



**Brick and Mortar Holdings Limited v Housing Finance Company of
Kenya Limited & another (Commercial Civil Case E544 of 2020) [2021]
KEHC 17 (KLR) (Commercial and Tax) (10 September 2021) (Ruling)**

Neutral citation: [2021] KEHC 17 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CIVIL CASE E544 OF 2020
DAS MAJANJA, J
SEPTEMBER 10, 2021**

BETWEEN

BRICK AND MORTAR HOLDINGS LIMITED PLAINTIFF

AND

HOUSING FINANCE COMPANY OF KENYA LIMITED 1ST DEFENDANT

LEAKEY'S STORAGE LIMITED 2ND DEFENDANT

RULING

1. It is not in dispute that the 1st Defendant (“the Bank”) advanced the Plaintiff USD 611,678.00 and USD 90,431 as set out in Letters of Offer dated 1st July 2015 and 1st October 2015 respectively. The facilities were for the purchase of Mercedes Benz Actros 3340 Prime Movers and Flatbed semi-trailers.
2. In the Plaint dated 17th December 2020, the Plaintiff contends that the following 5 Prime Movers and Trailers were duly registered in the joint names of the parties; KCJ 815J, KCF 816J, KCF 817J, KCF 818J, KCF 819 J, ZF 2005, ZF 2006, ZF 2007, ZF 2008 and ZF 2009. It further avers that it was agreed that the Plaintiff would deposit the logbooks of the following 7 Prime Movers and 4 trailers which were unencumbered as an interim measure pending registration of the financed vehicles; KBV 714D, KBV 713D, KBT 713J, KBT 714J, KBX 713B, KBV 714D, KBV 116E, ZE 1230, ZE 1229, ZE 3222 and ZE 3221.
3. The Plaintiff states that even though 5 trailers were required to be registered in the names of both parties, two additional trailers; ZF 2003 and ZF 2004 were erroneously and/or fraudulently registered in the joint names of the parties. Consequently, the Bank received a total of 22 logbooks.



4. The Plaintiff claims that on 5th January 2016, it demanded that the Plaintiff release the free and unencumbered logbooks but it failed to do so and continues to unlawfully hold them. In addition, the Plaintiff admits that between 2016 and 2018, it fell behind its scheduled loan repayments and that by a letter dated 2nd October 2018, it informed the Bank of its desire to obtain credit from another institution in order to settle its indebtedness with the Bank and that it wanted to use the unencumbered logbooks to secure those facilities. The Bank did not respond to this request despite a reminder on 15th October 2018. The Plaintiff further states that the Bank responded to its request by a letter dated 16th October 2018, giving unreasonable terms by demanding an irrevocable undertaking from the new financier to pay KES. 5,000,000.00 whereupon it would release the logbooks and that it assigns or jointly registers two more prime movers with the Bank as additional securities.
5. As a result, the Plaintiff claims that the Bank has frustrated it from liquidating the credit facility. It accuses the Bank of advertising the subject vehicles without any demand or notice and with any justification causing it loss and damage. It therefore seeks special damages amounting to KES. 2,500,000.00 per month from October 2018 when the trucks were impounded, a permanent injunction restraining the Defendants from disposing, selling or in any other way eliminating the 7 Prime Movers and 4 trailers which were unencumbered as an interim measure pending registration of the finance vehicles, that is, KBV 714D, KBV 713D, KBT 713J, KBT 714J, KBX 713B, KBV 714D, KBV 116E, ZE 1230, ZE 1229, ZE 3222 and ZE 3221 and release of the respective logbooks, a joint inspection of vehicles KCJ 815J, KCF 816J, KCF 817J, KCF 818J, KCF 819 J, ZF 2005, ZF 2006, ZF 2007, ZF 2008 and ZF 2009 which are jointly registered in the parties names, an order that the Bank transfers and releases the original logbooks for ZF 2003 and ZF 2004, general damages, costs and interest.
6. Together with the Plaintiff, the Plaintiff filed a Notice of Motion dated 17th December 2020 made, inter alia, under Civil Procedure Rules, seeking a raft of orders pending the hearing and determination of the suit. In essence, it prays for an injunction restraining the Bank from disposing of the vehicles by way of sale or otherwise, an order restoring to it the vehicles it contended were unencumbered, release of the respective logbooks and a joint inspection of the secured motor vehicles. The Plaintiff also seeks an order that the Bank be directed to provide accounts and that the parties be directed to appoint consultants to prepare and file a joint audit of the Plaintiff's accounts. The application is supported by the affidavit of Tengeri Osoro, a director of the Plaintiff, sworn on 17th December 2020.
7. When the application came before me on 21st December 2020, I granted an order of injunction to restrain the sale of the vehicles advertised for sale on condition that that the Plaintiff pays to the Defendant KES. 5,000,000.00 within 14 days in default of which the order of injunction would lapse automatically. I fixed the matter for mention for directions on 15th January 2021. By an application dated 1st January 2021, the Plaintiff once again moved the court for an order that the conditional injunction given on 21st December 2020 be reinstated and the time for compliance be extended for another 10 days. On 5th January 2021, I extended the time for compliance to 15th January 2021.
8. In response to the Plaintiff's application dated 17th December 2020 and 1st January 2021, the Defendants filed the replying sworn by its Legal Manager, Christine Wahome, sworn on 14th January 2021.
9. The Plaintiff filed a further Notice of Motion dated 23rd January 2021 seeking orders that the Bank and its officers namely; Christine Wahome, the Legal Manager, Robert Kibaara, the Bank's Chief Executive officer, Janeth Rotich, the Head of Collections, Jones Nzivo, the Collections Officer, Charles Karanja, Branch Manager Sameer Branch, George Njao, the Director General, National Transport Safety Board and Robert Ngugi, the Deputy Legal Director be cited for contempt for breach of the orders I issued



