REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 315 OF 2011

STANLEY KAMAU GATUNE …….....……. PLAINTIFF

VERSUS

EQUITY BANK LTD.…….....…….. DEFENDANT

R U L I N G

1. The Plaintiff's Application before this court is by way of Notice of Motion dated 21 July 2011. It is supported by an Affidavit sworn by the Plaintiff himself on 21 July 2011. There is a Replying Affidavit sworn by one **PURITY KINYANJUI** dated 14 November 2011 in which the deponent describes herself as the Head of Defendant's Recovery for the Defendant's Bank. With leave of this Court granted on 8 November 2011, the Plaintiff has sworn a Supplementary Affidavit dated 23 November 2011. The Plaintiff filed its written submissions herein on 7 December 2011 and the Defendant filed its written submissions on 13 December 2011.

2. The Application brought under Certificate of Urgency seeks orders to restrain the Defendant from selling, auctioning or otherwise disposing of 5 motor vehicles belonging to the Plaintiff pending firstly the inter partes hearing and determination of this application and secondly pending the inter partes hearing and determination of this suit. The Application is based on the following grounds:

"1) The Defendant has fraudulently caused to be detained the Plaintiff's motor vehicles referred to at prayer 2 above at the Leakey's storage on account of some non-existent debt owed to it by the Company known as Skema Supplies Company Limited, in which the Plaintiff is the majority shareholder and a Director.

2) The defendant has to date not executed any chattels mortgage over the said motor vehicles that were to constitute security to the loan granted to the Company known as Skema Supplies Company Limited and no chattels mortgage has to date been forwarded to the Plaintiff by the Defendant for his execution since the loan was disbursed to the Borrower on the 29th June 2009.

3) The continued detention of the motor vehicles is in itself illegal and is now causing the Plaintiff losses as his business in now adversely being grounded to a halt and thus prejudice him.

4) The Borrower had as of the 30th June 2011 made an overpayment of the principal debt by a sum of Kshs.286,463.10, which is well beyond the monthly repayment of Kshs.250,183/=.

5) The Defendant has continued to load the Borrowers account with monthly illegal debits of interest, notwithstanding the fact that the loan agreement dated 29th June 2009, had expressly provided that the debt would be repaid in 48 monthly installments comprising of both the principle and interest in the sum of Kshs.250,183/=.

6) No demand has to date been made to the Plaintiff or the Principle borrower.

7) The Defendant has further failed to disclose the debt owed to it if any by the principle borrower.

8) The statements of account supplied by the Defendant to the Plaintiff herein reveal that there are numerous errors therein made up of illegal debits and charges that are the sole responsibility of the Defendant to settle.

9) The Plaintiff has now been notified that the subject motor vehicles which were detained by the Defendant are due to be auctioned on the 23rd July 2011 to the detriment of the Plaintiff.

10) The purported public auction scheduled for the 23rd July 2011 is in blatant disregard to the rule of law and is incapable of being sanctioned by any competent court of law, as the same borders on patent illegalities.

11) The Plaintiff stands to suffer irreparable loss and damage in the event the sale is carried out.

12) This Honourable Court ought to uphold the rule of law and uphold the present application".

3. On the 22nd July 2011, the Application, as stated under Certificate of Urgency, came before the then Presiding judge of the Commercial Division of this Court Muga Apondi J who ordered that the status quo be maintained. Later on 22 July 2011, the same day arising out of a query raised by counsel for the Plaintiff, Muga Apondi J clarified the position thus:

"The court gave an order for the status quo to be maintained. That means that the Respondent should not dispose the subject matter pending the hearing of the application on 26th July 2011".

That Order has been in place ever since and has been extended until today.

4. The Plaintiff's Affidavit in support of the said Notice of Motion, dated 21 July 2011 details that he is the Managing Director of a company called **"Skema Supplies Company Limited"** (hereinafter "the Company") and with the authority of the Company's Board of Directors he approached the Defendant Bank which agreed to advance a loan facility for Shs.8,961,760/= under cover of its letter addressed to the Defendant as opposed to the Company dated 24 March 2009. That letter, exhibited to the said Affidavit as "SKG 2" detailed repayment of the loan by 48 monthly instalments of Shs.250,183/=. It also provided that the loan facility would attract interest from the date of draw down at a flat rate of 8.5% per annum. The security for the loan as per clause 6.1.1. was to be made by an existing joint registration and chattels mortgage over the 5 motor vehicles. Similarly under clause 6.1.2. of the facility letter, there would be a legal Charge over property title No. Kajiado/Kaputei North/15190 to secure Shs.5 million.

