According to the

respondent in paragraph 6 of its affidavit, the applicant fell into arrears and the applicant had stopped servicing account No. 230367501 by 22<sup>nd</sup> July, 2014 and account No. 230367502 by 2<sup>nd</sup> February, 2014. In paragraphs 9, 10 and 12 of its affidavit, the respondent states that the applicant owed it Kshs. 58,075,590/= as at 10<sup>th</sup> October, 2014 and that it warned the applicant of the impending seizure of the motor vehicles and trailers but the applicant did not make any payments.

10. The applicant in paragraphs 3, 4 and 5 of its affidavit admits having taken possession of the prime movers and trailers through an Asset Finance Agreement. The motor vehicles were however repossessed by the respondent in or about October, 2014 on the ground of outstanding loan instalments. In paragraph 6 thereof, the applicant deposes that the respondent advertised motor vehicle registration Nos. KBW 633H and trailer ZE 4681, KBW 644H and trailer ZE 4680 and KBW 622H for sale through a tender notice which closed on 20<sup>th</sup> April, 2015. A copy of the tender notice dated 10<sup>th</sup> April, 2015 was attached to the said affidavit as annexure NAJ 1.

11. In paragraphs 7 and 8 of the said affidavit, the applicant asserts that the respondent on 12<sup>th</sup> February, 2015 accepted to restructure the applicant's loan facilities, a letter to that effect was attached to the applicant's affidavit and marked as NAJ 2. It was a term of the restructuring of the loan facility that the applicant would provide extra security being the original title LR No. MN/111/1591.

12. Further, in paragraphs 9 and 10 of the applicant's affidavit, it states that it would be most unfair and unjust to allow the respondent to sell the motor vehicles as advertised when the plaintiff is still able to finance the remaining instalments and is in the process of obtaining the original title of the land aforementioned from the previous owner. In paragraph 16 of the said affidavit, the applicant's deponent states that she agreed with the respondent that she would charge land parcel No. Kilifi/Kawala "A" Kadzodzo/32 in addition to an earlier charge agreed on land parcel LR No. MN/111/1591. A copy of the letter from the bank on the said legal charge was attached to the affidavit and marked as annexure NAJ 3.

13. Although the respondent in paragraph 14 its replying affidavit states that the applicant was to accept the said terms within 21 days, I am in agreement with Counsel for the applicant that the letter dated 12<sup>th</sup> February, 2015 in which the respondent agreed to restructure the loan facilities did not give a time line within which the applicant was to comply with the requirements set therein. There was email correspondence between representatives of the applicant and the respondent with regard to the outstanding loan facility. A perusal of the said emails shows that the respondent was most accommodating and cordial to the applicant. Things came to a head on 25<sup>th</sup> March, 2015 when the applicant wrote to the respondent to this effect:-

***"We refer to your letter of offer dated 12<sup>th</sup> February, 2015 in which you indicated acceptance to charge the subject title deed. However the owner of the land has been unable to clear accumulated debt of Ten Million Shillings (Kshs. 10,000,000/=) to his lawyer for various services to do with that land .....*"**

14. The applicant's deponent on 23<sup>rd</sup> September, 2014 wrote to the respondent apologizing for not having remitted instalments since May, 2014 as the applicant had not been operating at optimal level due to late payments by its customers. Due to cash flow problems, the applicant sought restructuring of the loan and her rescheduling of the balance on the account as at 10<sup>th</sup> September, 2014. This is exhibited as annexure KW5 to the respondent's affidavit. It is then that the issue of a land title deed came into the picture.

15. The outstanding thing is that although the applicant requested for rescheduling of the asset finance facility on 23<sup>rd</sup> September, 2014; it received no feedback on the same until the 12<sup>th</sup> February, 2015. In the intervening period, the motor vehicles and trailers in issue were repossessed. I however note that since the motor vehicles in issue were seized, not a single penny has been deposited into bank account Nos. 23036705501 and 23036705502 to repay the loan.

16. The principles for grant of an interlocutory injunction were well spelt out in the case of **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.”***

17. On 18<sup>th</sup> March, 2015, Brian Osir of the respondent bank sent an email to the applicant’s representative Noor Jeizan, informing him that the bank was unable to give him more time, more so the two weeks that had been requested for since the applicant’s account had been recommended for downgrading, listing of Directors and collection by the auditors. He informed the applicant’s representative that he could salvage the situation by urging his lawyer to sort out the letters of undertaking with the title holders’ lawyers in the meeting (sic) and return the executed documents. It appears that the foregoing was not done thus the issuance of the tender notice of 10<sup>th</sup> April, 2015.

18. An analysis of the foregoing facts leaves me with no doubt that the applicant is in clear breach of the asset finance agreement and it admits so in its affidavit. Although the bank agreed to restructure the facility on 12<sup>th</sup> February, 2015, efforts to restructure the loan were futile. The title deed which was to be used as security could not be availed to the bank due to factors beyond the applicant’s control. The applicant thus failed to meet the conditionalities of the asset finance restructuring.

19. The subject matter of the dispute is motor vehicles and trailers. These are assets that depreciate quickly in value and any further delay in having the same disposed of will serve no useful purpose to the parties herein. In the case of **Andrew Muriuki Wanjohi vs Equity Building Society Limited & 2 Others** [2006] eKLR, Ochieng Judge stated thus:-

***“ .....In my considered view, if the 1<sup>st</sup> and 2<sup>nd</sup> defendants were restrained from selling off the property until the suit is heard and determined, there is a very real risk that the debt may outstrip the value of the property as the borrower has not made repayments for more than three years .....”***

20. In similar vein, the applicant has not financed its loan facility for over two years now. Debt is accumulating but the assets in motor vehicles are depreciating in value. It is my considered finding that the applicant has not made out a prima facie case with the probability of success.

21. For the foregoing reasons, the application dated 16<sup>th</sup> April, 2015 is hereby dismissed with costs to the defendant/respondent.

It is so ordered.

**DELIVERED, DATED and SIGNED at MOMBASA on this 12<sup>th</sup> day of October, 2016.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Mr. Mwawasi for the plaintiff/applicant

Ms. Leli holding brief for Mr. Odera for the defendant/respondent

Mr. Oliver Musundi Court Assistant

