



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NUMBER 118 OF 2013

KORE NASIR JILLO. APPELLANT

VERSUS

DIAMOND TRUST BANK LTD. 1ST RESPONDENT

JOHN KENNEDY ONGADI & MARY AKINYI

T/A JOHN MARIE AGENCIES. 2ND & 3RD RESPONDENT

G.G. KAMERI

T/A WESTMINISTER COMMERCIAL TRADERS. 4TH RESPONDENT

(From The judgment of R A Oganyo Principal Magistrate in Milimani CMCC No. 4137 of 2012)

J U D G M E N T

Filed together with the suit No. Milimani CMCC No. 4137 of 2012, was a Notice of Motion dated the 23rd July, 2012. The motion sought mainly that a permanent injunction do issue – restraining the Defendants/Respondents and their agents and servants from selling, alienating, detaining and/or continuing to detain motor vehicle registration KBQ 109S, pending the hearing and final determination of the lower court suit. An interim injunction to the above end was granted by this court on 15th March, 2013 and later extended until this judgment is delivered.

The facts leading to the filing of this suit and this appeal are as follows, to the extent the court understands them.

-By letters dated 15th February, 2011 and 26th September, 2011 the 1st Defendant/Respondent herein, Diamond Trust Bank Ltd (herein called “The Bank”), extended to 2nd and 3rd Defendants/Respondents, (herein called “**Johmarie Agencies**”) an Overdraft facility of Kshs.4,000,000/-, to finance its working capital. The bank also, on 25th May, 2011, separately, extended to Johmarie Agencies, a Hire Purchase Loan of Ksh.4,089,522/- to finance an acquisition of a motor vehicle truck registration, KBQ 109S (hereinafter called “The Lorry.”)

To complete the deal and business transaction on the lorry, the parties executed a Hire Purchase Agreement No. 010HPLC 113290001, dated 22nd November, 2011. Also to secure the overdraft facility a

Charge over a parcel of land Known as L.R. Kamagambo/Kabuoro/2955, was registered. Both facilities, on abundance of caution by the Bank were also secured by personal guarantees by the partners of Johmarie Agencies on 30th May, 2011 with provisions that allowed the bank as against the said Johmarie Agencies, a Right of Set-off not only to set-off any credit balances in the bank accounts operated by Johmarie Agencies against any indebtedness of the partnership, but also to use any securities granted by Johmarie Agencies to off-set outstanding liability by the partnership.

Further stipulations to be complied by the Johmarie Agencies included the followings: -

- i. Johmarie Agencies would not overdraw on its account beyond the approved limits.
- ii. All Sums overdrawn in accordance with the Overdraft facility would be repaid on demand.
- iii. The Hire Purchase facility would be repaid by way of 48 equal monthly instalments commencing one month after disbursement.
- iv. Ownership of the lorry would vest in the Bank until the sums due and owing under the Hire Purchase Agreement were repaid in full.

By 30th June, 2012, however Johmarie Agencies had allegedly defaulted on the Overdraft agreement by overdrawing to Ksh.4,512,515/84 over the agreed maximum of Ksh.4,000,000/- Johmarie Agencies also allegedly failed to adequately respond to demand notices to settle the overdraft sums due. Johmarie Agencies had furthermore as on 4th April, 2002 defaulted in repayment of the monthly instalments due under the Hire Purchase facility to the extent of Ksh.4,280,025/25.

It should however, at this juncture, be noted that Johmarie Agencies, while they concede defaulting on the terms of the lorry Hire Purchase Agreement, completely deny defaulting on the terms of the overdraft facility and give a different picture. They rely on the overdraft account statement annexed as exhibit to state that they did not at any relevant period before the Bank made a recall of the facility, draw beyond the authorized maximum.

What is shown to have happened is that the Bank, owing to the alleged defaults by Johmarie Agencies as the bank regarded them, opted to recall its facilities and call up its securities. The bank served Johmarie Agencies with a Statutory Notice for recovery of the charged real property. It also terminated the hiring of the Lorry and repossessed it from Johmarie Agencies, after which it proceeded to advertise it for sale in a public auction fixed for 14th July, 2012.

According to the Bank the 2nd Respondent and the Appellant herein visited the Bank on 12th July, 2012 to discuss on how to forestall the auction sale on 14th July, 2012 by allowing the appellant herein to purchase the Lorry before the 14th July, 2012, but that the Bank rejected the offer and told the Appellant to attend the auction sale and purchase the Lorry from there by offering the highest bid. That, thereafter the 2nd Respondent sought and obtained the bank statement relating Johmarie Agencies and left the bank premises in company of the Appellant in this case who was the Plaintiff in the suit before the lower court.

