



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**HCCC NO. 295 OF 2017**

**VEHICLE & EQUIPMENT LEASING LIMITED...PLAINTIFF/APPLICANT**

**-VERSUS-**

**JAMII BORA BANK LIMITED.....DEFENDANT/RESPONDENT**

**RULING**

1. This is a ruling in respect to the application dated 19<sup>th</sup> June 2020 wherein the plaintiff applicant herein substantively seeks orders of injunction to restrain the defendant from attaching and selling the plaintiff's assets pending the hearing and determination of the suit. The application is premised on the grounds that:

a. That the defendant, Bank, offered the plaintiff asset financing and invoice discounting sometime on 8<sup>th</sup> May 2015 totaling to Kshs 600,000,000.00.

b. That on the strength of this facility the plaintiff acquired assets and leased the said assets to third parties who have been making payment to the plaintiff's account held by the defendant bank for purposes of servicing the facility the plaintiff has with the bank.

c. That the loan account has always been services and to date the debt amount has been reduced from Kshs 600 million to Kshs 69,542,303.12 further the plaintiff is at the tail end of reducing its debt liability with the bank.

d. The despite this great effort, the current global pandemic, has frustrated the payment of the outstanding amount as the third parties who currently have possession of the leased assets are unable to make consistent payment since March 2020, causing the loan account to fall into arrears at no fault of the plaintiff.

e. That consequently the defendant Bank has issued a demand letter calling up for the payment of the entire loan being Kshs 69,542,303.12, failure to which the defendant bank will move to repossess the leased assets on 26<sup>th</sup> June 2020.

f. That the cost of terminating the ongoing contracts for purposes of repossession will cost the plaintiff Kshs 250 million in revenues, which if uninterrupted by the bank, will soon be realized once the government lifts most restrictions.

g. That the plaintiff has requested for a moratorium, a practice that most banks have issued their customers during this period, but the bank has ignored such requests.

h. That the court is called upon to take judicial notice of the effect of the pandemic on business and the court should not shut its eyes to the fact that just like the plaintiff, most businesses are facing difficult times due to reduced cash flows and operations thusly frustrating contractual duties and obligations.

i. It would be unjust to treat this circumstance as normal default during normal circumstances on the grounds that:

i. The pandemic has changed the socio-economic landscape of almost all businesses and these peculiar circumstances cannot be ignored.

ii. That the court as well as businesses exist in a society that should be responsive to changing times, and noting that

**this pandemic was unforeseeable and is unprecedented, it is only fair that the court intervenes to ensure that businesses are given time to adjust and avert any action that is not considerate of the abnormal times businesses have been subjected to.**

**j. That while the loan has fallen into arrears the same was at no fault of the plaintiff, it was occasioned purely by an unforeseeable intervening event, the plaintiff, like most businesses did not have notice of the same so as to organize its finances.**

**k. That noting that this matter is part heard, it is just and prudent to avert any prejudicial action temporarily so as to resolve the suit conclusively.**

**l. That the prejudice that the plaintiff suffers on the attachment is far much greater than the prejudice the bank would suffer at the issuance of interlocutory injunction.**

**m. That unless the matter is urgently heard and interim reliefs granted at the first instance, the plaintiff will suffer irreparable loss as its operations will be brought to a grinding halt and face imminent collapse as a going concern thusly.**

2. The defendant opposed the application through the Grounds of Opposition dated 24<sup>th</sup> June 2020 wherein it states that the applicant lacks the *locus standi* to file this application and that the court is statute barred from hearing and determining the applicant. The respondent also opposed the application through the replying affidavit of its Head of Credit Services **Mr. Peter Kefa Onsongo**.

3. He confirms the existence of the banker –customer relationship between the plaintiff and the defendant. He states that owing to the said relationship the plaintiff granted the defendant credit facilities in the nature of asset financing in the sum of Kshs 500 million and an invoice discounting facility in the sum of Kshs 100 million on. He further states that the terms of the lending were subsequently reviewed at the plaintiff's request in June 2015 and March 2016.

4. He avers that under their lending contract, the plaintiff's repayment obligation was absolute, not subject to any condition precedent and was to be solely borne by the plaintiff and not third parties. He further avers that the plaintiff created a Deed of Assigned in order to secure the repayment by which the plaintiff assigned all its rights, title and interest over all the assets subject of the financing facility in which case the plaintiff has no legal basis for seeking any order in respect to the said assets.

5. It is the deponent's position that the plaintiff has been a belligerent defaulter who has severally failed to meet its repayment obligations thereby repeatedly falling in default and has since 31<sup>st</sup> October 2019 failed to make any repayments of the various credit facilities granted to it by the defendant.

6. He states that owing to the default, on 4<sup>th</sup> March 2020, the defendant issued a formal demand for payment from the plaintiff setting out the cumulative outstanding balances on the various credit facilities and the attendant arrears. He further states that the plaintiff did not comply with the aforesaid notice and that on 12<sup>th</sup> June 2020, the defendant issued it with a formal notice calling for the delivery up of possession of the assets under financing within a period of 14 days.

7. He adds that the plaintiff's current application is disingenuous as the plaintiff has on occasions formally notified the defendant of its intention to sell/dispose of the very same assets so as to realize its overdue indebtedness.

8. He states that in the Ruling of 31<sup>st</sup> July 2017, the court made an interlocutory factual finding that the plaintiff is in default of various loans granted to it by the defendant. It is the defendant case that the plaintiff's inability to meet its financial obligations towards the defendant pre-date the outbreak of the Covid-19 Pandemic.

9. Parties canvassed the application by way of written submissions which I have carefully considered. The main issue for determination is whether the plaintiff has made out a case for the granting of orders of injunction.

