



**Njoroge v Baron Capital Limited & another (Civil Suit E136 of 2023)
[2023] KEHC 3711 (KLR) (Commercial and Tax) (24 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3711 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E136 OF 2023
JWW MONG'ARE, J
APRIL 24, 2023**

BETWEEN

ELIJAH NJORE NJOROGE PLAINTIFF

AND

BARON CAPITAL LIMITED 1ST DEFENDANT

**LAZARUS KINYUMU MATIVO T/A SPECTRUM AUCTIONEERS 2ND
DEFENDANT**

RULING

1. By an application dated 25th March 2023 brought under Certificate of Urgency the applicant has moved the court by way of Notice of Motion brought under Sections 1A, 1B, 3,3A and 63 (e) of the [Civil Procedure Act](#), Cap 21, Laws of Kenya and Order 40 rule 1, 2, (1) & 3, and 4(1) of the [Civil Procedure Rules](#) seeking the following orders;
 - a. Spent
 - b. Spent
 - c. That pending the hearing and determination of this suit this Honourable Court be pleased to grant the plaintiff a temporary injunction restraining the Defendants whether by themselves, their agents, servants, assigns, successors or otherwise howsoever from interfering with the plaintiffs quiet and peaceful possession of Motor vehicles registration numbers KDK 100Y, Toyota Land Cruiser, & KDK 220Y Lexus, taking possession of the said motor vehicles, transferring their ownership, offering them for sale or in whatsoever manner dealing with the said motor vehicles.



- d. That and further in the alternative, this Honourable Court be pleased to declare any purported sale by the Defendants or anyone acting at their behest of motor vehicles registration numbers KDK 100Y Toyota Landcruiser & KDK 220Y, Lexus whether by public auction, private treaty or howsoever, null and void.
 - e. That a mandatory injunction does issue requiring the defendants, their servants, agents, assignees, successors in title, or anyone acting on any rights derived from or accruing from the said defendants, to forthwith release and surrender motor vehicles registration numbers KDK 100Y Toyota Landcruiser & KDK 220Y, LEXUS to the plaintiff.
 - f. That such further or other orders as are appropriate for the effective administration of justice.
2. The Application is supported by the grounds on the face of it and the supporting affidavit sworn on the 25th March 2023. The application is opposed and the defendant has filed a Replying Affidavit sworn on the 11th April 2023 by Samuel Kinyanjui Ngotho, a director of the 1st defendant who also has filed Notice of Preliminary objection dated 17th April 2023. The second defendant equally filed a replying affidavit sworn by Lazarus Kinyumu Mativo, the Auctioneer, trading as Spectrum Auctioneers.

The Applicants Case

3. The Applicant has moved to court by way of notice of motion seeking orders to bar the sale and disposal of his motor vehicles registration numbers KDK 100Y, Toyota Land Cruiser and KDK 220Y, Lexus. The Applicant alleges that the 1st respondent advanced him a soft loan of Kshs.10,000,000/- and that the same was to be repaid by monthly instalments for 12 months. As a sign of good faith and an assurance that he would pay the amount back as agreed, the applicant released to the 1st respondent the logbooks to the above motor vehicles to hold as security for the repayment of the loan.
4. The Applicant states that although the loan was to be for Kshs.10,000,000/, the 1st respondent released to him the sum of Kshs.9,066,708.00/- instead. The Applicant further states he signed documents to acknowledge the loan but the same were retained by the 1st respondent and no copies or counterparts were provided to him. Further, and despite the fact the loan was released for a less amount than agreed, the applicant commenced repayment of the same in instalments as agreed and as at the time of forceful repossession of his vehicles, he had repaid to the 1st Respondent the sum of 1,855,000 being at least 20% of the loaned amount.
5. The applicant states that on 24th and 25th March, 2023, and without any prior notice, warning or communication, the 2nd defendant, acting on the instructions of the 1st defendant, violently and forcefully took possession of the said motor vehicles and carted them away to the 1st respondent's premises.
6. The Applicant states that neither the 1st respondent nor the 2nd respondent served him with any notification and nor were the vehicles proclaimed and he is apprehensive that they are planning to dispose the vehicles to his detriment and loss. The Applicant argues that the action by the two respondents has occasioned him and his family great difficulties and loss and he is now forced to either hire a vehicle or use public means to access his place of work or just attend to his daily activities. He urges that this court order for the immediate return of the two vehicles as he has been repaying the loan as agreed. He further states that there is no judgement or order of repossession from any court or tribunal and that the activities by the 2nd defendant were an illegality as they flouted the Auctioneers Act.



