Auto Cats International Limited & 6 others v DIB Bank Kenya Limited (Commercial Case E058 of 2024) [2025] KEHC 1552 (KLR) (20 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1552 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

COMMERCIAL CASE E058 OF 2024

JK NG'ARNG'AR, J

FEBRUARY 20, 2025

BETWEEN

AUTO CATS INTERNATIONAL LIMITED .... 1ST PLAINTIFF

MUHAMMAD UMAIR .... 2ND PLAINTIFF

ATIF FAROOQ BUTT .... 3RD PLAINTIFF

MUHAMMAD UZAIR .... 4TH PLAINTIFF

SAGHIR ABBAS .... 5TH PLAINTIFF

ADNAN KHAN .... 6TH PLAINTIFF

MUHAMMAD KASHIF KHAN .... 7TH PLAINTIFF

AND

DIB BANK KENYA LIMITED .... DEFENDANT

RULING

1. The Plaintiffs filed a Notice of Motion application dated 15th October 2024 under Certificate of Urgency pursuant to Section 1A, 1B, 3A of the *Civil Procedure Act*, Order 40 Rule 1 and 2, Order 51 Rule 1 of the *Civil Procedure Rules*, and any other relevant provisions of the law.

2. The Plaintiffs/Applicants seek for orders that this court be pleased to issue an order of injunction restraining the Defendant by themselves and/or their servants, agents, auctioneers, employees and/or any other party acting under their instructions from proclaiming, demanding, attaching/auctioning/crystalizing the charge and/or interfering with the charge/debenture and security offered in whatever manner pending the hearing and determination of the suit, and that costs of this application be provided for.

3. The application is premised on grounds on its face and the Supporting Affidavit sworn on 15th October 2024 by Muhammad Umair that the Defendant advance the 1st Plaintiff financial facility in the year 2020 for the sum of Kshs 120,567,697.85 and that as per the letter of offer, the 1st Plaintiff was to pay the loan in 36 months. That the terms of the letter of offer were that there would be a legal charge for Kshs 160,000,000 over subdivision No 22672/1/MN (Orig No 890/1) Section 1 Mainland North (CR 73683) and Subdivision No 22673/1/MN (Orig No 890/2) Section 1 Mainland North (CR 73692). That there was also a debenture of Kshs 240,000,000 over all assets of the 1st Plaintiff.

4. The Plaintiffs stated that the 1st Plaintiff did pay the said sum over the year and has paid Kshs 60,000,000 towards the same. That the Defendant has however issued a demand to the Plaintiffs demanding the sum of Kshs 125,934,503.63 without regard to the sum paid so far and the 1st Plaintiff continues to pay the same. That the Defendant is now threatening the Plaintiffs yet the Defendant did due diligence on the securities which can adequately satisfy the facility. That it is in the interest of justice that the application is allowed as prayed.

5. The Defendant filed a Replying Affidavit sworn by James Karanja on 6th November 2024 that pursuant to the 1st Applicant's application for a loan facility, the Respondent by a facility of offer letter dated 21st January 2020 subsequently varied and amended by a supplemental facility offer letter dated 14th February 2020 as further amended by a supplemental facility offer letter dated 7th May 2020 (hereinafter collectively referred to as 'facility offer letters') the Respondent as a lessor offered to grant to the 1st Applicant as the lessee, an Ijara Sale and Lease Bank Facility in the sum of Kshs 240,000,000.00 (the financed amount) for purposes of financing the 1st Applicant's working capital requirements in the form of vehicle purchases for resale in Kenya and/or payment of import duty subject to terms and conditions therein. That the Facility of Offer Letters were duly accepted by each of the Plaintiffs in so far as the terms and conditions thereof are relevant and material to the suit herein. That the Facility of Offer Letter made provisions for the securities that were to be provided by the Applicants to secure repayment of the facility, the profit and other charges required to be paid.

