REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. E107 OF 2021

EDSON CONVEYORS LIMITED.....APPLICANT

VERSUS

RHOMBUS CONSTRUCTION COMPANY LIMITED.....RESPONDENT

RULING

The application dated 4th May 2021 is brought under Article 50(1) and 25(c) of the Constitution of Kenya; Sections 1A, 1B, 3A and 63(c) of the Civil Procedure Act; and Order 40 Rule 1, 2, 3 and order 51 Rule 1 and 3 of the Civil Procedure Rules. It seeks the following orders:

1. Spent

2. Spent

3. THAT a temporary order of injunction be and is hereby issued stopping the Respondent whether by itself or its directors, agents, employees or any person whatsoever acting under its instructions from continuing to charge the Applicant leasing charges as regarding SANY HYDRAULIC EXCAVATOR MODEL SY335C CHASSIS NO. 0E111338K3L70047CF, and or threatening to recover the said accruing amount in any by themselves and or their agents, pending the hearing and determination of the Suit herein.

4. THAT an order compelling the Respondent to collect and or receive SANY HYDRAULIC EXCAVATOR MODEL SY335C CHASSIS NO. 0E111338K3L70047CF pending the inter-partes hearing and determination of the instant Application.

5. THAT the costs of this Application be provided for.

The application is supported by the affidavit of Edwin Kimutai Songoroh sworn on 4th May 2021 and his further affidavit dated 7th June 2021. He deponed, that the Applicant approached the Respondent regarding the said Hydraulic Excavator intending to purchase it through a loan facility. The Respondent, agreeing on the same, proposed to assist the applicant in acquiring a loan facility through Sidian Bank and further informed the applicant of their own lease and rent to own arrangement. The applicant agreed to acquire a loan facility through Sidian bank and filled the requisite forms which were to be submitted to the bank by the Respondent. Thereafter, Sidian sent a letter of offer, and the respondent assured the applicant of successful release of the loan facility.

Due to an urgent income generating contract that required the machine, the Applicant entered into a secondary arrangement (Lease and Rent to Own Agreement dated 19th October 2020) with the Respondent where they were to lease the said Hydraulic Excavator for a period of time until they acquired the loan facility from the Bank. The arrangement would terminate upon release of the loan facility from the bank.

The Applicant made a first instalment and the Respondent released the Hydraulic Excavator, though, in an incomplete state. The Applicant made further instalments amounting to Ksh. 3,794,000 as per the Lease and Rent to Own Contract that covered the first quarter of the Lease.

The Bank however failed to actualize the loan facility. The applicant informed the Respondent of the occurrence and made it clear they were financially incapable of continuing to lease the Hydraulic Excavator. The Applicant therefore would like to return it to the Respondent. Also, due to the unavailability of the loan, the respondent declined to release the remaining component of the machine that is crucial to its operation hence frustrating the Applicant. The Respondent however remains adamant and insists on payment of the full purchase price and further refused to accept the return of the machine.

In the further affidavit, it is indicated that the Respondent had not disclosed all material facts. The Respondent promised to make all bank arrangements to ensure the applicant secures the loan. It was the Respondent who introduced the Applicant to Sidian Bank and released the said machine on the promise that the Applicant would be financed. In order for the Applicant to secure the loan, the Respondent swore an

affidavit dated 2nd December 2020 indicating that he had received Kshs. 13, 005, 840 as deposit. However, there is no evidence on record to affirm that. Further, the actual price of the excavator is Kshs. 23,821,200.05 as per the receipt issued on 19th December 2020. The Respondent facilitated a transfer of the logbook even before it was paid as part of the Respondent's arrangement with the Bank. The Applicant did not secure the loan facility therefore the contract between the Plaintiff and Defendant collapsed.

The application was opposed by the Replying Affidavit, of Evanson Githinji Kinyanjui, the Director of the Respondent who averred that the Applicant is guilty of non-disclosure and concealment of material facts. The Applicant and Respondent executed a Leasing and Rent to Own agreement for the subject Sany Hydraulic Excavator where the Applicant agreed to lease out the said Hydraulic excavator on the terms set out in that Agreement dated 19th October 2020. The Applicant also executed an indemnity agreement and a personal Guarantee Agreement dated 19th October 2020 in favour of the Respondent.

The Respondent agreed that the Applicant was to partly finance the excavator of up to Ksh. 19, 370,000 through a Loan facility to be given by Sidian Bank. The Applicant was to fully comply with the requirements as per the Bank offer letter. The Respondent fully complied with the bank's conditions.

However, the respondent received communication from Sidian Bank informing them that they were unable to proceed with partial financing of the excavator since it was conditional upon the Applicant's full compliance with the bank's offer letter which the Applicant did not. The Particulars of the Applicant's noncompliance with the Bank's Letter of Offer have not been disclosed which are necessary for the just and fair determination of the real issues in controversy in the suit. It is the Respondent's prayer that the Application be dismissed with costs.

Analysis and Determination

The principle as per **AIRLAND TOURS & TRAVELS LTD VERSUS NATIONAL INDUSTRIAL CREDIT BANK MILIMANI HIGH COURT CIVIL CASE NO. 1234 OF 2002** is that in an interlocutory application, a court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed provisions of the law.

