



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 30 of 2008

THE WELLNESS HEALTH & FITNESS CENTRE LTD.....PLAINTIFF

VERSUS

SHAMSHER KENYA LTD.....DEFENDANT

RULING

The plaintiff filed suit seeking an order of permanent injunction to restrain the defendant from repossessing certain gym equipment pending reference of the dispute which had arisen between the plaintiff and the defendant to arbitration. Contemporaneous filing the suit, the plaintiff filed an application under **Order XXXIX Rules 2, 3 (1) and 9** of the **Civil Procedure Rules** and the **Hire Purchase Act (Cap 507 Laws of Kenya)**, seeking an order of interlocutory injunction to restrain the defendant by itself, its directors, servants and/or agents from interfering with or interrupting the quiet use and possession of the said gym equipment and/or the normal business operations of the plaintiff pending the hearing and the final award of an arbitrator to be appointed by the Chartered Institute of Arbitrators (*Kenya branch*). The application is supported by the annexed affidavit of Maina Kimani, the managing director of the plaintiff and the grounds stated on the face of the application.

The application is opposed. Rahim Samji, a sales director of the defendant swore a replying affidavit in opposition to the application. In the said affidavit, he deponed that the plaintiff and the defendant had entered into an agreement whereby the defendant agreed to sell to the plaintiff certain gym equipment. The purchase consideration was to be paid on agreed monthly installments until payment in full. The payment of the said purchase consideration was pegged on the value of the US Dollar. Any fluctuation in the value of the US Dollar would be borne by the plaintiff. Mr. Samji swore that the plaintiff only paid part of the purchase consideration i.e. KShs.6,905,898/= out of the total purchase consideration of KShs.12,180,498/= but had since the 24th September, 2005 failed to pay any balance of the purchase consideration. He deponed that the defendant was entitled to repossess the said gym equipment in light of the plaintiff's failure to pay the balance of the purchase consideration. He swore that the agreement gave the defendant the legal right to repossess the gym equipment in the event that the plaintiff defaulted in paying the balance of the purchase consideration.

At the hearing of the application, I heard the rival submissions made by Mr. Nduati on behalf of the plaintiff and by Mr. Kamunda on behalf of the defendant. Mr. Nduati submitted that the defendant had instructed an auctioneering firm to repossess the gym equipment which was sold to the defendant on hire purchase terms. He explained that the plaintiff had paid two-thirds of the purchase consideration and therefore the defendant had no legal right to repossess the said gym equipment. It was argued on behalf of the plaintiff that since the payment of the balance of the purchase consideration was pegged on the value of the dollar vis-à-vis the Kenya shilling, and since the Kenya shilling had appreciated in value,

accounts ought to be taken to determine the amount actually owed by the plaintiff in respect of the said sale agreement. Mr. Nduati urged the court to grant an injunction pending reference of the dispute to arbitration. He submitted that the court should protect the said gym equipment from seizure by the defendant pending hearing and determination of the dispute which has now been referred to arbitration. He maintained that the plaintiff would suffer irreparable damage if the said gym equipment is repossessed as it would result in its business being adversely affected. He urged the court to allow the application.

Mr. Kamunda for the defendant opposed the application. He submitted that the plaintiff and the defendant had entered into an agreement in which the defendant agreed to sell to the plaintiff some gym equipment at a purchase consideration of KShs. 9 million plus 14% V.A.T. The balance of the purchase consideration was to be paid in agreed monthly installments which would attract interest at 14% per annum. He submitted that after paying nearly half of the purchase consideration, the plaintiff failed to pay the balance of the purchase consideration hence the defendant's decision to invoke a clause in the agreement that entitled it to repossess the said gym equipment. He denied the suggestion by the plaintiff that the agreement between the plaintiff and the defendant was a hire purchase agreement. He submitted that the said agreement was a mere contract of sale. He maintained that the dispute between the plaintiff and the defendant was not a dispute which could be referred to arbitration as envisaged by the agreement. He submitted that the issue in dispute was the non-payment of the balance of the purchase consideration by the defendant. He reiterated that the plaintiff had issued post-dated cheques accompanied by promissory notes which were not honoured. He urged the court not to grant the application sought by the plaintiff as to do so would be rewarding the plaintiff for his unconscionable, deliberate and intentional failure to settle the balance of the purchase consideration. He urged the court to dismiss the application with costs.

I have carefully considered the rival submissions made by counsel for the plaintiff and counsel for the defendant. I have also read the pleadings filed by the parties to this suit in support of their respective opposing positions. The genesis of the dispute between the plaintiff and the defendant was the agreement which was entered on the 30th September, 2005 in which the defendant agreed to sell to the plaintiff certain gym equipment. The plaintiff agreed to purchase the said equipment by paying monthly installments until payment in full of the purchase consideration. It was agreed that the balance of the purchase consideration would attract an interest of 14% per annum on reducing balance. A fundamental term of the agreement was that the balance of purchase consideration would be pegged on the then prevailing rate of the US Dollar. Dr. Maina Kimani and Jeniffer Monyo Maina, the directors of the plaintiff executed a guarantee that they would charge their properties at Dundori in Nakuru district to Family Finance Building Society to settle the balance of the purchase consideration. It is apparent that soon after the execution of the said agreement and the supply of the gym equipment to the plaintiff; the plaintiff defaulted in paying the balance of the purchase consideration in the agreed monthly installments. There arose a disagreement as to the amount that the plaintiff had paid to the defendant.