6. The Defendant averred that following the creation and perfection of the bank securities, the Respondent disbursed to the 1st Applicant Kshs 160,000,000.00 on 20th February 2020 which sum was credited to the 1st Applicant's Business Enterprise Current Account No 00150xxxxxxxxxx and a corresponding debit made on the 1st Applicant's Facility Account No 001/CON 2005 10002. That pursuant to an application for rescheduling and rebooking of the facility made by the Applicant, the Respondent by a Facility Offer Letter dated 30th September 2020 rescheduled and rebooked the facility which then stood at Kshs 155,523,643.46 based on the terms and conditions set out in the said Facility Offer Letter which was duly accepted by all the Plaintiffs. That pursuant to the aforesaid rescheduling and rebooking, the outstanding aggregate rental payment being Kshs 137,966,747.72 was rebooked under Facility Account No 001/CON20xxxxxx whilst the Rental Payment Arrears of Kshs 17,556,895.74 as at 30th September 2020 were rescheduled and rebooked under Facility No 001MU02203xxxxxx.

7. The Defendant stated that the Applicants made a request for a further rescheduling and rebooking of the facility and by a Facility of Offer Letter dated 22nd November 2021, which was duly accepted by all the Applicants, the Respondent agreed to reschedule and rebook the facility which then stood at Kshs 103,478,257.11 and Rental Payment Arrears of Kshs 25,052,945.87, the latter component being Fixed Rental Payment Arrears and Variable Rental Payment arrears in the sum of Kshs 20,104,227.35 and Kshs 4,947,718.52 respectively. That in consequence of the 2nd restructuring aforesaid, the Facility Account Number 001TFB5213xxxxxx in the name of the 1st Applicant was opened and debited with Kshs 120,576,697.89 comprising the outstanding Rental Payment and Fixed Rental

Payment Arrears. That it was a term of the Facility Offer Letter dated 22nd November 2021 aforesaid that Kshs 3,005,786.61 being the Fixed Rental Payment Arrears under Facility Account Number 001MU02210xxxxxx had to be fully settled prior to the rescheduling and rebooking of the facility and consequent upon the said payment, the balance thereof was booked under Facility Account No 001WCCB213xxxxxx.

8. The Defendant deposed that as at 3rd March 2023 when the 1st Applicant stopped servicing the facility, the total amount comprising the outstanding aggregate rental payment arrears stood at Kshs 104,814,593.42 and on account of default in servicing the facility, outstanding amount stood at Kshs 126,885,654.33 as at 4th November 2024. That the 1st Applicant's default in making agreed payments towards offsetting the financial facility was so persistent and continued. As at 16th May 2023, the arrears in respect of Account Number 001TFBS213340001 was Kshs 13,647,757.54 together with the profit and other charges thereof which sum continued to accrue profit until payment in full. That arising from the 1st Applicant's default aforesaid, the Respondent sent a demand notice dated 17th May 2023 to the 1st and 2nd Applicants herein which notice was copied to the 3rd and 7th Applicants (hereinafter 'the guarantors') as well as to the 2nd Applicant's spouse, Sharmina Firdause, demanding for settlement of the sum of Kshs 13,647,757.54 together with profit and other charges thereof on the expiry of 90 days from the date of service of the said notice.

9. The Defendant maintained that the Respondent duly served the 1st and 2nd Applicant with a Statutory Notice dated 4th September 2023 which notice was similarly copied to the guarantors as well as the 2nd Applicant's spouse, Sharmina Firdause, demanding arrears on the facility which as at 31st August 2023 stood at Kshs 22,222,305.16 requiring settlement of the arrears on expiry of notice. That in light of failure by the 1st Applicant to settle the arrears in spite of the notices, the Respondent proceeded to instruct Ndutumi Auctioneers to advertise the charged property for sale by way of public auction. That in the process of attempting to realise security in the charged property through exercise of statutory power of sale, it came to the knowledge of the Respondent that a prohibition had been registered against titles to the charged property based on a court order issued on 13th May 2021 in ELC No 89 of 2021, BOS Shipping East Africa Limited v Khelef Abdulla Mohamed & 9 others, in which the said BOS Shipping East Africa Limited has claimed ownership of the charged property and in whose favour the court has granted injunctive orders restraining any dealings on the property pending the hearing and determination of the suit.

