REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT NO. 109 OF 2018

EXON INVESTIMENTS LTD.....PLAINTIFF/APPLICANT

-VERSUS-

CONSOLIDATED BANK LIMITED.....1ST DEFENDANT/RESPONDENT

MAKURI AUCTIONEERS.....2ND DEFENDANT/RESPONDENT

RULING

1. This ruling determines the Plaintiff/Applicant's notice of motion dated 6th November, 2018. The application has been brought under the provisions of Order 40 Rules 1(a), 2&4 and Order 51 Rules 1 & 3 of the Civil Procedure Rules, 2010 and Sections 1A,1B,3, 3A and 63 (c)&(e) of the Civil Procedure Act Cap 21. The application seeks for the following orders;

a) *Spent;*

b) *That this Honourable court be pleased to order a stay of execution of the Respondent's Notice to Repossess dated 3rd December 2018 and/or proclamation to sale/repossess Notice issued or the sale thereof of any of the proclaimed motor vehicles being motor vehicles/prime mover trucks numbers* ***KBP 375P, KBR 234T, KBR 235T, KBX 640A, KCB 890G, KCB 891G, KCB 892G, KCB 893G, KCB 894G, KCB 895G, KCB 896G, KBL 530V, KBR 530F, KBR 535F, KBZ 213R, KBW 288M, KBW 289M, KBZ 214R, KCA 744D, KBR 446M,*** *Car carrier trailer numbers* ***ZD4400, ZD 6487, ZD 9010, ZD 9015, ZE 4785, ZE 4786, ZE 7693, ZE 7694, ZE 9216, ZE 9217, ZE 9218, ZE 9247,*** *and* ***ZD 4401,*** *or any other property belonging to the Plaintiff/Applicant by way of a public auction or by any other means whatsoever pending the hearing and determination of this application and subsequent suit;*

c) *That the 2nd Defendant/Respondent herein the auctioneer and/or its servants, agents or otherwise, be restrained by this honourable court, from repossessing, attaching and/or selling the Applicant's Property being motor Vehicle/Prime mover Trucks Numbers* ***KBP 375P, KBR 234T, KBR 235T, KBX 640A, KCB 890G, KCB 891G, KCB 892G, KCB 893G, KCB 894G, KCB 895G, KCB 896G, KBL 530V, KBR 530F, KBR 535F, KBZ 213R, KBW 288M, KBW 289M, KBZ 214R, KCA 744D, KBR 446M,*** *Car carrier trailer numbers* ***ZD4400, ZD 6487, ZD 9010, ZD 9015, ZE 4785, ZE 4786, ZE 7693, ZE 7694, ZE 9216, ZE 9217, ZE 9218, ZE 9247,*** *and* ***ZD 4401,*** *or any other property belonging to the Plaintiff/Applicant by way of a public auction or otherwise as indicated and/or threatened in the collection/repossession orders dated 3rd December 2018 or at any other time thereafter to dispose of, alienate, transfer and/or otherwise interfere with the Plaintiff/Applicant's interest in the said property, pending the hearing and determination of the application and the subsequent suit;*

d) *That the 1st Respondent by themselves, their officers, servants, and agents be compelled to furnish the Plaintiff's outstanding arrears/alleged debt arrears and the requisite valuation reports for the Plaintiff's Property the subject of the said attachment/repossession;*

e) *That the 1st Respondent herein be and are hereby compelled to immediately release the log book for motor vehicle/truck registration numbers KBP375P, KBR 234T, KBR 235T, KBL 530V, KBR 539F, KBR 535F, KBR 446M car trailer numbers ZD 6487, ZD 9010, ZD 9015 being the applicant's property for the loan facilities granted in relation thereto have been paid/settled/cleared in full;*

f) *Spent;*

g) *The cost of this application be awarded to the Plaintiff/Applicant.*

2. The application is premised on grounds 1 to 16 on its face and further supported by the affidavit **of Ateet Jeth,** the Applicant's director, sworn on 6th December, 2018.

3. The Plaintiff/Applicant's case is that on or about the year 2013, it entered into a hire purchase agreement with the 1st Defendant/Respondent for the purchase of thirty three Motor Vehicle/Car carrier trailers. It was agreed that the 1st Defendant/Respondent would finance the Applicant to a tune of Kshs.100,000,000/= inclusive of interests. The Applicant avers that it repaid the monthly installments until December, 2018 when it was faced with financial difficulties and as at the time it was served with the repossession orders it had paid upto 65% of the entire facility.

4. The Applicant avers that on or about 3/12/2018 ,the 1st Respondent demanded arrears of Kshs.28,383,717.67/= inclusive of interest. The amount is disputed on the basis that the interests and penalties charged are illegal and irregular and any effort to settle the irregularities with the 1st Respondent has been in vain. The 1st Respondent further instructed the 2nd Respondent to repossess the Applicant's property including the 33 motor vehicles in an effort to recover the outstanding loan balance of Kshs.34,769,075.67/=, which amount the Applicant disputes in its entirety.

