REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 105 OF 2014

KHUNAIF TRADING COMPANY LIMITED …… PLAINTIFF

V E R S U S

1. **EQUITY BANK LIMITED……..…… 1ST DEFENDANT**
2. **TREVOR AUCTIONEERS ……..……. 2ND DEFENDANT**

RULING

1. The Plaintiff **KHUNAIF TRADING COMPANY LTD** obtained from the Defendant **EQUITY BANK LTD** various loan facilities which were secured by their joint registration of various vehicles and by Plaintiff's Director's guarantees. It is not denied that Plaintiff defaulted in the repayment of those facilities. Defendant following that default attached KBW 888F a Toyota Land cruiser, KBW 677H Scania Prime Mover and ZE 4660 Transtrailer.

2. The Plaintiff in its Plaint plead as follows-

- **The Plaintiff states that when the two facilities become owed and due to the 1st Defendant due to business vagaries whereby it experienced loses it sought audience with the 1st Defendant which promised to suspend adverse action and reschedule payment programme.**

- **The Plaintiff avers that it has been faithfully making installments payments until the aforesaid loses hampered its efforts hence, the ensuing discussions with the 1st Defendant.**

- **The Plaintiff states that without regard to the 1st Defendant's own promise to reschedule the loan repayment and without regard to its request that the Plaintiff pays any amount as a condition for consideration of the request pursuant to which the Plaintiff paid Kshs. 983,000/- the 1st Defendant still went on to instruct the 2nd Defendant to repossess the truck, Landcruiser and trailer and advertised the same for sale through the Daily Nation of 14th August, 2014 to sell by public auction on the 26th August, 2014.**

It is from those paragraphs that the issues for determination of the Notice of Motion dated 22nd August 2014 by this Court come from. By that Notice of Motion Plaintiff seeks injunction to stop the sale of the attached vehicles; an order for their release to Plaintiff; and an order to restrain Defendant from selling the vehicles pending determination of this suit.

3. The issues for consideration are-

i. **Does the down turn of business justify a party to obtain interlocutory injunction?**

ii. **Did parties agree to reschedule loan repayments?**

4. Before delving into those issues I will first deal with matters raised by Defendant in its written submissions.

5. Defendant sought the striking out of the 2nd Defendant from this case on the ground that its inclusion breached the principle of Law that an agent cannot be sued where there is a disclosed principle. Defendant on that ground relied on the case of **ANTHONY FRANCIS WAREHEIM T/A WAREHEIM & 2 OTHERS –Vs- KENYA POST OFFICE SAVING BANK, CIVIL APPLICATION NO. NAI 5 & 48 OF 2008** where it was held-

> **"It was also prima facie imperative that the Court should have dismissed the Respondent's claim against the second and third Appellants for they were impleaded as agents of a disclosed principal contrary to the clear principle of common law that where the principal is disclosed, the agent is not to be sued."**

6. My response to that submission is that the prayer to strike out a party from proceedings is a substantial prayer which cannot be dealt with in submissions as Defendant seeks to do. Such a prayer ought to be the subject of an application which the Plaintiff would have an opportunity to respond.

7. Defendant also sought the striking out of the Plaintiff's verifying affidavit in support of the Plaint and the affidavit in support of Notice of Motion dated 22nd August 2014. Both of those affidavits, Defendant submitted failed the test of Section 5 of the Oaths and Statutory Declaration Act Cap 15. Defendant relied on the case **CHARLES NYAGA NJERU –Vs- INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION & ANOTHER (2014)eKLR** where the Court rendered itself thus-

> **"The affidavits by Appellants witness contravenes Section 5 of The Oaths and Statutory Declaration Act (Cap 15) Laws of Kenya which provides:-**
>
> **'Every Commissioner for Oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.'**
>
> **The Section is couched in a mandatory way in that the word "shall" is used meaning that in the jurat the place and date on which the oath and affidavit is taken or made must be indicated."**

Defendant also relied on the case **SUPERSONIC TRAVEL & TOURS LTD & 3 OTHERS –VS- NATIONAL BANK OF KENYA LTD [2005]eKLR** where the Court held-

> **"The Plaintiff's affidavits are dated but fail to state where the Oath was taken. From the provisions of Section 5, Cap 15; it is clear that the said affidavits are in breach thereof. I am afraid I cannot accept the Plaintiff's contention that, that failure is a mere irregularity. I do accept the Defendant's submission as being correct that a breach of an Act of Parliament cannot be regarded as irregularity that can be cured by a subsidiary legislation. Indeed there can be no waiver of a condition prescribed by law."**

8. I have perused both affidavits. The jurat fails to state, in typed form, the place where the oath was taken. That as it may be I have noted that the Commissioner of Oaths stamp shows that the Commissioner's address is P. O. Box 86875 Mombasa. That in my view suffices to address the mischief in Section 5 of Cap 15. This holding is supported by the case **LAZARO KABEBE –Vs- NDEGE MAKAU & ANO. [2004]eKLR** where the Court rendered itself as follows-

> **"In this case, the Plaintiff relied heavily on the decision by Ringera J. in HCCC No.**