10. The Defendant maintained that whereas the Applicants were at all material times aware that the charged property was entangled in litigation thereby compromising the bank's security by virtue of being parties in the aforesaid suit, the Applicants in breach of their obligations under the Facility Offer Letters failed to disclose the same to the Respondent. That filing of the suit herein amounts to abuse of the court process as the suit does not disclose any reasonable cause of action against the Respondent considering the Applicants are in breach of their obligations.

11. The application was canvassed by way of written submissions. The Applicants filed submissions dated 13th December 2024 and stated that the Applicants have a *prima facie* case since they have demonstrated that the 1st Applicant has paid a sum of Kshs 60,000,000 which the Defendant has not factored in. That there is also a legal charge over the properties which the Defendant ought to realise in satisfaction of the debt having done due diligence on the same. That the Applicants will suffer great loss and prejudice that cannot be compensated by way of costs as they will be condemned to pay a colossal sum yet there are properties that can be sold to settle the debt. That further, the sum claimed is far more than the actual balance. That the Defendant ought to give a statement of account first and factor in all the payment made. The Applicants submitted that the balance of convenience is in favour of the Applicants and

that it is in the interest of justice that the matter can be heard and determined on merit before drastic actions are taken against the Applicants.

12. The Defendant filed submissions dated 19th November 2024 and argued that what constitutes a *prima facie* case was enunciated in the Court of Appeal in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* (2003) eKLR. That the Applicants were required to show that their rights were being violated by the Respondent for the court to find that they have established a *prima facie* case with probability of success. That it is not enough for the Applicants to merely state that it has a *prima facie* case. That it is not in dispute that that the Respondent advanced to the 1st Applicant a loan facility in the sum of Kshs 160,000,000.00 on 20th February 2020. That the Applicants fully understood the terms, conditions, meaning and effect of the facility offer letters and security documents and they duly executed them willingly, voluntarily and without any undue influence with their signatures on each of the security documents being attested to by an advocate.

13. The Defendant submitted that there is no dispute that the 1st Applicant was duly served with statutory notice and as such the statutory power of sale has arisen. That the Respondent cannot be barred from exercising its power of sale or exercise of its right under the statutory document merely because the 1st Applicant disputes the amount outstanding as was affirmed by the Court of Appeal in the case of *Giro Commercial Bank Limited v Halid Hamad Mutesi* (2002) eKLR. That the Applicant's failure to service the loan facility as at and when required amounts to unlawful and illegal conduct and thus undeserving the exercise of the court's discretion. That there is no proposal or demonstration of willingness by the 1st Applicant to complete the loan repayment even after coming to court for an intervention.

14. On whether the Applicants will suffer irreparable harm if the order of injunction is not granted, the Respondent relied on the holding in the case of *Gehlot & another v African Banking Corporation Limited* (Civil Suit 104 of 2018) [2022] KEHC 9 (KLR) (Commercial and Tax) (11 February 2022) (Ruling) where the court held that in order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured. That the Applicants have not demonstrated the harm they will suffer which cannot be compensated in monetary terms, and that in any event, the Respondent is a financial institution and has the resources with which to pay any such damages in the unlikely event that the Applicants are successful in the claim. That once the 2nd Applicant's properties were charged to the Respondent as security for the loan facility advanced to the Applicant, it then became a commodity for sale in case of default in the loan repayment. The Respondent relied on the holding in the case of *Andrew Mwanjohi v Equity Building Society & 7 others* (2006) eKLR.

15. On whether the balance of convenience tilts in favour of the Plaintiffs/Applicants in the grant of an injunction order, the Respondent placed reliance on the case of Kipchirchir Kogo v Frank Kimeli Tenai (2018) eKLR and submitted that based on the material on record, the balance of convenience does not tilt in favour of the Applicants because the 1st Applicant owes the Respondent a substantial amount of money which sum continues to accrue variable rental in line with the parties' agreement. That granting an injunction order will therefore occasion a greater inconvenience to the Respondent who will continue to be kept away from monies duly owed to it by the 1st Applicant.

16. I have considered the Notice of Motion application dated 15th October 2024, the Replying Affidavit sworn on 6th November 2024 and submissions by parties. The issue for determination is whether the application is merited for grant of the orders sought.

