



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 445 OF 2011**

**ELIZABETH ADERA.....PLAINTIFF**  
**- VERSUS -**  
**FINA BANK LIMITED .....DEFENDANT**

**RULING**

1. This is a notice of motion by the plaintiff dated 5<sup>th</sup> October 2011 praying for orders;
  - a) **THAT** pending the hearing and determination of this suit, or until further Orders of the court, this Honourable Court be pleased to issue an Order of temporary injunction restraining the Defendant either by itself, its servants and/or agents, employees, advocates or auctioneers or any of them or otherwise from doing the following acts or any of them, that is to say selling by public auction or private treaty, advertising for sale, disposing of or otherwise howsoever or completing any transfer of any sale, parting with possession except to the Plaintiff or otherwise howsoever interfering with the Plaintiffs ownership of Motor Vehicle Registration No.KAX 165 S or acting in any detrimental way to the Plaintiff.
  - b) **THAT** this Honourable Court be pleased to issue an order of mandatory injunction to compel the Defendant to immediately and unconditionally release Motor Vehicle registration No.KAX 165 S to the Plaintiff.

The application is expressed to be brought under sections 1A, 1B and 3A of the Civil Procedure Act, order 40 rules 1,2 and 4 of the Civil Procedure Rules as well as section 15 (1) of the Hire Purchase Act. There are two affidavits in support sworn by the plaintiff on 5<sup>th</sup> October 2011 and 8<sup>th</sup> November 2011.

2. The plaintiff bought motor vehicle KAX 165 S on hire purchase finance from the defendant as more particularized in the agreement marked "EA1". The consideration, as per the plaintiff, was Kshs 3,600,000. The plaintiff and the defendant were registered as joint owners. The plaintiff says she has to date paid Kshs 3,400,000 which is more than two thirds of the hire purchase debt and that according to section 15 (1) of the Hire Purchase Act, the defendant cannot attach the suit vehicle without court sanction. The plaintiff says she has not been served with any termination notice and was thus surprised on 15<sup>th</sup> September 2011 to learn that the defendant had issued repossession orders for the suit vehicle. She also learnt that the same was advertised for sale by public auction on 30<sup>th</sup> September 2011 as per annexure "EA3". In the meantime she instructed a Mr. Mathias Aketch to negotiate with the bank. An offer of Kshs 500,000 was made on 27<sup>th</sup> September 2011 but was rejected on 29<sup>th</sup> September 2011 by the

bank. Finally, the plaintiff avers that on 30<sup>th</sup> September 2011, she went to the offices of the bank's auctioneers and that no auction took place on that day. She thus prays for the injunctive reliefs aforementioned and costs.

3. The application is opposed. A replying affidavit by Zakary Muturi Muchai of the bank's recovery department sworn on 19<sup>th</sup> October 2011 confirms that a hire purchase agreement was executed by the parties on security of the suit vehicle. A sum of Kshs 3,600,000 was advanced to the plaintiff to be repaid in 59 monthly installments of Kshs 96,064.12 and a last installment of Kshs 97,564.12. Default occurred and on 7<sup>th</sup> February 2011, a notice as per condition number 17 of the agreement was issued and mailed to the plaintiff's address specified in the letter of offer.

A copy (annexture 2MM2) is attached. A statement of account is annexed showing a debit balance of Kshs 3,921,122.12 as at 30<sup>th</sup> September 2011, the date of the auction. The defendant in sum, says the plaintiff did not heed the notices to regularize the account and that her last offer of 27<sup>th</sup> September 2011 was unacceptable.

The bank thus instructed its auctioneers to proceed with the sale. The defendant avers that the sale took place on 30<sup>th</sup> September 2011 and the vehicle was sold to the highest bidder named as Shadrack O. Mirera for Kshs 1,205,000.

The defendant's position is that the sale having taken place, the application is overtaken by events and is for dismissal.

4. I have heard the rival arguments. I am satisfied that the plaintiff bought under hire purchase the suit vehicle on finance from the defendant of Kshs 3,600,000 upon the terms in the agreement and as set out earlier. In addition the plaintiff was to pay hire purchase charges of Kshs 2,078,867.43 together with Kshs 1,500 being her option to purchase bringing the hire purchase price to Kshs 5,680,167.43. From the statement of account marked "2MM3" I am satisfied that the plaintiff had neither completed the payments of the hire purchase debt nor exercised the option to purchase. As at 30<sup>th</sup> September 2011 the statement shows a debit balance of Kshs 3,921,122.12. It is also true that by that date, the plaintiff, on the credit entries in that statement had paid over Kshs 2,881,857. When one grants the plaintiff further credits after that date (presumably from the auction sale) it brings the total credits to Kshs 4,077,780.59 against a claim by the bank of Kshs 6,894,934.36 bringing the debt to just about Kshs 2,817,153.80.

