



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO 540 OF 2013

CYN ENERGY COMPANY LIMITED.....PLAINTIFF

VERSUS

SYNERGY INDUSTRIAL CREDIT LIMITED.....DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff's Notice of Motion application dated 9th December 2013 and 10th December 2013 was brought under the provisions of Order 40 Rules 2 and 3 of the Civil Procedure Rules, 2010 and Sections 1A, 1B and 3A of the Civil Procedure Act. Prayer Nos (1), (2), (3) and (4) of the said application are spent. It sought the following remaining prayers that:-
 - a. Spent.
 - b. Spent.
 - c. Spent.
 - d. Spent.
 - e. **The Defendant whether by itself, or by its servants, contractors or agents or licensees or otherwise howsoever be restrained from interfering in any manner whatsoever with the Plaintiff's right, possession, title and interest in KBL 967K Mercedes Benz Actros and trailer; KBL 966K Mercedes Benz Actros and trailer; KBL 968K Mercedes Benz Actros and trailer; KBQ 671J Mercedes Benz Actros and trailer; KBL 731J Mercedes Benz Actros and trailer; KBL 333Y Toyota Prado Silver; KBU 059C Toyota Saloon White and KBC 884G Toyota Pick Up Silver pending the hearing and determination of this suit.**
 - f. **The Defendant be strictly enjoined and restrained whether by itself or by its servants, agents or otherwise howsoever from trespassing, offering for sale, alienating and/or in any way interfering with the title and interest in all that piece of land or parcel of land known as Title No Kajiado/ Olekasasi/832 on account of its alleged power of sale accruing from the purported claim against the Plaintiff pending the hearing and determination of this suit.**
 - g. **The Defendant do forthwith deliver up to the Plaintiff a true and accurate account of its claim.**
 - h. **The costs of this application be provided for.**
2. The grounds under which the said application was premised were generally that:-
 - a. **The Plaintiff was involved in the business on a commercial basis of supplying**

- petroleum products through the Republic of Kenya as a result of which it acquired a fleet of motor vehicles to carry out the said business.**
- b. At various times since 2011, the Defendant advanced it credit facilities against security of the said motor vehicles and parcel of land, of which it had made substantial repayment.**
 - c. The Defendant demanded from the Plaintiff a sum of Kshs 20,745,116/= and a sum of Kshs 74,779,957/= barely a month later.**
 - d. Despite several requests, the Defendant had refused to furnish the Plaintiff with a Statement of Account to know what the claim was composed of and as a result, the Plaintiff had been unable to reconcile its accounts or engage the Defendant in a meaningful manner.**
 - e. On 6th December 2013, the Defendant and its agents vandalised the Plaintiff's property in an attempt to take possession of the said motor vehicles, which act was illegal and null and void as the Plaintiff had to file suit first if it intended to recover any monies owed to it by the Plaintiff.**
 - f. The Plaintiff was apprehensive that the Defendant would confiscate or impound the said motor vehicles thus crippling its operations and that if an injunction was not granted, this application and suit would be rendered otiose without a hearing.**

