



**Coast Raha Limited v Consolidated Bank Ltd (Commercial Case E142 of 2023)  
[2024] KEHC 7063 (KLR) (Commercial and Tax) (7 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7063 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E142 OF 2023**

**MN MWANGI, J**

**JUNE 7, 2024**

**BETWEEN**

**COAST RAHA LIMITED ..... PLAINTIFF**

**AND**

**CONSOLIDATED BANK LTD ..... DEFENDANT**

**RULING**

1. Before me is a Notice of Motion application dated 4<sup>th</sup> April, 2023 filed under the provisions of Sections 1, 1A, 1B, 63(c) & (e) of the *Civil Procedure Act*, Order 22 Rule 22(2) & Order 40 Rules 1(a), 2, 4(1), & 10(1)(b) of the Civil Procedure Rules, 2010, and the inherent powers of the Court. The plaintiff/applicant seeks the following orders -
  - i. Spent;
  - ii. Spent;
  - iii. Pending the hearing and determination of the plaintiffs' suit herein, an injunction do issue, restraining the defendant/respondent Consolidated Bank Ltd by its agents, servants, Auctioneers, or otherwise howsoever, from interfering with, disposing of, or attaching any of the plaintiff's assets, tools of trade, motor vehicle KCH 128Z, KCH 129Z, KCH 141Z, KCB 168P, and KCB 164P, or selling by public auction, private treaty, or otherwise howsoever interfering with the plaintiff's said assets and KCH 128Z, KCH 129Z, KCH 141Z, KCB 168P and KCB 164P; and
  - iv. The arising costs be borne by the respondent.
2. The application has been brought on the grounds on the face of it and is supported by an affidavit sworn on the same day by Joseph Muthama Kyengo, the plaintiff's Director. In opposition thereto, the



defendant/respondent filed a replying affidavit sworn by Judith Chepkorir, the defendant's Recoveries Officer, in the Debt Recovery Unit.

3. The instant application was canvassed by way of written submissions. The plaintiff's submissions were filed by the law firm of J. Harrison Kinyanjui & Co. Advocates on 22<sup>nd</sup> May, 2023 & 27<sup>th</sup> June, 2023, whereas the defendant's submissions were filed on 26<sup>th</sup> June, 2023 by the law firm of KO Associates LLP.
4. Mr. Harrison Kinyanjui, learned Counsel for the plaintiff cited Section 4(3) of the *Movable Property Security Rights Act*, 2017 and submitted that the proper procedure if there was a lawful legal charge would be to pursue reliefs as provided for under Section 90(2) of the *Land Act* and not in the manner the defendant has purported to do. He referred to the provisions of Section 84(1) of the *Land Act* and the case of Givan Okallo Ingari & Another v Housing Finance Co. (K) Ltd [2007] 2 KLR 232 and stated that the instant application is necessary to protect the plaintiff and to seek the protection of the law guaranteed under Article 27(2) of *the Constitution* of Kenya, 2010.
5. He relied on the case of Sheng Shuang Quarry Limited v National Industrial & Credit Bank Ltd [2019] eKLR and stated that the defendant is not entitled to assert any debt due to it from the plaintiff without first following the statutory procedure, which includes a valuation of the vehicle purportedly up for seizure and taking of accounts prior to the "repossession" or sale of the plaintiff's PSV buses under the agreement. Mr. Harrison Kinyanjui referred to the Black's Law Dictionary definition of 'Force Majeure' and the case of Pankaj Transport PVT Limited v SDV Transami Kenya Ltd [2017] eKLR and contended that the plaintiff has invoked the doctrine of force majeure in showing that the unforeseen Covid-19 lockdowns directly and negatively affected its PSV inter-county transport business following the lockdowns of the Mombasa and Nairobi City Counties, which are the end points of the its PSV business.
6. Counsel contended that no material prejudice will be suffered by the defendant in the event that the orders sought are granted, but the plaintiff on the other hand will suffer harm and damages in the event the application herein is disallowed. To this end, Counsel relied on the dictum of Lord Diplock in the case of NWL Limited v Woods [1979] WLR 1294 cited with approval by the Court in Sheng Shuang Quarry Limited v National Industrial & Credit Bank Ltd (supra).
7. Mr. Onyango, learned Counsel for the defendant stated that it is not disputed that the plaintiff is indebted to the defendant in the sum of Kshs.10,485,235.18 in arrears and an outstanding balance of Kshs. 44,696,902.42. He relied on the provisions of Section 6 of the Movable Property Security Act, 2017 and the case of Amicabre Travel Services Ltd v Alios Kenya Finance Ltd [2014] eKLR and submitted that the securities over the suit motor vehicles were created and perfected under the Movable Property Security Act, thus the defendant is entitled to realize them in satisfaction of the debt owed to it, should it wish to do so. Counsel stated that the suit motor vehicles were offered as security for the loan, and the defendant registered a chattels mortgage created over them in its favour, thereby creating a valid contract between it and the plaintiff.
8. Counsel submitted that the plaintiff has since breached the terms of the said contract by defaulting in its loan repayment obligations, thus the defendant is entitled to repossess and sell the vehicles to recover the debt owed to it by the plaintiff. To buttress his submission, Mr. Onyango relied on the cases of Jopa Villas v Private Investment Corporation & 2 others - Machakos HCCC No. 215 of 2008, cited by the Court in Brade Gate Holdings Limited & another v Jamii Bora Bank Limited [2016] eKLR. He also relied on decisions in Giella v Cassman Brown and Co. Ltd [1973] EA 358 and Mrao Limited v First American Bank of Kenya Limited [2003] KLR 125, and asserted that the plaintiff has failed to demonstrate that it has a prima facie case.