7. Further, he states that the 1st respondent never notified him of its intention to repossess the vehicles or even call for the full payment of the loan before dispatching the 2nd respondent and the said actions amount to an ambush and are an illegality and an outright violation of the law On Movable Property Rights Act and an attempt to dispossess him of his property.
8. The Applicant that there is no agreement to warrant or justify the actions of the respondents and even if there was, which he denies, then the purported agreement was entered into through fraudulent misrepresentation and is designed to dispossess him of his property. In any event, the loan having been issued in December 2022 for 12 months could not have been due within a period of only two and half months to justify the actions by the respondents.
9. The applicant urges the court to order the defendants to return his two motor vehicles to him as the actions of the deprived have greatly inconvenienced him and his family as he is now forced to hire alternative mode of transport to move around. The Applicant has asked the court to permanently restrain by an injunction from interfering with his quiet enjoyment and use of Motor vehicles KDK 100Y, Toyota Land cruiser and KDK 220Y, Lexus.

The 1st Respondents Case:

10. The 1st respondent has opposed the application and also filed a notice of Preliminary Objection challenging the jurisdiction of the court to entertain the application before it. The 1st respondent states that in accordance with clause 5 of the agreement and Section 6 of the *Arbitration Act*, any agreement that contains an arbitration clause, then the Courts jurisdiction is ousted by operation of the law and that the court should not make any orders but dismiss the suit as filed and refer the parties to the arbitral process as per the agreement clause.
11. Counsel reiterated that the Preliminary Objection met all the ingredients of a Preliminary Objection in *Mukisa Biscuit Company limited v Westend Distributors Limited* [1996] eKLR.
12. In response to the substantive application, the 1st respondent states that it was within its right to order for the attachment and repossession of the applicant's vehicles since there was default on the part of the applicant and the vehicles had been pledged as security for the due performance of the applicant's obligations under the agreement.
13. Further, the 1st Respondent states that the agreement under clause 2 gave it power to order repossession without issuing any advance notice to the Applicant once it determined that the loan was in arrears.
14. The 1st respondent acknowledged that indeed the Applicant had made payment totaling to Kshs.1,855,000/- but insisted that the same was made late and hence their action to seize the vehicles were justified and that they needed not issue any notices at all.
15. The 1st respondent further stated that the loan as at the moment stood at over Kshs.14,000,000/- on account of the interest and penalties it levied as per the agreement. The 1st respondent informed the court that there were three loan agreements each secured separately and with different interest regimes. In the first loan agreement, the rate on the loan was 5% per month with a default penalty of 3% per month bringing the total interest rate applicable to 60% and 96% per annum respectively. On the second and 3rd loans, the 1st respondent informed the court that it applied an interest rate of 15% per month and a penalty interest of 5% per month bringing the annual interest rate per annum on the loan to 180% and 240% respectively. The 1st respondent reiterated that the Applicant was in arrears and hence the reason it exercised the right to repossess the vehicles.



16. The 1st respondent further informed the court that it was not a deposit taking microfinance. The 1st respondent further stated that it was a limited liability company with a trading license from the County Government of Nairobi and was neither licensed as a microfinance or a financial institution under the Central Bank rules or the financial institution regulations.
17. On its part, the 2nd respondent supported the 1st respondent's position and stated that 1st respondent was within its rights to order for the repossession of the charged motor vehicle. The second respondent further supported the position taken by the 1st respondent on the Notice of Preliminary Objection where he held the view that the agreement required, if a dispute arose, the same should be referred to an arbitrator in the first instance. He further stated that he was not in violation of the [Auctioneers Act](#) as he issued the relevant proclamation notices and waited 7 days before repossessing the motor vehicles on the instructions of the 1st respondent.

Analysis and Determination:

18. I have perused and considered the pleadings, the submissions and the decided authorities relied upon by both parties and I have identified two issues for determination?
 - i. Whether the arbitration clause ousts the jurisdiction of this court?
 - ii. Whether the repossession of the applicant's motor vehicles by the 2nd defendant pursuant to instructions by the 1st defendant was lawful?
19. To answer the question as "Whether the Arbitration Clause ousts the jurisdiction of this court to hear and determine the matter before it?" In the celebrated decision of the Court of Appeal in *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR Justice Nyarangi stated that

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

Flowing from the above holding before delving into the merits of the application before me, I must first determine the issue of jurisdiction as canvassed by the 1st respondent and supported by the 2nd respondent.