AFFIDAVIT EVIDENCE

3. The Plaintiff's application was supported by the affidavit of Muema Muli, its General Manager. It was sworn on 9th December 2013 and filed on 10th December 2013. He reiterated the grounds on the face of the application and added that although the Defendant required the Plaintiff to execute Hire Purchase Agreements, which it did, the said motor vehicles were not being financed through hire purchase but rather the entire borrowing was at all times secured through the Plaintiff's Director's personal guarantees and various post-dated cheques issued in advance drawn on the Plaintiff's account in favour of the Defendant. He, however, said that the Defendant provided short and long term facilities and Hire Purchase services to its customers.
4. On 4th February 2014, the Defendant filed a Replying Affidavit sworn on 31st January 2014 by Jacob Meme, its Legal Officer. He deponed that the entire purpose of the suit herein was to forestall repossession of the security assets and enforcement of recovery of the debt due and owing to the Defendant by the Plaintiff. He stated that the Defendant had powers to enforce recovery through contractual instruments in the event the Plaintiff defaulted in meeting its repayment obligations.
5. The Defendant annexed copies of agreements in respect of the said motor vehicles, First Charge over the aforesaid parcel of land, copies of logbooks and transfer forms, invoices from the dealer, proof of payment of each of the ten (10) motor vehicles, communication from the Plaintiff re-scheduling the payments of the outstanding amounts, copies of cheques issued by the Plaintiff but returned to it unpaid and certified copies of statements it sent the Plaintiff amongst other documents.
6. He clarified that the post-dated cheques had not been issued as security but rather they were to ensure that all repayments were made to the Defendant. He further contended that it had not issued the statutory notice to facilitate the realisation of the said property but that it had every intention to do so should the Plaintiff's default desists.
7. He added that the Plaintiff had continued to sell petroleum products and it had not offered any explanation why it had neglected and/or refused to pay the outstanding monies due and owing to the Defendant. It was his contention that granting the orders would be prejudicial to the Defendant in that the Plaintiff continued to utilise the motor vehicles in its business.
8. In a Supplementary Affidavit that he swore on 13th March 2014 and filed on the same date, Muema Muli deponed that the Deponent continued to arbitrarily overcharge the Plaintiff's account despite the base lending rates having coming down progressively from the date of the indebtedness to date. He contended that as at 31st January 2014, the outstanding amount was Kshs 81,274,076/= up from the sum of Kshs 74,779,957/= as at 9th December 2013. He averred that being dissatisfied with the said calculations, the Plaintiff had commissioned Interest Rates

Advisory (IRAC) which had found that there was an overcharge by the Defendant and as such the Defendant was acting in bad faith for failing to render proper accounts when called upon to do so.

LEGAL SUBMISSIONS BY THE PLAINTIFF

9. The Plaintiff's written submissions were dated 13th March 2013 and filed on 14th March 2014. The said submissions were orally highlighted by its counsel on 31st March 2014. He told the court that the Plaintiff was seeking prayer nos (5) and (7) of its application as the Defendant had indicated in their written submissions dated and filed on 27th March 2014 that it did not intend to dispose of the parcel of land for the time being.
10. It was the Plaintiff's submission that if the Defendant was intent on proceedings with recovery, it ought to comply with the provisions of Section 15 of the Hire Purchase Act which provided that if 2/3 of the monies had been paid, the balance could only be recovered by way of suit. It also stated that Section 27 of the said Act mandated the Defendant to furnish it with a Statement showing the principle amount, variations of interest and the interest applied.
11. It was its case that it had disclosed all material facts herein and that it was not asking the court to grant definitive prayers but rather it argued that it had established a *prima facie* case with a probability of success. It submitted that it had satisfied the test set out in the case of **Giella vs Cassman Brown (1973) EA** as it had demonstrated that:-
 - a. **the mischief (if any) sought to be cured could not be adequately compensated by an award of damages at the end of the suit;**
 - b. **it stood to suffer irreparable harm if the temporary injunction was not granted; and**
 - c. **the balance of convenience tilted in its favour of the granting of the orders that it had sought.**
12. It argued that it had demonstrated a *prima facie* case with a probability of success at the trial as it had not been served with any statutory notices as was required by the law. It referred the court to the case of **HCCC No 22 of 1995 Office Equip Services Limited vs The Co-operative Bank of Kenya Limited** (unreported) in which the court held that the statutory power of sale had not arisen as no proper statutory notice had been issued.
13. It contended that the Defendant had fettered and clogged its equity of redemption by charging usurious and unconscionable rates of interest and other charges and that its intention to dispose of the said motor vehicles was to pre-empt its claim. It was its averment that statutory power of sale was not available to a party who was in breach of the law as was observed in the case of **HCCC No 74 of 2000 Joseph Mbugua Gichanga vs Co-operative Bank of Kenya** (unreported).
14. It also placed reliance on the cases of **HCCC No 485 of 1999 Samaki Industries vs Bullion Bank Limited** (unreported) where the court held that an injunction should be granted to stop a bank from selling the security unless it for the sum that was due and was strictly based on the contract. It also referred the court to the case of **HCCC No 79 of 2007 Givan Okallo Ingari vs HFCK Limited** (unreported) in which the court stated that the Defendant therein could not be allowed to engage in acts and omissions which were in contravention of the law.
15. Its counsel submitted that the Defendant's interests were secured by a First Charge where the security was valued at more than Kshs 62,000,000/= in which case damages would not be an adequate remedy.
16. On the issue of a balance of convenience, it relied on the case of **HCCC No 1248 of 2002 In Dhariwal Hotels Limited vs Southern Credit Banking Corporation Limited** (unreported) where the holding of the court was that the status quo was to be preserved until the determination for the substantial question it had found to be investigated. The Plaintiff averred that there were questions whether it had maintained good accounts.
17. In response to the Defendant's oral submissions, the Plaintiff was categorical that the Hire Purchase Act was applicable in the case herein as the Defendant had registered the agreements under the said Act.
18. It therefore prayed that the orders it had sought be granted.

