



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL CASE NO.20 OF 2013

REUBEN MONGARE KABA

t/a MONRO GENERAL STORES PLAINTIFF/APPLICANT

VERSUS

K-REP BANK DEFENDANT/RESPONDENT

RULING

1. Before this court is the plaintiff's Notice of Motion dated 16th September 2013 brought under certificate of urgency pursuant to **Orders 40 Rules 1, 2, 4 and 10** of the **Civil Procedure Rules, Sections 1A, 1B, 3A and 63 (e)** of the **Civil Procedure Act Cap 21 Laws of Kenya**, and **Section 44** of the **Banking Act Cap 288 Laws of Kenya**.
2. In the application, the applicant seeks ORDERS THAT:-
 1. *The application herein be certified urgent and the same be heard ex parte in the first instance.*
 2. *Pending the hearing and determination of the instant application, the honourable court be pleased to grant an interim order of injunction restraining the defendant/respondent either by herself, agents, servants and/or anyone claiming under the said defendant/respondent, from commencing and/or undertaking any recovery proceedings, including but not limited to (sic) repossession, confiscation, attachment and/or in any other manner, interfering with the plaintiff's rights and/or interests over and in respect of the suit motor vehicle, that is, **Motor Vehicle Registration Number KBQ 195 Z, Isuzu Tipper**.*
 3. *The Honourable Court be pleased to grant an Order of Temporary Injunction restraining the defendant/respondent either by herself, agents, servants and/or anyone claiming under the said defendant/respondent, from commencing and/or undertaking any recovery proceedings, including but not limited to (sic) repossession, confiscation, attachment and/or in any other manner, interfering with the plaintiff's rights and/or interests over and in respect of the suit Motor Vehicle, that is, **Motor Vehicle Registration Number KBQ 195 Z, Isuzu Tipper**, pending the hearing and determination of the instant suit.*
 4. ***In the alternative and without prejudice to the foregoing**, the Honourable Court be pleased to grant an Order for Maintenance Status Quo over and in respect of **Motor Vehicle Registration Number KBQ 195 Z, Isuzu Tipper**, pending the hearing and determination of the instant suit.*
 5. *Costs of this application be borne by the defendant/respondent.*
 6. *Such further and/or other orders be made as the court may deem fit and expedient.*
1. The application is based on the grounds set out on the face of it and it is also premised on the supporting affidavit of Reuben Mongare Kaba the applicant sworn on the 16th September 2013, and on the applicant's Further Supporting Affidavit sworn on 16th January 2014.

2. Briefly, the facts of the case are that in or about October 2011, the plaintiff/applicant approached the defendant/respondent with a request for a loan facility in the sum of Kshs.10,000,000/= only to enable the plaintiff/

applicant (herein referred to as the applicant) to purchase a motor vehicle, clear outstanding loan balances and for working capital. The above stated amount was advanced to the applicant, which loan sum was to be repaid in sixty (60) monthly instalments of Kshs.284496/14 only, inclusive of interests at the agreed rate of 23.45% per annum.

