REPUBLIC OF KENYA

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

Civil Case 647 of 2007

BANK OF AFRICA LIMITED…………………………..PLAINTIFF

VERSUS

JOHN MAINA NGARE………………………………..DEFENDANT

RULING OF THE COURT

1. The application before the court is the chamber summons dated 11th December 2007 brought under Order 38 Rule 5 and Order 39 Rules 1,2,3 and 9 of the Civil Procedure Rules, the inherent jurisdiction of the court under section 3A of the Civil Procedure Act, Cap 21 of the Laws of Kenya and all other enabling provisions of the law. The application seeks a total of eleven (11) prayers, but at the hearing hereof, counsel for the applicant informed the court that prayers 1,3,5 and 7 were already spent and he then summarized the remaining seven (7) prayers under three broad prayers seeking orders that:-

(a) There be a stay of proceedings in Milimani CMCC No. 8830 of 2007.

(b) There be a stay of the order dated 7th December 2007 in CMCC No. 8830/07.

(c) There be an order of injunction restraining the defendant from taking possession or in any other way from interfering with motor vehicle registration number KAW 535D or in the alternative the applicant be allowed to attach the said motor vehicle before judgment.

2. The application is supported by some ten (10) grounds on the face thereof and also the sworn affidavit of ANNE KAHINDI dated 13th December 2007. Among the grounds are that on 7th December 2007, the lower court made an order directing the defendant to release the subject motor the vehicle and that there was no order requiring the Plaintiff to furnish any security. It is also averred that the defendant is heavily indebted not only to the plaintiff but to other third parties and that if the vehicle is released to him, he will most likely dispose of the same and thus defeat the plaintiff's right to take possession of the same and subsequently attach it in enforcing the decree that it (plaintiff) is likely to get in this case. That if the vehicle is released to the defendant and subsequently sold off, the plaintiff will, ***prima facie*** suffer such irreparable loss that it cannot be compensated in damages.

3. ANNE KAHINDI has deponed that she is the Legal Officer of the plaintiff company which gave a loan facility to the 1st Defendant as per the letters of offer dated 15th and 23rd August 2006 respectively. The letters are annexed to her affidavit and marked "AKI". She also says that the defendant failed to make payments as and when they fell due, thereby forcing the

plaintiff to recall the facility under the provisions of clause 17 of the letter of offer dated 15th August 2006. She says that despite the plaintiff's demand to the defendant dated 2nd August 2007 calling for payment of the sum of KShs.3,289,944/75, the defendant failed to make payments as demanded and that it was upon such failure that the plaintiff moved to repossess the motor vehicle registration number KAW 535D.

4. The deponent also says that though the defendant was afforded an opportunity to regularize his account with the plaintiff, he failed to do so as can be seen from the defendant's letter dated 18th September 2007. By his said letter of 18th September 2007, the defendant also admitted being indebted to Co-operative Bank, Donholm Petrol Station and CFC Bank. For the debt to CFC Bank, the defendant indicated that he would sell off his other vehicle to clear the debt. It is however to be noted that the defendant did not, by the said letter, indicate his total indebtedness to the three institutions. The deponent also says that the defendant is truly and justly indebted to the plaintiff to the tune of KShs.3,149,377/68.

5. Filed contemporaneously with the application is the plaint dated 13th December 2007 by which the plaintiff prays for judgment against the defendant for:-

(a) KShs.3,149,377.68 together with interest at 19% per annum with effect from 2nd of August 2007 until payment in full;

(b) A declaration that the plaintiff has the vehicle as security for the claim in prayer (a) above and is entitled to possess and sell the vehicle to recover the claim.

(c) Costs of the application.

6. The Plaintiff's application is opposed through the respondent's sworn affidavit dated 22nd January 2008. He says that despite the court order issued against the applicant on 7th December 2007, the applicant, without any lawful excuse, has refused, failed and/or neglected to obey the said order which required the applicant to release the subject motor vehicle to the respondent. The respondent also says that since the applicant has not appealed against the said order or had the same reviewed, then it should not now be heard to challenge the jurisdiction of the subordinate court that issued the order in the first place. The respondent therefore says further that since the applicant is in breach of lawful court orders and since there is no evidence to show that the respondent is likely to dispose of the subject motor vehicle, then the applicant is not entitled to the orders sought.

