



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 359 of 2010**

**KURIA MANYORE & WAMBUI MANYORE T/A  
MOUNT ANGEL SCHOOL ..... PLAINTIFFS/APPLICANTS**

**VERSUS**

**CONSOLIDATED BANK FO KENYA LTD ... 1<sup>ST</sup> DEFENDAT/RESPONDENT  
MAINA NGURU  
T/A NGURU ENTERPRISES ..... 2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. The plaintiff filed HCCC NO.334 of 2010 and HCCC NO. 359 OF 2010 against the same defendant. On 7<sup>th</sup> June 2010 both suits were consolidated and 359 of 2010 is the lead file. The plaintiff filed a chamber summons under order 39 of the Civil Procedure Rules seeking for orders that the defendant be restrained by an order of injunction from dealing or taking possession of the plaintiff's motor vehicles KAS 265E and KAS 631M. The plaintiff also sought for an order for the release of the same motor vehicles pending the hearing and the determination of the suit. The plaintiff has also sought for an order to restrain the defendants from advertising for sale or disposing off property known as LR NO. 13537/301 Junja Thika Municipality, LR NO. Ngenda / Gathage /795 and Ngenda/Gathage/T.215 pending the hearing and determination of this suit.
2. This application is premised on the grounds that on 14<sup>th</sup> and 24<sup>th</sup> May 2010 the 2<sup>nd</sup> defendant acting on instructions by the 1<sup>st</sup> defendant seized and repossessed the plaintiff's motor vehicles KAS 265D and KAS 631M. The seizure is faulted as the plaintiff's claim that the motor vehicles were a security of a loan which has fully been repaid as per the annexed statement of account which shows the outstanding balance was paltry sum of Ksh.80,000/- which would in any event be repaid by the end of June. The statement of account shows the plaintiff paid the monthly installments according to schedule and the attempt to repossess the motor vehicle is based on malafides.
3. The 1<sup>st</sup> defendant also holds securities over the three parcels of land and the plaintiffs are apprehensive that the defendants is likely to advertise the property for sale. The application is also supported by the affidavit of **Kuria Manyore** sworn on 17<sup>th</sup> May 2010. According to the plaintiff's on 3<sup>rd</sup> March 2009 the 1<sup>st</sup> defendant offered a loan, they were granted a sum of Ksh.3,463,900/- to be repaid in twenty four (24) months at a sum of Ksh.144,325/- per month. The plaintiff claims that they were never supplied with a statement of account. There was a standing order signed by the plaintiff and the 1<sup>st</sup> defendant was supposed to remit the monthly installments through the standing order. In September 2009 the plaintiffs were able to pay a lump sum of Ksh.1,194,060.80/- being a portion of compensation for partly of their school land which was taken by the Government for the expansion of Thika Road. The plaintiff claims to have made 13 remittances and therefore

the total loan paid is Ksh.3.070.285. They were surprised when they were visited by the 2<sup>nd</sup> defendant who reposed the motor vehicle that transport the children to and from school.

4. The application was opposed, reliance was placed on the replying affidavit sworn by Julius Gikonyo on behalf of the 1<sup>st</sup> defendant on 4<sup>th</sup> June 2010. It is common ground that the plaintiff's were granted credit facilities by a letter of offer dated 3<sup>rd</sup> March 2009 which they duly accepted to pay by monthly installments for a period of 24 months. According to the letter of offer the interest rate payable is 19% per annum with a penal notice of 18% charged on the amount on arrears. In addition to the chattels mortgage in respect of the two motor vehicles KAS 631M and KAS 265D, the plaintiffs also pledged properties LR NO. 13537/301 Junja and LR NO. Ngenda/Gathage/797 and LR NO. Ngenda/Gathage/T215. It is denied that the plaintiffs have been making monthly payments as per the letter of offer. They only made a lump sum payment of Ksh.1.194,060.80/- in September 2009/-.