9. He further relied on the case of Alwalaa Construction Company Limited v Synergy Industrial Credit Limited & another [2014] eKLR, and stated that the plaintiff has failed to demonstrate that it will suffer irreparable loss that cannot be compensated by way of damages in the event the orders sought are not granted. He stated that the plaintiff has not made any payment towards settling the loan facility since August 2022, therefore the defendant reserves the right to continue with the precipitate action having issued the requisite Statutory Notice of default. Counsel argued that the plaintiff has not demonstrated that the projected losses cannot be recovered through damages, yet the defendant stands to lose greatly in earning interest and costs, in the event the instant application will be allowed. He submitted that given the said circumstance, the balance of convenience tilts in favour of the defendant.
10. In a rejoinder, Mr. Harrison Kinyanjui submitted that the principle of force majeure is applicable to the Covid-19 Pandemic in this case since in addition to the imposition of the half-capacity passenger freight requirements during the said period, the plaintiff was totally barred from operating the hire purchase buses on the Mombasa-Nairobi PSV route upon the inter-county closures following the Ministry of Health lockdowns under the Covid-19 directives. Counsel stated that for the said reason, the plaintiff could not earn any income from the said buses and remit the monthly instalments due to the defendant under the Hire Purchase Agreement. He further submitted that the defendant does not dispute that the Auctioneers it instructed had not complied with the law by issuing the requisite proclamations to the plaintiff before seizing the suit buses and advertising them for sale.
11. Mr. Harrison Kinyanjui referred to Rule 5 of Legal Notice No. 50 of 2020 under Legislative Supplement No. 27 of 2020 enacted by the Kenya Cabinet Secretary for Health and argued that it is incontestable that the income generated under such circumstances by the plaintiff's subject PSVs for passenger freight was not sufficient to meet the defendant's financial obligations initially set out under the Hire Purchase Agreement with the plaintiff. He asserted that the Covid-19 Pandemic was incontestably an act of force majeure totally beyond the control of the plaintiff, which restricted the plaintiff from meeting its obligations towards the defendant. Counsel relied on the Court of Appeal case of *Jomo Kenyatta University of Agriculture and Technology v Kwanza Estate Limited Nakuru Civil Appeal No. 64 of 2022*, where it was held that the Covid-19 Pandemic was proper force majeure. Counsel asserted that the balance of convenience tilts in favour of the plaintiff.