(Milimani) 1759 of 1999 Tom Okello Odongo V National Social Security Fund. In that case the Court expressed itself thus;

> **'Speaking for myself, I am in respectful agreement with Commissioner Visram, that by virtue of Order XVIII rule 7 of the Civil Procedure Rules, the Court has discretion to overlook any irregularity in the form of jurat of an affidavit filed in any proceedings before it. The words of the rule are plain enough. This view of the matter is fortified, if fortification is necessary, by what the learned editors of Halbury's Law of England, 3rd edition, Volume 15, state in paragraph 847. Citing authority, they propounded that:**
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> **'The parties cannot waive irregularities in the form of a jurat, but where the place of swearing is omitted, the Court may possibly assume that the place was within the area in which the notary before whom it was taken was certified to have jurisdiction and the irregularity, may be overlooked.'**
>
> **From the above commentary, it would appear as if the mischief sought to be cured by the rule in England was the need to state the place where an affidavit was taken, was the possibility of taking of affidavits by Commissioners or notaries outside their area of jurisdiction. That sort of mischief would not appear to be real in a case such as the present one where the affidavit is clearly taken in Kenya by a Kenyan Commissioner of Oaths, for the reason that Section 4(1) of the Oaths and Statutory Declarations Act empowers a Commissioner for Oaths to administer an oath or take an affidavit in any part of Kenya.'**
>
> **I find the reasoning of Ringera J. to be wholly sound, and I do adopt it herein. I therefore conclude that whereas the omission in the jurat is obvious, the same is not fatal."**

I do, in view of that holding assume that the Plaintiff's affidavits were sworn in Mombasa where the Commissioner of Oaths is based. I do therefore reject Defendant's submission in regard to the jurat of both affidavits.

9. Defendant objected to Plaintiff's use of letters dated 20th and 24th September 2014 written to the Defendant on behalf of the Plaintiff by a firm that is seemingly to be a financial adviser to Plaintiff, which letter was entitled "***without prejudice***". Defendant submitted that such a letter marked "without prejudice" is inadmissible. Defendant relied on the case **NZAU –Vs- MBUNI TRANSPORT CO. LTD [1990]KLR** where the Court stated -

> **"The without prejudice doctrine being a rule of evidence must not, to my mind, be taken to be confined to discovery alone. Nor can it be treated to apply only in cases where an attempted settlement is unsuccessful. The rationale of the doctrine is to encourage parties to a dispute to engage in pre-trial and out of Court settlements without the fear that admissions by them of certain facts would be used against them to their prejudice.**
>
> **The result of the foregoing is that the without prejudice correspondence which the Applicant annexed to his supporting affidavit is inadmissible. Accordingly the preliminary objection succeeds. The correspondence must be and are hereby expunged."**

10. The general rule on without prejudice communication is as set out in Section 23 of the Evidence Act Cap 80 as follows-

> **"In Civil cases no admission may be proved if it is made either upon an express condition that evidence of it is not given or in circumstances from which the Court can infer that the parties agree together that evidence of it should not be given."**

The implications of that Section were discussed in the case **HCCC NO. 13 OF 2014 UNISPAN**

LIMITED –Vs- AFRICAN GAS & OIL LIMITED thus-

> **The policy behind the Courts not admitting in evidence without prejudice communication was discussed in the book 'Principles of Evidence' by Alan Taylor where the learned author stated thus-**
>
> **"These are negotiations conducted on the basis that, if no agreement is reached, evidence of the offers and counter-offers made and rejected is not admissible, but if agreement is reached, a binding contract is thereby concluded. The policy underlying the rule was explained by Oliver LJ in Cutts v Head (1984) thus:**
>
> **… parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings … The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability. As was explained in Rush & Tompkins Ltd v Greater London Council (1989), the rule applies to exclude 'all negotiations genuinely aimed at settlement whether oral or in writing.'**
>
> **… It is worth stressing that if the negotiations lead to agreement, an enforceable contract is established. If one party then wishes to deny or resile from what has been agreed, the communications can be relied upon to prove the contract and its terms, because in such a situation, the question is whether there has been a concluded agreement, and it would be impossible to decide it without looking at the correspondence."**

11. In my view the objection raised by Defendant is valid. The Plaintiff has not shown that the without prejudice communication led to an agreement between the parties, thus forming a contract to justify the use of that correspondence. Accordingly those two letters dated 20th and 24th September 2014 written by Capital Budgeting Services are hereby expunge from the record.

12. I shall now proceed to consider the issues identified above and in so doing determine whether Plaintiff has met the principles of granting interlocutory injunction as set out in the case **GIELLA –Vs- CASSMAN BROWN & CO. LTD [1973]E.A 358**.