on 21st December 2020 and duly extended on 5th January 2021. The application was supported by the affidavit of Tengeri Osoro sworn on 23rd January 2021 and opposed through the replying affidavit of Christine Wahome sworn on 8th February 2021. On 2nd February 2021, I directed the applications be heard together. Both parties filed their respective written submissions. I will now deal with the application for contempt.

10. The Plaintiff's application for contempt is grounded on the order issued on 21st December 2020 and extended on 5th January 2021 on the following terms:

THAT pending the hearing and determination of this application inter parties, the defendants/respondents by themselves, their servants, agents or otherwise howsoever be and are hereby restrained from disposing off, selling, transferring or in any manner dealing with, by way of auction or otherwise, the motor vehicles make Prime Movers Mercedes-Benz Actros of registration numbers KCJ 815J, KCF 816J, KCF 817J, KCF 818J, KCF 819 J and trailers of make Bachu Trailers Flatbed and registration numbers ZF 2005, ZF 2006, ZF 2007, ZF 2008 and ZF 2009 as advertised on the Tuesday December 15th 2020, the Standard newspaper at Page 7, the Daily Nation on Tuesday at Page 7, the Daily Nation newspaper of Wednesday December 16th 2020 at page 5 and on Wednesday December 16th 2020 the Standard newspaper at page 7, or any other date thereafter, and scheduled at any time for sale and/or disposing of, alienating, transferring, and/or otherwise howsoever interfering with the Plaintiff's interest in the vehicles on condition that the Plaintiff pays to the Defendant Kshs. 5 million within the next 14 days in default of which the order shall lapse automatically.

