



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**CIVIL SUIT O. 1481 OF 2001**

**EUNICE NYAKIUMBA WAWERU ..... PLAINTIFF**  
**VERSUS**  
**NATIONAL INDUSTRIAL CREDIT BANK LTD. ....**  
**DEFENDANT**

**R U L I N G**

This application dated 26th September 2001 and brought into the court under Order 39 Rules 1, 2 & 9 of the Civil Procedure Rules and Section 3 and 3A of the Civil Procedure Act cannot succeed. The following are the reasons why I say it cannot succeed.

First this hire purchase agreement does not fall under the Hire Purchase Act as the amount, the subject matter of this suit was K.shs 2.5 million. That in effect means that the requirement in the Hire Purchase Act to the effect that repossession cannot proceed if 2/3 of the hire purchase price has been paid is not applicable to this case. Secondly, the Applicant says that the Respondent is fully secured. The Respondent is not seeking to sell the land given as security and there is no prayer seeking to stop the sale of the same land, NGONG/NGONG/18944. Even if the same was to be sold one would still need to consider the appropriateness or otherwise of such sale depending on whether the Respondent will have taken all such steps as is required in such cases. I say so because the Applicant also admits that she is still indebted to the Respondent to the tune of K.shs 1,927,425/- and there are no reasons why the Respondent cannot get hold of the easiest security to realise namely the vehicle.

Thirdly prayer for release of motor vehicle to the Applicant is a prayer for a mandatory injunction which can only be granted in very clear cases only – in cases which are incontrovertible and cases where the court feels that at the end when the case comes up for hearing it will most likely be found that the court was right in granting mandatory injunction. Here, the debt is clearly owing and that is not denied. The vehicle was one of the securities and the Respondent wants to realise it. What is plain and incontrovertible in this case as far as the Applicant is concerned? None, if anything the Applicant in seeking to retain the vehicle while the debt is not paid is being unfair to the extreme.

Fourthly to ask the court to order the Respondent to accept any amount other than what was agreed between the parties in repayment of the loan is to ask the court to rewrite the contract for the parties. That is not court's duty and no court can engage in such an act even on the use of its inherent powers unless the contract was an illegal contract.

For the above reasons, this application cannot succeed. It is dismissed with costs to the Respondent. Orders accordingly.

**Dated at Nairobi this 24th day of October 2001.**

**ONYANGO OTIENO**

**JUDGE**