



**Aswa Developers and Contractors Limited & 2 others v Synergy Industrial
Credit Limited & another (Commercial Civil Case E808 of 2021)
[2022] KEHC 70 (KLR) (Commercial and Tax) (4 February 2022) (Ruling)**

Neutral citation: [2022] KEHC 70 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CIVIL CASE E808 OF 2021
DAS MAJANJA, J
FEBRUARY 4, 2022**

BETWEEN

**ASWA DEVELOPERS AND CONTRACTORS LIMITED 1ST PLAINTIFF
STEPHEN WANGOMBE KINUTHIA 2ND PLAINTIFF
IRENE NJOKI WANGOMBE 3RD PLAINTIFF**

AND

**SYNERGY INDUSTRIAL CREDIT LIMITED 1ST DEFENDANT
PHILLIPS INTERNATIONAL AUCTIONEERS 2ND DEFENDANT**

RULING

Introduction and Background

1. The 1st Plaintiff (“the Company”) is a limited liability company. It is engaged in the business of construction, undertaking both corporate and government contracts throughout the country with the 2nd and 3rd Plaintiffs as its directors. The 1st Defendant, is a hire purchase company. It deals with the business of providing credit facilities for purchase of commercial vehicles, agricultural, construction, and industrial machinery.
2. Sometime in the year 2008, the Company approached the 1st Defendant seeking financing for the purchase of moveable assets, with the model of financing being in the nature of Hire Purchase and that since then, a financing relationship was created between them where the 1st Defendant could extend Hire Purchase facilities to the Company from time to time.



3. The facilities extended to the Company were secured by various motor vehicles over, inter alia, an existing Debenture dated 13th March 2008 registered in favour of the 1st Defendant for the sum of KES 40,000,000.00, an existing Chattels Mortgage dated 13th March 2008 registered in favour of the 1st Defendant for the sum of KES 20,000,000.00 and the Directors' Personal Guarantees executed by the 2nd and 3rd Plaintiffs.
4. The Company fell into arrears in servicing the facilities extended by the 1st Defendant whereupon on 14th September 2021, the 1st Defendant issued instructions to the 2nd Defendant ('the Auctioneers') to repossess the moveables. The Auctioneers issued the Company with a 7 day Proclamation of Moveable Property Notice dated 14th September 2021 threatening to attach and sell the Company's movable assets; ZE 0415 Tipper Trailer, Sany Concrete Pump, KCH 460H FAW Tipper, KBP 669Z FAW P/Mover, ZD 7054 Tipper Trailer, KAZ 313C FAW Tipper, ZD 7053 Tipper Trailer, ZD 7140 Tipper Trailer, KAZ 312C FAW Tipper, ZD 7055 Tipper Trailer, KBS 248J FAW Tipper, KAZ 315C FAW Tipper, KBQ 605A FAW Truck, KBP 342Y FAW Truck, CAT Grader 120G, KBQ 886J Tata Tipper, KBS 249J FAW Tipper, Smooth Drum Compactor, KBQ 881J Tata Tipper, KCH 456H FAW Tipper, KBQ 916N M/Benz E240, KBQ 883J Tata Tipper, KCH 458H FAW Tipper, KBE 607E Isuzu NHR, KBQ 884J Tata Tipper, KBQ 885J Tata Tipper, KBM 611H Toyota KUNI5 P/up, KBP 668Z FAW P/Mover, KCH 457H FAW Tipper, KBC 3095 Crawler Extractor, KBP 749Z FAW P/Mover, KCH 459H Tata Tipper and KBM 326W Man P/Mover ("the Listed Assets") on account of a debt of KES 61,821,356.00 which the 1st Defendant claimed was due and owing to it.
5. It is the aforesaid action that precipitated the Plaintiffs filing this suit by the Plaint dated 17th September 2021. It was accompanied by a Notice of Motion of even date made, inter alia, under Order 40 Rule 1, 2,3, 4 and 8 of the Civil Procedure Rules ("the Rules"). The Plaintiffs seek a temporary order of injunction restraining the Defendants, from repossessing, attaching, advertising for sale or offering for sale by public auction or private treaty, appointing receivers or administrators and/or in any other manner whatsoever, interfering with or otherwise dealing with the Listed Assets pending the hearing and determination of the application. The application is supported by the 2nd Plaintiff's affidavit sworn on 17th September 2021. It is opposed by the Defendants through the replying affidavit of the 1st Defendant's director, Jacob Meeme, sworn on 22nd October 2021.
6. On its part, the 1st Defendant has filed a Notice of Motion dated 22nd October 2021 made under Order 13 Rule 2 of the Rules seeking judgment on admission as against the Plaintiffs jointly and severally for KES 47,526,583.00 plus interest thereon at the rate of 18% per annum from 30th November 2019 until full and final payment. The application is supported by the said Jacob Meeme's supporting affidavit sworn on 22nd October 2021 and opposed by the Plaintiffs through the 2nd Plaintiff's replying affidavit sworn on 9th December 2021.
7. I directed that the two applications be heard together. They have been canvassed by written submissions with the parties advancing their respective positions.

