



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**COMMERCIAL DIVISION**

**CIVIL CASE NO. 43 OF 2019**

**MOMBASA HIGHWAY TRANSPORT CO. LTD.....PLAINTIFF**

**VERSUS**

**ASL CREDIT LIMITED.....DEFENDANT**

**RULING**

1. This ruling relates to a Notice of Motion Application dated 10.6.2019 which is brought under the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act, (Cap 21) Laws of Kenya, Order 40 Rules 1(a) 2, 4 and 10, Orders 51 Rule 1 of the Civil Procedure Rules and Article 50 of the Constitution.

2. The Applicant is seeking for orders:

***a) Spent;***

***b) Spent;***

***c) Spent;***

***d) That a temporary restraining injunction do issue, barring the Respondent herein either by itself and/or through its auctioneers, agents and/or servants from repossessing, intermeddling, attaching and/or advertising for sale any of the assets belonging to the Plaintiff/applicant herein pending hearing and determination of the substantive suit.***

3. The Application is premised on the twelve (12) grounds on its face and the supporting Affidavit sworn on the 10.6.2019 by **Seif Mohammed** who is a director to the Plaintiff.

4. The Respondents responded to the Applicants' motion by a Replying Affidavit sworn on the 21.6.2019 by **Mr. Daniel Wandera**, who is the Head of Legal at Ramco Group.

5. The matter was canvassed through written submissions with the Applicants filing theirs on the 15.10.2019 and the Respondents' on the 14.10.2019. The submission were orally highlighted on the 15.10.2019.

***The Applicant's case.***

6. The Applicant avers that it entered into a hire purchase agreement with the Defendant for the purchase of motor vehicles KBU 791P, KBT 758H, KBT 688G, KBT 690G, ZE 1026, ZE 1027, ZE 1028, ZE 1029 A on or about the year 2013. The repayment of the loan was regular and timely until on or about 2014 when it experienced financial hiccups leading to delayed remittances of the loan. However, as at April 2019, the principal amount owed stood at KShs.1,481,361/=, therefore, the *duplum rule* restrains the Defendant from charging an arbitrary interest that stood at KShs.31,108,591=

7. **Mr. K'okul**, Learned Counsel for the Applicant submitted that the levying of arbitrary interest is against the *duplum rule* and therefore the Applicant stands to suffer unprecedented damage and loss in the event it succeeds in the main suit.

***Respondent's case.***

8. The Respondent averred that it entered into a Hire Purchase agreement with the Applicant on the 27.6 2014, for the purchase of 24 motor

vehicles as per page 18 of the Defendant Replying Affidavit. It was a term of the agreement that the rate of interest payable on the facility advanced was 12% p.a variable from time to time and the Respondent was entitled to a late payment charge of 5% for any late payment per month on the entire sum due to it.

9. The respondent avers that the Applicant has consistently defaulted in making regular payments coupled with issuance of dishonored cheques in blatant violation of the Hire Purchase agreement. Following the default, on the 29.4.2019, a 14-day notice of repossession was served upon the applicant requiring it to settle the outstanding amounts. The Applicant defaulted, prompting the instruction of the Respondent's auctioneers to repossess and sell the securities, being, motor vehicles in attempt to recover the outstanding amounts.

10. **Ms. Mmbwana**, Learned Counsel for the Respondent submitted that the loan facility and the terms of the said facility have not been disputed. Also, the Applicant has not refuted that it issued bouncing cheques that were returned. Reliance was placed on the holding in the case of **Equatorial Commercial Bank v Wilfred Nyasim Oroko [2015] eKLR**, where it was held that it is upon the Issuer of a dishonored cheque to offer an explanation that he thinks will disentitle the Applicant of relief on the cheques.

11. Counsel further submitted that there is no doubt that the Applicant is in breach of the hire Purchase Agreement and it is a contractual right for the Respondent to exercise its contractual right of repossession. Therefore, Courts should not interfere and re-write contracts entered into freely by parties.

12. Counsel further submitted that the Respondent is a non –deposit taking institution and therefore, it is not governed by the Banking Act or the Central Bank of Kenya as alleged by the Plaintiff.

### **ANALYSIS & DETERMINATION**

13. I have considered the filed affidavits and the annexures thereto, submissions filed by both parties' advocates on record, the relevant applicable law and precedents relied upon.

14. The substantive law on this matter is **Order 40 Rule 1(a) of the Civil Procedure Rules 2010** which provides:

*"Where in any suit it is proved by affidavit or otherwise that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongly sold in execution of a decree ... the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders."*

15. The first issue for determination is whether on the evidence and material placed before this Court, the Plaintiff/Applicant has satisfied the conditions upon which a temporary injunction can be granted.