5. The Plaintiff went on to depone, in his said Affidavit that he executed a loan agreement dated 29 July 2009 as between the Defendant and the Company, the same being under seal. At paragraph 8 the Plaintiff stated that the Defendant had credited the Company's account with the entire amount of Shs.8,961,760/= and at paragraph 9 he deponed to the fact that as at 30 June 2011 the Company, as borrower, had made total repayments of Shs.6,451,629/50. He then to my puzzlement stated that this sum was paid against the amount that was due of Shs.6,165,165/90 making an overpayment of Shs.286,463/10. The Plaintiff

exhibited as "SKG- 7" a statement from the Company's accountants Njehia & Associates but from which I was unable to identify the overpayment as above. The Plaintiff also recounted how he and his wife had seen the advertisement advertising as to the impending sale of the said vehicles on 23 July 2011 and he ruminated on just why the Defendants had authorized the sale of the vehicles under the Chattels Mortgage when payments under the Loan Agreement were up to date (and overpaid).

6. The Replying Affidavit sworn by Purity Kinyanjui confirmed the granting of a loan not to the Company but to the Plaintiff in his personal capacity and/or as trading under the business name of Skema Supplies Company. At paragraph 7 of her said Affidavit the deponent dealt with the security for the loan made to the plaintiff and attached copies of the Chattels Mortgage instruments but not the Charge over the property Kiajiado/Kaputiei – North/15190. The Court has noted that the 5 Chattels Mortgage instruments are all in the name of the Plaintiff, not the Company which matches with 3 of the copy of Records from the Registrar of Motor Vehicles exhibited as "SKG-3" to the said supporting Affidavit of the Plaintiff. However, two of those Copy Records in respect of motor vehicle registration Nos. KAY 477Y and KAY 020A are registered in the name of Nzish Motors Ltd and Kewal Contractors Ltd. By consent the Notice of Motion was amended to read KAV 477Y and KAY 020A before me on 1 December 2011. Thus, in the Supplementary Affidavit sworn by the Plaintiff on 23 November 2011, he attached and exhibited the Copy of Record of the Registrar of Motor Vehicles for the 2 vehicles KAV 477Y and KAV 020A as exhibits "SKG-11" and "SKG 12" respectively. Both those Copy of Records show the Plaintiff as co-owner of the said vehicles together with the Defendant.

7. Perhaps more significant when taking into account the Plaintiff's averments as to the amount owing to the Defendant in his said Supporting Affidavit, is that the deponent to the Replying Affidavit exhibited as "PK V" a copy of the formal demand made of the Plaintiff being letter dated 7 April 2010 which details the outstanding balance of Kshs.7,577,446/=. That letter details that interest continues to accumulate at the rate of 8.5% per annum together with additional default interest at the rate of 6% per annum. The deponent to the Replying Affidavit stated that the Plaintiff has not demonstrated any willingness to pay the debt and has been in arrears on the Loan Account No. 0740593235000 and has concealed from this Court the true nature and extent of his indebtedness. However, the one thing that puzzled this Court as regards the said letter of demand dated 7 April 2010 ("PK V") was that it was addressed to the Plaintiff *"T/A Skema Supplies Company Ltd"*. It seems to this Court that Defendant could well have been confused as to which legal entity the Defendant was lending money to – the Plaintiff or the Company.

8. The Plaintiff swore the Supplementary Affidavit on the 23 November 2011, filing the same herein on 29 November 2011. As commented upon above, there would seem to be some confusion as to just which legal entity the Defendant bank had advanced money to. The Plaintiff at paragraph 3,4 & 5 of his supplementary Affidavits stated:

"3. THAT in response to paragraph 3 of the said Affidavit, I aver that I have never made a loan application for the amount stated therein, but that I sought a consolidation of three existing loans to be taken over by Skema Supplies Company Limited (hereinafter referred to as "the third party") and paid on one agreed date.

