



**Kanyingi v My Credit Limited (Commercial Miscellaneous Application E728 of 2022)  
[2024] KEHC 12551 (KLR) (Commercial and Tax) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12551 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL MISCELLANEOUS APPLICATION E728 OF 2022**

**PM MULWA, J**

**OCTOBER 17, 2024**

**BETWEEN**

**MARTIN NG'ANG'A KANYINGI ..... PLAINTIFF**

**AND**

**MY CREDIT LIMITED ..... DEFENDANT**

**RULING**

1. The Plaintiff filed a Notice of Motion dated 6<sup>th</sup> October 2022 under Order 40 of the *Civil Procedure Rules* seeking an order of injunction restraining the Defendant whether by itself, its servants or agents or otherwise howsoever from alienating, charging, transferring, selling, disposing or dealing in any manner with the Title Number Njoro/Ngata Block 4/344 (Rumwe) pending the hearing and final determination of the application.
2. The application was supported by the grounds on its face, the supporting affidavit sworn on the same date and written submissions dated 7<sup>th</sup> June 2024. The Plaintiff obtained credit facilities from the Defendant and gave the Title as part of the securities which included logbooks for three vehicles which it sold after calling up the credit facilities. He complains that the Defendant repossessed and sold the motor vehicles without notice to him and failed to account for the sale proceeds; that instead of preparing and registering a charge, it transferred the Title to its own name and that the amount due and payable to the Defendant is in dispute as it has not disclosed how the amount of Kshs 30,930,848.00 as of 3<sup>rd</sup> August 2022 was arrived at.
3. The Defendant opposed the application through a replying affidavit sworn by its chief operating officer, David Wangai and written submissions dated 8<sup>th</sup> July 2024. The core depositions were that the Plaintiff has not met the threshold for the grant of the orders sought; that the Plaintiff took a loan and



fell into arrears; that the Plaintiff defaulted and failed to rectify the default despite its leniency and that it strictly complied with the law in seeking to realize the securities.

### **Analysis and determination**

4. I have considered the application, the grounds, affidavits and submissions. The issue for determination is whether the application is merited.

5. The application has been made under Order 40 of the [Civil Procedure Rules](#) which provides that:-

“ [Order 40 rule 1] Cases in which temporary injunction may be granted.

1. 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.

“ [Order 40 rule 2] Injunction to restrain breach of contract or other injury.

- 2
  - (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.
  - (2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.”

6. From the above, it is clear that a temporary injunction can only be sought where an applicant has filed a substantive suit seeking substantive orders against the respondents. This is because the temporary injunctive orders must be premised on some foundation. In the absence of a suit, I find the application has been made in a vacuum and is therefore defective.

7. In this respect, the Court in [Kihara v Barclays Bank Ltd](#) [2001] 2 EA 420, stated as follows:

“...the property subject matter of the injunction is neither mentioned in the suit as being in dispute nor is it in danger of alienation to defeat any decree. And rule (3) is merely procedural on the giving of notice of the application for injunction. The application thus falls squarely



under rule 2. As indicated above, my reading of that rule is that the application must be made in a suit wherein the relief of a permanent injunction is sought. Such is not the case in the suit filed by the plaintiff. In those circumstances and seeing that the plaint has not been amended to incorporate such prayer and there is not even an offer of an undertaking to do so...I am constrained to agree with the submissions on behalf of the bank that the application is incompetent and ought to fail on this ground alone. [With Emphasis]

8. The failure/omission of the Plaintiff to file a substantive suit cannot be overlooked as a “mere technicality” (see *Chacha & another v Orbit Chemicals Industries Limited & another* (Environment & Land Misc. Case E003 of 2023) [2024] KEELC 3278 (KLR) (7 March 2024) (Ruling))
9. In the upshot, the Plaintiff’s application dated 6<sup>th</sup> October 2022 is struck out with costs to the Defendant.
10. Orders accordingly.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI**

**THIS 17<sup>TH</sup> DAY OF OCTOBER 2024.**

**P. MULWA**

**JUDGE**

In the presence of:

Ms. Gachinga h/b for Ms. Namachanja for plaintiff

N/A for defendant

Court Assistant: Carlos