### **Analysis And Determination.**

12. I have considered the instant application, the grounds on the face of it and the affidavit filed in support thereof. I have also considered the replying affidavit filed by the defendant together with the written submissions by Counsel for the parties. The issue that arises for determination is whether an order for temporary injunction should issue against the defendant.
13. In the affidavit filed by the plaintiff, Mr. Kyengo deposed that the plaintiff operates accounts with the defendant, at Koinange Street branch, being account numbers 10011902000189 and 1001190200159. That the plaintiff sought financial accommodation from the defendant to finance the purchase of PSV coaches and buses, and vide a letter of offer dated 17<sup>th</sup> July, 2017, the defendant offered the plaintiff the said financial accommodation identified as Asset Finance Facilities of Kshs.55,887,866.00
14. He averred that it was agreed between the parties herein that the said facility would accrue interest at the rate of 14% per annum and would be repaid within a period of sixty (60) months by the plaintiff making monthly instalments of Kshs.1,302,891.00 to the defendant. He further averred that the plaintiff did not complete the acceptance of the offer made to it by the defendant since the plaintiff's Directors were required to charge their private property being LR. No. 29187 (CR 57635) as part of the securities to secure the financial facility advanced to the plaintiff, but they were disagreeable to the said condition.



15. It was stated by the plaintiff that it was a condition of the grant of the said financial facility, that the plaintiff would offer as security, its existing securities of its PSV vehicles, KCH 1282, KCH 1292, KCH 1412, KCB 168P, and KCB 164P and the defendant would be jointly registered as proprietor of the said buses. Mr. Kyengo asserted that it was an implied term of the facility agreement that the plaintiff would have quiet possession of the suit motor vehicles upon payment of due instalments.
16. He further stated that the plaintiff legitimately expected that during the pendency of the financial facility, the defendant would provide it with regular statements of accounts and demonstrate any default within reasonable time so as to afford it an opportunity to service the said facility without default, but that has not been the case.
17. Mr. Kyengo contended that it is manifest from its statements of accounts that the defendant has been charging unjustified and unwarranted sums in the name of interest under the facility, thus causing the plaintiff to suffer loss and damage. He deponed that it was an implied warranty of the financial facility that any acts of force majeure would rationally be considered in militating any claims of default.
18. The plaintiff asserted that the declaration of the Covid-19 Pandemic on 16<sup>th</sup> March, 2020 and consequent lockdowns, curfews and ban of night travel and inter-county movement by the Government of Kenya leading to the cessation of passenger travel using the plaintiff's PSV buses constituted cumulatively as force majeure. He added that the said factors had a negative economic impact on the plaintiff since its cash flow was severely dampened.
19. He stated that the plaintiff vide a letter dated 29<sup>th</sup> March, 2022, requested the defendant for a more flexible repayment schedule of the sums due from it under the subject facility. That vide a letter dated 1<sup>st</sup> April, 2022, the defendant informed the plaintiff that it had acceded to its request under specified terms and conditions, and the plaintiff agreed to the reviewed terms and conditions of the subject financial facilities and deposited Kshs.250,000/= with the defendant.
20. It was stated by Mr. Kyengo that the defendant allowed the plaintiff to commence refurbishing of the 4 PSV buses it operated as part of its PSV fleet, being fully aware of the fact that the said exercise would take time. He stated that in total breach of the terms and/or warranties set out in the defendant's letter dated 1<sup>st</sup> April, 2022, the defendant advertised the suit motor vehicles for sale by public auction in the Daily Nation Newspapers of 25<sup>th</sup> April, 2022.
21. He further stated that in view of the above, the plaintiff stands to suffer severe loss and damage since the suit motor vehicles are at a risk of being seized by the defendant's Auctioneers, which act is totally unjustified and will render it bankrupt unless the orders sought herein are granted. The plaintiff contended that it continues to suffer serious financial losses that cannot be compensated by way of damages due to the grounded buses, yet it is required to pay excessive Auctioneer charges, and the defendant's repossession charges.
22. Mr. Kyengo averred that the plaintiff has never been issued with a proclamation notice or a demand letter by the defendant's Auctioneers, Makuri Auctioneers as provided for under the [Auctioneers Act](#), hence the planned and imminent public auction is illegal and ought to be stopped. He further averred that the defendant has failed to avail to the plaintiff the financial statements detailing the alleged debt that would entitle Makuri Auctioneers to sell the suit motor vehicles at a public auction.
23. In the defendant's replying affidavit. Ms. Chepkorir averred that the plaintiff wrote to the defendant vide an application dated 17<sup>th</sup> March, 2016 seeking an Asset Finance facility in the sum Kshs.14,300,000/=, and the said application was approved by the defendant on 22<sup>nd</sup> March, 2016 and the plaintiff was issued with a letter of offer and Kshs.14,300,000/= which was availed in USD that