The Plaintiffs' Application

8. The Plaintiffs' case is that at various times since the year 2008, the 1st Defendant advanced the Company Hire Purchase facilities against security of the Listed Assets to the tune of KES 159,212,042.00 which is inclusive of hire purchase charges (interest) due to the 1st Defendant. They assert that they have repaid KES 159,302,194.00 in full and final satisfaction of the facilities advanced together with interest due to the 1st Defendant. They maintain that the money claimed by the 1st Defendant includes illegal and unsubstantiated penalties in the nature of Late Payment Charges which they dispute.



9. The Plaintiffs further state that they prudently serviced the facilities with the delay in payment only occurring in the year 2014, owing to acts and omissions perpetrated by the 1st Defendant. They state that during the period January-July 2013, the 1st Defendant financed and purchased on behalf of the Company assets which were faulty and unfit for purpose and that when they informed the 1st Defendant, it ignored the Plaintiffs' call for replacement of the assets and proceeded to and continues to levy illegal Late Payment Charges against the Listed Assets which now remain grounded.
10. The Plaintiffs add that sometimes in the month of July 2019, they informed the 1st Defendant that they required port passes which required the 1st Defendant, as a joint owner, to confirm that the Listed Assets were cleared, to enable it execute contract works at the Kenya Ports Authority in Mombasa and Nairobi. It accuses the 1st Defendant of refusing to issue the authorization letters which resulted in cancellation of the contract by the Kenya Ports Authority. Further, during the month of August 2019, some of the Listed Assets were grounded for a period of 7 months by the National Transport Safety Authority (NTSA) owing to double registration and despite numerous requests, the 1st Defendant failed to regularize the registration and compelled the Plaintiffs to incur financial costs to regularize the registration.
11. The Plaintiffs state that despite the violations, the 1st Defendant threatens attachment and sale of the Listed Assets which if allowed, will cripple the Company operations since the Listed Assets are deployed in different parts of the country executing its contracts. It states that risk of collapse of its business is real owing to cancellation of contracts, litigation on account of non-performance, as well as litigation owing to the arbitrary termination of employment contracts for the more than 100 employees whose livelihoods are attached to the execution of the pending contracts, should the Listed Assets be attached.
12. The Plaintiffs contend that despite repeated demands to the 1st Defendant to provide true and accurate Statements of Accounts and that reconciliation be undertaken, the 1st Defendant has failed to engage in this process resulting in an illegal proclamation notice and threatened attachment of the Listed Assets.
13. The Plaintiffs urge that unless the court intervenes and issues the orders sought, the Plaintiffs will suffer substantial loss and prejudice, which cannot be compensated by way of damages, without having been afforded a fair hearing.

