



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
(MILIMANI LAW COURTS)
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 332 OF 2015

CFC STANBIC BANK LIMITED.....PLAINTIFF/APPLICANT

VERSUS

BLACKSTONE MINING

GROUP LIMITED.....1ST DEFENDANT/RESPONDENT

WILFRED KASHONGA SARONI.....2ND DEFENDANT/RESPONDENT

CAROLINE WANJIKU KAGO.....3RD DEFENDANT/RESPONDENT

RULING

1. The application before the court is the Plaintiff's **Notice of Motion** dated **8th July, 2015** brought under the provisions of Article 40 of the Constitution of Kenya, Section 10, 14 and 16 of the Hire Purchase Act Cap 507, Laws of Kenya and Section 3A of the Civil Procedure Act. The Plaintiff seeks the following orders -;
 - a. **Spent**
 - b. **THAT the Defendants/Respondents be compelled to cede possession and avail the DOOSAN CRAWLER EXCAVATOR registration number KHMA 985C (hereinafter "the Machine") for the Plaintiff/Applicant's possession and subsequent disposal.**
 - c. **THAT the Defendants /Respondents be compelled to bring the DOOSAN CRAWLER EXCAVATOR registration number KHMA 985C (hereinafter "the Machine") within the borders of the Country.**
 - d. **THAT pending the hearing and determination of this Application Defendants/Respondents be restrained from selling, transferring, transporting or otherwise dealing with the Machine in any manner that would serve to deprive the Plaintiff of his right of immediate repossession until the determination of this suit.**
 - e. **THAT costs be in the cause.**
2. The Plaintiff relied on the grounds on the body of the Notice of Motion and the Supporting Affidavit of **Ann Kaswii Muli**, sworn on 8th July, 2015. The Plaintiff's claim herein as well as the interlocutory application are founded on a Hire Purchase Agreement dated 27th December, 2013. The brief facts are that the 1st Respondent sought and obtained financing of USD 194,727 for the

purchase of the machine by entering into the Hire Purchase Agreement with the Plaintiff, which agreement was guaranteed by the 2nd and 3rd Defendants. A key term of the agreement was that the 1st Defendant was to service the amounts advanced by paying 47 monthly installments of USD 4,980.40 and one final installment of USD 5,080.55.

3. It is the Plaintiff's case that 1st Defendant defaulted in the performance of its obligations under the Hire Purchase Agreement and in particular the payment of the agreed monthly payments. That as it stands 1st Defendant has accrued a debt of USD 169,680.63/= which continues to attract interest on the principal amount of 5.57% per annum and a default interest at the rate of 20.25% as provided for in clause 2 (c) and (d) of the Hire Purchase Agreement. In consequence thereof, the Plaintiff informed the Defendants of its intention to repossess the machine, to which end it instructed the firm of Leaky Auctioneers to carry out repossession on their behalf, which repossession has not been successful, hence this suit.
4. It was further deposed by **Ann Kaswii Muli** on behalf of the Plaintiff that the said Auctioneers have been unable to trace the said machine despite their intensive investigations as to its whereabouts, and that they received information that the equipment could be in Tanzania. The Defendant therefore contends that the Defendants acted unlawfully and in breach of the Hire Purchase Agreement not only by failing to pay the purchase instalments as and when due, but also by taking the machine out of the country without the Plaintiff's express authorization. The Plaintiff further contended that the Defendants are intent on frustrating its efforts to repossess the said machine, which is an affront to its constitutional right to property. It was also averred that unless the orders sought are given, it may be impractical or impossible for the Plaintiff to recover and/or dispose of the machine with a view of recovering the sums advanced for its purchase.
5. In his oral address to the Court, Learned Counsel for the Plaintiff, Mr. Nyauchi, set out the Plaintiff's case and submitted that in the Hire Purchase Agreement dated 27th December, 2012 the 1st Defendant agreed to the terms of payment as well as the consequences of default. He drew the court's attention to Clause 5(1) of the Hire Purchase Agreement, which provides that the owner of the machine would be entitled to repossession upon default by the hirer. He pointed out that in this case, the 1st Defendant started defaulting on the repayments in the month of April, 2014. A demand letter dated 14th April, 2014 was consequently sent by the plaintiff to the Defendants informing them that they had fallen into arrears. Mr. Nyauchi submitted that even after this demand, the Defendants failed to regularize their account with the Plaintiff. It was thus his argument that, in the circumstances, it was within the Plaintiff's right to repossess the machine, which right has been frustrated by the removal of the machine from Kenya. Mr. Nyauchi therefore urged the court to grant the orders sought contending that there is a real danger that the machine may be disposed of outside jurisdiction, in which event the Plaintiff would lose out on the monies advanced to the 1st Defendant.
6. In response to the application, the Defendants filed a Replying Affidavit sworn by the 2nd Defendant on 13th October, 2015. The Defendants conceded that there was a Hire Purchase Agreement between the parties. It was however contended by the 2nd Defendant that the Plaintiff was not candid in its averments. It is their case that the Plaintiff failed to disclose the amounts that the 1st Defendant had already paid towards offsetting the purchase price of the machine and what was outstanding, for which repossession was sought. The Defendant also faulted the statements attached to the application on the ground that the same were neither printed on the official letter-head of the Plaintiff bank, nor certified by the Plaintiff as true copies of the originals, and therefore that their source and veracity were questionable.
7. The Defendants also refuted the claim that it received any notice demanding arrears on the amounts advanced by the Plaintiff, contending that they were never informed by the Plaintiff of any default on the part of the 1st Defendant in making payments. It was thus averred that this failure was in breach of the Hire Purchase Agreement. The Defendants were also of the view that the right to repossession was premature, more so because no evidence was adduced by the Plaintiff in support of their claim that the machine was in Tanzania. That therefore the assertions to that effect attributed to Leaky Auctioneers were based on mere speculation.
8. Another point raised by the Defendants in opposition to the application is that the plaintiff

