



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 203 OF 2015

GILEY INVESTMENT LTD..... PLAINTIFF

-VERSUS -

CFC STANBIC BANK LIMITED.....1ST DEFENDANT

DIKEMWA AUCTIONEERS2ND DEFENDANT

RULING

1. The 1st Defendant, **CFC STANBIC BANK** is a banking institution. On 22nd September 2010, the 1st Defendant granted to the plaintiff, a Hire Purchase facility, to enable the plaintiff purchase a new **ISUZU TRUCK**.
2. The purchase price for the vehicle was Kshs. 8,628,000/-, but the bank financed the plaintiff to the tune of Kshs. 4,314,000/-.
3. It was an agreed term of the contract that the plaintiff would pay the facility within a period of 48 months.
4. It was the understanding of the plaintiff that the monthly instalment was Kshs. 121,188/-. And, according to the plaintiff, it paid all the monthly instalments within the period of 48 months.
5. Indeed, the plaintiff's quantification of the sum it had paid to the bank showed that the total sum was Kshs. 6,053,167.45.
6. Considering that the plaintiff had originally made a down payment of Kshs. 4,314,000/-, it meant that the plaintiff paid the total sum of Kshs. 10,367,167.45.
7. The plaintiff's case was that it had fully liquidated the financial facility which it had been given by the bank. Therefore, the plaintiff intends to obtain an order from the court, to compel the bank to transfer the ownership of the vehicle, to the plaintiff.
8. If, as the plaintiff says, the facility was paid in full, the bank should be restrained, by a permanent injunction, from repossessing, attaching, selling or in any other way, interfering with the plaintiff's quiet possession of the vehicle **KBN 114 A, ISUZU FVZ 235 TRUCK**.
9. However, before the case proceeds to trial, the plaintiff has asked this court to issue an interlocutory injunction to restrain the bank from repossessing, attaching, selling or interfering with the vehicle which is the subject matter of the suit.
10. The 2nd Defendant, **DIKEMWA AUCTIONEERS**, were enjoined to the suit after they had issued a proclamation dated 23rd April 2015, indicating that the vehicle Registration **KBN 114 A** would be publicly auctioned unless the plaintiff paid Kshs. 488,069.94, plus the auctioneer's charges of Kshs. 20,000/-.
11. When the plaintiff came to court on 28th April 2015, with the application for an interlocutory injunction, they did so under a certificate of urgency. Therefore, the application was dealt with

- ex-parte*, in the first instance.
12. As the court was persuaded that the application was urgent, it granted an order to bar the defendants from repossessing or attaching the vehicle in issue. The defendants were also barred from taking control of the said vehicle.
 13. Having issued the interim orders, the court directed the plaintiff to serve the defendants with the application, and the application was set down for hearing on 6th May 2015.
 14. When the plaintiff's application came up for hearing on 6th May 2015, the Defendants had filed their own application. The said application sought, first, the setting aside of the interim orders which the court had granted on 28th April 2015.
 15. Secondly, the defendants asked the court to order that the vehicle be sold off, and the proceeds of the sale be deposited in a joint account.
 16. As far as the defendants were concerned, the plaintiff had misled the court when they initially came to court. Therefore, because of the material non-disclosure, on the part of the plaintiff, the defendants' contended that the *ex-parte* orders ought to be discharged or be set aside forthwith.
 17. On 6th May 2015 the court directed that the two applications, (*dated 27th April 2015 and 5th May 2015, respectively*) be heard together on 26th May 2015.
 18. Ultimately, the parties agreed, on 26th May 2015, that the applications be canvassed through written submissions.
 19. The bank submitted that the plaintiff should have disclosed that it was in arrears. It is on that basis that the bank concluded that the plaintiff was guilty of material non-disclosure.
 20. In the case of **OWNERS OF THE MOTOR VESSEL "LILLIAN S" Vs CALTEX OIL (KENYA) LIMITED [1999] KLR 1**, Kwach J A cited the following passage of **SCRUTTON L J** in the case of **R Vs Kensington Income Tax Commissioner E.P Princess Edmond De Polignac [1917] 1 K.B. 487**, at page 513;

"Now that rule giving a day to the Commissioner to show cause was obtained upon an ex-parte application; and it has been for many years the rule of the court, and one which it is of the greatest importance to maintain, that when an applicant comes to court to obtain relief on an ex-parte statement, he should make a full and fair disclosure of all the material facts – facts not law. He must not mistake the law if he can help it – the court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts, and the penalty by which the court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the court will set aside any action which it has taken on the faith of the imperfect statement".