4. THAT in explanation, I had previously taken out some loans with the Defendant herein secured by motor vehicles registration numbers KYK 889, KAQ 314G, KAZ 419A, KAV 477Y and KAV 020A and a charge over parcel of property known as Kajiado/Kaputiei – North/15190. Annexed hereto and marked as "SKG 8", "SKG 9" and "SKG 10" are copies of the Loan Statements in respect of the said loans.

5. THAT I sought the counsel of the Defendant with respect to consolidation of the balance amounts of all my previous loans to be held and repaid by the third party, and the Defendant advised me that it would take the necessary action to transfer the loan to a new account and arrange to perfect the securities".

It is to be noted from the above that the Plaintiff has not detailed any dates as regards his and/or the

company's dealings with the Defendant Bank.

9. The Plaintiff deponed to the fact that the Defendant having been made aware that the business of Skema Supplies Company having been taken over by the Company, its legal counsel prepared the Loan Agreement dated 29 July 2009 in the name of the Company. Continuing, the deponent referred the Court to the copies of the Loan Account Statements attached to the Replying Affidavit as "PK III". He maintained that despite the account being in the name of Skema Supplies Company, it was actually the Company's account which would account for the fact that it was opened on 28 June 2009 and the loan Disbursement Debt was made on 29 June 2009. Similarly the 3 Statements of Accounts attached to the supplementary Affidavit as "SKG 8", "SKG 9" and "SKG 10" are all detailed as *"account closed"* on 29 June 2009. From a layman's point of view, it does seem to this Court that those 3 accounts being numbered 0120590278848, 0120590615700 and 0120591283345 respectively, were closed with the loan proceeds from account No. 0430594090817 being credited to them. A further matter that has caused this Court's concern is that the deponent of the Replying Affidavit has exhibited as "PK III" copies of the Statements of account No. 0430594090817 while the deponent thereto in the Replying Affidavit at paragraph 13 talks about Loan Account No. 0740593235006. Are there 2 Loan Accounts in the name of the Company or one for the Company and one for the Plaintiff? No doubt the evidence put before the trial court in due course will explain this anomaly.

10. At paragraph 11 of the Supplementary Affidavit, the Plaintiff maintained that the instruments of Chattels Mortgage exhibited as "PK III" to the Replying Affidavit were entered into when he was applying to the Defendant Bank for loan in his personal name for the purchase of the motor vehicles. At paragraph 15 of the said Affidavit, the Plaintiff agreed that the loan repayments had fallen into arrears but upon receiving the demand letter, the same was cleared and as per an Audit Report (exhibited as "SKG 14", dated 16 November 2011), as at 31 July 2011, there was an overpayment of Shs.592,597/55. As per paragraph 5 above I was unable to ascertain the figure from the accounts at page 4 but it seems that such was a conclusion reached by the Accountant as their statement failed to detail the opening balance of the loan account. In any event, such matters will be gone into at the hearing in due course. I can only comment that I am somewhat surprised at the disparity in the account figures as from the Defendant Bank on the one hand and the Plaintiff and/or the Company on the other.

11. Thereafter, the Plaintiff in his Supplementary Affidavit exhibited Valuation Reports as "SKG 15", "SKG 16" and "SKG 17" in relation to some of the charged vehicles as well as a Valuation of the charged land on the Kitengela – Kajiado/Kaptiei – North/15190. Usually in such cases it is the Chargee that exhibits such valuations before proceeding to sell charged property. The remainder of the Supplementary Affidavit dwells upon the temerity of the Defendant in seizing the motor vehicles and how such has caused the Plaintiff's business to suffer. To a certain extent the Plaintiff himself has confused matters as he has previously deponed to the business having been transferred to the Company. However, the Plaintiff is right about one thing at paragraph 22 of his said Supplementary Affidavit – the Defendant has mixed up the securities it has taken after the transference of the loans to the Company. That is what the Plaintiff maintains but it appears to be the Defendant's position that it lent monies to the Plaintiff himself not the Company.

12. In the Plaintiff's written submissions, he outlined the brief facts of the case outlining the letter of offer dated 24 March 2009 and the Loan Agreement dated 29 June 2009. He detailed that the Defendant was to undertake the perfection of its securities but before it did this, it seized 3 of the Plaintiff's motor vehicles registration Nos. KAU 477Y, KAU 020A and KAZ 419A with a view to selling the same. Thereafter the Plaintiff set out the grounds of the said Notice of Motion as per paragraph 2 above and the prayers thereof requested of this Court. As regards the applicable law, the Plaintiff set out the provisions of **Order 40 rules 1** and **2** relating to the granting of injunctions, and detailed to Court the definition thereof as well as the principles emaciated in **Giella v Cassman Brown** (9173) EA 348. He also cited the observations of Lord Denning in **Hubbard v Vosper** (1972) 1 All ER 1023. Thereafter the Plaintiff's submissions echoed the averments in the Affidavits in support of the Application that the Plaintiff had lost business as a result of the seizure of the 3 motor vehicles contrasting radically with his own statement that the business had been transferred to the Company.