20. The 1st respondent in the Notice of Preliminary Objection has argued that this Honourable court lacks requisite jurisdiction to hear the case before it. The 1st respondent states that clause 5 in the three contracts between the parties contain a clause to refer all disputes arising from the agreements to arbitration in the first instance. In its submissions, the 1st respondent stated that there are three loans which are separate and independent agreements. Each of the loan has a different interest regime and also covers a different loan amount. In each of these three loan agreements, there is a clause specifically on arbitration which states as follow; "

"5. Arbitration

Should any dispute arise between any of the parties hereto with regard to the interpretation, rights, obligations, and/or implementation of any one or more of the provisions of this agreement, the particular dispute and/or implementation of any one or more of the provisions of this agreement, the



parties to such a dispute shall in the first instance attempt to resolve such a dispute by amicable negotiation.

Should such negotiations fail to achieve a resolution within fifteen (15) days, either party may declare a dispute by written notification to the other, whereupon such dispute shall be referred to Arbitration under the following terms;

- a)
- b)
- c)
- d)
- e) Notwithstanding the above provisions of this clause, a party is entitled to seek preliminary injunctive relief or interim or conservatory measures from any court of competent jurisdiction pending final decision or award of the arbitrator, and “
- f)

21. The Respondents further submitted that the above clause ousted the jurisdiction of this court to entertain the application before it and urged the court to dismiss the same and direct that the parties do submit the dispute to an arbitration process in line with section 6 of the Arbitration Act. Section 6 of the Arbitration Act provides as follows;

Section 6. Stay of legal proceedings

A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds—

- (a) that the arbitration agreement is null and void, inoperative or incapable of being performed, or

22. The applicant opposed the notice of Preliminary objection. The applicants argue that the Preliminary Objection brought by the 1st respondent does not meet the threshold set out in the case of *Mukisa Biscuit Company limited v Westend Distributors Limited* [1996] eKLR which states that:-

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is in the exercise of judicial discretion”.

The applicant’s position is that to determine the terms of the agreement, the court requires to interrogate the same and to do so would require evidence to be adduced on factual matters and therefore it cannot be deemed to be a matter of law as alleged.

23. Further in addition to the above, the Applicant urged the court to be guided by the law as per section 7 of the Arbitration Act which gives it power to issue interim orders to a party even when an arbitration process is ongoing. Section 7 of the Arbitration Act provides as follows.



24. I have considered the Preliminary Objection and the arguments in support and against it. I have also perused the authorities that both parties wish to rely on. I note that in objecting to the Jurisdiction of this court, the 1st Respondent wishes to rely on clause 5 of the purported agreement between the parties. I also note that under the said clause, subclause (5) (e) of the agreement provides as follows;

“e) notwithstanding the above provisions of this clause, a party is entitled to seek preliminary injunctive relief or interim or conservatory measures from any court of competent jurisdiction pending final decision or award of the arbitrator,”

Further and in addition to the said clause, as noted above, section 7 of the arbitration Act has clothed the court with jurisdiction to issue temporary reliefs to parties before it. Section 7 provides as follows;

- (1) It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.
- (2) Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.

25. The above section of the Arbitration Act and the purported loan agreements under 5(e) acknowledge the jurisdiction of the court to hear and determine a dispute between the parties hereto. Secondly, and in so far as the jurisdiction of the court is concerned, this court is clothed with original and inherent jurisdiction under the constitution of Kenya in article 165(3) therefore which states as follows;-

“(3) Subject to clause (5), the High Court shall have-- (a) unlimited original jurisdiction in criminal and civil matters;”.

26. In any event, courts have held that the Arbitration Act and the presence of an arbitration clause in an agreement does not oust the jurisdiction of the court per se, but stays the matter pending the conclusion of the arbitration process. This position was reiterated by the Court of Appeal in the case of Tononoka Steels Limited v Eastern and Southern Africa trade and Development Bank [1999] eKLR, the Court of Appeal held that an agreement cannot oust the jurisdiction of the courts. Instead, the least the court can do is to stay the process pending the arbitral process.

27. To my mind and guided by the law and the decisions emanating from the courts I find that this court has jurisdiction to determine the application before it. The Notice of preliminary objection on jurisdiction therefore fails and I shall now proceed to determine the second issue herein.

28. The second issue identified by the court for determination is as follows:-

“Whether the repossession of the applicant’s motor vehicles by the 2nd defendant pursuant to instructions by the 1st defendant was lawful?”.