11. The Plaintiff argues that the orders were explicit and issued in presence of counsel on record and duly served upon the Defendants' counsel to remove any possibility of intended action against the motor vehicles and trailers. It states that the Defendants' counsel became aware of the orders by phone call and email on 6th January 2021. That the application dated 1st January 2021 was placed before Ngenye J., on 5th January 2021 for directions and the link sent to the parties by the Hon. Githongori, the Deputy Registrar, who informed the parties that they would not be required to address the court but that directions would be issued on the same day. That, indeed, directions were issued by Majanja J., that evening hence the Defendants were aware of the directions so issued by the court but proceeded to disregard the orders.
12. The Plaintiff contends that despite the orders being in force and being aware of them, the Bank received money on 7th January 2021 from Link Freight Logistics Limited for the sale of KCF 818J and proceeded to transfer ownership on 25th January 2021. The Plaintiff therefore submits that the Bank's actions were in direct violation of the court order.
13. The Bank's position is that the order issued on 21st January 2021 lapsed when the Plaintiff failed to pay the Kshs. 5 million within 14 days. It therefore proceeded to review the bids it had received and accepted the bid for motor vehicle registration KCF 818J on 5th January 2021. The Defendants' advocates became aware of the application dated 1st January 2021 on 5th January 2021 as the same was served on 4.53am with an indication that the parties appear before Majanja J., on the same morning but the matter was not dealt with as the parties were informed that the directions would be issued later. The Bank states that it received the email from the Plaintiff's advocates at about 5.00pm informing it that the order issued on 21st December 2021 had been extended but the email did not annex a copy of the order which at any rate was not posted on the court online portal.



14. The Bank denies that it willfully disobeyed the court order as it was not served with the order despite requesting for the same and that the order only became available on 8th January 2021 despite a flurry of emails and correspondence between the parties and the court. By this time, the motor vehicle registration number KCF 818J had been released to Link Freight Logistics Limited and no action was taken on any subject vehicle.
15. The parties do not contest the fact that disobedience of court orders is not a matter to be taken lightly as obedience of court orders is fundamental to the administration of justice. This has been emphasized in several decisions of our courts among them *Teachers Service Commission v Kenya National Union of Teachers and 2 Others*, *Econet Wireless Kenya Limited and Minister for Information and Communication of Kenya and Another [2005] 1 KLR 828* and . Whether or not a party has disobeyed a court order is a question of fact. The applicant bears the burden of proving contempt on a standard higher than a balance of probabilities and below reasonable doubt (see *Mutitika v Baharini Farm Limited [1985] KLR 229*)
16. The party who is accused of disobedience of the court order must be aware of the order and its contents before he or she can be found guilty. In *Justus Kariuki Mate & Another v Hon. Martin Nyaga Wambora & Another* the Court of Appeal recognised that;

[T]his Court has slowly and gradually moved from the position that service of the order along with the penal notice must be personally served on a person before contempt can be proved Kenya growing jurisprudence right from the High Court has reiterated that knowledge of a court order suffices to prove service and dispense with personal service for purposes of contempt proceedings. For instance, Lenaola J., in the case of *Basil Criticos v Attorney General and 8 Others* This position was affirmed by this Court in several other cases including in the *Wambora Case [Justus Kariuki Mate & Another v Hon. Martin Nyaga Wambora & Another]*.
17. Turning to the facts of this case, it is not in dispute that the court issued an order on 21st December 2020 which order was extended on 5th January 2021. It is also not in dispute that the Plaintiff did not comply with the order of 21st December 2020 which is why it filed the application dated 1st January 2021 seeking an order that, “The conditional injunction orders given by the Honourable Court on the 21st December 2020 be and is hereby reinstated and compliance period be and is hereby extended for another ten (10) days.” It is also not in dispute or at any rate that the Bank accepted the bid for the purchase of the subject motor vehicle on 5th January 2021. The question then for resolution is whether the alleged contemnor’s had knowledge of the order and then proceeded to dispose the subject motor vehicle willfully and deliberately in disregard of the court order.
18. At this stage, I would point out that from the deposition in support of the application, there is no indication that the order was served on the Bank prior to 5th January 2021. What is clear though from the application dated 1st January 2021 is that the Plaintiff was aware that the order had lapsed and that it why it applied for, “reinstatement and compliance period be ... extended.” Hence at least, on 5th January 2021 before the orders were extended, the Plaintiff understood and expressed the position that the orders had lapsed and the Bank was at liberty to dispose of the vehicle before such extension as the order was not in force until I issued the order in the evening of that day.