13. The Plaintiff then referred me to the persuasive authority of **J. M. Gichanga vs. Co-operative Bank of Kenya Ltd.** (2005) eKLR as per Maraga J. applying the finding in the Court of Appeal in **Aikman vs. Muchoki** (1984) KLR 353 as follows:

"My understanding of the Court of Appeal decision in the *Giella* case is that the court proceeds to consider the second condition of irreparable harm which cannot be adequately compensated for an award for damages only if it entertains some doubt on the first condition of the probability of success, like when the court thinks that the plaintiff has a fifty/fifty chance of success. However, where, going by the material placed before it at an inter-parte hearing of an application for injunction, it appears to the court that the plaintiff has a strong case, like where it is clear that the defendant's act complained of is or may very well be unlawful, the issue of whether or not damages can be an adequate remedy for the plaintiff does not fall into consideration. A party should not be allowed to maintain an advantageous position he has gained by flouting the law simply because he is able to pay for it".

The Plaintiff submitted that the Defendant just because it was a financial institution and able to pay, should not be permitted to flout the law giving the example of the non-issuance of a proclamation notice. To my mind, the Plaintiff is getting confused here between the execution procedure under a Court Decree and a sale under an Instrument of Chattels Mortgage.

14. The next point that the Plaintiff raised in his submissions related to the Defendant charging as against the loan account excessive and inexplicable amounts, such charges being illegal and irregular. It pointed to the exhibited reports made by Njehia & Associates on the one hand and Thomas & Associates on the other. The Plaintiff also pointed out (although I do not quite appreciate what he was getting at):

"that the values of the properties seized are incredibly higher than the value of the loan".

Yet as I understand it, the Plaintiff maintains that he actually overpaid on the loan albeit by Shs.286,463.10 as per paragraph 9 of the Affidavit in Support and by Shs.592,597/55 as per paragraph 15 of the Supplementary Affidavit. The Plaintiff thereafter attached the contents of the Replying Affidavit putting fairly and squarely on the shoulders of the Defendant that its securities were inadequate. The Defendant had obviously accepted the position as to the Plaintiff's loans being consolidated and held in a Loan Account operated by the Company otherwise it would not have obtained the execution of the Company to the Loan Agreement dated 29 July 2009. The Plaintiff also noted that the Replying Affidavit makes no reference to any demand made to the Plaintiff (or the Company) nor the issuance of any notice of intention to sell the said vehicles.

15. The Plaintiff's submissions conclude by commenting that by the grant of an injunction herein, the Defendant will not be seriously affected. More importantly, however, the Plaintiff submitted that the Defendant's act of repossessing the said vehicles is null and void for the reason that it had not obtained any judgement, decree or order authorizing such re-possession. He also commented that no Debenture was ever executed as between the Company and the Defendant. As regards the illegal re-possession point, the Plaintiff referred this Court to **Gusii Mwalimu Investment Company Ltd. vs. Mwalimu Hotel Kisii Ltd.** EALR *Civil Appeal No. 160 of 1995* followed in the case of **Eric Omondi Anyanga vs. N.S.S.F. & Another** *HCCC No. 157 of 2003*. Finally, the Plaintiff concluded his submissions by saying that the whole issue surrounding the security documentation and advancement of the loan to the Company, rather than the Plaintiff, were issues that needed to be canvassed at the hearing of the suit in due course. In the meantime, the Plaintiff was of the opinion that the status quo needed to be maintained as between the parties and urged the Court to grant a temporary injunction to preserve the said motor vehicles pending the determination of this suit.