It was the Bank's further case that on the same day of 12th July, 2012 soon after the 2nd Respondent and Appellant left the bank a deposit of Ksh.4,400,000/- was made into the personal bank account of the 2nd Respondent being account No. 0487561002, an account which was different from the business account No. 0481346011 belonging to Johmarie Agencies.

It is at this juncture that the bank decided to act. Noting that the 2nd Respondent was a guarantor to the facilities of Johmarie Agencies and that the latter was in a defaulting status, the bank decided to exercise its Right of Set-off by using the said amount to settle part of the outstanding liability under the Overdraft facility. The bank asserts that it followed normal banking practice. The Bank then also decided to continue with the auction sale of the Lorry as scheduled on 14th July, 2012. According to the Bank, no

proper bids for the lorry were made, hence the reason to re-advertise and reschedule the auctions. Then on 20th July, 2012 the Bank allegedly received a demand notice from the Appellant herein who stated that he had bought the lorry at the price of Ksh.4,400,000/- which was deposited in the 2nd Respondent's personal account and that the Bank should release the lorry to him.

The Bank's further case is that it was the registered and legal owner of the Lorry and that it had not sold the vehicle to the Appellant and could not accede to such sale transaction in which it was not involved nor did not approve. It was, therefore a stranger to the transaction in which the Appellant bought the lorry on the 12th July, 2012 in an agreement entered into between the Appellant and the Johmarie Agencies.

For the above reasons the Bank did not comply with the Appellant's demand letter which failure led the Appellants to file this suit at the lower court seeking release of the Lorry to him as the purported new owner and at the same time through a contemporaneous Notice of Motion, sought permanent injunctive orders which after being refused by the lower court, led to this appeal being filed.

The Appellants and 2nd and 3rd Respondents facts however, do not exactly tally with the facts presented by the Bank as stated above. Their case is that when the 1st Respondent advertised the Lorry for auction sale scheduled on 14th July, 2012 they went to the Bank and met a Mr. Sammy Muringu on 12th July, 2012. Mr. Sammy Muringu who was the head of recovery team of the Bank, gave them the outstanding balance due in respect to the purchase of the Lorry. It was Ksh.4,356,761. That the Appellant who had been introduced as a potential purchaser offer to purchase the motor vehicle by clearing the said outstanding sum which incidentally included repossession, advertising, legal and auctioneers charges. That the Appellant agreed to pay the said sum through the 2nd and 3rd Respondents' and subject to any agreement that may be executed between the Appellant and the 2nd and 3rd Respondents. That in pursuance of such an agreement, the Appellant released a total sum of Ksh.4,400,000/- to the personal account of the 2nd Respondent in the 1st Respondent's bank.

It was further averred by the Appellant and the 2nd and 3rd Respondents', that the Bank would then proceed to download therefrom a sum of Ksh.4,356,761 to clear the purchase of the lorry inclusive of the advertising, legal and other charges. The Bank was then to release to the 2nd and 3rd Respondent the Lorry's Log Book and transfer documents to enable them to transfer the Lorry to the Appellant without any prejudice to the Bank or the Appellant. That way the sale and transfer of the Lorry to the Appellant would have the Bank's blessings while the Bank's interest would have been fully protected.

It is the Appellant's and 2nd and 3rd Respondents further case that immediately the funds were deposited in the 2nd Respondent's account with the Bank, things radically and inexplicably changed. That the latter accessed the account, transferred the agreed sum of Ksh.4,392,500/- to the 2nd and 3rd Respondents' Business/Overdraft Account which was at the time regular and in black. The Bank also cancelled the auction due for 14th July, 2012 but refused to release the lorry together with its Log Book and a Transfer in favour of either the Appellant or the 2nd and 3rd Respondents as had agreed between them.

The 2nd and 3rd Respondents' also averred that the Bank in addition proceeded to cancel the Overdraft and the Overdraft account which at the time was regular and had not become due and went ahead to transfer the relevant sum of Ksh.4,392,500/- which had just been deposited there notwithstanding that it was a separate and independent account with different terms from the Hire Purchase Account. That as a result the 2nd and 3rd Respondent protested the Banks unlawful action by a letter dated 14th July, 2012. That it was the Banks such conduct that led the Appellant to file this suit at the lower court seeking under the suit an injunction to restrain the Bank from selling or disposing of the motor vehicle as the Bank had recovered all the dues which were due and payable under the Hire Purchase Agreement.