- was equivalent to USD 140,196 at the time it was disbursed to the plaintiff's account. The defendant stated that the plaintiff was also availed with a further revolving asset finance facility with a limit of Kshs. 60,000,000/=.
24. She further averred that it was a term of the said letter of offer that upon draw down and maturity of the said asset finance loan, the plaintiff would purchase two brand new luxury transport buses on the first part, and subsequently purchase more buses locally from the revolving facility. She stated that the respondent undertook to issue letters of credit to facilitate the purchases.
  25. It was stated by Ms. Chepkorir that it was agreed between the parties herein that the loan facility would be repaid by the plaintiff making forty-eight equal monthly instalments of Kshs.1,725,000/= inclusive of interest and costs. She further stated that the facility was secured by with the defendant's interest being endorsed on the motor vehicle registration certificates of each purchased bus, by joint registration and depositing of the original logbooks with the defendant, issuance of personal guarantees, and delivery of undated signed and sealed motor vehicle transfer forms with the defendant among other terms.
  26. Counsel submitted that the plaintiff vide a letter dated 18<sup>th</sup> August, 2016 sought a variation of the terms of its initial letter of offer dated 17<sup>th</sup> July, 2017, by enhancement of the current revolving asset finance facility from a limit of Kshs. 60,000,000/= to Kshs.74,300,000/=:, which request was acceded to by the defendant, and the plaintiff was issued with another letter of offer dated 24<sup>th</sup> August, 2016, which was also secured by the defendant's interest being endorsed on the motor vehicle registration certificates of each purchased bus by joint registration and depositing of the original logbooks with the defendant, issuance of personal guarantees, and delivery of undated signed and sealed motor vehicle transfer forms with the defendant, among other terms.
  27. Ms Chepkorir stated that the second facility was to facilitate the plaintiff's purchase of buses and trucks. That pursuant to the said letter of offer, the defendant undertook to finance 75% of any such purchase by the plaintiff under the revolving facility. She asserted that it was a term of the contract between the parties herein that the outstanding amounts under the financial facilities shall be due and payable strictly on demand.
  28. The defendant deponed that during the pendency of the aforementioned financial facilities, the plaintiff defaulted in its loan repayment obligations. That on 24<sup>th</sup> May, 2017, the plaintiff applied to the defendant to have the revolving facility restructured so as to regularize its standing with the defendant. That the application was allowed and the said facility was restructured for the second time vide a letter of offer dated 17<sup>th</sup> July, 2017 which consolidated the plaintiff's default, making the amount due and owing to the defendant by the plaintiff to stand at Kshs. 55,887,866.00
  29. The deponent averred that it was a term of the letter of offer dated 17<sup>th</sup> July, 2017 that the aforementioned amount by the plaintiff comprised sixty (60) monthly instalments of Kshs.1,302,891.00, inclusive of all costs and interest. That being a restructure, the existing security on the first two facilities were maintained, but the defendant sought for additional securities due to the ongoing default on the plaintiff's part, which included an all asset debenture for Kshs.7,000,000/=:, a legal charge over property L.R. No.29187(C.R.57635) for Kshs.9,000,000/=:, a personal guarantee of Kshs.18,000,000.00 by Yusuf Ali, a Director of the plaintiff and a further personal guarantee by all the plaintiff's Directors for the sum of Kshs.55,887,392.00.
  30. It was stated that the plaintiff continued being in default of its repayment obligations towards the defendant prompting the defendant to issue it with an arrears notice dated 10<sup>th</sup> June, 2019 asking the plaintiff to make good the default by repaying the entire outstanding sum of Kshs. 49,967,232.04