5. It is averred that the Applicant has at all material times been willing to offset and settle the rightful amount in so far as the same is properly reconciled and agreed upon between the parties. The Applicant further alleges that it will suffer irreparable financial loss if the Respondents are not restrained from attaching and repossessing its property or otherwise the full trial of the suit will be rendered nugatory.

6. Lastly, the Applicant argues that its social and economic rights ought to be protected and it will only be fair and in the interest of justice that stay be granted to enable this court fairly adjudicate the matter.

7. The 1st Respondent filed a replying affidavit sworn on 13th February, 2019 by **its Credit Officer, David Ndirangu**, in response to the application. It is deponed therein that the 1st Respondent provided the Applicant a facility to a tune of U.S.D1,000,000/= as the first loan and a further facility of Kshs.100,000,000/= as the second loan as articulated in the bank's letters of offer dated 14th August, 2013 and 11th August, 2014 respectively. The offers were accepted by the Applicant wherein particulars of interest rates applicable and penalties were contained in the said letters.

8. With regard to the 1st loan, it is averred that it was intended to take over the Plaintiff/Applicant's loans and liabilities with NIC Bank Limited and also to act as a finance line accessible to the Applicant in the local and international purchase of trucks for its transport business. The loan facility was secured by joint registration of the Applicant's trucks in the names of the Applicant and the Bank. The original logbooks were deposited with the bank whereas the loan facility was expected to be repaid within a period of 48 months.

9. The 2nd loan facility was offered in terms of a letter of offer dated 11/08/2014 and was to be utilized as capital base to grow the Applicant's business and boost its fleet by further purchasing more trucks. Similarly it was agreed the loan to be repaid back to the bank in 48 months from the date of advancement. The 2nd loan facility was secured by inter alia a fixed debenture dated 10th April, 2015 for Kshs.100,000,000/= over the Applicant's assets.

10. It is averred that the Applicant promptly serviced the 2 loans for a short period of time and due to its financial constraints ,it requested the bank to restructure and amalgamate the 2 loans. The bank accepted the request in terms of the letter of offer dated 8th September, 2017 wherein it was agreed the Applicant would repay monthly instalments of Kshs.2,298,544/= over a period of 24 months with respect of loan 2 and U.S.D11,683/= over a period of 18 months in respect of loan 1. At the time when this request was made, the outstanding debt owed by the Applicant to the bank stood at Kshs.47,873,500/= with respect to loan 2 and U.S.D198,317.96 with respect to loan 1.

11. The 1st Respondent further explains that despite all its hospitality, the Appellant continued to default in servicing the facilities despite the frequent reminders by the bank. As at 3rd December, 2018 when the 1st Respondent commenced the repossession of the assets, the loan arrears were Kshs.28,385,717.67 with regard to loan 1 and U.S.D63,853.58 in respect of loan 2. It is averred that the proclamation is not illegal nor are the interests charged incredulous and unsubstantiated as alleged by the Applicant. According to the 1st Respondent, the Applicant's application dwells largely on unsubstantial generalities which the law as well as this court should frown upon.

12. The application was first heard ex-parte in chambers on 7th February, 2018. The Court granted prayers (1), (2), and (3) of the application but only limited to the hearing and determination of the application. On 26th February, 2019 it was agreed by consent of the advocates appearing for the parties that the application be disposed by way of written submissions after which the appeal was listed for further hearing on 30th April, 2019 when counsel for the parties would highlight their respective written submissions. When the matter was mentioned on 30th April, 2019, the respective counsel informed the court that the parties were attempting an out of court settlement which the court allowed the parties to pursue. What followed after this is a protracted series of attempted negotiations until 21.1.2020 when counsel for the parties informed the court that no settlement had been reached and that they would go by their written submissions. The 2nd Respondent never participated in the suit.

Plaintiff/Applicant's submissions

13. The Applicant submits that the repossession process was illegal because it violated its rights as consumer of credit, breached the terms implied by law and clogged its right to purchase under the Hire Purchase Agreements. The Applicant argues that it has paid over 65% of the loan facility hence by operation of law, it is protected by the provisions of Section 20(1) of the Consumer Protection Act which prohibits repossession where a consumer has paid more than two thirds thereof in accordance to the agreement unless by the leave of the court. It is submitted that the 1st Respondent never obtained such leave.

14. It is submitted that the process further violates Section 15 of the Hire Purchase Act which prohibits a financier from repossessing after the hirer has paid more than two thirds of the purchase price. Therefore,according to the Applicant, the 1st Respondent lost its right to reposses when the outstanding balance fell below one third of the entire facility.