16. Turning to the Defendant's submissions, here again they opened with brief facts of the case. The Defendant insisted that the loan advanced to the Plaintiff in the amount of Shs.8,961,760/= was given to him personally and had nothing to do with the Company, as at all material times, the Plaintiff carried himself and transacted with the Defendant trading as Skema Supplies Company. The Defendant

noted that the securities provided being the said motor vehicles and the property title No. Kajiado.Kaputiei – North/15190 all belonged to the Plaintiff and he charged them to the Defendant Bank by way of instruments of Chattels Mortgage for the said motor vehicles and a legal charge over the said property. Turning to the prayers sought by the Application, the Defendant maintained that the Plaintiff is not entitled to the relief sought by him and made the following submissions as against the prayers sought by the Plaintiff:

"I. An injunction is an equitable remedy and it is entirely equitable in origin. It is also discretionary in nature which is its most distinctive attribute today. This attribute has rendered discretion the most eminent element in and the very hallmark of the remedy of injunction, and forbids the granting of the remedy as of right.

II. In equity, discretion means a sound discretion guided by law governed by rule and it is not arbitrary, vague or fanciful. Thus an injunction may be found to be appropriate, but refused on a consideration of discretionary matters.

III. Under this principle we find cases like the instant one in which a Plaintiff might have a legal right but the injunction is refused because the court has keenly analysed the Plaintiff's case vis-à-vis the Defendant's and found in favour of the latter upon applying the discretionary approach. In this case, the Plaintiff is not entitled to the relief sought by him as he has among other justifications disentitled himself by acquiescence or lack of clean hands and also upon looking into the hardship to be suffered by the Defendant. This is explained as follows:

Plaintiff Has Disentitled Himself

The conduct of the Plaintiff is one that a court properly directed would consider it as inequitable to grant him an injunction. The principle is that a person must come to a court of equity with clean hands. He who comes into equity MUST fulfill all or substantially all his outstanding obligations before insisting on his right. The Plaintiff in this case has acted with abandon and unconscionably. The Plaintiff's account with the Defendant fell into arrears and on 7th April 2010 the Defendant wrote a letter to the Plaintiff demanding payment; which the Plaintiff responded by giving a repayment proposal contained in his letter of 13th May 2010. The Plaintiff neither honoured the proposal he offered to the Defendant, nor exhibited any serious commitment to pay the outstanding debt. He never honoured any of his previous proposals before the latest and continued defaulting on the repayment of his loan against the terms and conditions set out in the loan contract form.

Acquiescence

An injunction will not be granted to a Plaintiff who with full knowledge that the Defendant is infringing on his rights or with the means of acquiring that knowledge, stands there watching on those rights being violated and/or encourages the Defendant to claim them or otherwise omits to act to stop the infringement. So an injunction cannot issue when the Defendant on the strength of the implication that the Plaintiff will not otherwise object or on the strength of his encouragement or passive inaction relies on that representation by the Plaintiff. Any orders so issued against him would result to the Defendant suffering considerable detriment".

17. The Defendant maintained that the Plaintiff had not come before this Court with clean hands as he had requested the consolidation of his 3 previous facilities but did not clearly specify who was to make good of the consolidated debt to the Defendant. The Defendant pointed to its letter of offer dated 24 March 2009 as being the principal document of contract binding the parties and that was addressed to the Plaintiff trading as Skema Supplies Company, not the Company. The Defendant pointed out other instances where the Plaintiff had not come clean including the fact that the Defendant's security was continuing under the consolidated Loan Agreement i.e. such had already been in place as security for the Plaintiff's previous borrowings. The Defendant further submitted that if this Court was to allow the

injunction it would cause undue hardship to the Defendant as it will be denied the opportunity to recover its loan in the hands of the Plaintiff.

18. Apart from referring to the principle for granting temporary injunction as enunciated in the **Giella v Cassman Brown** case (supra), the Defendants referred this Court to the definition of a prima facie case as set out in **Mrao v First American Bank Ltd. & 2 Others** (2003) KLR at page 125: **"…… as a case where there exists a right that has been infringed by the opposite party as to call for an explanation".**

The Defendant submitted that the Plaintiff had not established such a prima facie case. It then referred this Court to the case of **Kenya Commercial Finance Company Ltd vs Afraha Education Society** (2004) eKLR in which the court stated that one should only consider the conditions 2 and 3 of the **Giella v Cassman Brown** (supra) principle, where the first one is satisfied. The Defendant pointed out that the Plaintiff had voluntarily offered his motor vehicles as security and executed the instruments of Chattels Mortgage. Consequently, the second principle under **Giella v Cassman Brown** needs be considered and that is the Plaintiff can be adequately compensated by way of damages if he succeeded at the trial in due course. Further the Defendant submitted on the third principle of **Giella v Cassman Brown** – the Court should decide the Application on the balance of convenience which, in the Defendant's view lay with it as it detailed:

