



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**CIVIL CASE NO. 13 OF 2011**

**KORA CONSTRUCTION COMPANY LTD. .... PLAINTIFF  
V E R S U S  
FAMILY BANK LIMITED ..... DEFENDANT**

**RULING**

On 4<sup>th</sup> July 2011, Lenaola J. dismissed the plaintiff's application in which the plaintiff had sought to restrain the defendant from repossessing and selling by public auction certain motor vehicles which the plaintiff had pledged to the defendant to secure certain financial accommodation. In the said ruling, the learned judge noted that the plaintiff had defaulted in repaying the loan that was advanced to it within the stipulated period. At page 5 of his ruling, the judge had this to say:

*"10. It is admitted that the plaintiff did not pay a single shilling to the defendant upto the time the present suit was instituted, two (2) months after the whole loan was supposed to have been paid. The action taken by the defendant was therefore prima facie within the terms of lending and I see no evidence of breach on its part.*

*11. Secondly, at paragraph 8 of the Chattels Mortgage dated 4<sup>th</sup> January 2010, it was the right of the defendant to exercise its rights under the Chattels Transfer Act, Cap 28 in the event of default in payment by the Grantor, in this case, the plaintiff. It had the right, according to that paragraph, to act "without any previous or further notice or concurrence on the part of the Grantor" and that is what it did by repossessing motor vehicle registration number KAY 363 D and again prima facie I see no basis for any complaint by the plaintiff."*

The plaintiff was not daunted by the court's decision. On 5<sup>th</sup> July 2011, the plaintiff moved this court by notice of motion purportedly pursuant to **Sections 1A, 1B and 3A** of the **Civil Procedure Act** seeking the orders of this court that the sale of motor vehicles registration number KAY 363D and KAL 871D be stayed pending the hearing and determination of the application. The plaintiff further prayed that the court allows it to pay the amount due to the defendant by reasonable monthly instalments. In the grounds in support of the application, the plaintiff claimed that it was a victim of the slow machinery of making payments due to creditors by the Ministry of Public Works. The plaintiff was of the view that even if the said motor vehicles were sold by public auction it would not realise the amount claimed by the defendant but would end up putting the plaintiff in double jeopardy. The plaintiff stated that it was ready to pay the amount due to the defendant in seven (7) monthly instalments. The application is supported by the annexed affidavit of Jackson Mutimba Lutta, a director of the plaintiff.

The application is opposed. Richard Maungu, the manager of the Debt Recovery Unit of the defendant swore a replying affidavit in opposition to the application. He averred that the application was incompetent and misconceived in light of the fact that the plaintiff had explicitly admitted being in default of its contractual obligation to repay the loan amount that was advanced to it. He, inter alia, deponed that the plaintiff was in actual fact seeking to rewrite the contract between itself and the defendant. It was the defendant's view that this court had no powers to rewrite a contract entered between two consenting parties. It was the defendant's case that it would be prejudiced if the orders sought by the plaintiff are granted by the court. He urged the court to dismiss the application with costs.

At the hearing of the application, this court heard oral submission made by Mr. Kasamani for the

defendant and by Mr. Nyamurongi for the plaintiff. I have carefully considered the said submissions. I have also read the pleadings filed by the parties herein in support of their respective opposing positions. The issue for determination by this court is whether the plaintiff made a case for this court to grant the orders of stay sought in the application pending the payment of the loan advanced to it in the said seven (7) monthly instalments. As stated earlier in this ruling, Lenaola J. dismissed the plaintiff's application for injunction. It is this court's considered view that if the plaintiff was aggrieved by the said decision of the learned judge, it ought to have appealed to the Court of Appeal or alternatively applied to review the decision before this court. The present application is neither an application for review nor is it an application seeking stay of the said order of Lenaola J. pending the hearing of an intended appeal.

What the plaintiff has done is to completely change the thrust of its case by seeking the court's indulgence to enable it pay the amount it owes to the defendant by monthly instalments. The content of the application is not supported by the plaint that the plaintiff filed. In the said plaint, the plaintiff had averred that the defendant had acted unlawfully by breaching the terms of the loan agreement that required the plaintiff to repay the amount advanced within a stipulated period. Lenaola J. found as a fact that it was the plaintiff who was in actual breach of the loan agreement by failing to repay even "a single shilling" within the contracted period. The plaintiff did not plead that it wanted to repay the loan advanced to it by instalments.

In any event, as correctly noted by the defendant, this court does not have jurisdiction to rewrite an agreement entered between two consenting parties. It was argued on behalf of the plaintiff that the court should protect the plaintiff from the defendant which was the stronger party in the agreement. It was submitted that the defendant was applying economic duress to force the plaintiff to pay the said loan. This court is of the considered view that while it is not disputed that the defendant is the stronger party in the agreement between itself and the plaintiff, the plaintiff was aware of this when it entered into the loan agreement with the defendant. The plaintiff cannot plead economic duress when in the first place it entered willingly into the loan agreement with the defendant. The plaintiff cannot cry wolf after enjoying the benefit of the loan, and when it defaulted in repaying the loan, and the defendant chose to exercise its rights under the loan agreement by recalling the securities charged, pleads economic duress.

There is not merit whatsoever in the application filed by the plaintiff dated 5<sup>th</sup> July 2011. The application is dismissed with costs. The interim orders granted are hereby vacated. The sum of KShs.100,000/= deposited in court as security for damages shall be paid to the defendant.

**DATED AT KAKAMEGA THIS 21<sup>ST</sup> DAY OF JULY 2011**

**L. KIMARU**  
**J U D G E**