The disagreement could not be amicably resolved. The defendant sought to invoke clause 4 of the agreement which provided that:

“In the event of default of any installment and without prejudice to the Vendor's right to arrears in any payment due and owing under the agreement, (including without limitation damages for breach of the agreement or other rights or remedies), the Vendor's consent to the Purchaser's possession of the Gym Equipment shall determine immediately and the Vendor may immediately and without further notice take possession of all the equipment and all other accessories wherever they may be and the Purchaser shall allow the taking of such possession.”

The defendant instructed Messrs Galaxy Auctioneers to repossess the Gym Equipment from the premises of the plaintiff. The said auctioneers went to the premises of the plaintiff and proclaimed the said gym equipment. It was contended on behalf of the defendant that the defendant had legal right to repossess the said gym equipment by virtue of the agreement. I have looked at the agreement which was annexed to the plaintiff's application as annexure no. “MK 1”. Although the said agreement was stamped and apparently registered under the **Registration of Documents Act (Cap 285 Laws of Kenya)**, the same was not a chattel mortgage registered under the **Chattel Transfer Act (Cap 28 Laws of Kenya)** which would

entitle the defendant to repossess the said gym equipment in the event that the plaintiff defaulted in paying the balance of the purchase consideration as per the repayment schedule in the agreement.

The plaintiff's interpretation of the said agreement is that the same was a hire purchase agreement which entitled the plaintiff to retain the property in the gym equipment once it had paid two-thirds of the purchase consideration. On the other hand, the defendant is of the view that the agreement in question was a simple agreement for sale of goods. This court is of the opinion that the said agreement is not a Hire Purchase Agreement since the same was not registered under the **Hire Purchase Act (Cap 507 Laws of Kenya)** which requires all hire purchase agreements to be registered (see **Section 5(1)** of the said **Act**). I am inclined to agree with the submission by the defendant that the said agreement was a simple agreement for sale of goods. It is evident that the plaintiff and the defendant have disagreed as to the purchase consideration that has been paid and the amount that is now outstanding. There is a clause in the agreement that provides for arbitration in the event that the plaintiff and the defendant have any dispute concerning the said agreement. Mr. Kamunda for the defendant submitted that the matter is in dispute related to failure by the plaintiff to pay the balance of the purchase consideration. In his view, this was not an issue which could be referred to arbitration. I do not however agree with this argument by Mr. Kamunda. It is clear that the said clause of the agreement provides that any dispute, controversy or claim out of or relating to the agreement, its interpretation, breach or validity would be referred to arbitration (*See clause 10 of the agreement*).

The plaintiff sought orders of interlocutory injunction to be issued to restrain the defendant from repossessing the said gym equipment pending the hearing and determination of the dispute by arbitration. To be successful in its application, the plaintiff was required to establish that it has a prima facie case with a likelihood of success and that it would suffer irreparable loss which would not be compensated by an award of damages (see **Giella –vs- Cassman Brown [1973] EA 358**). In the present application, the plaintiff has established that the defendant did not have any legal right under the agreement to repossess the gym equipment without reference to the court. If the defendant was of the view that it desired to repossess the said gym equipment, it could only do so after obtaining a court order. In the absence of a duly registered chattels mortgage, the defendant's act in purporting to repossess the gym equipment sold to the plaintiff was unlawful. On that basis, this court holds that the plaintiff has established a prima facie case. This court however note that the plaintiff failed to honour its part of the bargain by paying the installments due to the defendant. This being a court of equity, it will enforce equity. The plaintiff is seeking equity; it must do equity.

I will therefore grant the interlocutory injunction sought by the plaintiff in accordance with prayer 3 and 4 of the application pending the hearing of the dispute by arbitration. The defendant by itself or its agents are hereby restrained from interfering, interrupting from use or repossessing the gym equipment currently in the possession of the plaintiff pending the hearing of the dispute by arbitration. The chairman of the Kenya Branch of the Chartered Institute of Arbitrators is hereby directed to appoint a single arbitrator to determine dispute between the plaintiff and the defendant within thirty (30) days of today's date. The plaintiff is ordered to pay the defendant a sum of KSh.2 million (*which is part of the undisputed amount owed to the defendant*) within thirty (30) days of today's date. The plaintiff and the defendant shall deposit in a joint account of their counsels each the sum of KShs.100,000/= within fourteen (14) days of today's date being a deposit of the cost of arbitration. In default of the plaintiff complying with the order of this court directing it to pay the sum ordered paid to the defendant by this court, the order of injunction issued shall automatically lapse. In view of this court's ruling, the costs of the application shall be in the cause.

DATED at NAIROBI this 8th day of APRIL, 2008.

L. KIMARU

JUDGE