LEGAL SUBMISSIONS BY THE DEFENDANT

19. On its part, the Defendant submitted that the Plaintiff had not met the conditions set out in the case of **Giella vs Cassman Brown** (Supra). It denied that it unilaterally failed to render a true and accurate account or that it was acting illegally by seeking to repossess the Plaintiff's assets. It pointed out that the report by IRAC was prepared after the Plaintiff filed the suit herein. It said that the Plaintiff failed to take into account the earlier reconciliation wherein the Plaintiff's directors had admitted in its letter of 8th January 2014 was a true and accurate reflection of the amount that it owed to the Defendant.
20. It was the Defendant's contention that the various Hire Purchase Agreements were clear on the payment of the monthly instalments and that the Plaintiff had in fact admitted the debt in its letter of 4th April 2013 and issued it cheques which were returned unpaid. It argued that the Plaintiff was thus estopped from denying the correctness of its Statement of Accounts by virtue of Section 120 of the Evidence Act Cap 80 (laws of Kenya) which stipulates that:-

“ Where one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative, to deny the truth from that thing.”

21. It was also its argument that the Plaintiff had paid the principal amount and that if the Plaintiff was objecting to the amounts it levied, then it ought to have returned the said vehicles for the reason that a hirer does not own the chattel but merely hires it from an owner. It argued that it was well established that once a party pledged any asset as security, then it became a chattel available for sale. It submitted that when requesting for the re-scheduling of the payment, the Plaintiff had in fact stated that the Defendant could continue holding the logbooks, properties and all other securities until repayment of the facility.
22. In his oral submission, counsel for the Defendant stated that it was evident from the IRAC report alluded to in the Plaintiff's Supplementary Affidavit that the Plaintiff owed the Defendant a sum of Kshs 68,738,291.81.
23. It was the Defendant's submission that, in any event, the law was that a dispute as to accounts was not a ground under which an injunction could be granted as was held by the Court of Appeal in **Fina Bank vs Romak Limited (2001) EA 65**. It placed further reliance on the case of **Anthony Ngotho vs NIC Bank Limited (2004) eKLR** where the court declined to grant an injunction in a case where the Plaintiff therein had challenged the sale of its trucks under the Hire Purchase Act and had in fact submitted a report from IRAC as had been produced in this case.
24. It also referred the court to the cases of **Richard Mutiso vs CFC Bank Limited (2006) eKLR** where the court held that the Hire Purchase Agreement allowed the Defendant therein to vary, reduce or increase the hire rental without informing the hirer therein and that of **Zadrack Oyaró Achoki vs Consolidated Bank (2013) eKLR** where the court held that the debtor had to either pay the loan or allow the bank therein to realise its security.
25. It was its contention that the motor vehicles and assets had an ascertainable value as a result of which the Plaintiff could be compensated by way of damages and that having failed to demonstrate a *prima facie* case, the court could not grant an injunction on a balance of convenience. It averred that the Plaintiff had failed to give an undertaking as to payment of damages and that in any event, it was unlikely that the Plaintiff would be able to meet any damages bearing in mind its financial situation. It, however, contended that it would be able to meet such damages as it was a sound financial institution.
26. Additionally, the Defendant submitted that the Plaintiff could not be entitled to the equitable relief of an injunction as it had failed to disclose the material fact that it had admitted the debt herein. Its counsel told the court that omission of any document by the Plaintiff, whether or not it was favourable to it, was fatal to the Plaintiff's application. He pointed out that the Plaintiff failed to place several documents before the court. It relied on the case of **David Kamau Gakuru vs National Industrial Credit Bank Limited (2004) eKLR** in this regard.
27. It pointed out that that there was no threat for realisation of the suit property as it had not issued any statutory notice with a view to realising the said property, a fact that was admitted by the Plaintiff in paragraph 16 of its Supporting Affidavit. Its counsel orally submitted that the Defendant had a Charge in place and that it had reserved the right to realise the security if the debt