It is not in dispute that the Applicant obtained a soft loan from the 1st defendant of Kshs.10,000,000/- in December 2022 and that the said loan was to repaid back in instalments of 12 months. The applicant further stated that he provided the logbooks of his two Motor vehicles KDK 100Y, Toyota Land cruiser and KDK 220Y, Lexus to be held by the 1st respondent during the term of the loan agreement as security. These logbooks were



not transferred to joint names and are still the property of the Applicant. The Applicant further states that he has since paid the sum of Kshs.1,855,000/- towards its redemption. He claimed not to have defaulted and was not in arrears at all.

29. Secondly, the Applicant further alleged that he was not given a notice of the intention to repossess the vehicles nor was a proclamation notice issued to him by the Auctioneer. If he had notice, he stated, he would have moved the court before the repossession or taken another precipitate action to stop the intended foreclosure as he was repaying the loan as agreed. He urged the court to find that both the 1st and 2nd respondents violated the law under the Movable Property Rights Act and the Auctioneers Act, respectively.
30. To determine whether the attachment was lawful, we must determine the status of the parties. The Applicant is a Kenyan citizen while the 1st respondent is a business registered in Kenya. By its own admission, it is not a bank nor a microfinance. It operates under a trading license from the County Government of Nairobi. It lends monies to borrowers and collects interest from them. It takes Vehicles and other chattels as security. What then is the legal standing of the 1st respondent? Is it a body whose activities are sanctioned by law? The court has not been placed with sufficient material to make this determination. Activities by unregulated entities must be scrutinized by courts to avoid exploitation of the public.
31. Citing clause 2 of the of the loan agreements, the 1st responded that it was within its rights to order a repossession of the vehicles which were used to secure the loans. The 1st Responded urged the court to hold that parties are bound by the terms of their agreements and that the courts could not be called upon to revise or rewrite the terms when a dispute arises to suit one side.
32. I have considered the application and the pleadings and submissions by the parties. I have also looked at the annexed loan agreements by the 1st respondents. I am alive to the legal doctrine of privity of contract and the now settled legal position that parties are bound by the terms of the contracts that they have voluntarily entered into. This was clearly stipulated by the Court of Appeal in the case of in *National Bank of Kenya Ltd v Pipellastic Samkolit (K) Ltd* [2002] 2 E.A 503, At Page 507, the Court of Appeal said;

“A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved”.
33. Several factors have emerged here. Firstly, the 1st respondent was a dominant party in this transaction. It set the terms of the contract, determined the term and interest rate and retained the agreements. It disbursed less funds than was agreed and has set an interest’s rate of 60%-96% percent and 180%-240% per annum as per the document seen by the court. This would explain the argument by the 1st respondent that the loan had since risen to 14,000,000 and as such the vehicles would not cover it as they were given a value of Kshs.10,000,000/-.
34. Considering that the respondent is operating unregulated and outside the purview of the Central Bank and other regulatory laws, the above scenario sets a recipe for disaster which as per the decision cited above calls for intervention of the Courts. To my mind, I am persuaded that privity of contract cannot be used to bar the courts to come to the rescue of a party whose rights are likely to be trampled upon.
35. The case before me bears similarities to the *Danson Muriuki Kihara v Johnson Kabungo* [2017] eKLR where L.W. Gitari J stated that:-

..... “It is clear that the Court can interfere even where parties have agreed on a rate of interest as long as it is shown that the rate is illegal, unconscionable or fraudulent. From the evidence before the



learned trial Magistrate there is no evidence of illegality or fraud..... An interest of 50% per month was agreed on. This calculates to an interest of 600% per annum. Even the financial institutions which are authorized to charge interest do not charge those kinds of rates. The agreement was drafted after the Respondent had already been given the cash and taken it to school. This bargain between the Appellant and Respondent is found by this Court to be unconscionable in the sense that no man in his senses and not under delusion would agree to such an interest rate. Even no honest or fair man would make such an offer to a friend. This rate is so unreasonable and oppressive to the Respondent, even though they had agreed to it. The Appellant took advantage of the Respondent's desperate situation to fleece him." It is apparent from the authorities that a court of law will not interfere with contracts entered into by two consenting parties and the interest agreed upon unless the terms are on the face of it illegal, unconscionable, oppressive and fraudulent. It will also interfere where the terms amount to unjust enrichment at the expense of desperate borrowers. The defendant borrowed at 100%. In the case of National Bank cited (Supra) the Court found that the interest of 50% was unconscionable and that no man in his right senses would agree to such an interest rate. So in the present case where interest was at 100% I wonder how the Defendant could agree to such a rate and default from the first month. He may not have realized the full impact of such interest. He would be required to pay 1200% interest per annum which is no doubt extremely high for a person borrowing a paltry sum of 100,000/=. What use can he simply put to that money to enable him raise the interest. The Plaintiff must have taken advantage of the Defendant to unjustly enrich himself and/or acquire his land unjustly. This Court must refuse to enforce such interest rates in such contracts".

