Rarlon Company Limited v Equity Bank Kenya Limited & another (Civil Suit E246 of 2024) [2024] KEHC 15684 (KLR) (Commercial and Tax) (6 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15684 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL SUIT E246 OF 2024

FG MUGAMBI, J

DECEMBER 6, 2024

BETWEEN

RARLON COMPANY LIMITED ..... PLAINTIFF

AND

EQUITY BANK KENYA LIMITED ..... 1ST DEFENDANT

JESSE MBURI GITAU T/A GALLANT WORLDWIDE AUCTIONEERS .... 2ND DEFENDANT

RULING

1. The facility offered by the 1st respondent (the Bank) to the applicant by way of an Asset Based & Equipment Financing Facility is not denied. The loan of Kshs. 200,000,000/= was extended through the offer letter of 10th May 2021. It was for purposes of purchasing 27 motor vehicle units. It was a term of the contract that the applicant would repay the loan in 60 equal monthly installments or 20 equal quarterly installments, payable through a direct debit/standing order effected on the plaintiff's account number ****4236.

2. The facility was secured by amongst other things, the applicant's motor vehicles, Shacman Prime Movers Registration Numbers KDC 061T, KDC 087X, KDC 923Y, KDC 524Y, KDC 067T, KDC 059T, KDC 062T, KDC 619Y, KDC 063T, KDC 056T, KDC 622Y, KDC 922Y, a JMC double Cabin and Trailers registration numbers ZG 6034, ZG 6040 and ZG 6039 (the Motor Vehicles) which were registered in the joint names of both the applicant and the Bank.

3. The applicant asserts that a substantial portion of the loan has been repaid, leaving an outstanding balance of Kshs.54,002,339.76. The applicant takes issue with the 1st respondent for not issuing a formal demand before embarking on the repossession of the 16 out of 27 units, at a time when the parties were negotiating a restructuring. The applicant further contends that the forced sale value of

the units that the Bank intends to sell is Kshs.74,000,000/- which is way beyond the outstanding loan amount.

Analysis and determination

4. The main issue for consideration is whether a temporary injunction should issue pending the hearing and determination of the suit. Order 40 Rule 1 of the Civil Procedure Rules sets out the circumstances under which a temporary injunction can be granted by the court. The conditions guiding the court in granting such orders have been well established in the case of *Giella V Cassman Brown & Co Ltd, (1973) E.A 385,* at page 360 where Spry J. laid out the principles as follows:

    i. A party must show that they have a prima facie case with a probability of success;

    ii. That they might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages if the order is not granted and;

    iii. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.

5. To succeed, an applicant must satisfy each of these principles consecutively. On the first condition, this court must determine whether the applicants have established a prima facie case, as defined in Mrao Ltd V First American Bank of Kenya Ltd & 2 Others, [2003] KLR 125. In assessing whether a prima facie case has been demonstrated, I am mindful of the limitations on the scope of inquiry permitted at this stage, as articulated by the Court of Appeal in *Nguruman Ltd V Jan Bonde Nielsen 8 2 Others*, [2014] eKLR and *Hosea Kiplagat & 6 Other V National Environment Management Authority & 2 Others* (2015) eKLR. In both cases the Court warned against delving into the merits of a case at the interlocutory stage.

6. I have carefully considered the issues raised by the applicant in light of the relevant legal provisions and the authorities cited. Notably, the debt is admitted. The only dispute appears to concern the exact amount outstanding. The applicant claims that it owes Kshs.54,002,339.76. The Bank however states that as of 21st February 2024, the plaintiff owed the Bank Kshs. 91,113,965,76 which had increased to Kshs. 93,071,448.76 as at 16th April 2024. The applicant in fact acknowledges that it made the last payment in January 2024.

7. In my view, the same principles apply when a Bank seeks to repossess motor vehicles to recover an outstanding debt as they do when a Bank seeks to exercise its statutory power of sale. In this regard, I concur with the court's holding in *Scholastica Nyaguthii Muturi V Housing Finance Company of Kenya Ltd*, [2017] eKLR where the court stated:

> " The mortgagee will not be restrained from exercising his power of sale because the amount is in dispute or because the mortgagor has begun a redemption action or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount into court."

8. I would further refer to the case of *Quantum Petroleum Limited V Diamond Trust Bank Kenya Ltd*, [2017] eKLR where this court again reiterated that:

> "A debt is only resolved by payment and where a debt is acknowledged, it would be unconscionable, unlawful and unjust to stop the creditor from collecting his debt unless the creditor is shown to act unlawfully. Here, in this case nothing has been shown to be unlawful in the conduct of the defendant and to grant an injunction on the facts revealed would be to re-write the contract between the parties. That is not the duty or right of this court."

9. It follows from these authorities that, a dispute on the amount due is not a sufficient ground to prevent the Bank from repossessing the vehicles. In any event, should there be a surplus after the sale, as intimated by the applicant, the same will be established and refunded to the applicant.

10. As to whether a formal demand was issued to the applicant, the Bank has exhibited a letter dated 21st February 2024, which was sent to the applicant by way of registered post. The proof of postage of even date is also annexed to the Bank's documents.

11. The applicant's argument that the repossession is unlawful is further negated by clause 12.1 of the offer letter that both parties agreed to. This clause permits the Bank to terminate the agreement without notice and repossess the motor vehicles if the borrower defaults on any monthly repayment for seven (7) days. Such default, as I have noted, is acknowledged by the applicant.

12. For all these reasons, I am convinced that the applicant has not met the first threshold for the granting of injunctive relief. As established in the Nguruman Limited case [supra], if a plaintiff fails to satisfy this first condition, the question of whether damages would adequately compensate the plaintiff, or the balance of convenience, does not arise. Accordingly, I will not consider the remaining two limbs.

Disposition

13. Accordingly, the application dated 6th May 2024 is devoid of merit. It is dismissed with costs to the Bank. The interim orders are lifted.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 6TH DAY OF DECEMBER 2024.

F. MUGAMBI

JUDGE