



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 2 OF 2017**

**SHIVA CARRIERS LTD.....PLAINTIFF/APPLICANT**

**VERSUS**

**SYNERGY INDUSTRIAL CREDIT LIMITED.....1ST DEFENDANT/RESPONDENT**

**LEAKEY AUCTIONEERS.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. The Plaintiff/Applicant filed a Notice of Motion application dated 12<sup>th</sup> July, 2018, brought under the provisions of Order 40 Rules 1 (a), 2 and 4 and Order 51 Rules 1 and 3 of the Civil Procedure Rules, 2010, section 1A, 1B 3, 3A and 63 (c) and (e) of the Civil Procedure Act and all other enabling provisions of the Law. In this application, the Applicant seeks for the following orders:

(a) Spent;

(b) Spent;

(c) spent;

(d) Spent;

(e) Spent;

(f) That the Respondents be and are hereby restrained from harassing, intimidating, threatening, the plaintiff/Applicant, their agents and servants to the effect that they will sell, dispose of the applicant's property by way of a public auction or however and/or dispose off, alienating, transferring and/or otherwise interfering with the plaintiff/Applicants' interest in the said property

(g) This application be heard inter-partes on such date and at such time as this honourable court may direct.

(h) The costs of this application be awarded to the Plaintiff/applicant.

2. The application is premised on the grounds on the face of it and supporting affidavit of RAJEEV SONI, a General Manager of the Plaintiff company sworn on 12<sup>th</sup> July, 2018 which are as follows;

(a) That the Respondents' actions are in direct and blatant breach of, Section 15 of the Hire Purchase Act as well as Sections 20 (1), 61 (1) (a) and (b), Sections 66 (1) (2) of the Consumer Protection Act and more so further contravenes the terms of the consent entered into between the parties herein.

(b) That on or about the 31<sup>st</sup> of May 2017, the parties herein entered into a consent wherein the Applicant herein acknowledged owing the 1<sup>st</sup> Defendant a cumulative sum of Kenya shillings Thirty Million three hundred and seventy seven thousand six Hundred and fifty Four (Ksh 30,377,654) as per the statements of accounts as at 30<sup>th</sup> April, 2017 for agreement No .20116.02/3299 served upon and acknowledged as received by the plaintiff.

(c) That it was a further term of the consent that the said amount would be rescheduled and an associate company of the plaintiff would issue post-dated cheques for the rescheduled twenty four (24) monthly instalments.

(d) That the said post-dated cheques were duly issued and the outstanding balance paid off and/or reduced by a sum of Kenya

shillings Eleven million five hundred and fourteen thousand two hundred and twenty six ( Ksh 11,514,226/= ) which payments have been duly acknowledged by the 1<sup>st</sup> Respondent.

(e) That the plaintiff and /or is associate company always endeavored despite its tight financial constrains to pay its monthly installments up to and until February this year when the plaintiff as well as its associate company being transport companies experienced some major financial crisis due to the commissioning of the Standard Gauge Railway.

(f) That on or about the 2<sup>nd</sup> of July 2018 the plaintiff was served with a proclamation notice by the 2<sup>nd</sup> defendant for and on behalf of the 1<sup>st</sup> defendant/respondent calling for a total of Kenya shillings thirty million, Three hundred and seventy seven thousand six hundred and fifty four (Ksh 30,377,654/=) being the full outstanding sum as at the time when the consent was entered into and adopted and despite the said decretal amount having had drastically been reduced by Kenya shillings approximately twenty million ( Ksh 12,000,000/= thereby leaving a balance of approximately Kenya shillings eighteen million ( Ksh 18,000,000/=).

(g) The actual monthly instalments due as a to the 15<sup>th</sup> of July shall be Kenya shillings seven million seven thousand and Forty two thousand nine hundred and seven (Ksh 7,742,907/=) being the outstanding sums/arrears inclusive of interest and penalties.

(h) That by the time the said instructions and proclamation notices were issued ninety percent (90%) of the facility /trucks had been fully paid for.

(l) That the plaintiff/Applicant that at all material times been willing to offset and settle the rightful amounts that may be due to the 1<sup>st</sup> Respondent in lieu of the arrears for the facility granted by the 1<sup>st</sup> Defendant /Respondent a long as the same is properly reconciled and agreed upon between the plaintiff/Applicant and the 1<sup>st</sup> Defendant /Respondent.

(j) That the plaintiff/applicant is ready able and willing to offset the entire outstanding amount in lieu of the monthly instalment arrears within the next twenty one (21) days and is willing to give an undertaking to that effect.