- remained unpaid and the requisite notices were given.
28. The Defendant distinguished the cases cited by the Plaintiff as having been irrelevant in the circumstances of this case and argued that its application was not merited as it was entitled to repossess the securities as the Plaintiff had failed to meet its financial obligations towards it.

LEGAL ANALYSIS

29. It is evident that the issue of whether or not the Plaintiff and the Defendant entered into what could be regarded as hire-purchase agreements was hotly contested. The Plaintiff was emphatic that the Hire Purchase Act was applicable herein while the Defendant took the contrary view. In his oral submissions to the court, counsel for the Defendant contended that the said Act was applicable where the Hire Purchase Price did not exceed Kshs 3,000,000/= and that Section 2 of the Act refers to the total amount payable and not the outstanding sum. He further contended that if the said Act was applicable, then it was the Plaintiff that was in contravention of the said law.
30. The Defendant stated the correct position of the law being that there was a limitation of the total amount of the hire-purchase price that would in effect bring the applicability of the said Act in a particular case. However, the figure of the monetary limitation it gave was different from that that was set out in the Act.
31. Section 3 (1) of the Act provides as follows:-

“ This Act applies to and in respect of all hire-purchase agreements entered after the commencement of this Act under which the hire-purchase price does not exceed four million shillings or such other higher or lower sum as the Minister may, after taking into account market forces from time to time prevailing, prescribe other than a hire-purchase agreement in which the hirer is a body corporate, wherever incorporated:

Provided that monetary limitation does not apply so as to affect the definition of hire-purchase business.”

32. Under Section 2 (1) therein, hire-purchase business has been defined as:-

“ a business, whether carried alone or with other business, of entering into hire-purchase agreements, whatever the hire-purchase price under any agreement.”

33. Attached to the Defendant's Replying Affidavit were various letters of offer duly executed by the parties. The same referred to Hire Purchase facilities for various sums ranging between Kshs 11,000,000/- to Kshs 40,000,000/=. The Plaintiff appeared to have accepted the terms and conditions culminating in the Hire-Purchase Agreements which could be found between pp 6-91 of the said Replying Affidavit. These were referred to as Hire Purchase Agreements. A perusal of the said agreements reveals that the Hire Purchase prices were in excess of Kshs 4,000,000/=. In fact, the same ranged between Kshs 12,950,000/- to 40,000,000/=. Each of the agreements alluded to the fact that the Plaintiff was a corporate hirer.
34. It is therefore clear to this court that the Hire Purchase Act was not applicable to the said agreements for the reason that the total sum payable by the Plaintiff as hire-purchase price exceeded the monetary limitation of Kshs 4,000,000/= and further, it was a body corporate as stipulated in Section 3 (1) of the said Act. The court was thus persuaded by the Defendant's submissions that the said Act was not applicable herein and accordingly rejected the Plaintiff's submissions in this regard.
35. The Defendant annexed copies of Certificates of Registration of Agreements which were registered pursuant to Section 5 (3) of the Hire Purchase Act. Section 5 (4) of the Act is clear that enforcement of the agreement against a hirer cannot be done unless a hire-purchase agreement has been registered under Section 5(3) of the said Act. The court did, however, find that the Act was inapplicable herein in which event the said provisions would not be relevant in the proceedings herein.
36. In the same vein, it therefore follows that Section 15 of the Act that provides that where two thirds of the hire-purchase price has been paid an owner cannot enforce any right to recover possession