- within seven (7) days of issuance of the said notice. That the plaintiff failed to comply with the said notice, causing the defendant to issue it with a Statutory Default Notice under the Movable Property Security Rights Act, 2016 dated 8<sup>th</sup> July, 2019, which required the plaintiff to make good the default within 14 days failure to which the defendant would proceed to realize the security assets to recover the entire outstanding sum which stood at Kshs.49,447,042.04 at the time.
31. Ms. Chepkorir averred that the defendant made it clear in its statutory notice that any proposals made if accepted, and any part payment or instalments paid and accepted, would not constitute a waiver of the Statutory Default Notice, the intended sale would ensue unless the full outstanding default sum was made good. She deposed that the plaintiff continued defaulting in its loan repayment obligations and only wrote to the defendant on 29<sup>th</sup> March, 2022 offering a payment proposal and seeking yet another restructure of the loan facility.
  32. This was followed by extensive deliberations by the parties herein resulting in resolutions that were captured in the defendant's letter to the plaintiff dated 1<sup>st</sup> April, 2022, which inter alia to the effect that the outstanding debt stood at Kshs. 45,405,596.42 as at 1<sup>st</sup> April, 2022, the moratorium sought could not be granted on account of the loss that the bank continued to face, the plaintiff would commence repayment at the proposed sum of Kshs.250,000/= per month effective April 2022, and the plaintiff would complete refurbishment of the buses to fetch better prices. The defendant's deponent averred that it was also resolved that the plaintiff and the defendant through their marketing agents would scout for buyers for the buses and upon identification of buyers, parties would agree on the best way of disposal, and the plaintiff would bear all costs incurred in the process of recovery.
  33. Ms. Chepkorir further averred that Makuri Auctioneers was instructed by the defendant to market the buses, and in turn, they advertised the buses for sale on a Daily Newspaper. She asserted that the defendant has not repossessed the buses in terms of the Auctioneers Act, and that the parties herein agreed to sell the buses from the plaintiff's yard in Mombasa to cut on costs of repossession and storage. She contended that to demonstrate that the defendant was acting on the resolutions of its deliberations with the plaintiff, the suit motor vehicles were valued and inspected by AA of Kenya as agreed, immediately after resolutions of 28<sup>th</sup> February 2022.
  34. It was stated by the defendant that in as much as the Covid-19 Pandemic may be argued as a form force majeure, it is inconsequential to this matter since the plaintiff has been in default for a sustained period predating March 2020, when the economy in the Republic of Kenya was closed. She stated that the first restructure of the financial facility herein was done in August 2016 well over four years before the onset of the Covid-19 Pandemic in the context of a facility that was offered for a term of forty-eight months which ordinarily should have been fully serviced by the year 2020.
  35. Ms Chepkorir deposed that the plaintiff herein has been a beneficiary of an initial 12 months' moratorium on repayment which was granted in April 2020 to cushion it from the negative financial effects of Covid-19, and that once the said moratorium expired, the plaintiff requested to start paying Kshs. 3,000/= to Kshs. 5,000/= per day, since its business was yet to recover from the adverse effects of the Covid-19 Pandemic. That in place of the proposal by the plaintiff, the defendant extended the moratorium by a further period of three (3) months. Ms. Chepkorir further deposed that the plaintiff was granted a second extension of the said moratorium in February 2021 which expired in May 2021 when the plaintiff was expected to resume the monthly loan repayments from 10<sup>th</sup> May, 2021.
  36. She averred that the financial facilities in question were not restructured in the year 2022, and the plaintiff has not made any payments towards settling the said facilities since August 2022. She further averred that as at 7<sup>th</sup> March, 2023 the plaintiff was indebted to the defendant in the sum of Kshs.10,485,235.18 in respect of arrears, and an outstanding balance of Kshs.44,696,902.42. That



it was in view of the said sustained default by the plaintiff that the defendant instructed Makuri Auctioneers to issue the plaintiff with a collection/repossession order on 7<sup>th</sup> March, 2023.