15. Nonetheless, the Applicant relied on the landmark case of ***Giella-vs-Cassman Brown and Co. Ltd [1973] EA 358,*** where the court set out the principles governing the grant of interlocutory injunction. The Applicant adapts the same as the issues for determination, to wit; Whether the Applicant has established a prima facie case, whether the applicant will suffer irreparable damage in the event the orders sought are denied, whether in the circumstances the Applicant is entitled to the orders and lastly who should bear the costs.

16. On the first issue, the Applicant submitted that it has good case with high chances of success for the reasons that the agreement that the 1st Respondent seeks to enforce is not enforceable because it violates Section 5(1)&(4) of the Hire Purchase Act which prohibits the enforcement of an unregistered hire purchase agreement. Secondly because the 1st Respondent's right to repossess is already extinguished and thirdly because the agreement gave the 1st Respondent a wide and unfettered discretion to vary the terms to its sole advantage. The Applicant further argued that the Respondent breached terms implied by law by varying the interest rates to unreasonable rates without any notice to the Applicant. It is argued that the bank took advantage of the Applicant's vulnerable financial condition in order to extract the unconscionable bargain. In support of this line of argument, reliance was placed on the cases of ***Francis Joseph Kamau Ichatha-vs-Housing Finance Company Of Kenya Ltd [2014] eKLR*** and ***Givan Okallo Ingari & another –vs- Housing Finance Co.Ltd Nairobi HCCNo.79 of 2007 [2007] 2KLR 232.***

17. On the second issue, it is submitted that the Applicant will suffer irreparable damage in the event the repossession and the sale by auction are done because it will be impossible to determine the amount payable and that it will be permanently kept in debt contrary to consumer rights. It is also argued that the 1st Respondent will have benefited from illegal acts by charging unknown additional illegal interests before the correct amount is determined. The Applicant reiterates that it is willing to pay the amount which is lawfully due. Reliance is placed on the ***Givan Okallo Ingari case (supra).***

18. On the third issue, it is submitted that the Applicant is entitled to the orders sought because it will suffer irreparable loss when its chattels are sold for recovery of monies which is not legally due. It is sought that the court allows the application to preserve the subject matter of the suit.

1st Respondent's submissions

19. The 1st Respondent submits that the issues for determination are as set out in the ***case of Giella –vs- Cassman Brown (supra)*** ,where it was held that first, an Applicant must show a prima facie case with probability of success. Secondly, an interlocutory injunction will not be granted unless the Applicant might otherwise suffer irreparable injury which would not be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide the application on balance of convenience.

20. On the first issue it is argued that the Applicant has not established a prima facie case with probability of success. It is the 1st Respondent's case that the Applicant borrowed a loan facility from the bank, a fact which is not denied, and defaulted in repayment of the loan facility on the terms agreed therein. The Plaintiff's loan debit is still in debit state to date and the instant application was filed to stop the 1st Respondent from selling the suit motor vehicles.

21. It is the 1st Respondent's case that the suit motor vehicles were the securities for the loan facilities and in addition the Plaintiff issued a fixed Debenture over the Motor vehicles in favour of the bank as securities for the loans. Further the terms of the loan facility letters are that incase of default by the Plaintiff, the bank shall be entitled to repossess and sell the securities taken for the loans including the motor vehicles.

22. In the foregoing, it is argued that the 1st Respondent became entitled to realizing its securities by way of sale of the suit motor vehicles upon the default by the Plaintiff to honour its loan repayment obligation. The 1st Respondent further adds that dispute on interest and other fees charged is not enough to make the sale illegal as long as the loan facility has fallen in arrears. To buttress this line of argument, aid is sought in a plethora of judicial precedents including the cases of; ***Mrao Ltd-vs-First American Bank of Kenya Limited &2 others[2003] KLR125, Kyangavo-vs-Kenya Commercial Bank Ltd & Another [2004] 1 KLR 126, Stanbic Bank & another-vs-Martin Tumaini Ngala [2018]eKLR, Palmy Company Limited-vs-Consolidated Bank of Kenya Limited [2014] eKLR*** and ***Malti Singh Pandhal-vs-N.I.C Bank Limited & another [2015] eKLR*** .

23. The 1st Respondent further submits that the realization of securities cannot in any way occasion a loss in which an award of damages cannot remedy since the bank can compensate the Plaintiff/Applicant in the event that its case succeeds. It is argued that the Plaintiff/Applicant has not demonstrated that it may suffer irreparable harm that cannot be compensated by way of damages.

24. Lastly, it is the 1st Respondent's submission that the Plaintiff's default persists and the amount due and owing to the bank continues to increase and if not remedied the debt shall outstrip the value of the securities held. As such it is argued that the balance of convenience tilts in favour of the Bank.