3. According to the applicant, he commenced the repayments of the loan sum, in line with and in accordance with the terms of the letter of offer and the Chattel Mortgage prepared and registered in respect of motor vehicle registration Number KBQ 195Z an Isuzu Tipper (herein referred to as the suit motor vehicle). That the applicant has since repaid the loan sum in excess of Kshs.7,000,000/= only in favour fo the defendant/respondent (the Respondent) vide credit transfers from the applicant's Current Account Number 01015010001578, held by and/or at the Respondent's bank.
4. The applicant contends in his affidavits that notwithstanding the repayments which are now in excess of Kshs.7,000,000/= in favour fo the Respondent, the respondent has since demanded immediate payment of the sum of Kshs.8,646,675/= only vide Demand Notice dated 3rd September 2013. Under the said demand Notice, the applicant was required to pay up the whole sum of Kshs.8,646,675/= within 7 days from 3rd September 2013.
5. The applicant further contends in his affidavits that the respondent has no right to demand the said amount because the same is not done; that inspite of the applicant having effected a Standing Order in respect of his (applicant's) personal Current Account, the respondent failed in its duty to timeously transfer moneys from the said account into the applicant's mortgage account, thereby creating an artificial deficit, solely for the purpose of charging illegal default interests. The applicant also avers in his affidavits that inspite of requests for the same, the respondent failed to supply the applicant with copies of the Loan Repayment Statements and that when applicant eventually came across the Loan Repayment Statements on 11th September 2013, he forwarded the same to the Interests Rates Advisory Centre (IRAC) for analysis and advice and has since been advised that the loan balance as at 31st August 2013 was Kshs.7464059.87, only as opposed to the respondent's claim of Kshs.8646675.00 only. The applicant has annexed a copy of the re-calculation report and the re-calculation Schedule from IRAC as annexures **RMK 1 (a)** and **(b)** to the Further Supporting Affidavit dated 16th January 2014.
6. The applicant also contends in his affidavits that despite heaving deducted and/or debited an amount in excess of Kshs.1,182,615.13 only from the applicant's Personal Current Account, which amount represents a repayment for a period of over three (3) months, the same was not timeously credited to the mortgage account, thereby creating an artificial deficit. It is on the basis of the above facts that the applicant says that there were no loan repayment arrears as at 3rd September 2013 to warrant a recalling of the entire outstanding loan, which amount was in any event erroneous and excessive in the circumstances, and that the whole recovery process was premature, illegal and oppressive. The applicant prays that his application be allowed with costs since he believes he has established a *prima facie* case with probability of success. The applicant states that he is ready and willing to give an undertaking as to damages should the suit against the respondent not succeed.
7. Contemporaneously with the application, the applicant filed a plaint in which he alleges breach of contract and mismanagement of his account on the part of the respondent. He prays for judgment against the defendant in the following terms:-
 - a. *Declaration that the defendant has mis-managed and/or abused the plaintiff's Loan Account.*
 - b. *An order directing the defendant to supply and avil unto the plaintiff the Amortization Schedule and the attendant Loan Account Statements.*
 - c. *An order compelling the defendant to render and/or provide Accounts, over and in respect of the plaintiff's undisclosed Loan Account for purposes of ascertainment of the accurate and correct Loan Balance.*

- d. *Permanent Injunction restraining the defendant from commencing and/or undertaking an recovery proceedings, including but not limited to (sic) repossessing, confiscating and/or in any other manner, interfering with the plaintiff's rights and/or interests over and in respect of the suit Motor Vehicle, that is, **Motor Vehicle Registration Number KBQ 195 Z, Isuzu Tipper.***
 - e. *Costs of the suit and interests thereon be borne by the defendant.*
 - f. *Any such further and/or other relief as the honourable court may deem fit and expedient so to grant.*
1. The application is opposed. Erick Matoke, the Branch Manager of the Respondent bank has sworn an affidavit opposing the Notice of Motion which affidavit was sworn on the 10th October 2013. There are also filed a statement of grounds of opposition by counsel for the Respondent dated 10th October 2013. Briefly, in his affidavit, Erick Matoke, avers that the bank truly performed its part of the bargain by fulfilling its obligations under the contract entered into between them and the applicant.
 2. He denies the Applicant's averment at paragraphs 8-16 of the supporting affidavit and depones that the annexed statement of account is a reflection of the statement of the applicant's personal account ending on 24th October 2012. Further, that the applicant has withheld material particulars from the court to the effect that as at 3rd September 2013, he was indebted to the respondent in the sum of Kshs.8,846,675/= as per annexure "EM1" being the statement of the applicant's loan account showing the applicant's indebtedness to the respondent and the chattels mortgage as collateral.
 3. He also denies that the respondent is guilty of any errors and/or mistakes as alleged by the applicant and he reiterates the fact that the applicant is truly indebted to the respondent in the sum of Kshs.8,646,675.00 as per the attached statement of the loan account "EM1" and further that the applicant is not taking any steps to redeem the outstanding account.
 4. Mr. Matoke contends that the applicant has not made out a strong case to warrant the issuance of orders to restrain the Respondent Bank from realizing the chattel held by it so as to liquidate the outstanding account since the applicant has willfully neglected to make payments and that with the accruing interest the outstanding debt may reach a level which will not be managed by the applicant and in the process thereof, the respondent will suffer irreparable loss since the chattel is depreciating in value by the day.
 5. Lastly Mr. Matoke avers that the applicant has not furnished any security as to costs and so his application should be denied and the Respondent be granted liberty to realize the security held in its normal course of business.
 6. On the 12th November 2013 the applicant sought leave of the court to file a supplementary affidavit in response to the replying affidavit sworn on 10th October 2013. The Further Supporting Affidavit, dated 16th January 2014 was duly filed in court. According to the court's date stamp, the affidavit was filed on 15th January 2014. I have already alluded to the applicant's averments contained in the said Further Supplementary Affidavit.
 7. The parties herein canvassed the application by way of written submissions supported by various authorities. This court has had the opportunity of going through the said written submissions and authorities. It is not in dispute that the applicant took a loan facility with the defendant/respondent herein to the tune of Kshs.10 million. It is also not in dispute that the said loan was to be repaid in sixty (60) monthly installments of Kshs.284,496.14 inclusive of interest at the agreed rate of 23.45% per annum to be effected by way of credit transfers from the applicant's personal current account number 01015010001578 held at the respondent's bank. It was the duty of the respondent bank to undertake the credit transfer from applicant's personal Current Account to that of the loan account.
 8. It was also incumbent upon the respondent bank to give an account to the applicant of the various transactions between the current account held by the applicant and his loan account.
 9. Before proceeding further, this court has just become aware from the submissions by applicant that he was constrained to provide further security by availing the title deed over LR No. West Kitutu/Bomatara/3661 belonging to and registered in the name of Abigael Kaba the guarantor. The applicant has not made any mention of this in his supporting affidavit nor the supplementary affidavit.