**Whether an order for temporary injunction should issue against the defendant.**

37. Temporary injunctions are provided for under Order 40 Rule 1 of the Civil Procedure, 2010 which states that -

“Where in any suit it is proved by affidavit or otherwise-

- a. that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- b. that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

38. The test for granting an interlocutory injunction was considered by the Court in the case of *American Cyanamid Co. v Ethicom Limited* [1975] A AER 504 where three elements were noted to be of great importance namely:

- i. There must be a serious/fair issue to be tried;
- ii. Damages are not an adequate remedy, and
- iii. The balance of convenience lies in favour of granting or refusing the application.

39. From the pleadings filed, the following facts are not disputed. Vide a letter of offer dated 22<sup>nd</sup> March, 2016, the defendant advanced to the plaintiff financial facilities in the form of an asset finance in the sum of Kshs.14,300,000/= which was availed to the plaintiff in USD, equivalent to USD 140,196 at that time, for the purchase of two brand new luxury transport buses. The said letter of offer also availed to the plaintiff a revolving asset finance facility with a limit of Kshs. 60,000,000/= for the local purchase of more buses. The aforementioned facility was to be repaid within a period of forty-eight (48) months by the plaintiff making monthly instalments of Kshs.1,725,000/= inclusive of interest and costs. The said facility was secured by the defendant’s interest being endorsed on the motor vehicle registration certificates of each purchased bus, by joint registration and depositing of the original logbooks with the defendant, among other terms.

40. The plaintiff sought variation of the letter of offer by its letter 18<sup>th</sup> August, 2016, which request was acceded to by the defendant and led to the issuance of another letter of offer dated 24<sup>th</sup> August, 2016 which enhanced the revolving asset finance facility from a limit of Kshs.60,000,000/= to Kshs. 74,300,000/=. This facility was also secured by the defendant’s interest being endorsed on the motor vehicle registration certificates of each purchased bus by joint registration and depositing of the original logbooks with the defendant, among other terms. It is evident that during the pendency of the aforementioned financial facilities, the plaintiff defaulted in its loan repayment obligations, thus at the instance of the plaintiff, the defendant issued the plaintiff with another offer letter dated 17<sup>th</sup> July, 2017 which consolidated the plaintiff’s default, making the amount due and owing to the defendant by the



plaintiff to stand at Kshs. 55,887,866.00, thereby restructuring the plaintiff's financial facility for the second time.

41. In the letter of offer dated 17<sup>th</sup> July, 2017, it was agreed that the plaintiff was to repay the amount due and owing to the defendant by making sixty (60) monthly instalments of Kshs.1,302,891.00 inclusive of all costs and interest. On perusal of the letter of offer dated 17<sup>th</sup> July, 2017 annexed to the plaintiff's replying affidavit, it is evident that it was executed by both parties. However, Yusuf Ali who is listed as a guarantor did not execute it. Under Clause 10 of the said letter of offer, the financial facility was to be secured by existing securities already held by the defendant and additional securities comprising an all asset debenture for Kshs.7,000,000/=, a legal charge over property L.R. No.29187(C.R.57635) for the sum of Kshs.9,000,000/=, a personal guarantee of Kshs.18,000,000.00 by Yusuf Ali, a Director of the plaintiff and a further personal guarantee by all the plaintiff's Directors for the sum of Kshs.55,887,392/=. The plaintiff contended that it did not agree to the said terms as to the additional securities, thus it did not execute the letter of offer.
42. The letter of offer dated 17<sup>th</sup> July, 2017 was executed by the defendant and Mr. Joseph Kyengo, the plaintiff's deponent, and Mr. Hamisi Saidi on behalf of the plaintiff. Further, the plaintiff in support of this case is relying on the terms and conditions contained in the offer letter dated 17<sup>th</sup> July, 2017. This Court finds that the plaintiff cannot now claim that it did not execute the letter of offer dated 17<sup>th</sup> July, 2017 and run away from obligations arising from the said letter. Having found that the plaintiff duly executed the letter of offer dated 17<sup>th</sup> July, 2017, I find that the plaintiff is bound by the terms and conditions therein and is estopped from claiming otherwise.
43. It was stated by the defendant that despite restructuring the plaintiff's financial facility for the second time, the plaintiff continued being in default of its repayment obligations towards the defendant, thus prompting the defendant to issue it with an arrears notice dated 10<sup>th</sup> June, 2019. On perusal of the said notice, it is evident that the plaintiff was asked to rectify the said default within seven (7) days of issuance of the said notice. The plaintiff did not comply with the contents of the said letter, consequently on 8<sup>th</sup> July, 2019 the defendant issued the plaintiff with a Statutory Default Notice as provided for under Sections 65 and 67 of the *Movable Property Security Rights Act*, 2016. A perusal of the said notice reveals that the plaintiff was being asked to make good the default by paying the amount in arrears being Kshs.716,834.32 within fourteen (14) days, failure to which the defendant would proceed to realize the security assets to recover the entire outstanding sum which stood at Kshs. 49,447,042.04 at that time.
44. The said notice also indicated in the second last paragraph that any proposals made if accepted, and any part payment or instalments paid and accepted, would not constitute a waiver of the Statutory Default Notice. It is worthy of note that the plaintiff has neither disputed receipt of the notice issued by the letter dated 8<sup>th</sup> July, 2019, nor has it demonstrated any compliance with the terms of the notice. Later, in a letter dated 29<sup>th</sup> March, 2022 the plaintiff wrote to the defendant proposing to pay the outstanding financial facility by instalments. In the said letter, the plaintiff confirmed that the suit motor vehicles had since been valued by AA Kenya as agreed between the parties herein, and the plaintiff confirmed being indebted to the defendant.
45. The plaintiff then proposed to be afforded a grace period of six (6) months starting from 30<sup>th</sup> April, 2022 during which time it would be making instalments of Kshs.250,000/= towards settling the amount due. The plaintiff undertook to repair the remaining buses and put them back on the road so as to earn additional income in order to settle the outstanding loan. The plaintiff also gave an alternative proposal that it would assist the defendant to source for buyers at the market and AA valuation prices. The defendant responded to the plaintiff's letter dated 29<sup>th</sup> March, 2022 vide a letter dated 1<sup>st</sup> April,



