



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Appeal 606B of 2006**

**AFRICAN BANKING CORPORATION LTD.....1<sup>ST</sup> APPELLANT**

**AUKLAND AGENCIES.....2<sup>ND</sup> APPELLANT**

**WESTMINSTER COMMERCIAL TRADERS.....3<sup>RD</sup> APPELLANT**

**VERSUS**

**MUUSYA SYUKI.....RESPONDENT**

**R U L I N G**

1. I have before me a chamber summons dated 10<sup>th</sup> November, 2008 brought by the applicants, African Banking Corporation Ltd, Auckland Agencies, and Westminster Commercial Traders (hereinafter referred to as the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> applicants). The application seeks *inter alia* an order for stay of execution of the order made by the Senior Principal Magistrate, on 5<sup>th</sup> November, 2008 in Milimani CMCC No.5227 of 2008. In the alternative, the applicant seeks an order that the respondent Muusya Syuki, do deposit the sum of Kshs.803,723/50 into a joint interest earning account in the names of the parties' advocates. The application is supported by an affidavit sworn by Jeff Karanja a Senior Manager of the 1<sup>st</sup> applicant as well as grounds stated on the body of the application.

2. In short, the applicants are dissatisfied with the order issued by the Senior Principal Magistrate compelling the applicants to release motor vehicles KAB 449Z and KAM 328B pending the hearing of the suit. The applicants contend that the respondent had admitted being in breach of his contractual obligation to the 1<sup>st</sup> applicant and thereby being indebted to the 1<sup>st</sup> applicant in the sum of Kshs.803,723/50. The 1<sup>st</sup> applicant maintain that the order for release of the motor vehicles is likely to cause the 1<sup>st</sup> applicant to suffer substantial loss as it will jeopardize the applicant's security for the loan facility granted to the respondent and further expose the respondent's account to arrears and continuing penal interest.

3. The applicant has filed an appeal against the orders issued by the trial magistrate and therefore urges the court either to stay the order for release of the vehicles or in the alternative to order deposit of the sum of Kshs.803,723/50. The applicant further maintains that the mandatory injunction issued by the lower court has the effect of prematurely determining the whole suit.

4. Counsel for the applicant submitted that the respondent having admitted owing the 1<sup>st</sup> applicant, there was no prima facie case upon which the mandatory order of interlocutory injunction could be predicated. In this regard, counsel relied on the following authorities:

**(i) HCCC Milimani No.264 of 2006 Richard M. Mutiso vs CFC Bank Ltd.**

**(ii) HCCC (Nakuru) No.143 of 2005. Nakuru Veterinary Centre Ltd Vs Mary W. Kariuki.**

**(iii) HCA (Nakuru) No.295 of 2001 CMC Motors Group Ltd & Another vs Evans Kageche Boro.**

Counsel urged the court not to allow the respondent to use the mandatory injunction to steal a match on the applicants. Counsel further contended that the applicants are likely to suffer prejudice if the orders sought are not granted as the motor vehicles are likely to depreciate in value.

5. In response to the application, the respondent has sworn a replying affidavit in which he deposes that he received a hire purchase loan of Kshs.2,188,000/= from the 1<sup>st</sup> applicant to purchase two vehicles which were duly registered as Registration Nos KAP 449Z and KAP 450Z. The applicant swore that he faithfully repaid the loan until 20<sup>th</sup> November, when he defaulted the outstanding loan then standing at the sum of Kshs.210,063/=. That the 1<sup>st</sup> applicant instructed the 2<sup>nd</sup> applicant to repossess the two vehicles and motor vehicle KAM 328B which was security for a term loan. The respondent maintained that he has paid a total of 2,132,137/= of the hire purchase facility and Kshs.761,760/50 of the term loan account. The respondent maintained that he was given a statement of account from which he realized that repossession charges and penalty charges have been illegally and unlawfully loaded on to the account. The respondent denied having admitted owing a sum of kshs.803,723/50 as outstanding.

6. Counsel for the respondent urged the court not to grant the orders sought by the applicant as the applicant has failed to satisfy the conditions set out under Order XLI Rule 4(2) of the Civil Procedure Rules. He contended that the applicant had not established any substantial loss. It was maintained that although the respondent has admitted being indebted to the applicant the amount has not been established. It was further contended that the 1<sup>st</sup> respondent had no authority to sell the motor vehicle and the advertisement for sale of the motor vehicle was done fraudulently.

7. I have carefully considered the application, the affidavit in support and in reply as well as the submissions of both counsels. The applicants seek orders under Order XLI Rule 4 & 5 of the Civil Procedure Rules. It is therefore imperative that the applicant satisfies the conditions granted under Order XLI Rule 4(2) of the Civil Procedure Rules. That is, that substantial loss may result to the applicant unless the orders sought are granted, secondly, that the application has been made without unreasonable delay and thirdly, that such security as the court orders for due performance of the decree has been given.

8. In this case, the orders sought to be stayed are for unconditional release of two motor vehicles and further orders restraining the applicants from repossessing or selling the motor vehicles. It is not disputed that these motor vehicles were actually the subject of a hire purchase agreement in respect of which the respondent has defaulted. The question as to whether the order of mandatory injunction for the release of the vehicles issued by the lower court was proper, is the subject of the appeal now pending before this court. It would not therefore be appropriate to make any conclusive findings in that regard. Suffice it is to state that motor vehicles are articles which depreciates in value very fast, secondly, any loan outstanding in respect of the hire purchase is also attracting interest. Therefore the contention that the applicant is likely to suffer substantial loss if the orders sought are not granted is not without substance.

9. I would therefore grant the chamber summons to the extent of granting the alternative prayer by ordering the respondent to deposit the sum of Kshs.500,000/= in court as security before the release of the motor vehicles. The deposited sum shall remain in court until the appeal is finalized. The applicant shall file and serve a record of appeal within 30 days from the date hereof. Costs of the application shall be in the appeal.

**Dated and delivered this 15<sup>th</sup> day of December, 2008**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Luseno for the appellants/applicant

Advocate for the respondent absent