



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

Civil Case 373 of 2006

AFRICA ECO-CAMPS LTD. PLAINTIFF

VERSUS

FIDELITY COMMERCIAL BANK LTD. DEFENDANT

RULING

This is an application for an interlocutory injunction brought under Order XXXIX Rule 2 of the Civil Procedure Rules and all the enabling provisions of the law. The application is brought by the plaintiff against the defendant. On the plaintiff's application the defendant extended a credit facility to the plaintiff for the purpose of purchasing 3 Toyota Land Cruisers on Hire Purchase Agreement. The sum advanced for each vehicle was Kshs.2,743,042.00 and interest for the period of the hire was Kshs.534,902.00 for each vehicle – the period being 36 months. The facility was to be repaid at the rate of Kshs.91,054.00 per month plus one final payment of Kshs.94,054.00. The interest rate was 6.5% p.a. Those terms were contained in a letter dated 27.5.2004 titled: "Approval for Hire Purchase Facility". The letter was addressed to Nairobi Toyota and was from the defendant.

The plaintiff accepted the terms by an endorsement to that effect on the said letter. Hire Purchase Agreements were then executed on 9.7.2004. The plaintiff contends that it kept its part of the agreement but subsequently noticed that the defendant was charging additional interest that had not been agreed. It complained on 1.7.2005, 10.11.2005 and on 26.6.2006. The last complaint instead of eliciting the regularization of the accounts, provoked the defendant who instructed Dynasty Commercial Agencies to repossess the motor vehicles. Hence this suit and application. The crux of the plaintiff's application is that the defendant is charging additional and illegal interest in contravention of Section 44 of the Banking Act as read with Section 39 of the Central Bank of Kenya (Amendment) Act 2000. In those premises the plaintiff contends that unless the defendant is restrained by an order of injunction as sought it stands to suffer severe loss and damage which cannot be compensated by monetary means.

The defendant's response to the plaintiff's application is that under the Hire Purchase Agreements, it is the owner of the motor vehicles and under paragraph 4 thereof is entitled to repossess without previous notice or demand in the event of default by the plaintiffs which event has occurred. With regard to interest rate variation, the defendant contends that the same was with notice to the plaintiff even though strictly no notice was required. In those premises, the defendant contends that the plaintiff has not satisfied the conditions for the grant of an interlocutory injunction.

The conditions for the grant of an interlocutory injunction were well stated in the case of **Giella v. Cassman Brown & Co. Ltd. [1973] EA 358**. They are as follows: First an applicant must show a **prima facie** case with a probability of success at the trial; secondly, an interlocutory injunction will not normally

be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated in damages; and thirdly, if the court is in doubt, it will decide an application on the balance of convenience.

Does the plaintiff meet those conditions for the grant of the interlocutory injunctive relief sought? From the material on record and the submissions of the counsels appearing it appears to me that central to the plaintiff's application is the validity of the interest charged by the defendant.

The defendant argues that it was entitled to charge the interest rate applied and the amount or legality of the interest charged does not affect the validity of the facility. I have perused the notices served upon the plaintiff with regard to the increases in the lending rates by the defendant. The notices have the following paragraph:-

“As you are aware the interest rate scenario has changed significantly in the recent months, as a result of increase in interest rates offered by Central Bank of Kenya on Treasury Bills. Consequently, upon this rise in the Treasury Bill rates, there has been a general increase in rates that are being demanded by all depositors. As a result of the above we are increasing our lending rate on above account by 2.5 % p.a. effective 1st December 2004.”

On the same basis the defendant variously increased the interest rates it applied on the plaintiff's accounts. The defendant does not pretend that it sought the approval of the Minister of Finance to vary the interest rates. Section 44 of the Banking Act (Cap 488) reads:-

“No institution shall increase its rate of banking or other charges except with the prior approval of the Minister.”

And Legal Notice No.34 of 12.5.2006, regulation 2 reads:-

“An application for approval of increase in the rate of banking or other charges under Section 44 of the Act shall be in the form set out in the Schedule and shall be submitted to the Minister through the Governor of the Central Bank of Kenya.”

Legal Notice No.34 in my view merely declares the Regulations applicable with regard to increase of rate of banking and other charges. The Legal Notice in my view does not imply that Section 44 of the Banking Act had ceased to apply prior to the Legal Notice. In the premises the plaintiff has shown a

prima facie case with a probability of success at the trial on the issues of the validity of the various increases in the interest rates applied by the defendant. I do not agree with the defendant that the amount or legality of the interest charged does not affect the validity of the facility. The requirement for approval of the Minister to vary the rates is a Statutory one. Breach of a Statutory provision in my view would go to the root of the facility. A final determination must however await the trial of this action.

An issue has also arisen from the material on record with regard to LR. No. Kisii Block 111/77. The defendant raises the issue in its annexure "PM3" i.e. the letter dated 12.5.2006 addressed to the plaintiff. The plaintiff in its supplementary affidavit sworn by Azim Jiwa Rajwani on 4/10/06 depones *inter alia* that the defendant had agreed with the plaintiff that the defendant would reconcile Account Number 202-2384 which had been wrongly debited with illegal interest so that the sum of Kshs.20,000,000/= to be realized out of the sale of LR No. Kisii Block 111/77 would settle all accounts to finality. That issue in my view cannot be resolved at this interlocutory stage.

The dispute between the plaintiff and the defendant is not therefore merely as to the amount owed under the Hire Purchase Agreement.

With regard to the second condition for the grant of an interlocutory injunction, I am satisfied that the plaintiff has met the same. To lose the subject motor vehicles when it may turn out that no arrears are owed would in my view occasion to the plaintiff an injury which cannot be adequately compensated by damages. The plaintiff has deponed in its supplementary affidavit sworn by the same AZIM JIWA RAJWANI on 4.8.2006 that it is an internationally known tourist resort of high repute and stands to have its reputation irredeemably damaged in the event that the defendant repossesses the subject motor vehicles. Loss of reputation is not always compensatable by an award of damages.

In the premises, I am satisfied that this is a fit and proper case for the exercise of judicial discretion in granting an injunction to the plaintiff. I accordingly, order that an interlocutory injunction should issue restraining the defendant by itself or its agents, servants or any of them from repossessing motor vehicles registration numbers KAS 467 K, KAS 468 K and KAS 469 K – Toyota Land Cruisers or in any other way interfering with the plaintiff's possession of the said motor vehicles pending the hearing and determination of this suit. The plaintiff should file a written and sealed undertaking as to damages within the next 7 days. The plaintiff should also in the meantime, continue making the agreed monthly repayments in terms of the Hire Purchase Agreements.

Either party has liberty to apply.

The costs of this application shall be in the Cause.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 24th day of November 2006.

F. AZANGALALA

JUDGE

Read in the presence of:- Amondi for the plaintiff and Kanjama for the defendant.

F. AZANGALALA

JUDGE

24/11/06.