10. The above notwithstanding, the applicant herein avers that he had paid a sum of Kshs.7,000,000/= to the respondent but this the respondent disputes claiming that they are owed Kshs.8,321,934.74. This is an issue that has to be ventilated upon by the parties herein at a full trial. The court has also to look at both the accounts in question herein being the applicant's Personal Current Account and the Loan Account. All this can only ventilated upon at a full trial.

11. The applicant upon receipt of a statutory notice from the respondent in terms of the demand letter dated 3rd September 2013, has moved this court seeking a temporary injunction and/or orders of status quo to be maintained pending the hearing and determination of the suit filed herein. Where an injunction is granted, it will preserve or maintain the status quo of the subject matter pending the determination of the main issue before the court

12. The applicant therefore has to satisfy all the conditions for grant of an injunction against the respondent as set out in the case of **Giella -vs- Cassman Brown & Company Ltd.** Which are:-

1. *The applicant must show a prima facie case with a probability of success;*
2. *The applicant must demonstrate that he will suffer irreparable injury that cannot be compensated by an award of damages if the order sought is not granted; and*
3. *where the court is in doubt it will decide the case on the balance of convenience.*

1. Having gone through the pleadings the submissions and the law, this court finds and holds that the applicant has established a *prima facie* case with a probability of success. There are many questions regarding the management of the applicant's accounts that need to be answered, thus the applicant has satisfied the first principle in the above case. Secondly, I find that while it is true that the applicant may be compensated by an award of damages, the fact that the respondent failed to issue the loan statement of account and/or explain to the applicant herein the state of the transactions between his personal current account and the loan account means that the respondent has not acted candidly concerning the said accounts. Without the requisite information sought by the applicant from the respondent, I am of the considered view that requiring the applicant to make good the colossal sum of Kshs.8,646,675.00 within seven (7) days will actually occasion injury to the applicant herein if the suit vehicle is repossessed, thereby disabling the applicant further.

2. In the premises therefore the plaintiff's application is granted on the following terms:-

A temporary injunction be and is hereby issued restraining the defendant/respondent bank and/or its agents from repossessing, confiscating, attaching or in any manner interfering with the plaintiff's rights and/or interest over the said motor vehicle registration number KBQ 195 Z Isuzu Tipper pending the hearing and determination of the present suit. In the meantime, the applicant to continue servicing the said loan on the terms obtaining as at the time of the Demand Notice. Costs shall abide the out come of the main suit.

Delivered, dated and signed at Kisii this 23rd day of October 2014.

R.N. SITATI

JUDGE.

In the presence of:-

Mr. Onyango Samuel for Oguttu-Mboya for Plaintiff/Applicant

M/s Maosa & Co. (absent) for Defendant/Respondent

Mr. Bibu - Court Assistant