21. On the strength of that authority, if this court were to conclude that there had been material non-disclosure, I would have had no alternative but to set aside any orders which had been made *ex-parte*.
22. However, it is important to emphasize the fact that, in this case, the *ex-parte* order was only to remain in force until 6th May 2015, when the application was scheduled for *inter-partes* hearing. If that order was not extended by the court, it would have automatically lapsed on 6th May 2015. Therefore, there would have been no need for the defendants to seek orders to set aside the *ex-parte* orders.
23. This case is a complete contrast to that in "*The MV Lillian S*" case, in which the High Court had ordered that the motor vessel be arrested. The order was made *ex-parte*.
24. Being aggrieved with that order, the owners of the ship applied to the High Court, to have it set aside. After giving due consideration to the application, the High Court rejected it.
25. The owners of the ship then moved to the Court of Appeal. It is at that stage that the Court held that the plaintiff had not made a full disclosure of all the material facts when it went before the High Court.
26. In this case, the defendants have asserted that the plaintiff failed to disclose to the court that it was in arrears. At this stage, the court is unable to make any conclusive findings on the issue of the alleged arrears. I say so because the plaintiff's case was that it had already paid the full debt that was payable to the bank. If you sincerely believe that you have paid the whole debt, I cannot

- understand how you can simultaneously be said to know that you were in arrears.
27. Sincerity of belief can be demonstrated by laying bare the facts upon which the belief is founded.
 28. In this case, the plaintiff has put forth the material upon which its belief is founded. Meanwhile, the bank has also put forth material to show that the plaintiff was in arrears. At this stage it would be premature to make the final determination on the issue, as it goes to the very root of the case. Furthermore, the issue is not so plain and obvious that the court can proceed to determine it on the basis of the affidavits alone.
 29. The point I am making is that even when a party ultimately loses a case, it would not necessarily mean that the said party had deliberately either withheld some material information from the court, at the initial stage, or that the party should never have been granted the *ex-parte* orders, in the first instance.
 30. The next issue that I will address relates to the defendants' request, that the vehicle be sold-off and that the proceeds of sale be held in a joint interest-earning account.
 31. Obviously, if the plaintiff's prayer for an injunction were to succeed, it would imply that the court could not then order that the vehicle be sold.
 32. But if the plaintiff's prayer for an injunction were to fail, it would not, automatically, follow that the court would order that the vehicle be sold pending the hearing and determination of the case.
 33. In my understanding, the issue before the court is about whether or not the plaintiff had paid off the whole debt. On the one hand, the plaintiff says that it had paid more than it should have been obliged to do.
 34. Whilst on the other hand, the bank says that the plaintiff was in arrears.
 35. Clearly, the two parties are not on the same page as constitutes the calculation of the sums payable by the plaintiff.
 36. As far as the plaintiff was concerned, there was no provision for variation of interest rates chargeable to the account, thus leading to a constant monthly instalment of Kshs. 121,188/-. Once the plaintiff had paid those instalments over a period of 48 months, it was convinced that the debt had been cleared.
 37. But the bank pointed out that the contract between the parties, expressly stipulated that the bank was entitled, in its sole discretion from time to time, to determine the applicable rates of interest. Whenever there was a change in the rate of interest, the bank was under no obligation to advise the plaintiff of the same: that is the bank's contention.
 38. However, the bank contends that it, nonetheless, gave notice to the plaintiff whenever there were changes to the rate of interest.
 39. As the period for the repayment of the financial facility remained at 48 months, the bank submitted that any upward increase in the rate of interest resulted in a proportionate increase in the quantum of each monthly instalment payable after such increase.
 40. In my considered opinion, there is merit in the bank's position, concerning the inevitable increase in the quantum of each monthly instalment, after the bank increased the applicable rate of interest.
 41. Arising from the increase in the rate of interest, which the plaintiff did not respond to with a corresponding increase in the monthly instalment, I hold the prima facie view that the plaintiff fell into arrears.
 42. Therefore, it would follow that the bank would have been entitled to take steps to repossess the vehicle, when the plaintiff did not settle the resultant arrears.
 43. Accordingly, on a prima facie basis, I find no merit in the plaintiff's contention, to the effect that it had paid the debt in full.
 44. In the circumstances, I reject the plaintiff's request for an interlocutory injunction pending the hearing and determination of the suit.
 45. Should I now direct that the vehicle which is the subject matter of the suit be sold?
 46. In my considered opinion, there is no reason at all why this court was being called upon to order that the vehicle be sold. There is no need, in law, for the bank to seek orders from the court to sell the vehicle.
 47. The right to repossess the vehicle and to, thereafter, have it sold, flows automatically after the plaintiff makes default in the due punctual payment of any of the Hire Rentals.
 48. As I see the situation, there remains a dispute between the parties. It does not help either of the parties, to have the vehicle remain in the hands of the plaintiff, who was not paying the amounts which the bank claims to be due.

49. Secondly, the sale of the vehicle would place the subject matter beyond the reach of the court. By so saying, I am not at all indicating that even if the plaintiff was in default, the vehicle should not be sold.
50. The plaintiff could ensure that the subject matter of the suit remains available by it making payments as asked for by the bank. Such payments, if made, would not be construed as meaning that the plaintiff had abandoned its claims against the bank.
51. After securing the subject matter, the plaintiff could prosecute its claim against the defendants.
52. These suggestions are not orders which the plaintiff is obliged to comply with. They are simply suggestions which the court believes could preserve to the parties, the subject matter of the dispute, together with their respective claims against one another.
53. In the result, the plaintiff's application dated 27th April 2015 is dismissed, with costs to the defendants.
54. Similarly, the defendants' application dated 5th May 2015 is dismissed, with costs to the plaintiff.

DATED, SIGNED and DELIVERED at NAIROBI this 28th day of September 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Mrs. Naeku for the Plaintiff

Wawire for the 1st Defendant

Wawire for the 2nd Defendant

Collins Odhiambo – Court clerk.