of the goods from the hirer otherwise than by way of a suit had no place in these proceedings. The Defendant was under no obligation to file suit to recover the monies that were due and owing to it by the Plaintiff. Similarly, the provisions of Section 27 of the said Act requiring an owner to provide a statement to a hirer were also not applicable herein. Hence, the Plaintiff's submissions that the Defendant ought to have complied with Sections 15 and 27 of the said Act were misplaced in the circumstances of this case. On the other hand, the Defendant was entitled to repossess the securities with the terms and conditions of the said Hire Purchase Agreements.

37. Clause 6 of the said Hire Purchase Agreements provided as follows:-

6. If the Hirer shall:-

(i) Default in payment of any sum payable pursuant to this agreement...

THEN without prejudice to any of the existing obligations of the Hirer to the owner and also without prejudice to any of the other remedies, rights and entitlements of the owner herein contained, the owner shall by written notice determine this agreement and the Hirer shall thereupon be no longer in possession of the goods without the consent of the owner.

PROVIDED and it is hereby expressly agreed and understood that should any of the things set out in clauses (i)...happen, then this agreement shall automatically determine and the owner shall, without prior notice, be entitled to immediate repossession of the goods and without prejudice to the provisions of clause 7 below, neither party shall have any or any further rights under this agreement.

38. Clause 7 further stipulated as follows:-

“Notwithstanding the provisions of clause 6 above but without prejudice thereto upon termination of this agreement for any of the reasons aforesaid, the owner shall be entitled to immediate repossession of the goods with or without prior notice or demand and the Hirer shall, in addition...be liable in respect of:-

- a. **All the unpaid or due arrears of hire charges including all the interest and other charges levied thereon as provided for in this agreement up to the date of termination.**
- b. **All outgoing payable in respect of the goods including but not limited to, repair and maintenance costs, storage charges, license and rates fees.**
- c. **The cost of all reasonable work to be undertaken or carried out on the goods to render them in a good and serviceable condition or as near possible to the condition in which the goods were at the time the same were let to the Hirer.**

PROVIDED that if the value of the goods upon repossession and sale shall exceed in value the total amount payable to the owner as hire-charges inclusive of all interest and charges hereabove set out, then the excess proceeds shall be paid to the Hirer. PROVIDED further that in computing the total amount due to the owner in the event of premature termination of this agreements due regard shall be heard for the loss of profit suffered by the owner by reason of the agreement, not being completed.”

39. The Defendant emailed the Plaintiff severally as evidenced in copies of the emails attached to its Replying Affidavit. In addition to copies of the cheques found from pp 139-187 of its said Affidavit issued to the Plaintiff by the Defendant contained, the Defendant attached a copy of its letter dated 4th November 2013 requesting the Plaintiff to remit a sum of Kshs 20,745,116/= being arrears and late penalty charges as at that date. In its letter dated 29th November 2013, the Defendant indicated the outstanding sum as Kshs 74,779,957/= as at that date.