3. Upon being served with the said application, the Defendant/Respondent filed a replying affidavit sworn by JACOB MBAE MEEME on 30<sup>th</sup> August, 2018 in which he deponed that:

(a) That the Plaintiff/Applicant (hereinafter referred to as "the Applicant" requested the 1<sup>st</sup> Respondent vide its letter dated 10<sup>th</sup> February 2016 to reschedule the previous agreements they had entered into for credit facilities. The 1<sup>st</sup> Respondents offer letter dated 13<sup>th</sup> February 2016 was accepted and they entered into a rescheduling agreement No. 3411/02/16 dated 15<sup>th</sup> March 2016 which was duly executed. The said letter was annexed and marked as JMM1.

(b) That the Applicant herein had defaulted in payment and had issued bad cheque in an attempt to pay its due monthly instalments. That the Applicant's account had started being in arrears since the month of August 2016 and in view of this the 1<sup>st</sup> respondent had arrears and late payments charges as per the agreement which had accumulated to Ksh 6,036,155/= as at 31<sup>st</sup> December, 2016.

(c) That the Applicant filed the present suit on 17<sup>th</sup> January, 2017 which was compromised by a consent dated 31<sup>st</sup> May, 2017; filed in court on 5<sup>th</sup> June, 2017 and adopted as proceedings of the court on even date he annexed a copy of the consent thereto.

(d) That the said consent expressly provided among others under paragraph (e) that in the event of any default the 1<sup>st</sup> defendant shall be a liberty to take any measures including but not limited to recovery of the subject securities; by themselves or through their duly authorized agents and dispose the same off through private treaty or a public auction."

(e) That the Applicant herein had defaulted in payment and had issued bad cheques in an attempt to pay its due monthly instalments. That the Applicant's account begun to fall in arrears in the month of July, 2017 only two months after the adoption of the consent and in view of the late payment, charges started accruing as provided in the agreement referred and such arrears had accumulated bringing the closing balance of Ksh 8,511,203.00 at 31<sup>st</sup> July, 2018. The annexed copies of the allegedly bad cheques.

(f) That the current month's instalment due is Ksh 13,860,180/- making the total outstanding on account of the Applicant as at 31<sup>st</sup> August, 2018 Ksh 22,371,833/= and late charges continue to accrue until payment in full of the sums due.

(g) That the irrevocable undertaking dated 15<sup>th</sup> May 2017 by the Applicant further was that in the event of default and or any kind of breach the 1<sup>st</sup> Respondent had the express right to invoke the scheduled hire purchase agreement or any other previous agreement and immediately and expressly reposes the security motor vehicles and sell by either itself or by its agents to recover the outstanding payments, late payment charges, costs and charges incurred thereto.

(h) That several demands have been made by the 1<sup>st</sup> Respondent to the Applicant to regularize the account which were duly served and acknowledged by the Applicant. Copies of the demand correspondences attached thereto.

(l) That in view of the forgoing and the failure of the Applicant to regularize its account which had accumulated arrears the 1<sup>st</sup> Respondent then instructed its auctioneers the 2<sup>nd</sup> Defendant/ Respondent ( hereinafter referred to as the "2<sup>nd</sup> Respondent ) to invoke the terms of the undertaking and consent dated 15<sup>th</sup> May 2017 and 31<sup>st</sup> May, 2017 respectively and/or the agreement and repossess all the motor vehicles of the Applicant with a view of recovering the arrears that had greatly accumulated and the overall

outstanding balance.

(j) That the applicant once again ran to this Honourable court with tainted hands and without disclosing material facts seeking to stay the execution process.

(k) That the applicant was granted a conditional order of stay of execution by justice P J Otieno dated 13<sup>th</sup> July, 2018 and at paragraph 3 thereof to wit; that the applicant pays all instalments due and to be due within 21 days from the said date. The court order dated 13<sup>th</sup> July, 2018 was annexed thereto.

(l) That the Applicant's account continued to be in arrears and its advocates were notified and were served with the statement of accounts as at 31.7.2018 meaning the applicant failed and/ refused to clear the arrears and cheques which fell due within the 21 days as ordered were banked and returned unpaid.

(m) That indeed aware that the 2<sup>nd</sup> Respondent repossessed motor vehicle registration No KBY 552K before service of the order dated 6<sup>th</sup> August, 2018 was effected and the 2<sup>nd</sup> Respondent informed us that they were unable to trace the remaining motor vehicles. That further the Applicant was being mischievous with an aim of frustrating us from recovering the outstanding amounts.

