REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 280 of 2004

FARMLAND ENGINEERING ...……..……. PLAINTIFF

VERSUS

KENYA INDUSTRIAL ESTATES…….…..……DEFENDANT

RULING

This is an application made under **Order XXXIX Rule 1, 2 and 3 of the Civil Procedure Rules** by the plaintiff seeking the orders of this court to restrain the defendant by itself, its servant or agents from interfering with the plaintiff's operations in anyway whatsoever pending the hearing and determination of the suit filed by the plaintiff. The application is supported by the annexed affidavit of Isaac Arap Langat, a director of the plaintiff company and the grounds stated on the face of the application. The said Isaac Arap Langat swore a further affidavit in support of the application on the 1st of December 2004. The application is opposed. Tom Dulla Odeny, the Debt Recovery Manager of the defendant has swore a replying affidavit in opposition to the plaintiff's application.

At the hearing of the application, Mr Machage Learned Counsel for the plaintiff submitted that the machines which the plaintiff purchased from the defendant were unserviceable. It was contended that the defendant was aware of this fact when it sold the said machines to the plaintiff. The plaintiff argued that from the time the agreement was entered into, he was unable to service the loan advanced to it by the defendant due to the frequent breakdown of the machines. The plaintiff submitted that the defendant had at one time agreed to extend it another loan to enable it repair the said machines. Unfortunately the defendant did not disburse the said amount but instead told the plaintiff to repair the machines using its own resources and then claim credit from the amount to be repaid. The plaintiff submitted that after repairing the said machines, it was not given credit to the loan advanced it as promised by the defendant. Even though the defendant offered to take the machines back and give credit to the plaintiff on the said loan advanced, the plaintiff argued that the defendant had done neither. It was contended on behalf of the plaintiff that the machines sold to it by the defendant were either scrap or absolete. It was argued that the plaintiff was duped into buying the said machines on a loan lent at exorbitant interest rates. The plaintiff argued that for the type of machines supplied to him, he ought to be refunded the sum of Kshs.1.2 million that he had already paid plus interest. The plaintiff urged the court to allow it's application for injunction pending the hearing and determination of the suit filed.

Mrs Omwoyo learned Counsel for the defendant opposed the application. He submitted that the plaintiff had not established a case to entitled it to the order of injunction prayed. He submitted that the relationship between the plaintiff and the defendant was based on a loan agreement which the plaintiff duly signed. The plaintiff further executed a deed of guarantee. Learned Counsel argued that the plaintiff (*being an engineer*) knew the conditions of the machines and also accepted the fact that the machines sold to him were used. He further submitted that the plaintiff had accepted the price which the defendant had initially offered to sell the said machines to the plaintiff. When the plaintiff became dissatisfied with the some of the machines, the defendant offered the give credit to the plaintiff on the loan advanced provided the plaintiff surrendered the said alleged defective machines which it deemed to be unserviceable. According to the defendant, the plaintiff did not accept the offer but instead choose to remain with the machines. It was the defendants' submissions that the plaintiff's application lacked merit as the issue was the loan advanced and not the machines which the plaintiff had accepted from the time the letter of offer

was executed. The defendant therefore urged the court to dismiss the plaintiff's application with costs.

In response, Mr Machage submitted that the defendant and the plaintiff had varied in terms of the agreement by their conduct. It was submitted that the plaintiff understood the variation of the agreement to mean that no interest would be charged on the amount lent.

I have carefully considered the arguments made by learned Counsel for the plaintiff and learned Counsel for the defendant. I have carefully read the pleadings filed by the parties to this application, especially the affidavits filed and the annextures thereto. The issue for determination by this court is whether the plaintiff has established a case to entitle it to the orders of injunction sought. This court is aware of the test laid down in **Giella -vs- Cassman Brown [1973] EA 358** for this court to grant an order of injunction. The plaintiff entered into a loan agreement with the defendant on the 18th of August 1994 whereby the defendant agreed to advance the plaintiff the sum of **Kshs.964,949/-** in form of machinery and equipment that the plaintiff was then purchasing from the defendant. The plaintiff agreed to pay the said sum advanced together with interest. The plaintiff duly took over the said machinery and equipment from the defendant. When Isaac Kipngetich Langat, a director of the plaintiff company took over the said machinery and equipment in 1994 (*on the 24th of January 1994*), he signed a document indicating that he was satisfied with the condition of the said machinery.

From the evidence on record, it is clear that the plaintiff was aware that the machines being purchased were used. The issue of there being a guarantee that the said machinery would be serviceable did not therefore arise. It appears that the plaintiff had difficulty in repaying the said loan advanced to it. The plaintiff over time has sought to entangle the issue of the loan advanced to it with the condition of the machinery sold to it. In my considered view, the two issues are separate. The loan repayment was not predicated on the serviceability or otherwise of the machinery sold. Likewise, the fact that the plaintiff had difficulty in repaying the loan advanced to it was not dependant on whether or not the said machines were in a working condition. In my opinion, the plaintiff raised the issue of the serviceability of the machinery to fudge issues and conceal the fact that it had over time failed to repay the loan advanced to it together with interest as agreed in the loan agreement.

The fact that the defendant was prepared to accept back some of the machinery which the plaintiff was claiming were unserviceable, and the fact that the plaintiff refused to hand over the said "*unserviceable*" machinery lends credence to the finding of this court that the plaintiff raised the issue of the serviceability of the machinery as a red herring to enjoy the use of the said machinery without paying for it. From my careful consideration of the facts of this case, I find that the plaintiff has miserably failed to establish a *prima facie* case.

The plaintiff's application is typical. An individual borrows money from a financial institutional (*or in this case an industrial concern*). He fails to pay the loan amount advanced plus interest due. Instead of re-negotiating terms with the lender, such an individual comes to court and seeks injunction when the items charged as security are sought to be sold. The individual in question raises all manner of excuses as to why the lenders exercise of its right of sale (*or repossession, as the case may be*) is oppressive and contrary to the law. Unfortunately such an individual forgets the fact that courts are there to enforce rights of individuals. Courts are not forums where contracts deemed to be "*oppressive*" by one party are renegotiated. In filing suits before the court, such individuals are postponing the inevitable; the securities will be realised unless they abide by the terms of the loan agreement or renegotiate the same with the lender. Courts cannot intervene in such situations.

The plaintiff having failed to establish a *prima facie* case, it would be immaterial for me to consider the other principals governing the grant of injunctions as enunciated in the said case of **Giella -Vs- Cassman Brown** (*supra*). The plaintiff's application therefore lacks merit. The same is dismissed with costs to the defendant. The interim orders issued are hereby vacated.

DATED at NAKURU this 3rd day of August 2005.

L. KIMARU

JUDGE