5. I am satisfied that the plaintiff is thus not too far off the mark when she claims she had paid about Kshs 3,000,000 by September 2011. And the bank itself, if the statement is not contested, was demanding well over Kshs 3,000,000 on the same date. But it is also clear that the plaintiff was in default and no payments are reflected for the period between 24<sup>th</sup> March 2010 and 24<sup>th</sup> September 2011. Under clauses 5, 7.2 and 8.1 of the hire purchase agreement, the bank became entitled to terminate the agreement, repossess and sell the chattels.

My view is that most of those matters can only be fully ventilated at the trial and on tested evidence upon cross-examination; what is critical now is whether the plaintiff by the pleadings and depositions before the court has reached the threshold for grant of interlocutory injunction. The principles for grant of injunctive relief in East Africa were well settled in the decision of *Giella vs CassmanBrown & Company*[1973] E.A. 358. Those principles are, first, that the applicant must show a prima facie case with a probability of success; secondly that he stands to suffer irreparable harm not compensable in damages; and thirdly, if in doubt, the court must assess the balance of convenience.

In addition, there is ample authority that an injunction, which is a discretionary remedy, may be denied despite fulfilling some of the conditions above, if the applicant has committed acts or misconducted himself in a manner that would not meet approval of equity. *See Anne Njeri Mungai Kihui vs The Standard Group Limited* HCCC No 435 of 2011 (unreported).

6. The Hire Purchase Act at section 3 provides that the Act applies to agreements in which the hire

purchase price does not exceed Kshs 4,000,000. The hire purchase price in turn is defined as the total amount the hirer would be required to pay to own the goods but excluding penalties or damages for breach of agreement. On the face of it then, the hirer here would have owned goods by paying the total hire purchase price in the schedule to the agreement of Kshs 5,680,167.43 made up as principal finance of Kshs 3,600,000, hire purchase charges of Kshs 2,078,867.43 and an option to purchase of Kshs 1,500. I would thus hold that the total hire purchase price of Kshs 5,680,167.43 took it out of the purview and jurisdiction of the Hire Purchase Act. Accordingly, section 15 of the Act which bars the owner from repossessing the goods when  $\frac{2}{3}$  of the hire purchase price has been paid except by way of suit does then not come to the plaintiff's aid.

7. The hire purchase agreement here may be unfavourable to the plaintiff. But having executed it, she became bound by its terms and this court cannot rewrite the terms. See *Morris & Company Limited Vs Kenya Commercial Bank Limited* [2003] 2 EA 605. With regard to the prayer for a mandatory injunction to return the vehicle, some doubt has been created by virtue of the alleged auction sale and the possibility that the application has been overtaken by events. Furthermore, the court will only grant a mandatory injunction in the clearest of case. See *Locabail Internatinal Finance Ltd Vs Agro Export et al* [1986] 1 ALLER 901.

8. I also note the conflicting evidence on the auction sale. The bank insists the suit vehicle was sold to Shadrack O. Mirera as per annexures "2MM 6 (a)" and "2MM 6 (b)". The plaintiff claims no such auction took place on 30<sup>th</sup> September 2011. While these facts will emerge at the trial, it militates against the plaintiff's prayer for mandatory injunction to release the suit vehicle back to the plaintiff.

9. As the plaintiff's claim can be compensated in damages and there is no evidence that the defendant bank cannot pay for the loss upon decree, I would find in all the circumstances that the plaintiff has not made out a prima facie case or satisfied the second limb of the *Giella* case (Supra). See also *Ooko Vs Barclay Bank of Kenya Limited* [2002] 2 KLR 394 at 398.

10. For all the above reasons, I order that the plaintiff's notice of motion dated 5<sup>th</sup> October 2011 be and is hereby dismissed with costs.

**DATED and DELIVERED at NAIROBI this 24<sup>th</sup> day of November 2011.**

**G.K. KIMONDO  
JUDGE**

**Ruling read in open court in the presence of**  
Mrs. Macharia for Mr. Odera for the Plaintiff.  
No appearance for the Defendant.