17. The principles for grant of temporary injunction have been set out in *Giella v Cassman Brown* (1973) EA 358 as follows: -

(a) The applicant must first establish a *prima facie* case with a probability of success.

(b) The applicant must then demonstrate that he, she or it stands to suffer irreparable loss that cannot be adequately compensated through damages.

(c) Where there is doubt on the above, then the balance of convenience should tilt in favor of the applicant.

18. On whether a *prima facie* case has been established, the court in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* (2003) KLR 125 held as follows: -

> " So what is a *prima facie* case ... In civil cases it is a case which on the material presented to the court or a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation on rebuttal from the latter."

19. It is not in dispute that the Defendant advanced to the 1st Plaintiff a financial facility in the total sum of Kshs 120,567,697.85 which ought to have been repaid over a period of 36 months. The facility was secured by a legal charge for Kshs 160,000,000 over properties known as subdivision No 22672/1/MN (Orig No 890/1) Section 1 Mainland North (CR 73683) and Subdivision No 22673/1/MN (Orig No 890/2) Section 1 Mainland North (CR 73692) as well as a debenture of Kshs 240,000,000 over all the assets of the 1st Plaintiff.

20. The Plaintiffs on the one hand state that 1st Plaintiff did pay the said sum over the year and has paid Kshs 60,000,000 towards the same. That the Defendant has however issued a demand to the Plaintiffs demanding the sum of Kshs 125,934,503.63 without regard to the sum paid so far and the 1st Plaintiff continues to pay the same. That the sum claimed is far more than the actual balance and that the Defendant ought to give a statement of account first and factor in all the payments made.

21. The Defendant on the other hand state that as at 3rd March 2023 when the 1st Applicant stopped servicing the facility, the total amount comprising the outstanding aggregate rental payment arrears stood at Kshs 104,814,593.42 and on account of default in servicing the facility, outstanding amount stood at Kshs 126,885,654.33 as at 4th November 2024. That the 1st Applicant's default in making agreed payments towards offsetting the financial facility was so persistent and continued.

22. The Defendant further states that That in the process of attempting to realise security in the charged property through exercise of statutory power of sale, it came to the knowledge of the Respondent that a prohibition had been registered against titles to the charged property based on a court order issued on 13th May 2021 in ELC No 89 of 2021, *BOS Shipping East Africa Limited v Khelef Abdulla Mohamed & 9 others*, in which the said BOS Shipping East Africa Limited has claimed ownership of the charged property and in whose favour the court has granted injunctive orders restraining any dealings on the property pending the hearing and determination of the suit.

23. In consideration of the above, this court is satisfied that the Plaintiffs/Applicants have established a *prima facie* case for grant of temporary injunction sought pending the hearing and determination of the suit.

24. On whether the Plaintiffs/Applicants stand to suffer irreparable loss, the court in *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR expressed that: -

> " On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an

injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."

25. The Respondent is demanding payment of a colossal amount of money from the Plaintiffs/Applicants. This court is satisfied that if an order of temporary injunction is not granted and the charged properties are sold by public auction, the Plaintiffs/Applicants will suffer irreparably that cannot be compensated by an award of damages.

26. On the issue of the balance of convenience, this court relies on the holding in *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) eKLR where the court held as follows: -

> "The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer? In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it."

27. In light of the findings above, this court is satisfied that the Plaintiffs have met the necessary conditions for grant of the orders of temporary injunction.

28. The Notice of Motion application dated 13th August 2024 is merited and allowed in terms of prayer (2). A temporary injunction is hereby issued restraining the Defendant by themselves and/or their servants, agents, auctioneers, employees and/or any other party acting under their instructions from proclaiming, demanding, attaching/auctioning/crystalizing the charge and/or interfering with the charge/debenture and security offered in whatever manner pending the hearing and determination of the suit. Costs be in the cause.

DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 20TH DAY OF FEBRUARY, 2025.

....

J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of: -

.... Advocate for the Plaintiffs

.... Advocate for the Defendant

Court Assistant – Shitemi