40. In an email of 29th November 2013, the Defendant called for the said amount and pointed out that late penalty charges continued to accrue until payment. In an email of 5th December 2013, one Yasmin wrote to one Paresk asking him not to bank some cheques until such time they met. From

- the emails exchanged between the parties, the court notes that the Plaintiff remitted a sum of Kshs 808,195/= which the Defendant acknowledged on a without prejudice basis as the same did not satisfy its demand. The Plaintiff undertook to communicate to the Plaintiff regarding remittance of further instalments but failed to remit payments as it had promised and further sought indulgence from the Defendant on future payments.
41. A careful perusal of the documentation placed before the court suggests that the Plaintiff issued post-dated cheques to be banked on the due dates and were not securities as was alleged by the Plaintiff. It is difficult at this stage for the court to clearly establish what exactly was due and owing to the Defendant by the Plaintiff bearing in mind the figures given by IRAC and in the Defendant's demand letters of 4th and 29th November 2013.
 42. What is, however, clear from paragraph 7 of the Plaintiff's Supplementary Affidavit is that there were outstanding amounts. It did not, however, give a figure of what it considered to be undisputed amounts. Indeed in its two (2) letters dated 4th April 2013 to the Defendant which were annexed on pp 188 and 190 of the Defendant's Replying Affidavit, the Plaintiff undertook to pay a sum of Kshs 4,000,000/= and Kshs 6,900,000/= and requested the Defendant to hold onto the logbooks/properties and securities pending payment of the said sums which it requested the Defendant to re-schedule.
 43. By implication, the Plaintiff did also seem to admit that it had a balance of Kshs 68,738,298.91 if one is to go by the IRAC report which it submitted in its evidence. In the absence of any proof of payment of the same by the Plaintiff, the only logical conclusion was that this was an undisputed sum that ought to be paid. It committed itself to pay certain monies in its letters on 4th April 2013 which monies it does not appear to have paid. It would therefore be estopped from alleging that it does not owe the Defendant any monies or at all. Bearing in mind Clause 6 of the Hire-Purchase Agreements, the Defendant had the right to repossess the assets based on the arrears no matter the amount.
 44. The law is that an injunction is granted to an applicant to preserve subject matter pending the hearing and determination of an action. The applicant must demonstrate a *prima facie* case with probability of success, satisfy the court that it would suffer irreparable damage which would not be adequately compensated if the court did not grant the injunction and if the court is in doubt, then it should decide the case on a balance of convenience. These main principles were clearly spelt out in the case of **Geilla vs Cassman Brown** (Supra).
 45. The court requires tangible evidence when considering an application for interlocutory injunction pending the hearing and determination of the suit. It is therefore incumbent upon an applicant to submit a cogent case during the interlocutory stage to show that it has an arguable case. This is important because at this juncture, the court would not have had an opportunity to listen to the evidence in support of each party's case. This is a burden that lies on the applicant.
 46. In **Civil Application Nai No 140 of 1995 Uhuru Highway Development Limited vs Central Bank of Kenya & Others** (Supra) the Court of Appeal held as follows:-

“...it must be clearly understood that a party who goes to a judge in the absence of the other side assumes a heavy burden and must put before the judge all the materials, including even material which is against his interest...”
 47. As was correctly pointed out by the Defendant, the Plaintiff failed to make full disclosure at the time it sought the temporary injunction pending the determination of this suit. From the evidence it annexed to its Supporting Affidavit, it did appear that the Defendant went to its premises without good cause. On hearing the Defendant's, the court is satisfied that the Defendant was entitled to enforce the terms of its contract when the Plaintiff defaulted in its payments with or without prior notice as was stipulated in Clause 7 of the Hire-Purchase Agreements.
 48. It is the duty of courts to respect contracts entered into by parties and not to re-write their contracts. Granting an interlocutory injunction pending the hearing and determination of this suit would actually be prejudicing the Defendant's interests bearing in mind that there are accruing charges. The danger of granting an interlocutory injunction is that the outstanding amount could very well outstrip the value of the securities that the Defendant holds to its detriment. While the subject matter of these proceedings are motor vehicles and not a suit property as was in the case of **Andrew Muriuki Wanjohi vs Equity Building Society Limited & 2 others [2006] eKLR**, the

court finds the holding in the said case to have been relevant in the circumstances of the case herein.

49. In that case, Ochieng J stated as follows:-

“... In my considered view, if the 1st and 2nd Defendants were restrained from selling off the property until the suit was 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...”

