REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO. 135 OF 2017

(Being an appeal from the original ruling and order of Hon. MI Shimenga,

Resident Magistrate, of 2nd November 2017 in Butere SPMCCC No. 31 of 2017)

NIC BANK KENYA PLC (FORMERLY NIC BANK LTD).....APPELLANT

VERSUS

KENNEDY SHIHEMI SHIMANYULA.....RESPONDENT

JUDGMENT

1. The suit at the trial court, in Butere SPMCCC No. 31 of 2017, was initiated by the respondent herein against the appellant, for a mandatory injunction, to restrain the appellant from repossessing motor vehicle KCA 338D, FAW tipper, which the appellant had facilitated the respondent to acquire on hire purchase terms, on grounds that the respondent had been faithful in repaying the monthly installments under the contract but the motor vehicle broke down, and he needed to be granted time to repair the vehicle and to repay the money.

2. The appellant filed a defence, stating that the respondent had defaulted in payment of the amounts agreed in the hire purchase agreement, and that Kshs. 2, 376, 178.42 was still outstanding as arrears, and the total due was Kshs. 4, 550, 178.42 as at 27th June 2017. It asserted that under the terms of the hire purchase agreement, it was entitled to terminate the agreement, upon default by the respondent, and to repossess the lorry, and, therefore, the appellant was merely exercising its statutory right. It counterclaimed for the said amounts, with interest at the rate of 30% as per the hire purchase agreement.

3. The appeal arises from orders made in the ruling on the Motion dated 4th April 2017. In that Motion, the respondent sought an order that the appellant be restrained from advertising, transferring or repossessing the suit vehicle pending the hearing and determination of the application.

4. To clear any doubts, the principal prayer in the application is framed as follows: "THAT this Honourable court do issue an Order restraining the Defendant/Respondent, agents, assignees or servants from advertising transferring or repossessing motor vehicle registration number KCA 338D FAW tipper pending the hearing and determination of this application."

5. The Motion was placed before the court on 5th April 2017, under certificate of urgency, it was certified urgent and interim orders were granted in terms of prayers 2 and 3 thereof. Prayer 2 is the one that I have recited in paragraph 4 here above, while prayer 3 stated as follows: "THAT a date for inter parties hearing be provided."

6. In the affidavit sworn in support of the Motion, the respondent averred that he had entered into a financial arrangement with the appellant for the purchase of KCA 338D. He averred further that he diligently repaid the monthly installments until the lorry broke down. He stated that he was ready and willing to repay the loan facility in full if given time, saying that it was uneconomical and foolhardy to repossess the vehicle yet he was still in the process of repaying the loan balances. He stated that since he had repaid a substantial sum, he should be given time to clear the balance, and the appellant would not be prejudiced if more time were granted to him. He averred that if the appellant was not restrained he stood to suffer damage. He attached a letter to that affidavit, dated 30th March 2017, which had demanded payment of outstanding arrears.

7. In response to the facts averred to in that affidavit, the appellant filed a response, vide an affidavit sworn on 26th July 2017, by one of its officers. It was averred that the respondent had defaulted on the terms of the hire purchase agreement, by failing to remit the installments due on time. The arrears outstanding were said to stand at Kshs. 2, 376, 178.42 and the total amount due was put at Kshs. 4, 550, 323.72. It was averred that grant of the orders sought would prejudice the appellant by denying it the opportunity to enforce its rights under the contract. Copies of the hire purchase contract, the logbook for the subject vehicle and demand letters of the arrears were attached to the affidavit.

8. There was no reply to the facts deposed in the said replying affidavit.

9. No directions were given for the application to be canvassed by way of written submissions, but both sides did file written submissions, and it would appear that the ruling delivered on 2nd November 2017 was based on those written submissions. After reviewing the material before it, the court was of the view that the application was merited. The court took the view that the appellant would benefit unduly from the repossession of the vehicle and the respondent would suffer double loss, of the vehicle and of the money that he had already paid. The court noted that the application was poorly drafted, to the extent that it did not pray for restraining orders pending disposal of the main suit, but it nevertheless went ahead to grant orders pending disposal of the main suit.

10. The appellant was aggrieved by the decision, and lodged this appeal. Its case, as articulated in its memorandum of appeal, dated 29th November 2017, is that the trial court misdirected itself on the principles governing grant of injunctions, the trial court made an award which was above the maximum allowed by statute, the trial court did not consider the issues raised in the appellant's response to the application, the

trial court considered extraneous issues and immaterial facts, the court granted an injunction when one had not been sought in the plaint, the respondent had not established a prima facie case with probability of success, an injunction was granted to an admitted defaulter, the respondent had not demonstrated the loss he stood to suffer which could not be remedied in damages, and the court did not take into account the hire purchase agreement.

11. Directions were taken on 24th October 2019, for disposal of the appeal by way of written submissions. There was partial compliance with those directions since it was only the appellant who filed written submissions.

12. The appellants written submissions are dated 18th January 2019. In the written submissions, the appellant submits that the principles for grant of injunctions as set out in Giella vs. Cassman Brown [1973] EA 358, had not been met. The respondent was a defaulter, who had failed to meet the obligations that he had signed to in the hire purchase contract, and, therefore, he had not come to court with clean hands. It is further submitted that the application was not anchored on the plaint, for the injunction had not been sought in the plaint. The appellant has cited a number of decisions in the written submissions that I need not reproduce herein.