To demonstrate that the Overdraft Account was not outstanding or overdrawn, the 2nd and 3rd Respondents, in support of the Appellant, exhibited the Overdraft Statements (page 151-161 of the Record of Appeal) showing the same to be within the Bank-Client Agreement limits. The Appellant and the 2nd

and 3rd Respondents accordingly, averred that had the trial magistrate properly taken into account the above facts, she would not have dismissed the application seeking an injunction until the suit is determined. They averred further that the Bank has not controverted the fact that the Overdraft Account was not overdue or overdrawn to require the funds unilaterally transferred to it by the Bank. That the Bank's conduct therefore, was unlawful and unwarranted and in breach of Bank – customer agreement and bank customer traditions.

The Appellant, 2nd and 3rd Respondents also argued that while the Bank had the right or discretion to exercise a Set-Off against the 2nd Respondent, such exercise could only be exercised once there was default or overdrawing by the customer and only if a default notice had been properly and validly served upon the customer in commencement of recovery proceedings. That in this case the proceedings commenced by seizure of the motor vehicle could not continue after the funds to regularize them and fully repay, the purchase were deposited in the 2nd Respondent's personal account.

The Appellant and 2nd and 3rd Respondents' also averred that the trial magistrate not only failed to consider or take into account their submissions, but also failed to state why he failed to do so, more so because the failure led her to arrive at a wrong decision.

Finally, the Appellant and the 2nd and 3rd Respondents' drew the attention of this court to the fact that the Bank Official who handled the issue of the intended sale of the motor vehicle to the Appellant and who advised them on how to deposit the money intended to salvage the Hire Purchase Agreement, was one Sammy Muringu who for some reason not explained by the Bank, did not swear any relevant replying affidavit in answer to their facts in the supporting affidavit. That instead other officers who were not privy to the visit the Appellant and 2nd and 3rd respondents made to the Bank on 12th July, 2012, swore affidavits and that their depositions should not have been believed or be relied on in the circumstances.

The Appellant and the 2nd and 3rd Respondents' denied that the sum of Ksh.4,400,000/- paid by the Appellant to the 2nd Respondent, was a mistake or accident as the trial Magistrate concluded. They said that an accident or mistake was unlikely to have occurred where the said parties had visited the Bank and had full consultations with Mr. Sammy Muringu before depositing of the funds. That it was the Bank through Mr. Muringu who not only supplied Bank Statements to the relevant accounts to them but also advised them on how to conduct the salvaging of the motor vehicle.

The Appellant and the 2nd and 3rd Respondents finally submitted that in relying upon the representation by Sammy Muringu to them on behalf of the Bank the whole sum and costs required to clear the cost of the purchase of the lorry were deposited in the Bank Account of the 2nd Respondent immediately, the Bank would call off the auction sale and would release the log book and transfer documents of the lorry to the 2nd Respondent, an estoppel was created. That the Bank would not later renege on it after calling off the auction. That the Bank accordingly acted against the law by failing to act as promised.

Upon the above averments and arguments, the Appellant and the 2nd and 3rd Respondents sought that this appeal be allowed while the 1st Respondent sought the dismissal of the same.

I have perused the documents in this file record inclusive of the material that were placed before the trial magistrate and those concerning this appeal, taking into account also, the written submissions from both parties. I have come to the conclusion that two sides version of facts is similar except as to what happened on 12th July, 2012, between the Appellant and 2nd Respondent on the one side and a Mr. Sammy Muringu of the 1st Respondent, on the other hand.

That they met at the Bank premises, is not in dispute. That the said Muringu supplied the 2nd Respondent with the latter's bank statement of the Overdraft Account which was Current Account No. 0481346001 (pg 151-161 of Record of Appeal), is also common ground. What was agreed between the Appellant and 2nd Respondent on the one side and Sammy Muringu, on the other hand is highly disputed and the court

will revert to it in a moment. It is agreed also that the 2nd Respondent's personal account was on 12th July, 2012, the day of the visit, credited with funds amounting to Ksh.4,400,000/- deposited by or on behalf of the Plaintiffs. It is also common ground that the auction sale scheduled for 14th July, 2011 was cancelled immediately the Bank realized that the funds aforementioned had been deposited in the 2nd Respondent's personal account with the 1st Respondent's Bank.