7. Both Mr. Ogunde and Mr. Kalwa submitted at length during the hearing of the application. From the submissions the following facts emerge:-

· **That the respondent/defendant took loan facilities from the applicant.**

· **That the subject motor vehicle was given as security for the said loan facility.**

· **That the respondent has seriously defaulted on instalment payments**

· **That the respondent was granted an opportunity to regularize the default, but that he failed to do so.**

· **That the respondent is heavily indebted to other creditors.**

· **That as a result of the default, the applicant repossessed the subject motor vehicle which was bought with the proceeds of the loan facility given by the applicant.**

· **That after repossession of the motor vehicle, the respondent filed CMCC No.**

8830/2007 in his bid to stop the applicant from selling the subject motor vehicle.

· **That the court below issued an order on 7th December 2007 directing the applicant to release the subject motor vehicle to the respondent.**

· **That the applicant has not complied with the said court order.**

8. It is Mr. Ogunde's contention that there is an urgent need to stay the proceeding in CMCC No. 8830/2007 pending determination of this suit. Mr. Ogunde relies on section 6 of the Civil Procedure Act which provides thus:-

"***6. No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."***

9. These provisions do not apply to suits pending in a foreign court. My own interpretation of the section is that the suit that is filed or instituted later is the one to be stayed. The question that the court has therefore to decide is whether it is this suit or CMCC No. 8830/2007 that should be stayed.

10. On the issue of injunction, Mr. Ogunde contends that by the very nature of the circumstances of this case, and chiefly because of the fact that the respondent is admittedly unable to service the loan facility, then he (respondent) should be restrained from taking possession of the subject motor vehicle lest he should dispose of it to the dire detriment of the applicant. Mr. Ogunde submits that the applicant has clearly demonstrated that he has a prima facie case with a probability of success against the respondent and further that if the respondent should be allowed to have the motor vehicle back, there is a high likelihood that the other creditors will grab the vehicle as they seek to recover their own debts by the respondent and that if such a step were to be taken, the applicant would be put to great and irreparable loss. In the alternative Mr. Ogunde asks the court to allow it to attach the subject motor vehicle before judgment. In his view, the risk in losing the security is so great that unless this order or the order of injunction is granted, the decree that may eventually be obtained shall be rendered nugatory. In the further alternative, the applicant prays for an order requiring the respondent to furnish security for the sum of KShs.3,100,000/= and costs of KShs.300,000/= or produce the said sums and place them at the disposal of the court as may be sufficient to satisfy the anticipated decree (prayer 9).

11. Mr. Ogunde also submits that the Replying Affidavit is strangely silent on all the serious factual issues raised by the applicant both in the application and the affidavit in support; that the respondent's complaint about non-compliance with the court order by the applicant cannot stand against the applicant because the applicant moved expeditiously to this court on this application and obtained an order of status quo pending the outcome of this application. He says that mere non-compliance with the said court order would not deprive the applicant of its right to be heard before this court. Mr. Ogunde relies on the case of **ROSE DETHO –vs- RATILAL AUTOMOBILE LTD & 6 OTHERS (Civil Application No. 304 of 2006 (171/2006 UR)** and argues that unless the respondent can prove that disobedience of the court order is impeding the course of justice then the applicant should be heard fully.

12. On his part, Mr. Kalwa for the respondent contends that the applicant has taken the wrong approach in this matter; that it should not have come before this court on this application but should instead have either appealed against the order of 7th December 2007 or applied for its review before the same court that passed it, and that since this court has not been asked to sit on appeal on the order complained of, this application lacks merit and should be dismissed with costs. Mr. Kalwa also says that in view of the documentary evidence provided by the applicant

itself, and in particular annextures 12 and 13 to Anne Kahindi's affidavit, it is clear that the lower court was seized with the pecuniary jurisdiction to hear and determine the matter that was placed before it.