13. I will start with something that the appellant has not submitted on, but which I believe goes to the core of the matter. The application that was before the court sought restraining orders pending the hearing and determination of the application, rather than of the suit itself. The respondent did not amend the application at any time, and it was argued at it was. The appellant did not raise the issue at the hearing of the application. The court noted the anomaly, but, nevertheless, proceeded to grant orders as if the principal prayer was for grant of injunctive relief pending the hearing and determination of the suit.

14. A party is bound by its pleadings. It should not be the responsibility of the court to amend or correct errors that the parties have made in their pleadings. Of course, the court has inherent power, and can overlook some errors in order to do justice. However, some errors are of such nature that the court ought not to descend into the arena of conflict and correct errors made by the parties in their pleadings and filings. In this case, the respondent sought injunctive relief pending the hearing and determination of the application, and not the main suit. He did not seek to correct that error at the hearing, and it should not have been with in the province of the court to purport to overlook such a grave error and grant orders that had not been sought in the Motion. The court ought to have struck out the application on that ground alone.

15. On whether the principles for grant of interlocutory injunctions had been properly applied or considered, I must start by noting that the trial court did consider those principles as laid out in Giella vs. Cassman Brown (supra). However, the court did not analyse the facts of the case in light of the said principles. The only factor it took into account was that if the appellant repossessed the vehicle and retained it and still kept the moneys paid by the respondent, the respondent would suffer double loss, and impliedly the appellant would benefit unduly in the process.

16. The starting point in cases of applications for interim injunction is whether the applicant has a prima facie case with probability of success. To assess whether there was a prima facie case with probability of success in a hire purchase contract scenario, one has to look at the contract of hire purchase between the two parties. In this case, the trial court did not venture into that exercise. The fact of the matter is that there was a contract of hire purchase, in which the respondent undertook to pay the loan money by monthly installments. One term of that contract, which is standard, is that upon default the appellant was entitled to repossess the vehicle and call for the balance of the loan money. That is what the parties signed up for. The court cannot seek to rewrite that contract for the parties, in the manner that the trial court purported to do. The appellant was in default of the contract, he admitted to the fact and was pleading for time to settle the loan. He surely did not have clean hands as he approached the court for relief. It cannot, therefore, be said that he had a prima facie case with probability of success. He was in breach of the terms of the hire purchase contract, and the clause on repossession had kicked in, and the appellant was entitled to exercise that right.

17. The respondent has not alleged that there was any wrongdoing by the appellant, in terms of either varying the terms of the agreement unilaterally to his disadvantage or of breaching some term of the agreement. He has stated and pleaded that it was the grounding of the vehicle that has exposed him to difficulties. That has nothing to with the appellant. It has not been averred that the appellant is not entitled under the hire purchase contract, or the general hire purchase law, to repossess the vehicle. The respondent concedes that he has defaulted in his obligations because the vehicle broke down, and he would like the appellant give him time to sort himself out. That is what I understand his case, as presented in his pleadings, to be saying. He does not point to any fault at all on the part of the appellant, to warrant it being restrained from exercising its rights under the relevant law and the contract between them. So there cannot be a prima facie with probability of success where no fault is attributed to the appellant.

18. On irreparable loss, the trial court appeared to hold that the respondent would have lost twice if repossession was done, but that was the contract that he signed into. He has not pleaded that there was misrepresentation, or variation of the original terms of the contract without recourse to him. In any event, it has not been demonstrated that the appellant was insolvent and, therefore, unlikely to settle any damages that the court may award. What he would lose would be a motor vehicle, which is replaceable, and money, which is recoverable.

19. On balance of convenience, the respondent is in default. He has conceded as much. He has not demonstrated that he had sought to negotiate with the appellant for more time. He has not displayed letters he might have written to the appellant or any meetings held with the appellant with that regard. Instead, he is asking the court to grant him the time he seeks, through the device of injunction. He has not come to court with clean hands, and he has not demonstrated any fault on the part of the appellant, and, therefore, the balance of convenience tilts in the appellant's favour.

20. The appellant urges that the respondent had not prayed for the injunction in the plaint. I do not understand that submission. The principal prayer in the plaint is for permanent injunction. That is what the trial court should consider making at the end of the main trial. The prayer for injunction through the Motion was for interim relief. Interim reliefs should not be prayed for in the plaint. I see nothing wrong, therefore, with the respondent having not pleaded for interim relief in his plaint. Such a prayer would have been meaningless in the plaint as it cannot be granted at the end of the trial.

21. Overall, I do find that the trial court ought not have granted the prayers sought in the Motion dated 4th April 2017, for the reasons given above. There is, therefore, merit in the appeal herein, which I hereby allow, with costs. The consequence of allowing the appeal is that the injunctive orders made in Butere SPMCCC No. 31 of 2017, on 2nd November 2017, are hereby discharged.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 8TH DAY OF MAY, 2020

W. **MUSYOKA**

JUDGE