"iii) If the court is in doubt, then it should decide the application on a balance of convenience. The relief sought is a discretionary equitable remedy which will not be granted if it is shown that the Applicant's conduct as it is now does not meet the approval of a court of equity. The Plaintiff has attempted to cause confusion as to who is the actual borrower; whereas it is clear the he is the borrower. Secondly, he made payment proposals which he did not honour and in effect he is not playing his role as far as payment of the loan is concerned. He has persistently defaulted on his payments to the Defendant. These are circumstances that a court of equity MUST frown upon.

The delay in realization of the security will most significantly diminish the value of the security, whereas, the indebtness of the Plaintiff to the Defendant continues to compound day by day. In this regard, the balance of convenience tilts in favour of the Defendant".

19. Finally, the Defendant underlined that the Plaintiff had always related to the Defendant as an individual not a limited company. Further, whether or not the procedure for the attachment and selling of the said vehicles under the instruments of Chattels Mortgage does not form part of the Plaintiff's pleadings herein. The Defendant maintained that the fact was that due process was followed by the Defendant in repossessing the Plaintiff's vehicles.

20. I agree with the Defendant as regards its submissions that the principal document outlining what was the agreement between the parties hereto as to the lending, was the Defendant's letter of offer dated 24 March 2009, exhibited as "PK 1" to the Defendant's Replying Affidavit herein. That letter quite clearly is addressed to the Plaintiff trading as Skema Supplies Company. However, the acceptance of the letters terms and conditions at page 6 thereof is signed by the Plaintiff as well as (presumably his wife?) Judy Wambui Kamau as directors of the borrower company under a rubber stamp of the Company, not the Company Seal. The purpose of the loan facility is described as that it is to be utilized by the Borrower (defined as the Plaintiff) for loans consolidation and restructure. Further, under the heading of *"Security"* the borrowing is stated to be secured by the existing joint registration and chattels mortgage over the 5 motor vehicles "to continue as security".

Then the clause details:

"The Borrower undertakes at their own cast to execute and have registered all the documents required to be executed and registered in order to perfect the security for the Facility".

Further this Court notes that under the heading of *"Conditions of Sanction of Facility"*, *"the existing loan accounts Nos. 012590278848, 0120590615700 and 0120591283345 to be cleared with the proceeds of this loan"*. Finally in connection with "PK 1" this Court notes the terminology under paragraph 12 thereof *"Default and Termination"* that as per paragraph 12.1:

"12.1 If the Borrower shall make default in payment of any monthly sum payable hereunder for seven (7) days after the same shall have become due or shall fail to observe the terms and conditions of this agreement or if the Borrower becomes bankrupt or a receiver is appointed of his property or if distress or execution is levied against his property or if the Borrower shall do or cause to be done or permit or suffer any act or thing whereby the Bank's rights in the said Motor Vehicle may be prejudiced or put in jeopardy, the Bank may without prejudice to the Bank's claim for breach of this contract, terminate the Agreement without notice and retake possession of the Motor Vehicle and it shall be lawful for the Bank, its agents or servants to enter upon any premises where the Motor Vehicle may be and seized and take possession thereof".

21. In other words, the Plaintiff agreed to and signed off against the Defendant Bank being permitted upon breach of the Agreement, to seize and take possession of the Motor Vehicle. Further, the Defendant in Exhibit "PK III", the Statements of Account for account No. 0430594090817 from 28 June 2009 through to 25 July 2011 has maintained that account in the name of "Skema Supplies Company", not *"Limited"*. As far as that goes, this Court may have been persuaded by the Defendant's submissions that as far as it was concerned it was always dealing with the Plaintiff as an individual along with his business "Skema Supplies Company". Unfortunately, for the Defendant, it executed, along with the Company, the Loan Agreement dated 29 July 2009 exhibited as "SKB 3-4" to the said Affidavit in support of the Application. That Agreement is clearly with the Company and not the Plaintiff. Basically, the Loan Agreement repeats the terms and conditions of the Defendant's Letter of Offer dated 24 March 2009, and furthermore at recital No. 3 on page 1 the Agreement details that the Borrower defined as the Company has agreed to abide by the terms and conditions of the said Letter of Offer of 24 March 2009.

