



Mombasa Highway Transport Ltd v Gulf Africa Bank Ltd; Gulf African Bank Limited (Plaintiff to the Counterclaim); Mombasa Highway Transport Limited & 4 others (Defendant to the Counterclaim) (Civil Suit 95 of 2015) [2024] KEHC 15637 (KLR) (Commercial & Admiralty) (9 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15637 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND ADMIRALTY
CIVIL SUIT 95 OF 2015
JWW MONG'ARE, J
DECEMBER 9, 2024**

BETWEEN

MOMBASA HIGHWAY TRANSPORT LTD PLAINTIFF

AND

GULF AFRICA BANK LTD DEFENDANT

AND

GULF AFRICAN BANK LIMITED PLAINTIFF TO THE COUNTERCLAIM

AND

MOMBASA HIGHWAY TRANSPORT LIMITED DEFENDANT TO THE COUNTERCLAIM

SHINUNA SAID SALIM DEFENDANT TO THE COUNTERCLAIM

FAHMI SULEIMAN SALIM DEFENDANT TO THE COUNTERCLAIM

SAIF MOHAMMED SEIF DEFENDANT TO THE COUNTERCLAIM

NASSOR SULEIMAN MBARUK DEFENDANT TO THE COUNTERCLAIM

RULING

1. The application before the court is the one dated 23rd February, 2024 by the Plaintiff/applicant. It is brought pursuant to Order 10 rule 11, Order 45 Rule 1(a) of the Civil Procedure Rules, Sections 1A, 1B, and 3A of the *Civil Procedure Act* and all other enabling provisions of the law. The application seeks the following orders:-



- a. spent
 - b. spent
 - c. That pending the hearing and determination of this application inter-parties, an interim stay of execution proceedings emanating from the application dated 28th June, 2021.
 - d. That this Honourable court be pleased to review and/ or vary its decision to consider the application for interlocutory judgment and the subsisting execution proceedings emanating from the application dated 28th June, 2021.
 - e. A mandatory order for the immediate release with no orders as to costs of the attached asset ZD2992.
 - f. The Respondent to furnish the current statement of accounts within 14 days upon the plaintiff /applicant and that the matter does proceed for trial on a priority basis.
 - g. That costs of the application be borne by the defendant/ Respondent.
2. The application is grounded on the assertions made in the application itself and is supported by an affidavit sworn by ERICK T. KOKUL, the advocate representing the Plaintiff/applicant. In the affidavit, sworn on 23rd February 2024, MR. KOKUL asserts that the application dated 28th June 2021 is executionary in nature, despite the absence of a formal judgment in the matter.
 3. In opposition to the application, the Defendant filed a Replying Affidavit sworn on 5th April 2024 by LAWI SATO, the legal officer. MR. SATO deposes that judgment on admission for the sum of Kshs.31,626,532.00/- was entered against the 5th Defendant on 24th March 2015. He further asserts that the prayer for the release of the trailer is sub judice, as it was previously raised in the Notice of Motion dated 19th December 2019, which is still pending determination. MR. SATO also claims that the Plaintiff is approaching the court with unclean hands, having defaulted on servicing the debt.
 4. The application was canvassed by way of written submissions and oral highlights by counsel. The court notes that the key issue that arise for consideration is whether the present application is merited.
 5. Upon reviewing the record, I note that this court(Okwany J.) dismissed the application dated 28th June 2021 on 23rd June 2022, ordering that the matter proceed to full trial. Therefore, I find that there is no execution arising from the said application, and as a result, prayers 3 and 4 of the application fail.
 6. The applicant also seeks a mandatory order for the release of the motor vehicle. It is well-established that at an interlocutory stage, a mandatory order can only be granted in very clear circumstances. The court must be satisfied that the party seeking the order has a strong case, which the Defendant has not defended. Additionally, it must be demonstrated that an award of damages may not be adequate or assured. The court will also consider the conduct of the parties before issuing a mandatory injunction. This position was affirmed in *Locabail International Finance Limited v. Agro-Export & Another* (1986) 1 All ER, where the court stated:-

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases, either where the court thought that the matter ought to be decided at once, or where the injunction was directed at a simple and summary act that could easily be remedied, or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction, the court must feel a high sense of assurance that at the trial it will appear that the injunction had



rightly been granted, as this is a different and higher standard than what is required for a prohibitory injunction.”

