**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 466 OF 2018**

**PICALLILY INTERNATIONAL LIMITED.....APPELLANT**

**VERSUS**

**I & M BANK LIMITED.....1ST RESPONDENT**

**DALALI TRADERS AUCTIONEERS,**

**REPOSSESSORS & INVESTIGATORS.....2ND RESPONDENT**

**RULING**

**1.** Before me for determination is the Notice of Motion dated 2nd October 2018 filed by the appellant/applicant *Picallily International Limited* seeking the following orders:

*i. Spent*

*ii. That the Honourable Court do set aside orders issued on 28th September 2018 by SRM Hon. D.A. Ocharo pending hearing and determination of the appeal by the appellant.*

*iii. That pending the hearing of the appeal an injunction of this honourable court do issue restraining the respondents and their agents including any court bailiffs or auctioneers against attaching and selling by public auction or otherwise the property of the applicant including motor vehicle reg. no. KCK 422Y, on 2nd October 2018 or at all.*

*iv. The proclamation/attachment and sale by public auction through advertisement on the Daily Nation dated 2nd October 2018 or otherwise of the said property by the 2nd respondent be declared irregular and invalid.*

*v. That the appellant be allowed to deposit in court the logbook of the subject matter in chief magistrate's court in case no. 5156 of 2018.*

*vi. That the Honourable Court do grant any order it deems fit to grant.*

**2.** The application is premised on *Sections 1A, 1B and 3A* of the *Civil Procedure Act* and *Orders 42 and 51* of the *Civil Procedure Rules*. It is supported by the grounds stated on its face and the depositions made by *Hilda Wairimu Ndungu*, a Director of the applicant in her supporting and further affidavits sworn on 2nd and 17th October 2018 respectively.

**3.** The application is contested through a replying affidavit sworn on 11th October 2018 by *Alexander Irungu Wokabi*, the 1st respondent's Legal Officer.

**4.** Before dealing with the merits of the application, I think it is important to briefly outline the background to the application in order to understand the different positions taken by the parties in this matter.

From the material availed to this court by both parties, it is clear that the applicant and the 1st respondent executed a hire purchase agreement through which the 1st respondent advanced to the applicant a loan of KShs.3,000,000 to finance the purchase of motor vehicle registration number KCK 422Y (subject motor vehicle) which was used as security for the loan.

**5.** According to the hire purchase agreement which was annexed to the replying affidavit as exhibit marked *"AIWI"*, the loan amount was to be paid together with the agreed interest in instalments of KShs.102,533 within a period of 36 months.

**6.** It is the 1st respondent's case that the applicant subsequently failed to repay the loan as per the terms and conditions set out in the hire purchase agreement. The 1st respondent then moved to realize the security and instructed the 2nd respondent to repossess the vehicle and have it sold by way of public auction. The applicant resisted this move and filed Civil Case No. 5156 of 2018 in the Chief Magistrate's Court at Milimani against both respondents. The applicant subsequently presented a notice of motion dated 31st may 2018 principally seeking orders of interim injunction to restrain the respondents from attaching and selling the motor vehicle pending the hearing and determination of the suit.

**7.** The application was heard and was dismissed by the trial court in a ruling delivered on 28th September 2018. The applicant being aggrieved by the trial court's ruling filed the instant appeal through a memorandum of appeal dated 2nd October 2018. It subsequently filed the application under consideration.

**8.** In the grounds supporting the motion and in the affidavits sworn on its behalf, the applicant contends that it had been servicing the loan as required by the parties' hire purchase agreement both prior to and after institution of the suit but that the 1st respondent neglected or failed to issue it with clear accounts showing the balance of the principal amount; that it was ready and willing to settle any outstanding amount within a reasonable time and that the court should grant it the orders sought to enable it do so; that the vehicle is used for operations of its business and if the application was dismissed, it was likely to suffer irreparable harm.

**9.** In its response, the 1st respondent denied the applicant's claim that it had consistently met its loan obligations under their agreement and that it had supplied the applicant with conflicting statements regarding what had been paid and the amount that was outstanding.

**10.** The 1st respondent further denied the applicant's claim that by the time the vehicle was repossessed, the applicant had paid a total sum of KShs.1,961,578. The 1st respondent averred that the applicant did not make payments on a monthly basis as required and that at the time of repossession, the applicant had arrears in the sum of KShs.1,038,422.86 and that this was communicated to the applicant through an email dated 27th April 2018.

**11.** The 1st respondent further contended that the application was filed in bad faith with the sole aim of preventing or defeating its right under the contract to enforce payment of the loan arrears; that the application amounted to an abuse of the court process and it ought to be dismissed with costs.

**12.** The application was canvassed by way of written submissions which both parties duly filed. The submissions were briefly highlighted before me on 17th December 2019 by learned counsel *Mr. Muroga* who held brief for *Mr. Chege* for the applicant and learned counsel *Mr. Kaula* who held brief for *Ms Akonga* for the 1st respondent.