FIRST ISSUE: BUSINESS DOWN TURN

13. The relationship of the Plaintiff and Defendant is governed by the contract they entered into. The Plaintiff acknowledges that relationship. In the agreement between the parties there is no provision that if the Plaintiff business experienced a down turn payment of instalments would be suspended indeed paragraph 52 of the parties agreement provides otherwise. It provides that if there is default on the part of the Plaintiff the following would occur-

> **"THEN the facility shall immediately become due and payable and the Borrower shall pay to the Bank all amounts outstanding then together with interest thereon and all other costs charges and expenses due and payable to the Bank hereunder or under the security and the Bank shall cease to be under any further commitment to the Borrower and the Bank shall be entitled at its option to sue for the repayment of the Facility (or so much thereof as shall be outstanding) and enforce the payment thereof and/or enforce the powers rights and privileges conferred on the Bank by this letter and the security."**

14. There is no doubt there was default on the part of the Plaintiff and this was acknowledged by Plaintiff's Director by her letter dated 30th July 2014 as follows-

> **"30th July, 2014**

To,

The Manager

Debt Recovery Unit

Equity Bank Ltd

NAIROBI – HEAD OFFICE

REF: LOAN ARREARS PAYMENT: A/C 0250261488275

I, NURU ALI ISLAM JEIZAN THE DIRECTOR OF KHUNAIF TRADING CO. LTD, HAVE AGREED TO MAKE ARRANGEMENT TO PAY KSHS. TWO MILLION ONE HUNDRED THOUSAND (KSHS. 2,100,000/-) TO EQUITY BANK BY THE END OF DAY i.e; 30TH JULY, 2014.

THEREAFTER WE SHALL HAVE A MEETING ON HOW THE OVERDRAFT SHALL BE PAID.

IF THE ABOVE IS NOT HONOURED, I SHALL SURRENDER THE CHARGED VEHICLES THAT ARE IN THE COUNTRY TO THE BANK, AS I WAIT FOR THOSE OTHERS ARRIVE IN THE COUNTRY.

THANKING YOU,

NURU ALI ISLAM JEIZAN C/o KHUNAIF TRADING CO. LTD."

15. It follows that the fact Plaintiff suffered a down turn in business is not justification for granting an injunction. This issue was well responded to by defence in their submissions where they stated-

> **"We submit that problems with business, no matter how real and genuine, cannot be a basis for granting an injunction."**

Defence relied on the case **JOSEPH CHEGE GITAU –Vs- CFC BANK LIMITED [2008]eKLR** where the Court stated-

> **"The Appellant blames the Respondent for repossessing the motor vehicle without taking into account that the Appellant was unable to pay the rental installments because the motor vehicle had mechanical problems and the appellant could not therefore generate any income. However, the fact that the motor vehicle had mechanical problems did not absolve the Appellant from his obligation to make the monthly payments, nor did it deny the Respondent its right to repossess the motor vehicle. It is evident that the agreement provided the Respondent the right to repossess the motor vehicle as long as there was default in payment of the monthly installments."**

SECOND ISSUE: VARIATION OF AGREEMENT

16. Although Plaintiff alluded to agreement whereby it was agreed Plaintiff modify its repayment, there is no evidence of such agreement. The fact Plaintiff made payments into its accounts and even committed the payments from KTDA into its account, the Plaintiff was doing no more than it was expected to do, that is repaying its loan with the Defendant.

17. Over and above that to allow discussion between the parties, after they have committed themselves in contract, to alter that contract is against the principle of law that parole evidence cannot vary or alter the terms of a deed. This is what Section 97(1) of the Evidence Act Cap 80 provides. It is as follows-

"(1) When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act."

There is case Law which supports that provision. In the case **KENYA BREWERIES LIMITED –Vs- KIAMBU GENERAL TRANSPORT AGENCY LTD [2000]eKLR** the Court of Appeal stated-

"A variation of an existing contract involves an alteration as a matter of contract of the contractual relations between the parties. Hence, the agreement for variation must itself possess the characteristics of a valid contract. To effect a variation therefore, the parties must be ad idem in the same sense as for the formation of a contract. Indeed, the agreement for variation must further be supported by consideration – See Halsbury's Laws of England, Fourth Edition, Volume 9 at page 391 paragraph 569. If the agreement is a mere *nudum pactum* it would give no cause of action for breach particularly if its effect was to give a voluntary indulgence to the other party to the agreement."

18. The Plaintiff fails also in respect to the second issue.

19. Having failed to succeed in both issues it goes without saying that the Plaintiff has not proved a prima facie case with probability of success. Accordingly its application for interlocutory injunction fails. An interlocutory injunction is intended to protect parties whose rights are being violated. It so stated in the case **HARRISHCHANDRA BHOVANBHAI JOBANPUTRA & ANOTHER V PARAMOUNT UNIVERSAL BANK LIMITED & 3 OTHERS [2014]eKLR** viz-

"The orders of injunction cannot be used to intimidate and oppress another party. It is a weapon only meant for a specific purpose – to shield the party against violation of his rights or threatened violation of the legal rights of the person seeking it."

CONCLUSION

20. The consequential orders in view of the above finding are that the Notice of Motion dated 22nd August 2014 is dismissed with costs to the Defendant. I do wish to commend the Defence Learned Counsel for the excellent research undertaken which has gone way to enrich this Ruling.

DATED and DELIVERED at MOMBASA this 26TH day of FEBRUARY, 2015.

MARY KASANGO

JUDGE