13. Mr. Kalwa is also of the view that the prayer for security and further is unfounded since the applicant has not adduced evidence to show that the respondent is either likely to abscond or to dispose of the security; that the log-book for the subject motor-vehicle is in the safe custody of the applicant. Mr. Kalwa further contends on behalf of the respondent that the applicant has not come before this court with clean hands since it is in contempt of a lawful court order.

14. I have considered the two opposing views, the pleadings, the law and the submissions made to me. It is not disputed that the respondent took out loan facilities from the applicant for which he (respondent) gave the logbook of his motor vehicle registration no. KAW 535D as security. It is also not in dispute that the respondent is in breach of the terms of the agreement in that he has defaulted on repayments as agreed and that even upon rearrangement of the repayment schedule, the respondent is still in default. It is further not in dispute that the applicant seized and repossessed the security. The parties also agreed that on 7th December 2007, the court below issued an order requiring the applicant to surrender the subject motor vehicle to be respondent and that to date, the applicant has not complied with the said order, nor has the applicant appealed against nor applied to have the said order reviewed. It is also not in dispute that the respondent is indebted to other creditors to the tune of undisclosed amounts and that he (respondent) is unlikely to settle the applicant's debt within the foreseeable future. It is also not in dispute that CMCC No. 8830 of 2007 is still pending in the lower court.

15. What is in dispute is how much money the respondent still owes the applicant. The applicant says that the amount is still in excess of KShs. Three Million (KShs.3,000,000/=) as per paragraph 13 of Anne Kahindi's supporting affidavit which would then imply that the lower court as constituted had no pecuniary jurisdiction to hear and determine the dispute. On the other hand, while the respondent contends that as per annexures at pages 12 and 13 of "AKI" to Anne Kahindi's affidavit, the amounts shown to be due and owing by the respondent to the applicant are KShs.182,549/46 and KShs.273,885/20 respectively.

16. The other issue that is in dispute is whether by failing to comply with the court order of 7th December 2007, the applicant lost his right to be heard before this court. In Mr. Ogunde's view, the applicant is still entitled to be heard for the reason that what is at stake is the legality of the order that the applicant is alleged to have breached or to be in contempt of. It is to be noted however that instead of coming before this court by way of a miscellaneous application the applicant has come by way of a substantive suit.

17. The law relating to the discretion of the court to hear or not to hear a contempt is well set out in the ROSE DETHO case (above) where it is stated that the general rule has been not to hear a contemnor until he purges the contempt for the reason that:-

"***It is a fundamental tenet of the rule of law that court orders must be obeyed "(See Kwach JA (as he then was) in <u>COMMERCIAL BANK OF AFRICA LIMITED vs ISAAC KAMAU NDIRANGU – Civil Appeal No. 157 of 1991)</u>."***

18. The Court of Appeal has however stated (quoting from the case of **HADKINSON –vs- HADKINSON [1952] 2 ALL ER 567 pages 569-570)** that there is an exception to the general rule that was enunciated by Denning LJ in the HADKINSON case (above) where the learned law Lord stated:-

"***I am of the opinion that the fact that a party to a case has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the court to ascertain the truth or enforce the order which it may make, then the court***

may on its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed."

19. As **Onyango Otieno, JA** said in the ROSE DETHO case (above) the exercise of my discretion in this matter must be done judicially and not capriciously and must be properly guided by reason and not on the whims of this court or on such other grounds as sympathy for any of the parties or other sentimental issues to prove that the court has teeth that can bite. I am duly guided that courts "act on reason and not on emotion".

