

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE 1775 OF 2001

AUTOMEK ENGINES & COMPONENTS LTD PLAINTIFF

VERSUS

HABIB BANK LIMITED DEFENDANT

RULING

This application dated 21st November 2001 is seeking two main orders. These are an order that the proclamation issued on the Plaintiff on 6th November 2001 be lifted and all attached goods be released to the Applicant unconditionally, and that the Defendant by itself and or its servants, agents and whomsoever it may delegate authority be restrained from disposing off, parting possession with transfer, selling, alienating in whatever manner the Plaintiff's proclaimed property. The application is also seeking costs. The grounds are that the Defendant wrongfully proclaimed/attached the Plaintiff's various goods whereas the Plaintiff has never entered into any contract with the Defendant; that the Plaintiff is likely to suffer irreparable damage incapable of being compensated in damages and shall be prejudiced. There is an Affidavit in support of the same application.

The Respondent opposed the application stating in its grounds of opposition that the application is an abuse of the court process; that the Applicant has not met the conditions necessary for the grant of the orders sought; that the Plaintiff Company is a sham and was incorporated with the sole intention of preventing the Defendant from realising its securities; that the Plaintiff has not proved that any of the proclaimed goods rightly belongs to it, that the orders sought are not capable of being granted at the interlocutory stage and that the Plaintiff is guilty of misrepresentation and suppression of material facts. There is Replying affidavit filed by the Respondent. To both Affidavits there are several annexures. On perusing the Affidavits before me, the following facts do emerge. The Deponent of the Applicant's Affidavit, Sajid Iqbal Malic who is the Director of the Plaintiff/Applicant is the son of one Javid Iqbal Malik who carries out a business under the name and style of Automec Diesel Equipment and Parts. By a Deed of Hypothecation dated 26th March 1997, the same Javid Iqbal Malik (I will refer to him as Javid only in this Ruling while the son will be referred to as Sajid only) who was then carrying out his business at the premises known as L.R. No. 37/79 Baricho Road Nairobi, charged all his stock in trade including all other goods and/or merchandise to secure as continuity security the repayment on demand of all advances made to him by the Defendant Bank.

Later, after the execution of the said deed, Javid moved to premises known as L.R. No. 2916/21/22 Baba Dogo Nairobi. On 31st July 2001 stock list of the goods belonging to him t/a Automec Diesel Equipment & Parts was given and these were goods in the premises L.R. No. 2916/21/22 at Baba Dogo Road. The same property had been insured with the insurance policy covering the period 13.9.2000 to 13.9.2001. What were insured included: "On stocks, furniture, fixtures, and fittings, machinery spare equipment, Automotive parts, tools, and all other items whilst in a building of a single storey in height built of stone and roofed with corrugated iron sheets situate at LR 29/6/21/22 Baba Dogo, Nairobi and occupied as spare parts Retail outlets for motor vehicles". And the value is given. The same Javid then failed to pay or is alleged to have failed to pay the debt. The Bank's auctioneers, pursuant to deed of hypothecation moved in to proclaim the goods in the same premises. This was done on 6.11.2001. Meanwhile, Sajid and others had on 12th September 2001 incorporated the Plaintiff's company and were trading in the same premises as his father. The Plaintiff filed the Plaintiff herein and this application.

It will be noted first, that the Plaintiff is not pleading trespass by the Defendant on the premises. Indeed the Plaintiff/Applicant is not stating the premises from which the alleged property were proclaimed. Secondly the Plaintiff has not stated anywhere that the principal debtor to the Bank is trading in the same premises with the Plaintiff – a fact which must be in the knowledge of the Director of the Plaintiff's company. Further it is noteworthy that the Plaintiff is claiming the proclaimed goods to belong to it yet, it has not annexed even a single evidence to prove this allegation. Properties like motor vehicles which are already registered e.g. No. KAA 493J, Peugeot 205GL, KYW 937 Datsun 1200 Pick Up are properties that have or should have logbooks. It is clear to me that the Plaintiff has not satisfactorily proved that the goods that were proclaimed truly belong to it. However, that is not the end of the story. In the matter before me, it is not a simple attachment of a debtor's property as happens in the usual execution of a decree. This is a matter where the goods are being proclaimed on account of a Deed of Hypothecation of Goods to secure advances and other indebtedness. My understanding of the same situation is that like in the case of a property mortgaged, only the mortgaged property should be sold in case of default to pay the debt. Here clause 8 of the same Deed of Hypothecation states:

“The Bank or any person authorised by the Bank may at any time or times enter any premises or places where the goods hereby hypothecated or any of them are kept and inspect and take particulars thereof”. and clause 9, gives the Bank power to enter any premises or place where the goods hypothecated are and take and retain possession of the said goods or any of them. I have not been told whether the same Deed of Hypothecation needed to be registered but be that as it may, it is clear to me that the goods to be taken possession of and retained by the bank must be goods hypothecated and none other. In this case the stock report annexed as RVC by the Respondent lists several units of Isuzu vehicles, several Mitsubishi vehicles, several Nissan vehicles, several Toyota vehicles, one Datsun vehicle, spare parts for overhaul service parts, electrical, mechanical, diesel fuel injection and gardner, car & lucas Parts, Dismantled parts for engine, gearboxes, and differential, mechanical, suspensions & electrical parts. Differential centre units with rear axles and drums double wheel Isuzu. These were the stock that the Debtor Javid did list. This list does not tally with the list of goods proclaimed which includes All Household goods, e.g. sofa sets, TVs, videos, Radio cassettes, carpets, cookers, fridges etc.

It seems to me that the Bank did not ensure that the Debtor Javid complied strictly with clause 3 of the Deed. The Bank also did not ensure that the debtor Javid complied with Clause 4 of the deed as the only stock list I see is the one prepared as at 31st July 2001. Perhaps a stock list as at 31st October 2001 would have been more useful. For what I have stated above, I do not think this is a proper case for the grant of mandatory injunction as is sought in prayer 2 of the application. In the case of Malindi Air Services and another vs. Abdinoor Hassan, Kenya Court of Appeal, Application No. NAI 202 of 1998 (unreported) three Judges of appeal said: “A mandatory injunction at an interlocutory stage is rarely granted; only when the Plaintiff's case is clear and uncontrovertible”.

In this case, as I have stated, I am not satisfied that the Applicant has demonstrated that the goods proclaimed are its goods and so the Plaintiff's case is not clear and incontrovertible. However as to prayer 3, it will be clear from what I have stated hereinabove that I do entertain a doubt as to whether the goods proclaimed while I am not satisfied were Applicants goods were the goods actually hypothecated. That doubt demands that the goods be not disposed of till the matter is fully heard and decided. It is on that score that I will grant prayer 3 and order that the goods proclaimed, while they remain proclaimed, be not disposed of in any other manner till the suit is heard and determined. Each party to bear its own costs. This order only affects the goods appearing in the proclamation annexed and does not in any way stop the Respondent from proceeding to proclamation of the hypothecated goods.

Dated and delivered at Nairobi this 15th day of February 2002.

ONYANGO OTIENO

JUDGE