5. The 1<sup>st</sup> defendant annexed copies of the loan account as at 7<sup>th</sup> May 2010 there was an outstanding sum of Ksh.1.028,693.65/-. They also annexed letters by the plaintiff's requesting to be allowed to convert the overdraft into a loan. According to the 1<sup>st</sup> defendant there were no funds in the plaintiff's account to service the loan the plaintiff have always been in default. The last payment on the account was made on 25<sup>th</sup> January 2010. The defendant was thus entitled to realize the security under the Chattels Mortgage. The plaintiffs were also furnished with regular statements and the issue of interest rates has never been raised. It was submitted that the plaintiff has not established a prima facie case to warrant the granting of the order of injunction. The plaintiff's are seeking for mandatory order of injunction. Their case must therefore be clear because a permanent order of injunction is final in nature.

6. This application seeks for both temporary and mandatory order of injunction. The principles upon which such orders are sought are well settled. As regards the prayers for interim order of injunction, the plaintiff is required to establish a prima facie case with a probability of success. Secondly irreparable harm which cannot be compensated for in damages would arise and if in doubt the court will determine the matter on a balance of convenience. (See the often cited case of **Giella vs Cassman Brown & Company limited [1973] EA 358**)

7. The principles to guide the court on whether to grant a mandatory order of injunction are similarly articulated in a long line of authorities by the Court of Appeal especially in the case of **Kenya Breweries Ltd & Another vs. Washington Okeyo C.A. Civil Appeal No.322 (Nairobi)** (unreported) at page 3 Their Lordships quoted with approval the Text Vol.24 of Haslbury Laws of England 4<sup>th</sup> Edition paragraph 948 which reads as follows:-

*“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff . . . A mandatory injunction will be granted on an interlocutory application.*

*Also in **Locabail International Finance Ltd. V. Agroexport and others [1986] 1 ALL ER 901 at page. 901 it was stated:-***

*“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was*

*directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”*

*These principles of law enunciated in those e decisions have received full approval in other cases within our Courts. See the cases of; Belle Maison Limited vs Yaya Towers Limited H.C.C.C. 2225 of 1992, per Bosire, J (as he then was) and The Ripples Limited vs Kamau Mucuha H.C.C.C. No. 4522 1992 per Mwera J.”*

8. The plaintiff contends that they have nearly completed the loan repayments leaving a small sum of about Ksh.80,000/- outstanding. On the part of the 1<sup>st</sup> defendant this contention is denied. They annexed a statement of the loan arrears account which shows there is an outstanding balance of Ksh.1.028,693.65/- as at May 2010. The plaintiffs are faulted for failure to make material disclosure of the loan account and the overdraft account. The plaintiff’s have not shown the payments made into the account and the allegation that they had completed paying the loan is denied, the plaintiffs have not established a prima facie case. Am therefore not satisfied they have established a prima facie case with a probability of success to warrant the granting of an interim order or injunction let alone the mandatory order of injunction has been made out by the plaintiffs.

9. Apart from this application lacking in merit it is now trite that where a plaintiff seeks for both interlocutory and mandatory orders of injunction, the procedure to adopt is of a notice of motion. See the persuasive case on Morris and company Limited vs Kenya Commercial Bank & Other [2003] eKLR Vol.2. As per the decision of Ringera J (as he then was) it was held that:-

*“Where the plaintiff sought both interlocutory prohibitive and mandatory injunctions it was incumbent on him to do so in a motion on notice, for under our procedural law it is established that where a mater partly falls within the scope of a summons in chambers and partly within a motion on notice, the large procedure, namely, the motion, is to be invoked”*

For the above reasons the application lacks merits and is hereby dismissed with costs to the defendant. The interim orders issued are hereby discharged.

**RULING READ AND SIGNED ON 30<sup>TH</sup> JULY 2010 AT NAIROBI.**

**M.K. KOOME**  
**JUDGE**