(n) That Mr Rajeev at paragraph 11 of his supporting affidavit sworn on 2<sup>nd</sup> August, 2018 reiterates the applicant's commitment to clear all the outstanding arrears as per the conditional order of court of 13<sup>th</sup> July, 2018.

(o) That the applicant did not honour the said court order as it only make a payment of Ksh 800,000 on 18<sup>th</sup> July 2018 leaving the account in arrears to the tune of Ksh 8,511,203/= as at 31<sup>st</sup> July, 2018.

(p) That the Applicant herein has without colour of right filed omnibus applications as a strategy of defeat the repossession process which it succeeded in by not disclosing all material facts to the court.

(q) That further the Applicant has blatantly lied to this Honourable court that the twelve (12) cheques from Jagged Alliance Limited dated from 30<sup>th</sup> August, 2018 to 30<sup>th</sup> July, 2019 each of Ksh 608,628/= respectively referred to at paragraph 21 of the supporting affidavit of RAJEEV SONI sworn on 2<sup>nd</sup> August, 2018 have been delivered to the 1<sup>st</sup> Respondent.

4. When the application dated 12<sup>th</sup> July, 2018 came up for hearing on 22<sup>nd</sup> October, 2018, the parties opted to dispose of the same via written submissions. However, the Applicant did not file their written submissions be that as it may, the court will rely on what is deponed in its supporting affidavit.

#### **THE RESPONDENTS' SUBMISSIONS.**

5. M/s Kagu, learned counsel for the Respondent submitted that the Applicant/Plaintiff has all along admitted its dishonestness to the 1<sup>st</sup> Respondent and has on numerous occasions issued bad cheques which upon encashment have been returned unpaid. M/s Kagu also states that the Plaintiff/Applicant has made numerous payments proposals among them, and email dated 5<sup>th</sup> January, 2016 and all of them have never been honored.

6. According to the Respondent's counsel, the parties vide a consent dated 31<sup>st</sup> May, 2017 filed in court on the 5<sup>th</sup> June, 2017 and adopted as proceedings of the court in which the plaintiff/applicant admitted owing the Respondent Ksh 30,377,654/- as at 30<sup>th</sup> April, 2017. The consent was annexed as annexure JMM-3 of the 1<sup>st</sup> Respondent's replying affidavit dated 30<sup>th</sup> August, 2018.

7. The Respondent's counsel submits that at paragraph 11 of his supporting affidavit sworn in 2<sup>nd</sup> August, 2018, the Applicant admits their accounts is in arrears and makes a commitment for regularization within 21 days in fulfilment of the conditional order of court issued on the 13<sup>th</sup> July, 2018 counsel for the Respondent contends that the 1<sup>st</sup> respondent has dutifully sent the statement of accounts to the Applicant/Plaintiff informing them of the outstanding balances so that the request by the Applicant/Plaintiff for audited statements of accounts is just a smokescreen. She relied on the decision in the case of KOILEKEN OLE KIPOLONKA ORUMOI VRS MELECH ENGINEERING & CONSTRUCTION LIMITED & 2 OTHERS (2015) to drive this point home.

8. Further, the Respondent counsel submitted that the Applicant /Plaintiff has blatantly lied to this Honourable court that the twelve cheques from its associates Jagged Alliance dated 30<sup>th</sup> August, 2018 to 30<sup>th</sup> July, 2019, each of Ksh 600,628/= have been delivered to the 1<sup>st</sup> Respondent and there being annexed was with the sole intention of deceiving this Honorable court. The 1<sup>st</sup> respondent annexed true compiles of the bad cheques as annexure JMM-4 including the Applicant's statement as at 31<sup>st</sup> July, 2018. The counsel relied on the case of KOILEKEN OLE KIPOLONKA ORUMI VRS MELECH ENGINEERING & CONSTRUCTION LIMITED (Supra).

9. In conclusion the 1<sup>st</sup> Respondent's counsel submitted that the Applicant/Plaintiff's application is a play to obtain another order with tainted hands and without full disclosure, so that it is therefore unjust and an abuse of the court process to prolong the suit when clearly there is no suit in the first place. She prayed that the application together with the suit be dismissed with costs for the reasons she has advanced.

#### **ANALYSIS AND DETERMINATION.**

10. In determining the application dated 12<sup>th</sup> July, 2018, I have read through the ground upon which it is premised, the replying affidavit other pleadings (application) on record. I have also considered that submissions by the Respondent, cited authorities and the relevant law in regard to the issue(s) in question.