7. Similarly, the Court of Appeal in *Kenya Breweries Limited & Another v. Washington O. Okeyo* [2002] eKLR held that:-

“The test for granting a mandatory injunction is correctly stated in Vol. 24 of Halsbury’s Laws of England 4th Edn. para 948, which reads:

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff, a mandatory injunction will be granted on an interlocutory application.”

8. The crux of the matter is that the Plaintiff sought several loan facilities from the Respondent, which were secured by various trucks. The 2nd to 5th Defendants signed personal deeds of indemnity for the loans. Upon the Plaintiff’s default, the Bank exercised its statutory right and attached the subject motor vehicle, ZD 0926. Subsequently, the Plaintiff obtained an injunction to prevent the sale of the truck.
9. It is trite law that if a borrower defaults on a loan, lenders typically have statutory powers to sell collateralized assets, provided that proper notice is given in accordance with the law. I note in this case, the Respondent’s actions appear fully justified, as they complied with all necessary legal procedures following the Plaintiff’s default on the loan.
10. I therefore find no fault with the Respondent’s seizure of the truck. The Plaintiff is in clear default of the loan repayment, and has failed to show any evidence of compliance with the repayment terms. The Court holds discretionary power in determining whether to grant mandatory orders or injunctions. In this matter, the Plaintiff has not established a prima facie case or demonstrated a high likelihood of success on the merits. Furthermore, the Plaintiff has not presented special or compelling circumstances that would warrant the granting of extraordinary relief. This reinforces the Respondent’s right to seize the truck as collateral for the unpaid loan. The Plaintiff’s claim, grounded in an alleged breach of contract, suggests that damages would be the appropriate remedy, should the breach be proven.
13. For the aforesaid reasons, the application by the Plaintiff is hereby disallowed.
14. Having declined to grant the orders sought by the Plaintiff, I must now consider the question of whether the injunctive orders issued in favour of the Plaintiff should be discharged.
15. The Respondent submits that, following the grant of the injunction preventing the sale of the truck, the vehicle remains in storage at Eldoret Auction Center and Storage Services, accruing daily storage fees. The auctioneer has threatened to sell the truck unless these charges are paid. The continued existence of the injunction is prejudicing the Respondent, as it leaves the truck in storage and continues to impose financial burdens due to the accumulating fees.
16. Order 40 Rule 6 of the Civil Procedure Rules states as follows:-

“Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.”



15. Further, in the case of Erick Kimingichi Wapang'ana & Another v. Equity Bank Limited & Another [2015] eKLR, it was held as follows:-

“Rule 6 of Order 40 was made in clear cognizance of the preceding Rules in that order. It therefore follows that notwithstanding the wording of any order of interlocutory injunction, the same lapses if the suit in which it was made is not determined within twelve months, unless, as the Rule provides, for any sufficient reason the court orders otherwise... In this case, there was no subsequent order extending the injunction. Having been issued on 11th October 2011, the injunction lapsed on 12th October 2012.”

16. An interlocutory order of injunction issued ought to lapse at the expiry of twelve months unless extended by the court for sufficient reason. In the instant suit, the Plaintiff obtained the injunctive orders on 20th December 2018, which is now slightly over six years ago. Thus, applying the provision of Order 40 Rule 6 of the Civil Procedure Rules, I find that the orders of injunction issued by this court automatically lapsed on 20th December 2019. Consequently, it is my finding that there is no valid injunctive order on record.

17. In light of the above, I dismiss the Plaintiff's Notice of Motion dated 23rd February, 2024 with costs to the Respondent. The interim orders issued on 20th December 2018 are hereby discharged forthwith.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI VIRTUALLY THIS 9TH DAY OF DECEMBER 2024

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J. W. W. MONGARE
JUDGE

In the Presence of:-

1. Mr. Maliambo holding brief for Mr. Kokul for the Plaintiff/Applicant.
2. Mr. Ongeru for the Defendant/Respondent.
3. Amos - Court assistant.