22. As security under the Loan Agreement the Company agreed to provide the Defendant with:

"(a) Existing joint registration and Chattels Mortgage over Motor Vehicles Registration Number KAZ 419A, KYK 889, KAV 477Y, DAV 020A and KAQ 314G to continue as security.

(b) A first Legal Charge over the property known as TITLE NUMBER: KAJIADO/KAPUTIEI – NORTH/15190 registered in the name of STANLEY KAMAU GATUNE to be registered to cover the amounts of Kenya Shillings Two Million only (Kshs.2,000,000/=).

The above securities to be perfected before release of the loan".

It seems therefore that the two documents, the Loan Agreement dated 29 June 2009 and the Letter of Offer dated 24 March 2009 are to be read side by side as to what was agreed between the Defendant and the Company.

23. I have perused the instruments of Chattels Mortgage executed by the Plaintiff in favour of the Defendant and as exhibited to the Replying Affidavit to the Application as "PK IV". There are 5 of them all dated 30 December 2008 and all certified by one Patrick Kerongo an advocate of this Court, on the same date. They cover motor vehicles Nos. KAZ 419A, KYK 889, KAV 477Y, KAV 020A and KAQ 314G. For each of the instruments, the wording is the same. Clause 1 reads as follows:

"1. In pursuance of the said agreement and in consideration of the Maximum Principal Amount or such lower amount as may for the time being and from time to time be fixed by the Grantee in is sole discretion made available to the Grantor by the Grantee and to others for whom the Grantor is surety, the Grantor hereby assigns and transfers all his right, title, estate and interest in and to the Chattel to the Grantee by way of mortgage as a continuing security for the payment and satisfaction in full of the Secured Obligations (as defined below)".

The relevant words above are:
"…….. and to others for whom the Grantor is surety".

This Court has no doubt that the Plaintiff, therein referred to in the said Instruments as "the Grantor", acted as surety for the Company.

24. The Plaintiff complained that the Defendant had not followed the proper procedure in seizing and attaching the 3 motor vehicles KAZ 477Y, KAV 020A and KAZ 419A. This Court is however satisfied that the Defendants had the right of seizure and attachment of the said motor vehicles under the instruments of Chattels Mortgage. Those instruments were in being under the provisions of *The Chattels Transfer Act (Cap 28, Laws of Kenya)*. The Third Schedule of that Act details the Covenants, Provisions and Powers implied in the Instrument. Under paragraph 7 of the Third Schedule, it does appear that:

"If at any time execution is levied against the goods of the grantor that execution is not stayed or satisfied within ten days, then and in that case the grantee, either personally or by his agent or servants may immediately thereupon or at any time thereafter, without any further consent by the grantor, and without giving to the grantor any notice, or waiting any time, and notwithdstanding any subsequent acceptance of any payment of any money due on this security, enter upon any lands or premises whereon the chattels for the time being subject to this security may be, and take possession thereof, and sell or dispose of them or any party thereof by private sale or public auction, separately or together, in such lots and generally in such manner in every respect as the grantee deems expedient, with power to allow time for payment of purchase-money, or to buy in the chattels or any part thereof at the auction, and to rescind or vary the terms of any contract of sale, and to resell without being answerable for any loss or expense occasioned thereby, and to execute all such assurances and do all such things for giving effect to any such sale as may be necessary or proper; and the receipt of the grantee or his agents shall be a sufficient discharge to any purchaser at the sale for any of the purchase-money; and upon any sale purporting to be made in exercise of the powers herein expressed or implied no purchaser shall be bond to inquire as to the propriety or regularity of any such sale, or be affected by notice express or constructive that any such sale is improper or irregular"

It seems from the above that the Defendant should have given 10 days notice of attachment before the seizure and attachment of the said vehicles. It seems that this is a matter that will be in issue at the trial of the suit in due course and cannot be determined by this Court in considering the present Application.

25. Referring to the case cited to this Court by the Defendants, being **Mrao Ltd. vs. First American Bank of Kenya Ltd.** (supra), has the Plaintiff put up a prima facie case with a probability of success? *"Prima facie"* as per the head note to the **Mrao** case:

"includes but is not confined to a "genuine and arguable case".