20. **Githinji JA** in the **ROSE DETHO** case (above) also referred to other leading cases on the issue of contempt of court and in **particular GORDON –vs- MORGAN – GRAMPIAN (PUBLISHERS) LTD [1990] 2 ALL ER 128**, as ably cited to the court by Mr. Ougo, counsel for the applicant in the **ROSE DETHO** case (above) and stated that:-

"***According to Gordon's case (supra), the general rule that a party in contempt could not be heard or take proceedings in the same case until he has purged his contempt applies to proceedings voluntarily instituted by himself in which he was (has) made some claim and not to a case where all he seeks is to be heard in respect of some matter of defence or where he has appealed against an order which he alleges to be illegal having been made without jurisdiction. In Morgan's case (supra) House of Lords approved the dictum of <u>Denning LJ in Hadkinson –vs- Hadkinson [1952] 2 ALL ER 567 at pages 574-575</u> and held that the court has a discretion whether to hear a contemnor who has not purged his contempt and that in deciding whether to bar a litigant, the court should adopt a flexible approach."***

21. At the hearing of this application, Mr. Kalwa sought to distinguish the facts of the ROSE DETHO case (above) from the facts of the present case by saying that the disobeyed order therein had been appealed against while no such a step has been taken by the applicant in the present case. Mr. Ogunde says that though no appeal has been preferred against the order of 7th December 2007 the applicant has come to this court questioning not only the legality of the said order but also the jurisdiction of the court that issued the order.

22. The issue that arises for determination regarding the contempt is whether the applicant has, by failing to comply with the lower courts order of 7th December 2007 deprived itself of the right to be heard. I do not think so. I do not think that the disobedience of the said order has in any way impeded the course of justice either in this cause or in the cause before the lower court. If it has done so, then it has worked against the applicant himself. The applicant, by coming to this court is trying to say that its only security for the moneys owed to it by the respondent whether the amount is Kenya Shillings Three Million or less ought not to be released to the respondent unless the applicant is certain that the order requiring such release was properly made. In any event, according to the holding in the GORDON case (above) I would hold the contempt against the applicant if it was the applicant who had made some claim in CMCC No. 8830 of 2007. According to the pleadings in the lower court, the applicant only seeks to be heard in respect of some matter of defence though he has not appealed against the said order. I therefore find that the applicant has his right to be heard despite the alleged contempt I so order.

23. In any event, a pertinent question to ask at this point is whether it is enough for the respondent to come to this court and complain that the applicant herein is in contempt of court orders issued by the lower court. Should the respondent have taken action to enforce the order which the applicant is said to be in contempt of? The order complained of was issued on 7th December 2007, some six days before the filing of these proceedings. There is no evidence by the respondent that any action was taken either as at 13th December 2007 or thereafter to bring a formal application under section 5 of the Judicature Act asking for leave of this Honoruable Court to cite the applicant for contempt. It is not enough, in my view, for the respondent to simply come to court during the hearing of the applicant's application and to complain that the

applicant is in contempt. For this reason too, I would find no reason to deny the applicant his right to be heard.

24. What then should happen to CMCC No. 8830/2007 and to the prayers made by the applicant in this matter? By virtue of the provisions of section 6 of the Civil Procedure Act (whose details I have set out herein above), this court should not proceed to hear this case when CMCC No. 8830 of 2007 is still pending. It is not disputed there that the parties litigating in these two matters are the same and that the subject matter is also the same. Would such a step serve the interests of justice taking into account the undisputed facts of this case which I have set out elsewhere in this ruling? If I were to take this approach, I would not grant any of the orders sought by the applicant and would also refer the parties back to the lower court to pursue the matter in that court. However, and by the power conferred upon this court by the provisions of section 18 of the Civil Procedure Act I order and direct that CMCC No. 8830 of 2007 shall be transferred forthwith to this court. Once the case is transferred it would be prudent to have the two matters consolidated for proper determination of the issues between the parties.

25. In the meantime and so that the subject motor vehicle is not wasted, the status quo ordered by this honourable court with the consent of both parties on the 18th December 2007 shall be maintained. The costs of this application shall be costs in the cause.

It is so ordered.

Dated and **delivered** at **Nairobi** this 21st day of February 2008.

R. N. Sitati

Judge