The Defendants' Reply

14. The Defendants oppose the application. They submit that the Plaintiffs have not met the conditions for grant of an injunction.
15. The Defendants state that when the Plaintiffs fell into arrears in 2016, they requested for a rescheduling of the facilities and equally requested for financing of 5 units of New FAW CA 3223 TIPPER from Transafrica Motors Limited. At the time, the arrears amounted to KES 9,104,406.00 and the upcoming installment until completion of the facility agreement was KES 16,691,410.00 totaling KES 25,795,816.00. The Plaintiffs requested a KES 27,500,000.00 credit facility and they were also to pay hire purchase charges of KES 9,186,494.00 making an entire facility of KES 72,482,310.00 which was to run for a period of 36 months with monthly installments of KES 2,013,398.00 payable by two (2) cheques of KES 671,133.00 and KES 671,132.00 respectively per month. This arrangement was captured in the Hire Purchase Agreement for rescheduling Reference No. 2016/06/3335 dated 30th June 2016.
16. The Defendants aver that Plaintiffs immediately fell into arrears once the facility was granted. The 1st Defendant demanded that the Plaintiffs remedy the breach by a letter dated 6th February 2017 but the



- Plaintiffs failed to do so but continued to be in default. The 1st Defendant issued a demand dated 1st August 2017 calling for payment of KES 60,719,902.00. In the response dated 23rd August 2017, the Plaintiffs informed it that they were expecting payment from a client; Blackstone Trading Company Limited towards part settlement of the arrears but the payment was never received.
17. The Defendants state that the Plaintiffs requested, by their letter dated 31st August 2017 for a second reschedule of the facility. They explained that their clients were delaying payments making it difficult to service their monthly obligations. By this time, the total outstanding facility was KES 61,251,560.00. The Defendants state that the Plaintiffs were aware of the outstanding amounts as the 2nd Plaintiff had been served with the statement of account which he acknowledged. The Defendants state that the Plaintiffs further defaulted in the payment of their premiums for insurance of the Listed Assets.
 18. The 1st Defendant acceded to the Plaintiffs request for restructure of the facility. By 30th November 2017, the arrears stood at KES 54,876,689.00. For the facility to be rescheduled, the Plaintiffs were required to pay KES 11,889,949.00 as hirer charges making an aggregate of KES 66,766,639 to be repaid in 19 months with monthly installments of KES 3,400,000.00 payable by four cheques of KES 850,000.00 with the last installment of KES 2,166,639.00 payable by two cheques of KES 850,000.00 each and a third Cheque of KES 466,639.00. The repayment was to run from December 2017 to July 2019. The understanding resulted in a rescheduling Hire Purchase Agreement Reference No. 2016/06/3335 on the same terms and conditions as the previous agreements.
 19. The 1st Defendant states that it was aware that the Plaintiffs were having difficulty servicing their monthly installments. It had a meeting with the Directors of the Company to discuss on the modalities of its second rescheduled facility and as evidenced by correspondence, the Plaintiffs were informed of their indebtedness which they acknowledged. The Defendants stress that the Plaintiffs knew and were aware of their true state of indebtedness and that despite numerous meetings and request for payment, the Plaintiffs failed to remit their monthly installments and or regularize its accounts. On 19th July 2018, the Company wrote to the 1st Defendant advising it that it would like to dispose of some of the Listed Assets to enable it meet its obligations with comfort. However, the sale did not take off nor did the Plaintiffs clear their arrears and the 1st Defendant made further demands to the Plaintiffs. On 3rd May 2019, the Company wrote a letter confirming that the reschedule was to end in the month of July 2019 and the Plaintiffs further requested that they be granted an extension of the period of their facility.
 20. The 1st Defendant denies the Plaintiffs' claim that they made repeated requests for clarification of their indebtedness which has not been forth coming. It also denies that it purchased assets on behalf of the Company reiterating that it is a Hire purchase company which provides credit facilities. The Defendants admit that the Plaintiffs informed it that one motor vehicle was having an issue at NTSA of double Registration and as soon as it was informed, it took steps to resolve the issue.
 21. The Defendants deny that some of the Listed Assets were grounded for 7 months and that the Plaintiffs are before Court with unclean hands as they have not put forth any evidence detailing that there indeed was a delay and that the delay was occasioned by the 1st Defendant. The 1st Defendant states that as a Hire Purchase company, it does not have any association with NTSA and or the services rendered by them and that by an email dated 11th October 2019, the Plaintiffs' agent advised the 1st Defendant that all the documents required for resolving the doubleregistration issue had been handed over to NTSA headquarters.
 22. The Defendants state that on 2nd December 2019, the 2nd Plaintiff visited the 1st Defendant's office with a view to discuss their accounts. As at 30th November 2019 the amount that was outstanding stood at KES 83,469,011.00. Due to the long standing relationship between the parties, the 1st Defendant decided to give the Company a rebate of KES 30,302,372.00 which reduced the outstanding arrears