The principles of an interlocutory injunction that the Applicant need to meet were well set out in the case of **GIELLA V. CASSMAN BROWN [1973] E.A. 358** where it was stated:-

> "**First, 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.**"

To be granted the temporary injunction, the applicant must meet the above principles. Also, as per **KENYA COMMERCIAL FINANCE CO. LTD –VS- AFRAHA EDUCATION SOCIETY [2001]1E.A. 86,** the conditions are sequential. The second condition can only be addressed if the first one is met. If, however, the court is in doubt, the third condition is then assessed. This was also upheld in the Court of Appeal's case **NGURUMAN LIMITED V JAN BONDE NIELSEN & 2 OTHERS [2014] EKLR**. To quote the finding:

> "**In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;**
>
> **a. establish his case only at a prima facie level,**
>
> **b. demonstrate irreparable injury if a temporary injunction is not granted, and**
>
> **c. ally any doubts as to (b) by showing that the balance of convenience is in his favour.**
>
> **These are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.**

Has the applicant established a prima facie case? A prima facie case in **MRAO LTD V FIRST AMERICAN BANK OF KENYA LTD& 2 OTHERS [2003] EKLR** was defined as "**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**".

It is the applicant case that they entered into a contract of sale where the respondent was to sell them a Sany Hydraulic Excavator Model SY335C. In the contract the applicant made it clear that they had the intention to finance the same through a bank facility which the respondent agreed to assist in acquiring. The said loan facility was ultimately rejected by the bank and therefore the respondents lack the funds required to pay for the machine. They therefore seek to be allowed to return the machine to avoid further accrual of debt that will lead them into further financial turmoil. The court has to consider whether the applicant will suffer irreparable injury, incapable of being assuaged by an award of damages. **Halsbury's Laws of England, 3rd Edition volume 21, paragraph 739 page 352** defines irreparable injury in the following terms:

> "**Injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by grant of injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages, an injunction may be granted, if the injury in respect of which relief is sought**

is likely to destroy the subjected matter in question."

The applicant has stated that if they are not allowed to return the aforementioned machine they will continue to accrue debt which would expose them to grave financial and economic turmoil which has been exacerbated by the Covid 19 Pandemic. This court notes however that such turmoil as explained by the applicant can be adequately remedied by damages. The applicants did not adequately explain how they would suffer irreparably and as such fail to satisfy the second ingredient.

The Applicant has also prayed for an order compelling the Respondent to take back the Hydraulic Excavator. It is the Respondent's argument that this Prayer is in the nature of a mandatory injunction. The Respondent further argues that the test for a mandatory injunction is higher than an ordinary injunction.

Concerning mandatory injunctions, **Megarry, J** (as he then was) expressed this in **SHEPHERD HOMES LTD V SANDHAM [1970] 3 ALL E.R 409**:

> **"As it seems to me, there are important differences between prohibitory and mandatory injunctions. By granting a prohibitory injunction, the Court does no more than prevent for the future the continuance or repetition of the conduct of which the plaintiff complains. The injunction does not attempt to deal with what has happened in the past; that is left for the trial, to be dealt with by damages or otherwise. On the other hand, a mandatory injunction tends at least in part to look to the past, in that it is often a means of undoing what has already been done, so far as that is possible."**

Therefore, a mandatory injunction does not preserve the status quo but positively alters it by requiring a defendant/respondent to take a new step or undo what has been done. The principle of mandatory injunction was the subject of discussion in the case **RAFIQUE EBRAHIM V WILLIAM OCHANDA T/A OCHANDA & CO. ADVOCATES [2013] EKLR**. To quote the finding:

> **The threshold for granting mandatory injunction orders is well set out in the case of Locabail International Finance Ltd v Agroexport & Others (1986) All ER 901 wherein the court stated;**
>
> > **"A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only 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 which could be easily remedied or where the defendant has attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibition injunction."**

The Respondent, in their case, argued that the particulars of the Applicant's noncompliance with the Bank's Letter of Offer have not been disclosed which are necessary for the just and fair determination of the real issues in controversy in the suit. This Court agrees that the Applicant did not communicate to the court the full particulars surrounding the Bank's rejection to provide financing hence they did not meet the criteria to award a mandatory order of injunction as there were no special circumstances. Also, granting the order for the Respondent to take back the Hydraulic Excavator brings an air of finality whereas the suit has not been exhaustively determined.

The applicant took possession of the machine and has been utilising it. It's not clear at this stage how the applicant took an incomplete machine but was able to use it due to some urgency attributable to some work. The machine has not been valued. Ordering the respondent to take back the machine in whatever condition it is would be imprudent. The balance of convenience is in favour of the respondent. The respondent released the machine to the applicant and the natural depreciation of the machine attributed to normal wear and tear needs to be explained during the hearing. I am satisfied that the applicant has not at this stage convinced the court to grant the orders being sought.

In the end this court find that the application herein is without merit and is hereby dismissed. Costs shall follow the outcome of the main case.

DATED AND SIGNED AT NAIROBI THIS 12TH DAY OF OCTOBER, 2021

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S. CHITEMBWE

JUDGE