10. The conditions for consideration further in granting an injunction is now well settled in the case of ***Giella v Cassman Brown & Company Limited (1973) E A 358***, where the court expressed itself on the condition's that a party must satisfy for the court to grant an interlocutory injunction: -

**"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will convenience 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."**

11. The test for granting of an interlocutory injunction was considered in the American ***Cyanamid Co. v Ethicom Limited (1975) A AER 504*** where three elements were noted to be of great importance namely:

**i. There must be a serious/fair issue to be tried,**

**ii. Damages are not an adequate remedy,**

**iii. The balance of convenience lies in favour of granting or refusing the application.**

12. I note that the following facts are not disputed: -

- a. That the plaintiff and defendant had a bank-customer relationship.
- b. That on the basis of the said relationship, the defendant advanced credit facilities in the nature of assets financing to the plaintiff as shown in the facility letters marked as annexure “PKO-2” to the defendants Replying Affidavit.
- c. That the plaintiff created a Deed of Assignment to secure the repayment of the loan facility by which it assigned all its rights, title and interest over all the assets subject to the said asset financing. The Deed of Assignment was attached to the Defendant’s replying affidavit as annexure “PKO-3”.
- d. That the plaintiff defaulted in the loan repayments thereby precipitating the issuance of a formal Demand by the defendant as shown in the letter dated 4<sup>th</sup> March 2020 marked as annexure “PKO-5”.

13. From the above stated undisputed facts, it is clear that the plaintiff is truly indebted to the defendant and that by extension the defendant is justified in initiating the debt recovery measures.

14. I note that the plaintiff does not deny its indebtedness to the defendant but attributes its financial woes to the global Covid -19 Pandemic which, it states, has led to global economic downturn.

15. I however note that as can be seen in the loan statements of accounts, the plaintiff’s default and indebtedness existed as at 31<sup>st</sup> October 2019 long before Covid -19 that was declared a Pandemic in Kenya in March 2020.

16. I am therefore not satisfied that the plaintiff’s application meets the condition on prima facie case for the granting of orders of injunction as its indebtedness is neither disputed nor explained. Having found that the condition on prima facie case is not established, I do not find it necessary to consider the two other conditions for granting orders of injunction, to wit, irreparable loss and balance of convenience. Needless to say, all the conditions for granting injunction have to be established sequentially and as a unit. In *Joseph Muruka v National Bank of Kenya Ltd* [2015] eKLR it was held:

**“In the case Industrial Hardware Ltd –vs- Standard Chartered Bank [1999] KLR 25, the court refused to restrain the charge after the chargor admitted being in debt due to hard economic time, and that it is not the duty of a court to renegotiate terms of contract in a manner different from that contracted under the charge.”**

17. My above findings would have been sufficient to determine this matter but I am still minded to consider the aspect of the existence of the orders of this court made in the Ruling delivered on 31<sup>st</sup> July 2017 wherein the late Justice Onguto issued order as follows:

**i. The defendant, its servants, employees, agents and or nominees are hereby ordered by way of mandatory injunction to release to the plaintiff motor vehicles detailed in paragraph 4 of Amended Notice of Motion namely motor vehicles registration numbers KCD 602H, KCD 249P, KCE932M, KCE 908L, KCE 778M, KCE 987M, KCE 259H, KCE 778M, KCE 726M, KCE 469U, KCE 468U, KCE 910M, KCE 730H, KCE 903L, KCF 400E, ZF2126 Trailer, KCF 292D/ZF1729, KCF402E/ZF1730 and KCA 463T.**

**ii. The defendant, its servants, employees, agents and or nominees are hereby restrained by way of prohibitory injunction from attaching or selling or disposing of the plaintiff’s motor vehicles detailed in paragraph 4 of Amended Notice of Motion namely motor vehicles registration numbers KCD 602H, KCD 249P, KCE932M, KCE 908L, KCE 778M, KCE 987M, KCE 259H, KCE 778M, KCE 726M, KCE 469U, KCE 468U, KCE 910M, KCE 730H, KCE 903L, KCF 400E, ZF2126 Trailer, KCF 292D/ZF1729, KCF402E/ZF1730 and KCA 463T pending hearing and determination of this suit.**

**iii. The above order (ii) is conditional upon the plaintiff continuing to pay and meets its monthly obligations to the defendant and in the event of default the defendant will be at liberty to issue appropriate notices under the security documents to the plaintiff for delivery up of the assets constituting the security.**

**iv. The defendant to immediately and in any event not later than fourteen days from the date of service of this order supply the plaintiff with a detailed account showing any interest charged on credit facilities since 14 September 2016.**

**v. Liberty to apply to either party.**

**vi. The costs of this application are awarded to the plaintiff.”**

18. From the above extract of the order, it is quite clear that as at July 2017, the plaintiff was already experiencing challenges in servicing the loan facility advanced to it by the defendant and approached the court for orders of prohibitory injunction which was granted, but on condition that it continues to service the loan with rider that the defendant was at liberty to issue appropriate notices in the event of a default.

19. My finding is that the terms of the orders issued on 31<sup>st</sup> July 2017 were clear on the consequences of a default. I therefore find that the plaintiff cannot seek refuge in the fact that the main case is part-heard as a basis for obtaining the order of injunction sought herein.

20. For the reasons that I have stated herein, I am not persuaded that the application dated 19<sup>th</sup> June 2020 is merited and I therefore dismiss

it with costs to the defendant.

**Dated, signed and delivered via Microsoft Teams at Nairobi this 15<sup>th</sup> day of October 2020 in view of the declaration of measures restricting court operations due to Coved -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17<sup>th</sup> April 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Njoroge for defendant.

No appearance for the plaintiff.

Court Assistant: Silvia