to KES 53,166,639.00. The Plaintiffs' account was further credited with KES 5,640,056.00 being amounts received from the proceeds of a contract dated September 2018 between the Company and Capital Square Limited reducing the balance to KES 47,526,583.00, which the Company admitted in writing on the said statement of account and the 2nd Plaintiff appending his signature. The Defendants thus deny that the Plaintiffs have been making repeated requests for statements that have not been forthcoming and that if anything, the Plaintiffs have been aware of their debt and the interest rates to be charged as from November 2019 as highlighted above.

23. The Defendants state that the Plaintiffs have always been receiving demands from them to settle the outstanding arrears including the latest one of 18th June 2021 which was responded to by the Plaintiffs' advocates on 2nd July 2021 and therefore, the sudden change of attitude by the Plaintiffs is an afterthought geared towards avoiding its legally bound duties and serves to unfairly enrich the Plaintiffs.

Injunction against the Defendants

24. The Plaintiffs seek to restrain the Defendants from dealing with and realizing the Listed Assets in order to settle the debt claimed by the 1st Defendant. The principles upon which the court acts in such cases is not a matter of dispute. In order to succeed, the Plaintiffs have to meet the conditions for grant of an interlocutory injunction set out in *Giella v Cassman Brown [1973] EA 348*. They must demonstrate that they have a prima facie case with a probability of success, demonstrate irreparable injury which cannot be compensated by an award of damages if a temporary injunction is not granted, and if the court is in doubt show that the balance of convenience is in their favour. In *Nguruman Limited v Jane Bonde Nielsen and 2 Others NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR* the Court of Appeal reiterated the three conditions to be fulfilled before an interim injunction is granted as set out in *Giella v Cassman Brown (Supra)* and further clarified that they are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. This means that if an applicant does not establish a prima facie case then irreparable injury and balance of convenience do not require consideration. On the other hand, if a prima facie case is established, then the court will consider the other conditions.
25. In *Mrao Ltd v First American Bank of Kenya Limited and 2 Others [2003] eKLR*, the Court of Appeal explained that a prima facie case 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 to call for an explanation or rebuttal from the latter." A prima facie case with a probability of success is based on the Plaintiffs' case as pleaded in the Plaint. The Plaintiffs must thus demonstrate that the 1st Defendant has been in breach of the Hire Purchase Agreement.
26. First, there is the issue as to whether the Plaintiffs are truly indebted to the 1st Defendant. From the Plaint, the Plaintiffs impliedly state that they are indebted to the 1st Defendant but that this is because the 1st Defendant violated the terms of their Agreements and this affected the Plaintiffs' ability to regularly service the facilities. They also accuse the 1st Defendant of continuing to levy illegal late payment charges against the Listed Assets.
27. I have gone through the parties' depositions and the annexures therein more so the correspondences between the parties. In almost all of them, the Plaintiffs acknowledge being indebted to the 1st Defendant and mostly blame delayed payments from their clients as the reason why they are not being able to make good their account with the 1st Defendant. At no point do the Plaintiffs blame the 1st Defendant or the late payment charges being levied as the reason for the indebtedness. Even if that was the case, it cannot be denied and the Plaintiffs were always aware that it was an express term of



the Hire Purchase Agreements that the total Hire Purchase Price included Hire charges which the 1st Defendant was entitled to levy.