36. I am persuaded by the above reasoning by the learned Judge that Courts must do something to prevent such behavior which in my view is unconscionable and also illegal. The above rate of interest cannot be allowed to stand as the end result will be a loan that is not unrepayable but too high and I find that the rate applied here was intended to divest the Applicant of his property.
37. The respondent urged the court to order parties to submit to Arbitration process as per the agreement. To my mind, Arbitration is a form of dispute resolution regulated by the law, and has clear guidelines on how it is approached. It cannot be invoked when one party is greatly disadvantaged. If the 1st respondent intended to be so, the first thing to do was when it deemed the agreement as violated, would have been, instead of unleashing auctioneers and repossessing the property of the applicant, followed the laid down procedures and declared a dispute. Instead, and in a clear violation of the said contract, he moved to repossess the vehicles, without notice to the Applicant and proceeded to advertise them for sale. He unilaterally declared a value of 10,000,000 on both vehicles, which he now states even the sale will not cover the amount due. This in itself is an illegality. The legal maxim of he who comes to equity must do so with clean hands is applicable.
38. Further Under the Movable Property Rights Act, any party that wishes to dispose of a movable asset in which it holds a lien, must first avail to the registered owner the first opportunity to redeem it. This is well elaborated by the said act in sections 68-75 of the said Act. Failure to do so renders any act taken by the seller illegal and a violation of the law.
39. Under the *Auctioneers Act*, repossession happens in two folds. One, from a court order directing the attachment to satisfy a debt or from a jointly registered owner claiming an interest recognizable by law. In the case before me, no court order was produced to satisfy the above requirement and neither was it adduced in evidence the joint registration of the vehicles between the Applicant and the 1st respondent. Subsequently, the attachment by the 2nd respondent was itself an illegality. Further, it was



not demonstrated that Regulation 12. (1) of the Auctioneers Rules were followed in the attachment process. The said regulation provide as follows;

- (1) Upon receipt of a court warrant or letter of instruction the auctioneer shall in case of movables other than goods of a perishable nature and livestock—
 - (a) record the court warrant or letter of instruction in the register;
 - (b) prepare a proclamation in Sale Form 2 of the Schedule indicating the value of specific items and the condition of each item, such inventory to be signed by the owner of the goods or an adult person residing or working at the premises where the goods are attached or repossessed, and where any person refuses to sign such inventory, the auctioneer shall sign a certificate to that effect;
 - (c) c) in writing, give to the owner of the goods seven days' notice in Sale Form 3 of the Schedule within which the owner may redeem the goods by payment of the amount set forth in the court warrant or letter of instruction;
 - (d) on expiry of the period of notice without payment and if the goods are not to be sold in situ, remove the goods to safe premises for auction; (e) ensure safe storage of the goods pending their auction;
 - (f) arrange advertisement within seven days from the date of removal of the goods and arrange sale not earlier than seven days after the first newspaper advertisement and not later than fourteen days thereafter; (g) not remove any goods under the proclamation until the expiry of the grace period.

40. Upon attachment as stated above, the auctioneers was expected to store the goods in a safe place. By his own admission and that of the 1st respondent, the vehicles were handed over to the 1st respondent as he proceeded to advertise the same for sale. In the opinion of the court, the actions by the 2nd respondent amount to a violation of his License.

41. In conclusion, I find that the applicant has made a good case to warrant the intervention of this court. I hold and find that the attachment of the Motor Vehicles KDK 100Y Toyota Landcruiser and KDK 220Y Lexus, by the 2nd Respondent at the instructions of the 1st Respondent was unlawful and an illegality.

42. The upshot of the above finding is that the Application herein has merit and is hereby allowed. The 1st and 2nd respondents are hereby ordered and directed with immediate effect to release the two motor vehicles KDK 100Y Toyota Landcruiser and KDK 220Y Lexus to the applicant. Costs of this application to the Applicant to be borne by the 1st Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF APRIL 2023.

.....
J. W. W. MONGARE

JUDGE

In the Presence of: -



1. Mr. Mutuku for the Applicant
2. Mr. Gitau holding brief for Ms. Wanjala for the 1st Respondent and appearing for the 2nd Respondent.
3. Sylvia- court Assistant