19. The question is when did the Bank have notice or indeed knowledge that the order was extended. In this respect, I quote *Shimmers Plaza Limited v National Bank of Kenya Limited (Supra)* where the Court of Appeal spoke on the issue of knowledge of the orders:

It is important however that the court satisfies itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the Court forbidding it. The threshold is quite high as it involves possible deprivation of a person's liberty. This standard has not changed since the old celebrated case of *Ex Parte Langley 1879, 13 Ch D. 110 (C.A)*, where Thesiger L.J stated as follows. at p. 119:

“...the question in each case, and depending upon the particular circumstance of the case, must be, was there or was there not such a notice given to the person who is charged with contempt of Court that you can infer from the facts that he had notice in fact of the order which has been made? And, in a matter of this kind, bearing in mind that the liberty of the subject is to be affected, I think that those who assert that there was such a notice ought to prove it beyond reasonable doubt.”

What then amounts to “notice”?

Black's Law Dictionary, 9th Ed defines notice as follows:-

“A person has notice of a fact or condition if that person-

Has actual knowledge of it;

Has received information about it; Has reason to know about it;

Knows about a related fact;

Is considered as having been able to ascertain it by checking an official filing or recording.”

Would the knowledge of the judgment or order by the advocate of the alleged contemnor suffice for contempt proceedings? We hold the view that it does. This is more so in a case such as this one where the advocate was in Court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an advocate appears in court on instructions of a party, then it behoves him/her to report back to the client all that transpired in court that has a bearing on the client's case.

20. The Plaintiff's application for the extension of orders came up for hearing on 5th January 2021 but it was not dealt with in open court. The application was allowed when the order was issued online and the Plaintiff's advocate enforced. Counsel for the Plaintiff wrote to the Bank's counsel, an email dated 5th June 2021 at 4.28PM informing him that the injunction issued on 21st December 2021 was extended to 15th January 2021 and that the orders were in the process of being extracted. Counsel for the Plaintiff wrote a further email to the counsel for the Bank on 6th January at 12.08AM to the same effect as the previous one. There is also an email dated 8th January 2021 at 9.49AM to the Deputy Registrar inquiring about when the order would be extracted. After an exchange of emails with the Deputy Registrar, Counsel for the Plaintiff confirmed at 3.22PM that he had received the extracted order.



21. I agree with Counsel for the Bank that while I issued the order on 5th January 2021, I did not issue it in the presence of the parties, I issued it *ex-parte* and the Defendant's counsel could only know of the order when he was in fact notified. In order to find the alleged contemnors guilty of contempt, the applicant must prove that the alleged contemnor acted deliberately and willfully as was held in *Sam Nyamweya and Others v Kenya Premier Ltd and Others NRB HCCC No.69 OF 2015 (2015) eKLR* where the court stated that;

Contempt of court is constituted by conduct that denotes willful defiance of or disrespect towards the court or that willfully challenges or affronts the authority of the court or supremacy of the law, whether in civil or criminal proceedings.

22. I agree with Counsel for the Bank that while I issued the order on 5th January 2021, I did not issue it in the presence of the parties, I issued it *ex-parte* hence any knowledge of the counsel cannot be attributed to the client. Further, the application in the hands of the parties implied that the order had lapsed and would have to be reinstated and extended. By the close of business, the Bank, according to its deposition, accepted the bid for one motor vehicle. In my view, the acceptance of the bid was neither willful nor deliberate in light of the fact that the order had not been served or notified to the alleged contemnors.

