THE TRADING FLOOR LTD…….PLAINTIFF

VERSUS

CFC STANBIC BANK LTD…….DEFENDANT

RULING

By its application dated 4th March 209, The Trading Floor Limited sought an order of injunction restraining The defendant CFC Stanbic Bank Limited from repossessing, selling, disposing off, alienating, transferring and/or in any other manner whatsoever interfering with the plaintiff's possession of motor vehicle registration number KAT 513F Renault Prime Mover (hereinafter "*the suit vehicle*") pending the hearing and determination of this suit.

The general grounds upon which the application is based are that the hire purchase agreement has already been terminated and the threatened repossession and sale of the suit vehicle will occasion the plaintiff irreparable injury unless restrained by the injunction. The application is supported by an affidavit sworn by Dominia Ivuli Livu, a director of the plaintiff in which it is deposed that the defendant financed the plaintiff in the purchase of the suit vehicle under a hire purchase agreement which was terminated on 6th March 2007 by the defendant. The said director further deposes that after the termination, negotiations were held between the parties as a result of which the defendant allowed the plaintiff to repair the suit vehicle and offered it to the plaintiff at a purchase price of Kshs. 2,000,000/= upon which the plaintiff took possession of the vehicle. In the premises, the plaintiff contends that the defendant is estopped from repossessing the subject vehicle pursuant to the hire purchase terms which terms no longer apply as a result of the termination. Annexed to the affidavit are copies of the hire purchase agreement and the letter terminating the same.

The application is opposed and there is a replying affidavit sworn by Hannah Ndarwa, the Team Leader Customer Debt Management official of the defendant. In the affidavit, it is deponed, among other things, that the hire purchase agreement was not and has not been terminated but that when the defendant repossessed the suit vehicle, the plaintiff requested to be allowed to pay Kshs. 2,000,000/= in full and final settlement which request was accepted by the defendant on terms which the plaintiff failed to meet. The defendant accuses the plaintiff of material non-disclosure and maintains that it is entitled to repossess the suit vehicle. Annexed to the replying affidavit are copies of letters exchanged between the parties showing previous indulgence extended to the plaintiff and pleas for the indulgence.

The defendant has also delivered a written statement of defence and raised a counter-claim. In the defence, the defendant denies the plaintiff's claim and avers that the hire purchase agreement remains validly in force and is binding upon the parties. In the counter-claim, the defendant claims against the plaintiff, *inter alia*, the sum of Kshs. 3,992,175/= being sums due under the hire purchase agreement. Interest at 2.75% per month is also claimed with effect from February 2009 until payment in full.

The plaintiff has filed a reply and defence to the counter-claim in which it reiterates that the hire purchase agreement was terminated by the defendant's letter dated 6th March 2007 and an oral agreement entered

into by which agreement the suit vehicle was sold to the plaintiff for Kshs. 2,000,000/= out of which the plaintiff paid Kshs. 230,000/=. In the premises, the plaintiff contends that no money is outstanding under the hire purchase agreement.

The pleadings were in that state when the application came up before me for hearing on 23rd July 2009. Counsel agreed to file written submissions which were duly filed by 25th September 2009. They elaborated their clients' stand-points taken in the respective affidavits.

I have considered the pleadings, the application, the affidavits 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 the hire purchase agreement dated 10th September 2004 was terminated by the defendant's letter dated 6th March 2007. The said letter reads in part as follows:-

"**Due to your default and contravention of the Hire Purchase Finance Agreement mutually entered into, the Bank on 28th February 2007 served a Repossession Order on Messrs Heavy Vehicles & Plant Industries Limited, where the above vehicle is currently stored. We enclose herewith a copy of the Repossession Order dated 27th February 2007 for your records. The above mentioned agreement now stands TERMINATED with effect from the date of seizure of the vehicle.**

The Bank may however, without prejudice allow you to purchase the vehicle for Kshs. 2,492,009/= plus any other charges that may subsequently accrue. This option to purchase the said vehicle is subject to payment in cash or bank draft within ten (10) from the date of this letter."

So, in terms of the said letter, the Hire Purchase Finance Agreement stood TERMINATED with effect from 28th February 2007. Despite the termination, the defendant gave the plaintiff the option to purchase the suit vehicle for Kshs. 2,492,009/= which option the plaintiff could exercise within ten (10) days of the letter dated 6th March 2007.

It is common ground that the plaintiff did not exercise the option to purchase the suit vehicle.