unilaterally and arbitrarily closed the 1st Defendant's account without informing any of the Defendants, and that in consequence thereof, the 1st Defendant was unable to obtain any information including the amounts paid towards the purchase of the machine.

9. On behalf of the Defendant's, Learned Counsel Mr. Osoro submitted that the application before the court had no merit and the same ought to be dismissed. He urged that since 2nd and 3rd Defendants were guarantors of the 1st Defendant, all the defendants were entitled to notice of default before any attempt towards repossession could be made. According to Mr. Osoro, no such notices have been produced before the court. He reiterated the point that the orders sought ought not to be given at this interlocutory stage as doing so would dispense the entire suit, thereby denying the Defendants the right to a hearing.
10. With regard to the claim that the machine was outside the country, it was Mr. Osoro's argument that this allegation is not supported by any evidence. According to him, a representative from Leakey Auctioneers ought to have sworn an affidavit in support of such a claim. Further, he argued that no report has been prepared by the said Auctioneers to illustrate that they had actually carried out investigations on the whereabouts of the machine. In conclusion, Mr. Osoro urged the Court to dismiss the application with costs to the Defendants.
11. I have carefully considered the subject Notice of Motion Application, the Supporting Affidavit as well as the Replying Affidavit filed in opposition thereto. I have also considered the submissions for and against the application by Learned Counsel to the respective litigants. The issues for determination in my view are fairly straightforward, namely:

(a) whether the Defendants should be compelled to cede possession and avail the machine to the Plaintiff from repossession and subsequent disposal; and,

(b) whether the Plaintiff has satisfied the requirements for the grant of an injunction as prayed in paragraph 4 of the application.

12. At the center of this dispute is the Hire Purchase Agreement entered into by the parties, in which the 1st Defendant plaintiff company sought and obtained an asset financing facility from the Plaintiff bank for the purpose of purchasing the subject machine. It is contended that in breach of terms and conditions of the Hire Purchase agreement, the 1st Defendant defaulted in its payment of the agreed sums when they fell due. Consequently, the account fell into arrears. In a bid to exercise its rights under the Hire Purchase Agreement, the Plaintiff instructed Leakey Auctioneers to trace and repossess the machine. However, it has been averred and there appears to be no dispute that despite numerous and concerted efforts, Leakey Auctioneers were unable to trace the location of the machine. According to the Plaintiff, the auctioneers, through investigations, were able to establish that the same had been moved across the border to Tanzania.
13. In Clause 2(1) of the Hire Purchase Agreement the 1st Defendant covenanted;

“ ...Not to allow the Vehicle(s)/Equipment to pass out his custody or control, not to part with possession nor sell, let, charge or in any way deal with or dispose of or attempt to dispose of the Vehicle(s)/Equipment not to represent himself to be nor to hold himself out as being nor to do or suffer any act or thing whereby he may be reputed to be the owner of the vehicle(s)/Equipment nor to take or send the Vehicle(s)/Equipment or permit the same to be taken or sent out of Kenya”

It is pertinent then determine whether, as claimed by the Plaintiff, the aforesaid Clause has been breached by the Defendants.

14. In paragraph 6 of the Supporting Affidavit of **Ann Kaswii Muli**, it was averred thus:

"That I have been informed by the Firm of Leakey Auctioneers, which information I verily believe to be true that their efforts to trace the Machine took them on a trail that led

them to Mwatate Constituency in Taita-Taveta County onwards to Tsavo National Park where they received information that the Machine is in Tanzania and the trail subsequently ran cold."

This averment was premised on email correspondence between the Plaintiff and the Auctioneers.

