



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**HCCC NO. E071 OF 2019**

SCANIA CREDIT SOLUTIONS (PTY) LIMITED.....1<sup>ST</sup> PLAINTIFF

SCANIA FINANCE SOUTHERN AFRICA(PTY)LIMITED.....2<sup>ND</sup> PLAINTIFF

VERSUS

METRO LOGISTICS LIMITED.....DEFENDANT

**RULING**

1. This ruling is in respect to the application dated 2<sup>nd</sup> April 2019 in which the plaintiffs/applicants seek the following orders.

**1. Spent**

**2. That an order do issue compelling the respondent to release, surrender and/or return to the applicants, the vehicles registration numbers: ZF6018, ZF6019, ZF6020, ZF6021, ZF6022, ZF6023, ZF6024, ZF6025, ZF6026, ZF6027, KCK 088Q, KCK 089Q, KCK 090Q, KCK 152Q, KCK 153Q, KCK 100Q, KCE 912Z, KCE 913Z, KCE 151Q, which vehicles are currently in the custody and/or possession of the respondent; with the vehicles being placed at a premises designated by the applicants; min the alternative,**

**3. That an order do issue authorizing Mr. Godfrey G. Kamiri T/A Westminister Commercial Auctioneer to take possession of the Applicants' vehicles registration numbers: ZF6018, ZF6019, ZF6020, ZF6021, ZF6022, ZF6023, ZF6024, ZF6025, ZF6026, ZF6027, KCK 088Q, KCK 089Q, KCK 090Q, KCK 152Q, KCK 153Q, KCK 100Q, KCE 912Z, KCE 913Z, KCE 151Q, which vehicles are currently in the custody and/or possession of the respondent and thereafter deliver the said vehicles to the Applicants.**

**4. That an order so issue authorizing the Officer Commanding the nearest Police Station to where the Applicants' vehicles may be located to provide escort and security to the Applicant's agent Mr. Godfrey G. Kamiri T/A Westminister Commercial Auctioneers to enable him to carry out his repossession duty peacefully.**

**5. That costs of this application be borne by the Respondent.**

2. The application is supported by the affidavit of the applicant's Finance Representative **Ms Jane Wamuti** and is premised on the grounds that: -

**a) On or about 11<sup>th</sup> April 2017, the applicants and the respondent entered into 19 Financial Lease Agreements (consisting of 19 transaction schedules with deal numbers 33110000605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 628, 629, 630, 631, 632, 633, 634, 635 and 636 which together with the Plaintiff's General Terms and Conditions as well as a Consolidation Agreement collectively constitute the "the Lease Agreements") for the lease of 19 vehicles.**

**b) The applicant complied with the Lease Agreements and delivered the vehicles to the respondent who took and acknowledged possession thereof.**

**c) At all material times, while the Agreements were in force, the applicants remained the owners of the vehicles and the respondent had no right to the vehicles, or than the limited right to possess and use the vehicles subject to the terms of the Lease**

**Agreements.**

**d) The respondent committed a material breach of the terms of the Lease Agreements in that it failed to effect payment in terms thereof. In the premise, the applicants terminated the Agreement by way of Notice dated 20<sup>th</sup> December 2018 and demanded a return of the leased vehicles in terms of the Lease Agreements.**

**e) Under the Lease Agreements, should the Agreements be terminated, the respondent was required to forthwith forego possession of and return the leased vehicles to the applicants at the respondent's costs.**

**f) Notwithstanding the termination of the Lease Agreements and notwithstanding the demands by the applicants for the respondent to return the applicants' vehicles, the respondent has in breach of the Lease Agreements refused and/or failed to surrender the applicants' vehicles, and remains in unlawful possession of all the vehicles set out in the table at paragraph 3 above.**

**g) The applicants are apprehensive that if left in the custody of the respondent, the said vehicles are in danger of being wasted, damaged and/or misused so as to be left in such a depreciated state that their value will be considerably diminished and the applicants would not be able to subsequently lease or dispose them to other third parties.**

**h) The applicants are apprehensive that since the vehicles are subject to constant use by the respondent, the value of the vehicles diminishes with every use and by the mere passing of time.**

**i) The applicants are further apprehensive that whatever losses the applicants suffer as a result of the respondent's unlawful and continued possession and use of the vehicles, will be immense and cannot be recovered and/or compensated by an award of damages.**

3. The respondent/defendant opposed the application through the replying affidavit of its Legal Officer **Ms Viviane Wafula** who states that the defendant complied with the terms of their lease agreement. She avers that prior to the filing of this suit, the defendant engaged the plaintiffs and agreed on the payment plan for all outstanding dues. She attached a letter to that effect to the replying affidavit as annexure marked "**MLL1**". She further states that plaintiffs were agreeable to the defendant's proposal and that the defendant has subsequently been faithfully making payments as they fall due. She also attached proof of payments through annexure marked "**MLL2**".

4. It is the defendant's case that the filing of the present case is totally unnecessary as the parties have continued to have a good relationship that led to the plaintiffs' request that a deed of suretyship to be executed to secure their payments which was done on 9<sup>th</sup> June, 2019.

