



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**Civil Case 617 of 2005**

**LINEAR COACH CO. LIMITED ..... PLAINTIFF**  
**VERSUS**  
**FIDELITY COMMERCIAL BANK LTD ..... DEFENDANT**  
**RULING**

In this application, the Applicant who is the Plaintiff is seeking one primary order. This is that the Court be pleased to grant the Plaintiff/Applicant a temporary injunction restraining the Defendant/Respondent by itself, its agents and/or servants from repossessing, disposing and/or interfering with motor vehicles Registration Nos. KAS 647Y and KAS 648Y pending hearing and determination of the suit.

The grounds for the application are 6. They are as follows:-

- (i) That the Defendant/Respondent has proclaimed the applicant's motor vehicles Reg. No. KAS 647Y and KAS 648Y and is due to carry them away anytime now.
- (ii) That the Plaintiff/Applicant has fulfilled all conditions precedent on the Loan facility Agreement between it and the Defendant/Respondent.
- (iii) That the Defendant/Respondent has failed to perform its part of the agreement despite the fact that it has the Plaintiff's securities.
- (iv) That the Defendant/Respondent is indeed in breach of the aforesaid agreement.
- (v) That the Defendant/Respondent has made wrong entries on the Plaintiff/Applicant's A/C No. [particulars withheld] leading to loss of money from the Applicant's account.
- (vi) That the proclamation by the Respondent has been done in bad faith and out of malice because it is the Respondent who has made it impossible for the Applicant to operate.

The application is supported by an affidavit sworn on 25.10.2005 by one Alfred Michira a director of the Plaintiff. In this affidavit the Applicant states that by an agreement dated 23.3.2005 the Defendant agreed to extend a loan facility of Kshs 22,000,000/= to the Plaintiff as follows:-

**(a) A term loan (1) of Kshs 4,000,000/=**

**(b) A term loan (2) of Kshs 8,000,000/=**

**(c) Other facility (including hire purchase) of Kshs 10,000,000/= (existing) facilities.**

It is averred in paragraph 5 of the said affidavit that the propose of the said facility was to provide the Plaintiff company with a working capital and also to service the existing overdraft facility account. The Plaintiff further avers in paragraph 7 of the said affidavit that after signing the said agreement the Plaintiff fulfilled all conditions precedent stipulated in the agreement and it was the duty of the Respondent/Defendant to release the said term loans. However, as averred in paragraph 8 the Respondent has not released the 2nd term loan. It is further averred in paragraph 14 of the said affidavit that in June 2005 the Plaintiff discovered wrong entries on his account showing debits that the Plaintiff had no knowledge of but when he enquired about this the Respondent did nothing. It is also stated in paragraph 16 that on 19.10.2005 the Respondent through Auckland Agencies proclaimed the said motor vehicles using repossession orders given by the Respondent. In paragraph 19 it is averred that the Respondent is estopped from repossessing the said motor vehicles because to do so would be in breach of the said agreement. The Plaintiff has annexed to this affidavit "AM1" being a copy of the said agreement. Statements of accounts are also annexed.

The said Alfred Michira also swore a further affidavit on 17.11.2005 in which he avers that the Respondents replying affidavit does not answer the Plaintiff's complaints.

The Respondent opposed the application and vide a Replying Affidavit sworn by its Legal Officer stated in brief that the Plaintiff entered into two hire purchase agreements with the Defendant for the purchase of the suit motor vehicles under which the Plaintiff was to repay for the vehicles in 36 monthly installments but the said accounts fell in arrears as a result which the Respondent is entitled to repossess the motor vehicles. Accordingly the Plaintiff is the one in breach of the hire purchase agreements. The Respondent has also averred that the hire purchase accounts or agreements have no relationship with the other Loan Accounts and in the premises the orders sought should be declined especially, as the motor vehicles are depreciating in value by passage of time.

The application was debated before me on 7th December, 2005 by Mr. Mugikoyo, Learned Counsel for the Plaintiff and Ms Mungai, Learned Counsel for the Respondent. Learned Counsels recited the averments in the affidavits filed and ably urged their clients' respective cases.

The main complaint as I can gather from the application, the Affidavits, the annexures and the submissions by the Applicant's, Learned Counsel is that the Respondent has not kept its part of the bargain with respect to the agreement of 23.3.2005. It is the Plaintiff's position that despite the provisions of the said agreement, the Defendant failed to release the 2nd term loan of Kshs 8,000,000/= whose purpose was to provide the Plaintiff with a working capital and also service, the existing overdraft facilities. The Plaintiff also complains that its accounts have not been properly handled by the Respondent with the result that one of its accounts, has been wrongly debited with a sum of Ksh 9,100,000/= and the Respondent has refused to reverse this position. According to the Plaintiff the cumulative, effect of the Respondent's wrongful actions or omissions is to hamper its business operations and its financial operations.

The Respondent's answer to the Plaintiff's first complaint is that the hire purchase agreements have no relationship with the other accounts and the repayments of the hire purchase accounts have fallen in arrears. In the premises it is the Respondent's view that it is entitled to repossess the suit motor vehicles. I am not hearing the entire case. I should therefore not make any definitive findings of fact or Law. I have read the agreement of 23.5.2005, annexed to the Plaintiff's supporting affidavit as "AM1". By clause 1 thereof the Respondent was prepared to make available to the Plaintiff. . (a) Term Loan 1 – Kshs 4.0 million (b) Term Loan 2 – Kshs 8.0 million (c) Other Facilities (including Hire Purchase) Kshs 10 million (existing facilities).

The said facilities were (as per clause 2) for the purposes stipulated as follows:- "Term Loan facilities shall be utilized by the Borrower for the purpose of working capital and adjustment of the outstanding on the overdraft facility account."

It is illustrative that clause 1 (c) specifically mentions the Hire Purchase facility and so does clause 5 (c) which reads:- "(c) The Hire Purchase facility (existing) shall be payable to the bank for a maximum period of 36 months from the date of disbursements provided that the Borrower shall repay the facility together with all accrued interest fees and other sum's due in respect of the Term Loan in any event on or before Facility Termination Date."

In the light of the above provisions of the agreement, the Respondent is not candid when it asserts that the Hire Purchase Agreements had no relationship with or are separate from any other facilities the Plaintiff may have had with the Defendant. The Respondent has also not breathed a word about the Plaintiff's complaint that the Term Loan of 8.0 million was not disbursed and if so the reason of non-disbursement. The Respondent has not also satisfied me that the Plaintiff's complaint with respect to the unauthorized debits of Kshs 9,100,000/= is frivolous.

In the above premises, I find that the Plaintiff has demonstrated an arguable case that the Respondent may not have kept its part of the bargain. Being of that persuasion I am satisfied that the Plaintiff has shown a prima facie case with probability of success at the trial and damages would not be an adequate remedy. Accordingly I allow the Plaintiff's application dated 21.10.2005 in terms of prayer 2 thereof on terms that

the Plaintiff company files a sealed undertaking as to damages within 7 days of today.

The company's undertaking to be fortified by the personal undertaking of Alfred Michira the plaintiff Company's director to the same effect and the same to be also filed within 7 days of today. There will be liberty to apply. Costs shall be in the cause.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JANUARY 2006.

F. AZANGALALA JUDGE

Read in the presence of:-

Mugikoyo for the Plaintiff and Njeru for Mungai for the Defendant

F. AZANGALALA

JUDGE

27.1.2006