The parties are not in agreement as to what happened subsequently. The plaintiff's case is that a fresh oral agreement was then entered into between it and the defendant vide which it purchased the suit vehicle for Kshs. 2,000,000/= out of which Kshs. 230,000/= was paid and the vehicle was released to it. The fresh agreement, according to the plaintiff, was not a Hire Purchase Agreement and the defendant cannot seek possession of the vehicle on the basis of the terminated agreement. The defendant's position on the other hand is that the release of the vehicle to the plaintiff was just one of the many instances when it extended indulgence to the plaintiff without prejudice to its rights under the Hire Purchase Finance Agreement. Reliance was placed upon clause 11 of the said agreement which reads as follows:-

"**11. No forbearance indulgence or relaxation on the part of the owners shown or granted to the Hirer or in enforcing any of the terms or conditions of this agreement shall in any way affect, diminish, restrict or prejudice the rights or powers of the owners under this Agreement or operate as or be deemed to be a waiver of any breach of the terms and conditions of this Agreement on the part of the Hirer."**

The Court of Appeal decision of **Benson Ngugi Muiruri – v – Kenya National Corporation Ltd [CA No. 190 of 2001] (UR)** was invoked in further support of the defendant's contention. Citing with approval **Nordin Bundali – v – Lombank Tanganyika Ltd [1963] EA 304,** the Court of Appeal stated as follows"-

"**From the earliest days the rule laid down in Gamer – v – Gile 1883 Cab & E, 151 that equity would not interfere to protect a hirer in default has been followed without any exception in so far as the owner's right to possession is concerned….."**

I have perused copies of letters exhibited by the defendant to the replying affidavit. They do reveal

default on the part of the plaintiff and the indulgence extended by the defendant to the plaintiff. Default under the Hire Purchase Finance Agreement was not denied by the plaintiff at all. However, in the letters served upon the plaintiff prior to the letter of 6th March 2007, the defendant did not state that the Hire Purchase Agreement had been terminated as it expressly stated in the letter dated 6th March 2007. The indulgence was extended and accepted on the basis of the existence of the Agreement.

Prima facie therefore, the plaintiff would appear to be on firm ground when it contends that after the termination of the Hire Purchase Finance Agreement, a new relationship was created between it and the defendant. The deposition of Hannah Ndarwa in paragraphs 26 and 27 of the replying affidavit suggest as much. The paragraphs read as follows:-

"**26. That the plaintiff's representative visited the defendant's Nairobi office and asked the defendant to withdraw the repossession order dated 29th January 2009 and also requested that the defendant be allowed to pay Kshs. 2,000,000/= in full and final settlement.**

27. That the plaintiff was advised that the repossession

order would not be withdrawn and that its proposal would only be considered on meeting certain criteria. The Plaintiff gave a cheque for Kshs. 230,000/= on a strictly without prejudice basis. It is the only payment from the plaintiff in over two years."

These two paragraphs suggest a renegotiation following the termination which took place almost one year before. The defendant contends that the plaintiff did not meet the prerequisites stated in its letter dated 13th February 2009 which clearly acknowledged the Hire Purchase Finance Agreement. Yet despite the said failure to comply with the prerequisites, the defendant had let the plaintiff take possession of the suit vehicle even after the termination.

The facts established in this case distinguish it from **Benson Ngugi Muiruri – v – Kenya Nation Capital Corporation Ltd (supra)** in which the Hire Purchase Agreement was not alleged to have been terminated. Mbaluto J, as he then was in **George Masaki Masereti – v – Victoria Commercial Bank Limited** (a case invoked by the defendant) considered provisions of a valid hire purchase agreement which had not been alleged to have been terminated.

In the premises, I have come to the conclusion that the plaintiff has established a prima facie with a probability of success at the trial. The second necessary condition for the grant of an injunction is whether the plaintiff's injury could adequately be compensated in damages if an injunction were not granted at this stage. It was submitted for the defendant that the plaintiff can easily be compensated by an award of damages which can easily be quantified and be paid by the defendant which is a stable multinational bank with vast assets. I agree that the defendant's injury is compensable in damages. However, 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 defendant has itself raised a counter-claim for the sums due to it under the Hire Purchase Agreement. If the counter-claim succeeds, the issue of possession of the suit vehicle will only be of academic interest. The injunction will however preserve the suit vehicle as the parties seek to establish whether or not the Hire Purchase Finance Agreement was terminated or whether a new relationship between them was created after the alleged termination and what if, any, are the duties, rights or obligations of the parties.

In the result, I think I should exercise my discretion in granting the injunction sought. Accordingly, the plaintiff's application dated 4th March 2009 is allowed in terms of paragraph 3 thereof. The plaintiff should file an undertaking as to damages within seven (7) days from the date hereof. The plaintiff's undertaking should be under its seal and should be buttressed by a separate undertaking as to damages by

Dominic Ivuli Livu, the plaintiff's director. Such undertaking to be under oath and be filed within the same period of seven (7) days.

For the plaintiff to ultimately benefit from this injunction, it should within ninety (90) days from the date hereof pay to the plaintiff Kshs. 2,000,000/= being the sum it acknowledges as being due to the defendant. In default of the payment within the said period, the injunction hereby granted shall stand discharged.

Each party has liberty to apply.

Costs of the application shall be in the cause.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 22ND DAY OF OCTOBER 2009.

F. AZANGALALA

JUDGE

Read in the presence of:-

Ngigi holding brief for Muinde for the Plaintiff and Tindi holding brief for Omondi for the Defendant.

F. AZANGALALA

JUDGE

22ND OCTOBER 2009