5. She further states that the defendant has been complying with all the terms of the lease agreements including taking the vehicles for inspection even after the suit was filed thus showing its good faith.

6. Parties canvassed the application by way of written submissions which I have considered. The main issue for determination is whether the plaintiffs have made out a case for the granting of orders of interlocutory injunction.

7. I note that while the respondent claims that it been faithfully servicing the loan facility in line with the terms of their agreement and that parties had agreed on settlement of the outstanding sum, the applicants maintained that the respondent was in default and they were therefore entitled to the orders sought in the application. The applicants' case is that following the material breach of the terms of the Lease Agreements by the respondent, they were entitled to terminate the Agreements which they did by way of Notice dated 20<sup>th</sup> December 2018 but that despite the termination, the respondent failed and/or refused to return the leased vehicles thus necessitating the filing of the instant application.

8. On its part, the respondent argued that the Lease agreements did not contain any provision upon which a party could apply for the assistance by auctioneers and police in making repossession. The respondent observed that the mere fact that the applicants have been receiving and continue to receive the monthly payments from them is a clear indication that they are not in breach of the Agreement.

9. The threshold to be met in an application for temporary injunction was settled in **Giella v Casman Brown** [1973] E A 358, where the court rendered itself as follows: -

**"Firstly, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."**

10. The test for granting of an interlocutory injunction was considered in the **American Cyanamid Co. v Ethicom Limited** (1975) A AER 504 where three elements were noted to be of great importance namely: -

**i. There must be a serious/fair issue to be tried,**

**ii. Damages are not an adequate remedy,**

**iii. The balance of convenience lies in favour of granting or refusing the application.**

11. The important consideration before granting a temporary injunction under **order 40 Rule 1 of the Civil Procedure Rules** is the proof

that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose the property, the court is in such a situation enjoined to grant a temporary injunction to restrain such acts.

12. In *Mrao Ltd v First American Bank of Kenya and 2 others*, (2003) KLR 125 which was cited with approval in *Moses C. Muhia Njoroge & 2 others v Jane W Lesaloi and 5 others*, (2014) eKLR, the Court of Appeal defined a prima facie case thus: -

***"A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later"***.

13. In the instant case the applicants state that that they are likely to suffer loss and damages if the vehicles are left in the custody of the respondent as they are in danger of being wasted, damaged and/or misused such that they will not be able to subsequently lease or dispose them to other third parties. The respondent on the other hand maintained that it has faithfully been taking the vehicles for inspection by the applicants and that the applicants have not filed any inspection or valuation report to demonstrate that the trucks are diminishing in any way.

14. My finding is that the applicants' claim that the subject motor vehicles are in danger of being wasted or damaged has not been proved. I find that if indeed the subject vehicles were being misused or damaged by the respondent, nothing would have been easier than for the applicant to furnish the court with an inspection report to that effect. Moreover, the applicants did not deny the respondent's averment that it has periodically been taking the subject motor vehicles to the applicants for inspection, in which case, any deterioration in their condition would have been detected. I am therefore not satisfied that the applicant has established that they have a prima facie case or that they will suffer irreparable loss unless the orders sought herein are granted.

15. Furthermore, it is noteworthy that the agreement between the parties herein was for the lease of motor vehicles. This means that it is expected that the terms of the agreement should have included an exit clause in the event of a default by either party. I find that in the circumstances of this case and in the absence of a repossession clause in the Agreements, inviting this court to issue the orders sought in the application will be tantamount to re-writing the terms of the Agreements.

16. The respondent also claimed that the application has been overtaken by events following a subsequent agreement by the parties. The applicants' case was that they are entitled to the orders sought in this application as they had terminated the Agreement by way of Notice dated 20<sup>th</sup> December 2018 and demanded a return of the leased vehicles in terms of the Lease Agreements which demand was not heeded by the respondent.

17. I have perused the respondent's annexures marked "MLL1", MLL2" and "MLL3" which indicate that the parties herein had, prior to the filing of this suit engaged in talks geared towards resolving the outstanding dues which talks resulted in the execution of a deed of suretyship on 9<sup>th</sup> June, 2019. The applicants did not state that the respondent has been in default after the execution of the said deed and I therefore find that the applicants' earlier Notice of default was overtaken by their subsequent agreement.

18. I have also perused the plaint and the orders sought therein which is basically a claim for the liquidated sum of USD 422,405.64 together with interest. The applicants did not state that the respondent will not be able to settle the decretal amount should the case be ultimately determined in their favour. I am therefore not convinced that this application meets the test set in the *Giella* case (supra) and I consequently decline to grant the orders sought therein. The costs of the application shall abide the outcome of the main suit.

**Dated, signed and delivered via Microsoft Teams at Nairobi this 3<sup>rd</sup> day of June 2021 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17<sup>th</sup> April 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Nyakundi for the Plaintiffs/Applicants.

Mr. Tuwei for Kirimi for Defendant/Respondent.

Court Assistant: Sylvia.