28. Further, the statements of accounts annexed have consistently indicated that the Company has been in arrears with the latest statement of account as at 31st August 2021 indicating that the Company is in arrears of KES 61,821,356.00. I have no doubt and I find and hold that on a prima facie basis, the Plaintiffs are truly indebted to the 1st Defendant. Further I do not find any evidence, that the 1st Defendant has been in violation of the Hire Purchase Agreements or that they have been levying illegal late payment charges on the Plaintiffs. The 1st Defendant has answered the allegations made by the Plaintiffs and it is clear that the complaints, even if true, are not anchored on the agreements or in any way vitiate those agreements.
29. It is also important to understand the nature of a Hire Purchase agreement. The court explained its nature in *Eunice Kanugu Kingori v NIC Bank Limited ML HC COMM No. 12 of 2012 [2018] eKLR* as follows:

Hire purchase Agreements are Agreements whereby, an owner of goods allows a person, known as the hirer, to hire goods from him or her for a period of time by paying instalments. The hirer has an option to buy the goods at the end of the Agreement if all instalments are being paid. However, it is not a contract of sale but contract of bailment as the hirer merely has an option to buy the goods and although the hirer has the right of using the goods, he is not the legal owner during the term of the agreement, the ownership of the goods remains with the owner.” [Emphasis provided]

30. From the above exposition, the hirer, in this case, the Company, is not the legal owner of the Listed Assets, until it completes payment. If it defaults in making payments, the lender is entitled to repossess and sell the asset in order to recover its money. As the Defendants point out, Clause 6 of the Hire Purchase agreements provides that if the Company defaulted on payment of any of the sums payable pursuant to the Agreements, the owner shall by written notice determine the Agreement and the Hirer shall thereupon no longer have possession of the Listed Assets. As default is admitted, the 1st Defendant is entitled to exercise its right of repossession. This is a contractual right and the court will not grant an injunction merely on the ground that the debt is disputed or that the hirer has difficulty making payments (see *Amicabre Travel Services Limited v Alios Kenya Finance Limited HC COMM No. 436 of 2013 [2014] eKLR*).
31. It is for the reasons I have set out above, that the Plaintiffs application for an injunction fails as they have failed to surmount the first hurdle of making out a prima facie case. Even if I am to consider the other conditions, I find that the same can only be in favour of the 1st Defendant as the Listed Assets continue to depreciate and the outstanding debt continues to balloon if it remains unpaid. The Plaintiffs’ application thus fails in its entirety.

Judgment on Admission

32. Turning to the Defendants’ application for judgment on admission, it is premised on the Counterclaim that the Plaintiffs owe it KES 61,821,356.00 as at 31st August 2021 which the Plaintiffs have refused, failed and neglected to settle. It states that on several occasions through correspondence, the Plaintiffs acknowledged and admitted being indebted to the 1st Defendant wherein they made several promises to pay but failed to honour the same.
33. The Plaintiff’s contested the basis for upon which the Defendants’ application is grounded and in the absence of Reply to Defence and Defence to Counterclaim, I propose to stay application since



Plaintiffs impeach the agreement on which the claim is based. Further, having dismissed the application for injunction, the Defendant may proceed to exercise its rights under the Agreements which may or may not affect the Plaintiffs' liabilities.

Disposition

34. For the reasons I have set out above, I now make the following orders:

- (a) The Plaintiffs' application dated 17th September 2021 is dismissed with costs to the Defendant.
- (b) The Defendants' application dated 22nd October 2021 is stayed pending further orders of this court.
- (c) The Plaintiffs shall file and serve their Reply to Defence and Defence to Counterclaim within 14 days from the date hereof.
- (d) The interim orders in force are discharged.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF FEBRUARY 2022.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Ms Kiiru instructed by Omusolo Mungai and Company Advocates for the Plaintiffs

The Defendants represented by the 1st Defendant.