16. Temporary injunctions are granted upon the satisfaction of triple conditions to wit: whether the Applicants have established a prima facie case; whether upon examination of the prevailing circumstances it becomes clear that the Applicants stood to suffer irreparable loss that the Respondents would be hard pressed to assuage by an award of damages and finally, where there was still doubt, it would be in order to consider in who's favour the balance of convenience tilted. These principles were established in the case of **Giella vs. Cassman Brown & Co. Ltd [1973] EA 358**, where the court stated:

**"The conditions for the grant of an interlocutory injunction are ...well settled in East Africa. 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."**

17. Bearing the above in mind, the first stop of the journey towards my final determination is whether the Applicants have established a prima facie case. A prima facie case was defined in the case of **Mrao Ltd v. First American Bank of Kenya Ltd & 2 Others [2003] eKLR**, where Bosire, JA stated as follows:

**"So what is a prima facie case? I would say that in civil cases 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 as to call for an explanation or rebuttal from the latter."**

18. Similarly, the Court of Appeal deliberating what amounted to a prima facie case in the case of **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR** made the following comments:

**19. "We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right, which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right, which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."**

20. Does the Plaintiff/Applicant have a 'genuine and arguable case' and therefore a prima facie case? Before I can go any further, I must

point out to the parties that this Court's findings are not conclusive and must await the full trial of this suit. This position is buttressed by the decision in the case of **Airland Tours & Travels Ltd versus National Industrial Credit Bank Milimani High Court Civil Case No. 1234 of 2002**, where the court held as follows:

**“In an interlocutory application, the 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.”**

21. The Applicant's indebtedness to the Respondent has not been denied. The principal loan amount advanced was Kshs. 65,662,628/=. It is not disputed that the Applicant has issued bouncing cheques and no explanation has been offered by the Plaintiff to justify that it is not indebted to the Respondent and it is clearly in breach of the Hire Purchase agreement. Consequently, the Respondent is entitled to utilize its remedies under the Hire Purchase Agreement as it did. This position is buttressed in the case of the **NATIONAL BANK OF KENYA LTD VS PIPEPLASTIC SAMKOLIT (k) LIMITED (Supra)** the Court of Appeal held that:-

**“A Court of law cannot re-rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved.”**

22. In the instant case, the Plaintiff has not shown on a prima facie basis how the rate charged was exorbitant or extravagant. To the contrary, what has emerged from the affidavit evidence tendered is that the parties agreed to the rates to be charged as contained in the Hire Purchase Agreement dated 27.6.2014.

23. In my view, the Applicant's case is grounded on its alleged arbitrary interest rate and the allegation that the Respondent claim is against the duplum rule. As far as the issue of interests go, I find and hold that a dispute as to the amount of interests owing is not a basis upon which an interlocutory injunctive relief may be based. Therefore, the Applicant has failed to establish a prima facie case with a probability of success. This position is similar to the one taken in the case of **Air Travel & Related Studies Ltd v Equity Bank (Kenya) Ltd Civil Application Nai 272 of 2017 [2017] eKLR**, be wherein the Court of Appeal stated:

**“14. Even if we were to find there is a single arguable point, the law as it stands is that disputes on the loan amount and interest cannot be a basis for granting an injunction restraining the exercise of power of statutory sale when it arises. It is not in dispute that the applicant has defaulted in the repayment of the loan amount. Ringera J, (as he then was) in the case of Thathy vs. Middle East Bank (K) Ltd & another [2002] 1 KLR 595 aptly stated that: -**

**“Since it is settled law that a dispute as to the amount owed would not of itself be a ground for injunctioning the mortgagee from exercising its statutory power of sale, whether the accounts were supplied (as sworn by the bank) or not supplied (as sworn by the plaintiff's attorney) would not have a decisive bearing on whether or not to grant an injunction as prayed.” Emphasis added**

24. Similarly, **Halsbury's Laws of England, volume 32 (4<sup>th</sup> edition) at paragraph 725:**

**“The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has began a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged.”**

25. On the issue of duplum, this Court cannot determine the same at an interlocutory stage; the same has to be reserved for the main trial where this Court will determine it on merit.

25. What I am being asked to do by the Applicant is to deprive the mortgagee of his right to realize the benefit of the security without any settlement of the loan amount.

26. The upshot is that the temporary injunctive relief that had been granted to the Applicants be and is hereby vacated and Notice of Motion dated 7.6.2019 dismissed. The costs shall be borne by the plaintiff.

**DATED,SIGNED and DELIVERED at NAIROBI this 14th 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 15<sup>th</sup> 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