50. The court finds that the Defendant would be entitled to repossess the securities to recover the exact monies due to it within the parameters stated in the Hire-Purchase Agreements. The Plaintiff would have a cause of action if the Defendant recovered more than it was entitled to. Clauses 7 of the Hire- Purchase Agreements provided that any amounts recovered in excess of what was owed would be refunded to the Plaintiff.

51. It is, however, of paramount importance that the Plaintiff be furnished with a Statement of Accounts with a view to getting sufficient information of the exact sum that is due from it to the Defendant. This is critical as there was a disparity of the sums demanded by the Defendant in its letters of 4th and 29th November 2013. The court has merely found the necessity of the Defendant furnishing the Plaintiff with Statements of Accounts out of abundance of caution and not on the basis that the Plaintiff satisfied the court that the Defendant did not furnish it with Statements of Accounts.

52. Be that as it may, as it has been held time and again in several court decisions, a dispute regarding the amount due would not be reason enough for a court to grant an injunction in favour of an applicant. Indeed, the Plaintiff did not demonstrate that it overpaid any monies and/or that if it overpaid the same, it would not be able to recover the same from the Defendant. It would be unfair and unjust for the Plaintiff to retain the securities which continue to depreciate and still expect not to pay the monies due and owing to the Defendant while litigating this matter.

53. Hence, after a careful analysis of this matter, the court has come to the conclusion that the Plaintiff did not demonstrate that it had established a *prima facie* case with a probability of success to meet the criteria that was set out in the case of Giella vs Cassman Brown (Supra) in which it was held that:-

“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 adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

54. As regards the Charge contained on page 99 of the Defendant’s Replying Affidavit, the court noted that the same showed that the Chargor, one Wilson Chemno Boinett and the Defendant, in consideration of sums set out in Recital B therein, created a Third Party Legal Charge over L.R. No KJD/OLEKASASI/832 which Charge was registered at the Lands Office. The Title Deed was registered in the name of the Wilson A.C. Boinett.

55. The Plaintiff did not demonstrate to the court that the Defendant had purported to dispose of the said property outside of what the law provides and had in fact indicated to the court that it was not pursuing prayer No (6) as the Defendant had submitted that it was not exercising its statutory power of sale in respect of the said parcel of land.

56. Suffice it for this court to state that it would be interfering with the contract between the Plaintiff and the Defendant if it issued an injunction to restrain the Defendant from exercising its statutory power of sale. That power under the Charge, however, cannot be exercised without issuing the Defendant issuing the requisite statutory notices as required by the law.

57. The court has found it necessary to address the submissions as regards prayer No (6) for the completeness of the record and to erase any doubt as to how it would have proceeded in the event the Defendant was exercising its statutory power in this case.

58. As the power to grant an interlocutory injunction is a discretionary one, it must be based on the

law and evidence. Having considered the parties' affidavits, the written and oral submissions and the case law in support of their respective case and having applied the principles of granting interlocutory injunction pending the hearing and determination of the suit herein, this court is not satisfied that this is an appropriate case for it to exercise its discretion in favour of the Plaintiff herein.

59. Accordingly, having found that the Plaintiff had not made out a *prima facie* case with a probability of success, the court finds that the question of the Plaintiff suffering loss that cannot be compensated by way of damages if the interlocutory judgment is not granted in which case, the balance would not tilt in favour of the Plaintiff for the court to grant it an interlocutory injunction on a balance of convenience.

DISPOSITION

60. For the reasons foregoing, only prayer No (6) of the Plaintiff's Notice of Motion application dated 9th December 2013 and filed on 10th December 2013 has been granted. The court did not find merit in the remaining prayer No (7) of the said application and the same is hereby dismissed with costs to the Defendant. In the circumstances foregoing, the status quo order issued by this court on 16th January 2014 is hereby discharged and/or vacated.

61. It is so ordered.

DATED and DELIVERED at NAIROBI this 30th day of May 2014

J. KAMAU

JUDGE