I have carefully examined and considered the material by both parties before me. Clearly it was a Mr. Sammy Miringu who met the appellant and 2nd Respondent Mr. John Kennedy Ongadi on the 12th July, 2012, two days before the scheduled auction of the subject motor vehicle. The Appellant and 2nd Respondent deponed that Mr. Miringu who was the head of Recoveries Section of the Bank advised them to deposit the amount of Ksh.4.4 million which the Appellant was offering to purchase the motor vehicle. They allegedly promptly deposited the funds in the 2nd Respondent's personal account in the Bank with an oral agreement that the Bank would call off the Auction sale and sell the motor vehicle to the Appellant through a private treaty. Mr. Miringu however, denies this allegation and depones that he rejected their oral offer and told Appellant to attend the Auction on 14th July, 2012 to bid for the motor vehicle.

On what basis then could the Appellant part with such a large sum of money to be deposited in the 2nd Respondent's personal account without assurance of some kind from the Bank? It is not upon this court to decide that issue at this stage, but on the face of things (prima facie) this court do believe that there is a serious issue thereon to be decided by the trial court and that whichever side the same is decided, the other sides should be given an opportunity to properly put his/its case because the consequences of such finding, might lead to a given legal position. For example, if the Bank gave such assurance and the Appellant and 2nd Respondent relied on the assurance of Mr. Miringu to deposit the funds, and then the bank acted contrary to such understanding, there are legal consequences which will arise.

On the same issue, the court notes that the bank actually cancelled the Auction Sale fixed for 14th July, 2012 wherein the Bank through Mr. Miringu had allegedly advised the Appellant to attend and bid for the motor vehicle. Calling off the auction appears to give support to Appellant's and 2nd Respondents' deponement about an existing oral agreement. It would discredit those of the Bank's allegations. Even the sum required by the Bank to cover the Hire Purchase indebtedness, inclusive of other incidental charges that had accrued upon the date of the meeting, were supplied by Mr. Miringu for the Bank and it is clear the Appellant and the Respondent deposited an exact sum that would leave no deficit on the Hire Purchase account.

Mr. Miringu for the Bank in his earlier replying affidavit, terms the deposit of Kshs.4.4 million aforesaid as incidental and of great interest to the Bank, thereby trying to give an impression that the bank had no interest in it or that the Bank had no knowledge or influence on the Appellant and 2nd Respondent in respect to the depositing made by them. However, that is not borne out by the deponements and in the court's view, is intended to mislead. The court's position is that, prima facie, the Bank influenced the making of the payment but took an adverse conduct of applying the money differently from the probable oral understanding that had been possibly reached between the parties. The final truth is left to the trial court.

The Bank disowns the Sale Agreement of the motor vehicle between the Appellant and the 2nd and 3rd Respondents' because it was not privy to it. However, the court that will try the case should be given a proper opportunity to investigate whether or not the Bank influenced the making of the payment of Ksh.4.4 million. In any case, if the former gave evidence that the deposit they made to the bank of Ksh.4.4 million was influenced by any representations made by Mr. Miringu, then the Sale Agreement of the motor vehicle between Appellant and the 2nd Respondent will be relevant. In any case, the sale agreement may not have influenced the actions of the Bank complained of.

The 2nd Respondent and the Appellant deponed that the Bank through Mr. Miringu had undertaken to

release the motor vehicle to the 2nd and 3rd Respondent once the Hire Purchase outstanding were cleared, hence the reason the Bank gave them the total outstanding sum to cover all expenses when the parties discussed the matter on 12th July, 2012. The Bank denied this position. However, the Bank failed to justify the reason for not releasing the vehicle since all the outstanding purchase sums were recovered from the money deposited and the Auction Sale was cancelled which is also what was allegedly agreed between Mr. Miringu and the 2nd Respondent and Appellant. Indeed it has possible to think that once the outstandings for the final purchase of the motor vehicle were recovered by

the Bank, which it has not denied, the Bank's interest in the motor vehicle would cease to exist and it could have no reason not to release it to the 2nd and 3rd Respondents to dispose of it as they wished, including selling it to the Appellant, who after all, to the knowledge of the bank, had provided the funds.

Taking all the matters and facts above into account, the court comes to the conclusion that the Appellant and the 2nd and 3rd Respondent had established a prima facie case with chances of success and if the injunction they sought is not granted, they will suffer irreparable loss and damage. Furthermore, these facts established the 3rd condition in **Giella case** which is that the balance of convenience dictated in the circumstances of this case, that the injunction sought ought to have been granted in favour of the Appellant.

For the above reasons, this appeal is allowed and the injunction sought in the lower court by the Appellant is granted until the suit there is heard and finally determined. Costs are in the lower court cause. Orders accordingly.

Dated and delivered at Nairobi this 22nd day of May, 2014.

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JUDGE