2022. In the said letter, the defendant indicated that it was unable to grant the plaintiff a further six (6) months moratorium, but agreed to the payment of Kshs.250,000/= monthly from the month of April 2022. It directed that the plaintiff to complete refurbishment of the four remaining buses, and indicated that the parties herein would source for buyers of the buses in issue through their marketing agents, among other terms.
46. The defendant asserted that it had not repossessed the buses in terms of the *Auctioneers Act*, and that the advertising for sale of the suit motor vehicles by Makuri Auctioneers was not as a result of the defendant exercising its statutory powers to realize the securities held as provided for under the *Movable Property Security Rights Act*, 2016, but was pursuant to the agreement between the parties herein in their meeting of 28<sup>th</sup> February, 2022 which culminated in the letter dated 1<sup>st</sup> April, 2022.
47. The Court of Appeal in the case of *Mrao Ltd v. First American Bank of Kenya Ltd & 2 others* [2003] eKLR, considered what constitutes a prima facie case and held as follows-
- “So, what is a prima facie case” I would say that in civil cases it is a case in which on the material presented to the Court 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 or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the Applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”
48. It is not disputed that the plaintiff is indebted to the defendant. The plaintiff however invoked the doctrine of force majeure to demonstrate that the unforeseen lockdowns due to the Covid-19 Pandemic directly and negatively affected its PSV inter-county transport business following the lockdowns of the Mombasa and Nairobi City Counties which are the end points of the its PSV business. The plaintiff stated that as a result, it could not earn any income from the said buses and remit the monthly instalments due to the defendant under the Hire Purchase Agreement. In this Court’s perspective, that was incontestably an act of force majeure totally beyond the control of the plaintiff, thus restricting the plaintiff from meeting its obligations towards the defendant.
49. It is however worth noting that the subject financial facilities were first advanced to the plaintiff vide a letter of offer dated 29<sup>th</sup> March, 2016 which provided that the facility was to be repaid over a period of (forty-eight) 48 months. Thereafter, the loan was restructured by a letter of offer dated 24<sup>th</sup> August, 2016 which also indicated that the facility was to be repaid over a period of (forty-eight) 48 months. From the record, it is evident that the plaintiff started defaulting in its loan repayment obligations sometime in the year 2017, which prompted the plaintiff to apply to the defendant to restructure its loan facility. Subsequently, the said loan facility was again restructured vide an offer letter dated 17<sup>th</sup> July, 2017 which provided that the facility would be repaid over a period of sixty (60) months. The plaintiff was issued with a statutory default notice by the defendant by a letter dated 8<sup>th</sup> July 2019, which was way before the first case of Covid-19 was reported in the Republic of Kenya, and also way before the Government issued several restrictions to curb the spread of Covid-19.
50. In light of the foregoing, I agree with Counsel for the defendant that in as much as Covid-19 Pandemic was a form of force majeure, it is inconsequential to this matter since the plaintiff had been in default for a prolonged period of time, way before the first case of Covid-19 was reported in this Country. The plaintiff averred that it has never been issued with a proclamation notice or a demand letter by the Makuri Auctioneers as provided for under the *Auctioneers Act*, hence the planned and imminent public auction is illegal and ought to be stopped. The defendant has asserted that repossession and



