



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Commercial Civil Suit 53 of 2009

DEKOW SHEIKH ABDI ABDILLAHI.....PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LTD.....DEFENDANT

RULING

By his application dated 25th November 2009, **Dekow Sheikh Abdi Abdillahi** the plaintiff sought primarily an order of injunction restraining **Barclays Bank of Kenya Limited**, the defendant, from selling motor vehicle registration number KBC 784F (hereinafter “*the suit vehicle*”) pending the hearing and determination of this suit. The main grounds upon which the application is based are that the defendant extended a banking facility of Kshs. 5,231,495/= to the plaintiff for the purchase of the suit vehicle which sum was to be repaid by monthly instalments of Kshs. 141,248.00 which the plaintiff paid without fail. Notwithstanding such compliance, the defendant recalled the entire sum advanced and sought to repossess the suit vehicle without serving any notice or valid notice upon the plaintiff. In good faith the plaintiff offered to increase the monthly instalments which offer was accepted by the defendant but the defendant was bent on repossessing the suit vehicle unless it is restrained by an order of injunction. The application is supported by an affidavit sworn by the plaintiff in which the said grounds are elaborated.

This application is opposed and there is a replying affidavit sworn by one **Michael Maina**, the defendant’s Recoveries Officer, who has deposed among other things that the plaintiff was in breach of the repayment terms of the loan facility prompting the recovery proceedings after due notice to the plaintiff. In the premises, the defendant contends that the relief of injunction is not available to the plaintiff.

When the application came up before me for hearing on 29th April 2010, counsel agreed to file written submissions which were duly in place by 19th May 2010. I have considered the application, the affidavits filed and the submissions of counsel. Having done so, I take the following view of the matter. The plaintiff’s application stands or

falls on whether he was in default of the loan facility documents in respect of the suit vehicle. The defendant has exhibited those documents. The facility was approved by the defendant by its letter dated 3rd April 2008 which proposed monthly instalments of Kshs. 148,437.00 and an interest rate of 18% linked to the Barclays Bank Rate (As at 4th May 2005 13.75%). The repayments were to be made monthly in arrears.

On 7th June 2008, M/S Mitsubishi Motors issued a sales invoice for a total sum of Kshs. 5,231,495/=. The invoice is exhibited as annexure DSAA 1. Also exhibited are the plaintiff's bank statements for the months of July, 2008 to May, 2009. Those statements reflect a monthly standing order for Kshs. 141,248.00 effected for the entire period save for the month of December, 2008 which was effected in January 2009. The plaintiff's account is held at the defendant's branch at Nkrumah Road Mombasa. It is not clear how the monthly instalments were reduced from Kshs. 148,437.00 to Kshs. 141,248.00. Both parties have not been clear on the same. Prima facie however the instalments were accepted by the defendant and by the time the defendant demanded immediate payment of the balance due by its letter of 11th May, 2009, the plaintiff had almost religiously paid the said monthly instalments without fail.

Prima facie therefore, I do not detect breach of the terms of the loan facility by the plaintiff by the time the said demand was made. The plaintiff's rights under the loan agreement were therefore threatened by the action of the defendant and he was entitled to seek the court's intervention.

In the premises, I find and hold that the plaintiff has demonstrated a prima facie case with a probability of success at the trial. With regard to the 2nd condition for the grant of an injunction, I hold that although the plaintiff's injury is compensable in damages, the rule is not cast in stone. Indeed under sub-rule 2 (2) of Order XXXIX of the Civil Procedure Rules, an injunction can still issue for breach of contract whether compensation is also claimed or not.

On the balance of convenience, I am persuaded that the same tilts in favour of granting the injunction. The injunction will accord the parties an opportunity to settle this account and the suit vehicle will be preserved.

In the result, I think I should exercise my discretion in granting the injunction sought. Accordingly, the plaintiff's application dated 25th November 2009 is allowed in terms of paragraph C thereof. The plaintiff should file an undertaking as to damages within the next seven (7) days from the date hereof. The plaintiff's undertaking should be under oath.

For the plaintiff to ultimately benefit from this injunction, it should continue paying the agreed instalments regularly failing which the defendant is at liberty to move the court to have this injunction discharged.

Each party has liberty to apply. Costs in the cause.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 30TH DAY OF JUNE 2010.

F. AZANGALALA

JUDGE

Read in the presence of:-

Mr. Odongo holding brief for M/S Mutisya & Company and Mr. Khagram holding brief for M/S Kontos Advocates.

F. AZANGALALA

JUDGE

30TH JUNE 2010