23. Having reached the conclusion that the charges of contempt cannot be sustained in the circumstances, I now consider the application dated 17th December 2020 which seeks a myriad of prayers in relation to the motor vehicles subject of the suit. In Prayer 4 and 5 of the application, the Plaintiff seeks injunctions restraining the Defendants from selling the motor vehicles and trailers that were registered in the joint names of the Plaintiff and the Bank and an order restoring possession of the same vehicles to it. In Prayer 7, the Plaintiff seeks an order for release of the motor vehicles and trailers that were not registered in the parties' joint names. The other prayers, in my view, are consequential to the main prayers for injunction.

24. In order to succeed, the Plaintiff has to meet the conditions for grant of an interlocutory injunction set out in *Giella v Cassman Brown [1973] EA 348*. It must demonstrate that it has 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 its 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. As to what constitutes a prima facie case, the Court of Appeal in *East Africa Vantor Co. Ltd v Agricultural Finance Corporation Limited and Another* explained that it 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 proceeds from what the Plaintiff has pleaded in the Plaintiff. In this case, the Plaintiff must establish that the Bank is not entitled to sell the motor vehicles and trailers and that it is not entitled to hold the logbooks in its possession.

26. From the Plaintiff, whose contents, I have summarized in the introductory part of this ruling, the Plaintiff's case is that the Bank has frustrated its efforts to liquidate the loan by refusing to release the



- unencumbered logbooks it holds by making unreasonable demands and then proceeding to advertise for sale the securities without notice. On the other hand, the Plaintiff does not deny that it is indebted to the Bank. This admission is not only contained in the Plaintiff's pleadings but also in its depositions. The Plaintiff does not dispute the fact that the Bank is entitled to sell the securities in the event of default.
27. The vehicles subject of this claim fall into two categories; the first is in respect of the vehicles that are registered in the joint names of the Plaintiff and the Bank and the second, are the vehicles whose logbooks were deposited with the Bank. There is no dispute about the first category of vehicles but as regards the second category, the Plaintiff submits that the logbooks were given to the Bank as temporary securities as is the trade custom between banks and players in the transport industry pending registration of the financed fleet whenever purchasing more vehicles for the fleet. The Plaintiff claims that the holding of the logbooks contrary to the agreed terms violates its right to property under Article 40 of the Constitution. It urges that logbooks should be returned since the Bank has registered the other motor vehicles and trailers as security for the advances.
 28. On its part, the Bank states that under Clause No. 9 of the Letters of Offer dated 9th June 2015, 1st July 2015 and 1st October 2015, the facilities were secured by joint registration of the motor vehicles being financed and "simple deposit of the free logbooks of vehicles owned by the Brick and Mortar Holdings Limited". Thus, it contends that the unencumbered logbooks were given Bank as part of the securities for the facilities. I accept the Bank's position and hold, that the unencumbered vehicles were indeed given as security and that is why the Bank was entitled to receive an irrevocable undertaking before releasing them to the Plaintiff's financier.
 29. In regard to the motor vehicles and trailers used as securities, the Plaintiff invokes the provisions of section 67 of the *Movable Property Security Rights Act, 2017* ("MPSRA") argues that the right of sale can only accrue after issuing the notices required by the Act. In this case, it submits that since the Bank did not serve the notice, then it cannot sell the securities and any sale is illegal. Counsel for the Plaintiff cites *East Africa Venter Co. Ltd v Agricultural Finance Corporation Limited and Another* and *East Africa Venter Co. Ltd v Agricultural Finance Corporation Limited and Another* to support the proposition that the chargee must serve notice to the charger before giving it the opportunity to remedy the breach or otherwise redeem the property.
 30. The Bank submits that the Plaintiff failed to plead violation of the provisions of the MPSRA hence raising the issue in the submissions is an afterthought. In any case, it urges that the right to sell the pledged assets accrued in May 2017 when it made the demand but the right to repossess and sell was interrupted by proceedings commenced by the Plaintiff in the Magistrates Court and which were terminated in the High Court. It also asserts that the right to sell accrued before the MPSRA came into force. It points out that the logbooks not registered were also held as security and could not be released. On the whole, the Bank submits that the Plaintiff is in default and is not entitled to the reliefs sought.
 31. I agree with the Plaintiff's position that service of the notice under section 67 of the MPSRA is a mandatory requirement before the Bank can exercise its right to sell the securities (see *Elite Intelligent Transport Systems Limited v Gulf Africa Bank Limited and Another ML HC COMM No. E 240 of 2020 (2020) eKLR*) However, the Defendant's submission that the Plaintiff did not specifically plead violation of the MPSRA is equally valid as it denied the Bank the opportunity to discharge its burden of showing that it had notified the Plaintiff of its default. The Plaintiff did plead in vague terms that no demand or notice was issued before the Bank intended to sell the secured motor vehicle and trailers. I would therefore grant an injunction but merely for the purpose of allowing the Bank to serve a proper notice.