advertising for sale of the suit motor vehicles by Makuri Auctioneers was not as a result of it exercising its statutory power to realize the securities held as provided for under the *Movable Property Security Rights Act*, 2016, but was pursuant to the agreement between the parties herein in their meeting of 28<sup>th</sup> February, 2022 which culminated in the letter dated 1<sup>st</sup> April, 2022.

51. It is therefore my finding that the defendant was under no duty to demonstrate that Makuri Auctioneers complied with the provisions of the *Auctioneers Act* before advertising the suit buses for sale. This Court perused the letter dated 1<sup>st</sup> April, 2020 and noted that the defendant informed the plaintiff that it was unable to grant it a further six (6) months moratorium, but agreed to the payment of Kshs.250,000/= monthly from the month of April 2022 towards offsetting the debt due to the defendant. The defendant directed the plaintiff to complete refurbishment of the four remaining buses and the parties herein would then source for buyers of the buses in issue through their marketing agents, among other terms.
52. I noted that plaintiff in support of its case relies on the terms of the said letter in regard to payment of Kshs.250,000/= monthly, from the month of April 2022 towards offsetting the debt due to the defendant and completion of refurbishment of the four remaining buses, but does not want to be bound by the condition requiring the parties herein to source for buyers of the buses in issue through their marketing agents. The defendant's position for the parties herein to source for buyers of the buses through their marketing agents, was as a result of the plaintiff proposing the same in its letter dated 29<sup>th</sup> March, 2022. It is my view that the plaintiff cannot now rush to Court claiming that the defendant has advertised the suit motor vehicles for sale, without first issuing it with the requisite notices as provided for under the Auctioneer's Rules.
53. In the premise, this Court finds that the plaintiff has not established a prima facie case with a probability of success to warrant being granted the orders sought herein.
54. As to whether the plaintiff stands to suffer irreparable damage that cannot be adequately compensated by an award of damages in the event the instant application is disallowed, I am persuaded that this is not the case. This is because, the plaintiff does not dispute that it defaulted in its loan repayment obligations to the defendant. Further, the value of the suit motor vehicles is ascertainable from the various valuations reports already carried out by AA Kenya. For this reason, if the Court ultimately finds after the hearing of the case that the advertisement and sale of the suit motor vehicles was unlawful, the plaintiff will be adequately compensated by an award of damages. It is now well settled legally, that a property offered as security becomes a commodity for sale in the event of default. See the case of *Shimmers Plaza Limited v National Bank of Kenya Limited* [2013] eKLR, where the Court of Appeal agreed with the High Court's finding that damages could be an adequate compensation therein as the appellant's guaranteed security had been converted into a commodity for sale upon the same being charged to the respondent.
55. From the foregoing analysis, I am of the considered view that the balance of convenience tilts in favour of the defendant since the plaintiff can always be compensated by an award of damages in the event its suit is successful.
56. In the end, this Court finds that the instant application is devoid of merits. It is hereby dismissed with costs to the defendant.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7<sup>TH</sup> DAY OF JUNE, 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**



## **JUDGE**

In the presence of:

Mr. Harrison Kinyanjui for the plaintiff/applicant

Mr. Onyango for the defendant/respondent

Ms B. Wokabi – Court Assistant.