Analysis and Determination

25. Having set out the respective parties' positions as above and this being an application for injunction, it is vital to point out that the principles that guide the court when considering an application for an injunction are set out in the case of **Giella –v- Cassman Brown (1973) EA 358** to the effect that an applicant must establish a prima facie case with a probability of success; that an injunction will not normally be granted unless the applicant might otherwise suffer irreparable loss; and that if the court is in doubt, it will decide the said application on a balance of convenience. Further, it is noteworthy that this being an interlocutory application, care must be exercised to obviate expressing any conclusive views on issues which fall for determination at the main trial.

26. As such, I find that the issues that fall for determination is whether the Plaintiff/Applicant has placed enough material before the court to

persuade it to grant the interim orders sought.

27. I will begin by answering prayer (e) in which the Plaintiff/Applicant seeks the 1st Respondent to be compelled to immediately release the log book for motor vehicle/truck registration numbers KBP375P, KBR 234T, KBR 235T, KBL 530V, KBR 539F, KBR 535F, KBR 446M car trailer numbers ZD 6487, ZD 9010, ZD 9015 on the ground that the respective loan for which the vehicles were used as security has now been fully repaid. I find that, first and foremost, the prayer seeking for an order to compel the Respondent to release log books held as security can only be granted as a final prayer,that is, once the court has heard the matter fully to establish whether the parties have fully discharged their obligations under the subject Hire Purchase Agreements.

28. Similarly, as stated in the preceding paragraph, the prayer seeking for an injunction requires the Applicant to establish that it has a prima facie case with a high probability of success. I have considered the materials placed before the court, and find that it is not disputed that the Plaintiff/Applicant has not fully repaid the amount advanced together with interests thereof. However, it is averred that the 1st Respondent has levied illegal interest which is unknown to the Applicant and the Plaintiff is only willing to settle the amount which is legally due. The Plaintiff further argues that it has paid more than 65% of the entire facility and if the orders sought are not granted, then its consumer rights and rights protected under the Hire Purchase agreement will be infringed. Whatever the case maybe, the issue of charging illegal interest cannot be fully determined on affidavit evidence.

29. Be that as it were, a dispute as to the amount owing between a borrower and a financier cannot be a ground for issuance of an injunction order. In my considered opinion, the rationale thereof is that this is an issue of accounts and parties can get persons qualified in that field to assist them if they are unable to agree.

30. Further, the issuance of an injunction in such a case does not benefit the parties. If the account continues to accrue interest and eventually it is established that there was default, the party enjoying the restraining order, i.e. the Applicant, suffers detriment due to increasingly accommodated interest. On the other hand, the opposing party is denied its right to recover the sums due and if eventually the matter is determined in its favour, the security may have eventually been depleted by increased interest in the meantime.

31. To the contrary, if the creditor is not restrained and the assets are sold, as long as they have an economic value, the borrower can adequately be compensated in monetary terms or damages. Further, it suffices to note that, an injunction is an equitable remedy granted in cases where the grant of damages is not adequate. Further, an analysis of the documents relied on by both parties reveal that the parties indeed entered into credit Agreements and loans advanced. The Plaintiff and the Defendant have both produced statements and/or evidence of repayment of the loan as well as statements reflecting the arrears which either side think is legally due. In that case, it is in the interest of justice to hear and determine the main matter on a priority basis. I further note that, the Respondent is apprehensive that any further delay in hearing the matter will render the subject matter, being, the motor vehicles out valued by the accruing interest.

32. In that regard and in the interest of justice, I make the following orders:

a) ***The parties to file and serve the documents that they will be relying on to prosecute their respective cases within thirty (30) days from the date of this ruling and take a mention date before the Honourable Deputy Registrar on the immediate following the expiry of the thirty (30) days for Case Management Conference.***

b) ***In the meantime, the Respondent to file and furnish the Plaintiff with a statement of accounts stating the outstanding arrears.***

c) ***In the meantime, there will be no disposal of any of the motor vehicles that are a subject of these proceedings by either party pending the hearing and determination of the matter.***

d) The costs of the application will abide the outcome of the suit.

It is so ordered.

Dated, Delivered and signed at Nairobi this 19th Day of May, 2020.

D.O CHEPKWONY.

JUDGE.

In view of the declaration of measures restricting court operations due to the COVID-19 pandemics, and in light of the directions issued by His Lordship, the Chief Justice, on 15th March 2020. This ruling/judgment has been delivered to the parties online with their consent. They have waived compliance with Order 21 rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159 (2) (d) of the Constitution which requires the court to eschew technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 18 of the Civil Procedure Act, Cap 21, Laws of Kenya, which impose on this court the duty to use, inter alia, suitable technology to enhance the overriding objective, which is to facilitate just, expeditious proportionate and affordable resolution of civil disputes