**13.** I have given due consideration to the application, the affidavits on record and the rival written and oral submissions made on behalf of the parties as well as the authorities cited.

Having done so, I find that prayers (ii) and (iv) go to the merits of the appeal and they cannot therefore be properly adjudicated upon by this court in the context of this interlocutory application. The same will have to await determination of the appeal. The parties appear to have appreciated this fact quite well as in their submissions, they only addressed themselves to prayers (iii) and (v) which will form the subject of this ruling.

**14.** It is however worth noting that though in prayer (iii) the applicant explicitly sought orders of injunction pending appeal, the parties in their submissions proceeded as if the applicant had sought for orders of stay of execution of the trial court's orders of 28th September 2018 pending appeal.

Granted that orders of temporary injunction pending outcome of an appeal and stay of execution pending appeal would serve the same purpose, the two prayers are different and distinct as they are separately provided for under *Order 42* of the *Civil Procedure Rules* and different considerations apply for grant of injunctions and for grant of stay orders.

**15.** Stay of execution pending appeal is provided for in *Order 42 Rule 6 (1)* upto *Rule 5* while *Order 42 Rule 6* gives power to an appellate court to grant temporary injunctions pending an appeal. *Order 42 Rule Rule 6* (6) is expressed in the following terms:

> ***(6) Notwithstanding anything contained in subrule (1) of this rule*** *(which empowers courts to grant stay of execution)* ***the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with."***

**16.** The principles which guide the court in the exercise of its discretion in the determination of applications for interlocutory injunctions pending disposal of suits should in my view apply to guide an appellate court in deciding whether or not to grant orders of temporary injunction pending hearing of an appeal. The said principles were well enumerated in the celebrated case of ***Giella V Cassman Brown & Company Limited, (1973) EA***. An applicant would have to establish a *prima facie* case with a probability of success and in an application such as the present one, that the pending appeal has high chances of success; that unless the order sought is granted, the applicant will suffer irreparable injury which cannot be adequately compensated by an award of damages and lastly, if the court was in doubt, it would decide the application on the balance of convenience.

**17.** Applying the above principles to the present case, it is not disputed that the parties entered into a hire purchase agreement in which the 1st respondent advanced the applicant a loan of KShs.3,000,000 to purchase the subject motor vehicle. The motor vehicle was registered in the joint names of the applicant and the 1st respondent as evidenced by the annexture marked *"AIW2"* and was charged as security for the loan amount. The purpose of the vehicle being used as security no doubt was to secure the 1st respondent's interests so that if there was default on the part of the applicant in servicing the loan as agreed, the 1st respondent would realize the security to recover the sums advanced together with interest.

**18.** In this case, the applicant has claimed that the repossession, attachment and threatened sale of the motor vehicle was unlawful as it had not defaulted in the loan payments; that at the time of the vehicle's repossession, it had repaid a total of KShs.1,961,578 leaving a balance of KShs.1,038,422.86. The applicant however annexed to its supporting affidavit two deposit slips dated 17th September and 19th June 2018 in the sum of KShs.220,000 and Shs.105,000 respectively. These two deposit slips account for payment of only KShs.325,000 in a space of about one year out of the principal loan advanced of KShs.3,000,000. It is however worth noting that the applicant readily admitted in the supporting affidavit that at the time the 1st respondent moved to realize the security, it had arrears in the sum of KShs.1,038,422.86,

**19.** Given the foregoing and the fact that the pending appeal challenges the trial court's decision dismissing the applicant's prayer for temporary injunction on grounds that the applicant had failed to demonstrate that it had a prima facie case with a probability of success, I am persuaded to find that the applicant has failed to prove that its appeal has high or good chances of success.

**20.** Another critical factor which I think I should consider in deciding this application is whether if I dismiss the application, the appeal will be rendered nugatory.

In this case, what is at stake is a motor vehicle whose value can be quantified and ascertained in monetary terms. If I dismiss the application and the motor vehicle is sold, any loss that the applicant may suffer is quantifiable because it is purely financial and, in the event that the appeal succeeds, the applicant can be adequately compensated by an award of damages.

**21.** The 1st respondent is a bank and no claim or suggestion has been made that it is financially unstable and that it will not be in a position to compensate the applicant for the loss of the motor vehicle or any other consequential loss should the appeal succeed. In the premises, I find that if the order sought is declined, the appeal will not be rendered nugatory.

**22.** Having found as I have above, I have come to the conclusion that the applicant's motion dated 2nd October 2018 is devoid of merit and it is accordingly dismissed with costs to the 1st respondent.

It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI this 14th day of May 2020.**

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Ms Akonga for the 1st respondent

No appearance for the applicant

Ms Carol: Court Assistant