Is this a case 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 as to call for an explanation or rebuttal from the latter"?* Looking at the Plaintiff's Application as presented to this Court, I am asked to issue a temporary injunction to restrain the Defendant, basically, from selling the 5 vehicles belonging to the Plaintiff being registration numbers KAZ 419A, KYK 889, KAV 477Y, KAV 020A and KAQ 314G. It appears from the Defendant's submissions that the only remaining vehicle in the auctioneers' yard is KAZ 419A while KAQ 314G and KYK 889 are still held by the Plaintiff. It does appear that KAV 020A and KAV 477Y have already been disposed off. KAZ 419A is a Caterpillar Tractor according to the Copy of Records from the Registration of Motor Vehicles exhibited to the Affidavit in support. Further KAQ 314G and KYK 889 are 2 saloon vehicles again according to the copy of records of the Registrar of Motor Vehicles. KAV 477Y is a Caterpillar Wheel Loader and KAV O2OA is an Isuzu truck. It appears that what is left for the Plaintiff are 2 saloon motor vehicles and one Caterpillar tractor.

26. The Plaintiff has deponed to the fact that the above numbered vehicles are used in his business of construction and building supplies. The tractor KAZ 419A may well be used for that purpose, it is doubtful that the saloon vehicles are so used. In any event, is it the Plaintiff's business or the Company's? The Plaintiff deponed to the fact that his business operated in his own name but trading as Skema Supplies Company. The Court does not consider that the Plaintiff has been straight forward in this matter. As per the copy of the Certificate of Incorporation of the Company exhibited as "SKG-1" to the Affidavit in support of the Application, the Company was incorporated on the 15th August 2006 almost 3 years before the transaction with the Defendant Bank was entered into in March – June 1999. Such seems to be a deliberate attempt to mislead this Court.

27. The Plaintiff has also spent time deponing to the fact that he or is it the Company? have overpaid the instalments due to the Defendant under the Loan Agreement. In fact the Plaintiff has produced two different sets of figures from two different firms of accountants to show that position. This Court is mindful of the finding of the Court of Appeal in **Priscillah Krobought Grant vs. Kenya Commercial Finance Co. Ltd. & Others** being *Civil Application No. Nai. 227 of 1995* (unreported) in which it was stated:

"Finally, it will bear repetition, we think, if we were to restate that a court does not normally grant an injunction to restrain a mortgagee from exercising its statutory power of sale solely on the ground that there is a dispute as to the amount due under the mortgage".

I am also persuaded by my learned brother Njagi J's finding in **Beatrice E. Wambugu vs. Savings & Loan Kenya** – *HCCC No. 1865 of 2001* (unreported), when he noted that:

"There is abundant case law in this country, and it is now well established, that a dispute as to the amount payable is not an adequate ground for granting a injunction restraining the sale of mortgaged or charged property in order to realize the security thereof".

Accordingly, I find myself unable to uphold the Applicant's submissions for an interim injunction to be granted on this ground.

28. Finally, I come to the principles enunciated in the **Giella v Cassman Brown** case (supra).The Applicant submitted that they had met the conditions enunciated therein in that firstly they have a *prima facie* case with a high probability of success; secondly, the Applicant would suffer irreparable damage that cannot be compensated by damages and thirdly, that the balance of convenience rests in having the injunction in place pending the hearing and determination of this suit. The Defendant, on the other hand, maintains that a *prima facie* case has not been established and even if this Court should consider that it has, then in relation to the loss of the Applicant's property, he could be compensated therefor in damages. My having taken the above view in relation to the Applicants' submissions, I find that the Plaintiff has not established a *prima facie* case with a probability of success at the trial. He does not meet therefore the first condition for the granting of an interlocutory injunction. As above, the second condition is that an interlocutory injunction will not normally be granted unless the Applicant can show that he will suffer irreparable injury which cannot be compensated by an award of damages. The onus is on the Applicant to show that. In the instant case, the Applicant has not shown that he will suffer irreparable injury. He has maintained that the sale of the charged vehicles will affect his business. It is no longer his business, it is the Company's – a different legal entity altogether.

29. In conclusion, this Application for injunction pending the *inter partes* hearing of this suit is dismissed with costs to the Defendant.

Dated and delivered at Nairobi this 10th day of February 2012.

J. B. HAVELOCK
JUDGE