15. It is therefore evident that, first and foremost, no investigation report or affidavit by Leakey Auctioneers augmenting the Plaintiff's case in this regard was availed. As correctly pointed out by Mr. Osoro, such evidence would have provided more reassuring basis as to the whereabouts of the machine. Secondly, and more importantly, it is noteworthy that even Leakey Auctioneers were not in a position to state with exactitude that the machine was in Tanzania.

It is instructive to note that in their email communication dated 22nd June 2015, Leakey Auctioneers stated that:

"...We got information that the machine was in Tanzania but upon arrival we could not trace the same. We are still doing our investigations and will keep you posted on any new developments."

16. Whereas it would appear that the Plaintiff's application is premature, for the reason that the exact location of the machine is yet to be ascertained, it is telling that in the 2nd Defendant's Replying Affidavit, he skirted round this issue and avoided stating the whereabouts of the machine or whether indeed the same was within the jurisdiction of the court. Accordingly, there exists a possibility that the machine may have been moved out of jurisdiction; otherwise, the Defendants would have readily disclosed its location in their Replying Affidavit.
17. With regard to the equitable relief of injunction, the Plaintiff's prayer as brought out in paragraph 4 of the Notice of Motion is:

"that pending the hearing and determination of this Application the Defendants/Respondents be restrained from selling, transferring, transporting or otherwise dealing with the Machine in any manner that would serve to deprive the Plaintiff of his right of immediate repossession until the determination of this suit."

18. It would seem then that this prayer is spent in so far as it targeted the intervening period between the filing of the suit and the hearing of the application, with a view of preserving the Plaintiff's right to immediate possession until the determination of the suit. But even assuming that the restraining orders sought were to subsist during the pendency of the suit, it would be necessary to ascertain if the threshold therefor has been established herein. The guiding principles set out in the case of ***Giella –Vs – Cassman Brown 1973 E.A. 358*** are firstly, that an applicant must show a prima facie case with a probability of success; secondly, that an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages; and thirdly, that if the court is in doubt, it will decide an application on the balance of convenience.

19. With regard to the first threshold of establishing a prima facie case, it is now trite, that a prima facie case is one in 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 to call for an explanation or rebuttal from the latter. (See ***Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125***) I note the averments of the ***Ann Kaswii Muli*** in her supporting affidavit that the 1st Defendant breached the terms of Hire Purchase Agreement by defaulting on its monthly payments. That as it is, the debt by the 1st Defendant stands at USD 169,680.63 which continues to attract interest and penalties. I have also perused the documents attached to the application, notably the letters dated 14th April, 2014 and 8th May, 2015 to the 1st Defendant. However, the question of whether or not the account is in arrears and for how much is one of the issues having in disputation in the main suit. A question has similarly been raised as to whether the Defendant's, especially the guarantors, were entitled to notice of the 1st Defendant's

default before the filing of this suit.

20. More importantly, it is unclear and therefore yet to be proved whether the machine has been moved out of jurisdiction. An injunction, being an equitable remedy is not the kind to be issued in vain, before ascertaining the exact whereabouts of the subject matter.

In the case of ***Eric V.J. Makokha & Others Vs. Lawrence Sagini & Others, Civil Application No. Nairobi. 20 of 1994***, the Court of Appeal stated:

"There is one other reason on which the order of injunction granted in that case could be questioned. An application for ... injunction is an invocation of the equitable jurisdiction of the court. So its grant must be made on principles established by equity. One of it is represented by the maxim that equity would not grant its remedy if such order will be in vain. As is said, "Equity, like nature, will do nothing in vain". On the basis of this maxim, courts have held again and again that it cannot stultify itself by making orders which cannot be enforced or grant an injunction which will be ineffective for practical purposes. If it will be impossible to comply with the injunction sought, the court will decline to grant it."

21. In the light of the foregoing, the court is far from being convinced that the Plaintiff/Applicant has made out a prima facie case with a probability of success to warrant the granting of the orders sought. Accordingly, I find it superfluous to consider the other principles of irreparable harm and balance of convenience. As was held in the ***Nguruman case***, the three principles are to be applied as separate, distinct and logical hurdles, which the applicant is expected to surmount sequentially. In addition to the foregoing issues is the valid concern of the Defendants that to grant the prayers sought in the application would essentially amount to a final determination of the suit.

22. Be that as it may, the court is duty-bound to take cognizance of the principle that a lender ought to be able to realize its security. I therefore take the view that, whereas I find no merit in the instant application, the interest of justice will be better served by ensuring the preservation of the status quo pending the hearing and final determination of this suit, the status quo being that the machine remains in the possession and custody of the 1st Defendant pending the expedited hearing and disposal of this suit.

In the result, I would dismiss the Plaintiff's Notice of Motion dated 8th July 2015 with an order that costs thereof be in the cause.

Orders accordingly.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF NOVEMBER, 2015

OLGA SEWE

JUDGE