32. But this is not the end of the matter as an injunction is an equitable remedy and disclosure of material facts is a relevant consideration as to whether to grant an order of injunction. Although the Plaintiff disclosed in its Complaint that it had filed a previous suit in respect of the same subject matter; Milimani Chief Magistrates Court Civil Suit No. 9282 of 2018, Brick and Mortar Holding Limited v Housing Finance Company of Kenya Limited, it did not disclose to the court that it had obtained an ex-parte injunction on 19th October 2018 restraining the Bank from selling the secured motor vehicles and trailer. That order remained in force until 14th December 2020 when the High Court in, Housing Finance Company of Kenya Limited v Brick and Mortar Holding Limited NRB HC COMMA No. 007 of 2020 [2020] eKLR, allowed the appeal and set aside the ex-parte order and struck out the suit before the subordinate court. In effect, the Plaintiff had an ex-parte injunction for a period of 2 years without resolving the debt. In my view these were material fact which the Plaintiff ought to have disclosed in its deposition. It was not enough to merely allude to the fact that it has filed a suit in the subordinate court. I adopt what the court stated in *Tate Access Floor v Boswell* as follows:

No rule is better established and far more important than the rule (the golden rule) that a Plaintiff applying for ex parte relief must disclose to the court all matters relevant to the exercise of the court's discretion whether or not to grant relief before giving the defendant an opportunity to be heard. If that duty is not observed by the Plaintiff, the court will discharge the ex-parte order and may mark its displeasure, refuse the Plaintiff further inter-partes relief even though the circumstances would otherwise justify the grant of such relief. [Emphasis mine]

33. In its written submissions, the Plaintiff states that what is required is an opportunity for restructure of the arrangements. It proposes that a joint examination of the accounts be carried out with a view to determination of the amount due to the Bank, that the motor vehicles and trailers be released after a joint inspection to determine their usability and that it be given a 4-6 months' moratorium in order to restore the trucks in usable condition. I am afraid that there is no basis to accede to the Plaintiff's proposals as this would amount to re-writing the contract between the parties (see *National Bank of Kenya Limited v Pipeplastic Samkolit (K) Limited and Another*). Further, it would be inequitable given that it is as result of interim orders in force that the Bank was unable to liquidate its securities.

34. I have come to the conclusion that the Plaintiff is not entitled to any injunction pending the hearing and determination of the suit. It has not established case for a mandatory order directing the Bank to release the logbooks in its possession. What is clear from the Plaintiff's case is that it needs time to resolve the debt despite the fact that it had 2 years to make payments. During this time, the quality and value of the securities continue to deteriorate in relation to the debt and it is clear that the Plaintiff would not be in a position to liquidate the debt in full in the circumstances that are apparent from the record.

35. For the reasons I have set out above, I dismiss the Notice of Motion dated 17th December 2020 and the Notice of Motion dated 23rd January 2021 with costs to the Defendants. The interim order in force be and is hereby discharged forthwith.

DATED and DELIVERED at NAIROBI this 10th day of SEPTEMBER 2021.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Mr Muga instructed by Prof. Tom Ojienda and Associates Advocates for the Plaintiff.



Mr Ogunde instructed by Walker Kontos Advocates for the Defendants.