11. I find that it is not in dispute that the Applicant/Plaintiff is indebted to the Respondent and that the debt account is in arrears. It is also not in dispute that the parties entered into a consent dated 31<sup>st</sup> May, 2017 wherein the Applicant/Plaintiff acknowledged owing the 1<sup>st</sup> Respondent Ksh 30,377,654/= as at 30<sup>th</sup> April, 2017 and rescheduled the facility for a period of twenty four (24) months with a penalty clause.

12. What is therefore left for determination is whether the Respondents have breached the provisions of section 15 of the Hire Purchase Act as well as sections 20 (1), 61 (1) (a) and (b) section 66 (1), (2) and (3) of the Consumer Protection Act, hence contravened the terms of the consent to warrant its adoption as an order of the court set aside.

13. In the case of **HIRANI –VRS- KASSAM ( 1952) 19 EACA 131**, the court with approval quoted the following passage from the book of SECTION on JUDGMENTS AND ORDERS (7<sup>th</sup> EDITION) Vol. 1 page 124 where the position on when a consent judgment or order can be set aside.:

**“Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or actions, and on those claiming under them cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court or if consent was given without sufficient material facts, as in misapprehension or in ignorance of material facts, or in general for a reason would enable the court to set aside and agreement”.**

14. In the case of **FLORA WASIKE VRS DESTIMO WAMBOKO (1982-1988) I KAR 625**, HANCOX J A (as he then was) said in his judgment at page 626:

**“ It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out”.**

15 The court in the case of **BROOKE BOND LIEBIG VRS MALLYA (1975) E.A 266** held;

**“A consent judgment may only be set aside for fraud collusion, for any other reason which would enable the court to set aside and agreement”.**

16. At paragraph 3 of the supporting affidavit, the plaintiff avers that the parties entered into a consent wherein they acknowledged owing the 1<sup>st</sup> Respondent a cumulative sum of Ksh 30,377,654/= as per the statement of account as at 30<sup>th</sup> April, 2017 for Agreement No 2016/02/3299/. This same positions echoed by the plaintiff at paragraph 6 of its replying affidavit dated 30<sup>th</sup> August, 2018.

17. I have looked at the consent dated 31<sup>st</sup> May, 2017, on record and find that the same originated from the Plaintiff/Applicant's advocate and was signed by the 1<sup>st</sup> Respondents counsel. It is worth noting that the Applicant/Plaintiff has not demonstrated to this court that they had no authority to enter into the said consent and or that they were forced to do so.

18. They have also not applied to have the same received and or set aside. The Applicant/Plaintiff have alleged that despite financial challenges, they endeavored to pay their instalments until February, 2018 when their associate company experienced financial constrains as a result of the launch of the Standard Gauge Railway. This assertion is in itself an admission that the Applicant/Plaintiff is already in arrears.

19. At paragraph 11 of the Applicant/Plaintiff's supporting affidavit, the Applicant /Plaintiff's General manager avers that he is readily, able and willing to offset the entire outstanding amount in lieu of the monthly instalments arrears within the next 21 days and that he is willing to give an undertaking to that effect. This was however not done since the Applicant/Plaintiff has not complied with the conditional order issued by Hon Justice P.J. Otieno on the 13<sup>th</sup> July, 2018.

20. From the forgoing, it is clear that the Applicant/Plaintiff has approached this court seeking orders of equity with tainted hands and is therefore not a good candidate for the equitable remedy of an injunction.

I find that the Respondent has the right to enforce the terms of the consent dated 31<sup>st</sup> May 2017, filed and adopted as an order of this Honourable court on 5<sup>th</sup> June, 2017.

21. In the upshot, equity will not suffer a wrong without a remedy. This court cannot be a bystander while seated in the driving seat of justice. It is therefore ordered that the 1<sup>st</sup> Respondent furnishes the Applicant/ Plaintiff with the full statement of account of the Applicant/Plaintiff's arrears within seven (7) days and the Respondent is at liberty to enforce its rights under the consent dated 31<sup>st</sup> May, 2017 adopted as an order of this court on 5<sup>th</sup> June, 2017.

The Applicant/Plaintiff application dated 12<sup>th</sup> July, 2018 is thereby dismissed with costs to the Respondent.

It is so ordered.

**Ruling delivered this 17<sup>th</sup> day of July, 2019.**

**LADY JUSTICE D. O. CHEPKWONY**