



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CAUSE NO. E394 OF 2018

A.O. BASID LIMITEDPLAINTIFF

VERSUS

SYNERGY INDUSTRIAL CREDIT LIMITEDDEFENDANT

RULING

1. By a notice of motion application herein dated 22nd November 2018, brought under the provisions of Section 1A, 1B, 3A and 63 (c) of the Civil Procedure Act, Order 40 Rules (1) and (4), Order 51 Rules (1) and (3) of the Civil Procedure Rules and all enabling provisions of the law, the Plaintiff (herein “the Applicant”) are seeking for orders that, a permanent injunction do issue to restrain the Defendants (herein “the Respondent”) ether by themselves, agents, servants from proclaiming, attaching, repossessing its motor vehicles whose registration numbers are listed under prayers (2), (3) and (4) of the application.

2. That the Respondents be ordered to deliver all the log books held as security against hire purchase account numbers 2016/01/3285, 2016/01/3287, 2075/03/2549, 2075/12/3278, 2014/01/2501 and 2015/03/2548 and the court do grant any other relief it may deem fit to grant and the costs of the application be provided for.

3. The application is based on the grounds on the face of it and the affidavit in support sworn by the Plaintiff’s director Abdi Basid Sheikh Ali; other. He avers in a nutshell that, on diverse dates between 2015 to 2016, the Applicant entered into several contracts with the Respondent, whereupon the Respondents granted the Applicant various loans secured by the Applicants’ motor vehicles as per the annexure marked “ABO1”. The Applicant made monthly installments in good faith and in accordance with the contract.

4. However, the Respondent capitalized on the Applicants once in a while late payment of installments and resorted to charging unilateral, punitive, illegal interest rates charges and penalties, thus varying the interest in an unjustifiable manner; without the consent, and/or knowledge of the Applicant and contrary to the contractual terms.

5. The Applicant argues that, these charges are illegal as they do not comply with the Hire Purchase Act, Banking Act, Central Bank Guidelines and Regulations, External Loans and Credit Act, General Loans and Stock Act, and all other relevant provisions of law that govern facilities interest charges and penalties.

6. That the Applicants on diverse dates on 25th October 2016, 3rd November 2016, 22nd December 2016, 2nd May 2017, 2nd August 2017, made the final payment thereby settling in full the loan account, in terms of the principal sum plus the accrued interest. However, due to the illegal charges, the Applicant’s business has been exposed to financial crisis, straining its operations. The Respondent has threatened to repossess and sale the subject motor vehicles which are the Applicants main tool of trade and source of livelihood.

7. That the Applicant sought for interim orders in the CMCC No. 3959 of 2018 and were issued accordingly but the suit was withdrawn due to the pecuniary jurisdiction of the court and biasness of the sentiments made by the court. Therefore the Plaintiff is exposed without the restraining orders; as the Respondents have ignored the concerted efforts to release the log books pledged as securities.

8. However, the application was opposed vide a Replying affidavit dated 18th January 2019, sworn, the Defendant’s company legal officer Mr. Jacob Meeme. He deposed in a nutshell that the application is unmeritorious, an abuse of the court process and does not meet the consideration of grant of an injunction. He concurred with the Applicant that the parties entered into various Hire Purchase contracts in consideration of advancing the Applicant various sums of money. That the Applicant offers fifty three (53) movable assets (as per paragraph 3 of the Applicant’s supporting affidavit). The same were offered as security for the loan facilities, and were offered as continuing securities for the Applicant’s past, preset, contingent and future liabilities.

9. That under the Hire Purchase agreements, the Applicant was to make punctual and consistent monthly installments on due date, but since 22nd December 2016, the Applicant has not honoured its obligations under the Hire Purchase Agreement, and is in arrears of Kshs. 80,499,546 as at 31st March 2018 and Kshs. 137,200,953 as at 31st December 2018.

10. The Respondent denied that the Applicant has fully repaid the loan facilities arguing that no evidence is provided. That to the contrary, the Applicant has previously acknowledged being indebted to the Respondent in particular in the year 2017 and early 2018 where the Applicant wrote several letters to that effect, and sought for indulgence to settle the arrears. However, notwithstanding the said indulgence, the Applicant has not made good the promises to settle the debt.

11. The Respondent denied breaching the statutory provisions referred to by the Applicant and argued, it is not a Banking institution within the meaning of the Banking Act. Further it did not charge the interest rate as alleged herein. The charges levied are purely contractual. Further, the Applicant has always received statement of accounts, demand letters to settle the outstanding arrears, attended several meetings with the Respondent's representatives, where the amount due has been deliberated without complaints or cavil or arguments.

12. It was argued that the repossession of the hire assets is an option available under clause 6 of the Hire Purchase Agreements. That the Respondent has not moved to distrain the Applicant's movables on account of non-payment of rent, therefore Section 6 of Distress for Rent Act (Cap 293 of Laws of Kenya) does not apply.

13. Further the ex parte order issued in the CMCC No. 3959 of 2018 ought not to have been issued. To demonstrate bad faith, the Applicant did not serve pleadings therein until after two (2) months and the Applicant lied and misled the court by lying an auctioneer Ms. Icon had been instructed to proclaim the goods. Similarly in order to defeat the Respondent's claim, the Applicant is vandalizing and selling the hired goods. Finally, the claims herein are mere allegations that lack merit and should be dismissed.

14. The application was disposed of vide written submissions. The Plaintiff submitted that, the principles that govern grant of an injunction are settled as laid down in the case of; Giella vs Cassman Brown & Co. Ltd and authoritatively captured in the case of; R.J.R. Macdonald vs Canada (Attorney General).

15. It was submitted that, the amounts in the demand letter dated 10th April 2018 contain falsehood and are unidentifiable, unrecognizable and that is the cause of action herein. The Plaintiff in further submissions details how the amounts in each account has inconsistencies and invited the court to note that, at an interlocutory stage, and in considering an application for interlocutory injunction, the court is not obliged to make final findings on contested facts but only to "weigh the relative strength of the parties case." Reference was made to the cases of; Mbuthia vs Jimba Credit Corporation Ltd Platt JA, Moses C. Muhia Njoroge & 2 Others vs Jane W. Lesaloi and 5 Others and Mrao Ltd vs First American Bank of Kenya & 2 Others.

16. Further reference was made to Steven Mason & McCathy Tetraut, in their article entitled "Interlocutory Injunctions: Practical Considerations" where it is stated as follows:-

"with some exceptions, the first branch of the injunction test is a low threshold. as stated by the Supreme court in R.J.R. Macdonald vs Canada (Attorney General) "Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at the trial. Justice Henegham of the Federal Court explained the review as being "on the basis of common sense and a limited review of the case on the merits." It is usually a brief examination of the facts and law."

17. Finally, the Applicant argued that if the orders sought are not granted, it will suffer irreparable harm as it will be driven out of the business and will not meet the obligations to various contractual suppliers and creditors. It will lead to heavy penalties and the company will be wound up and will loose employment.

18. However, the Respondent submitted that, the Applicant has not established a prima facie case and failed to satisfy the condition in Giella's case (supra). Neither has it proved the contested accounts are false, thus failing the 2nd principle in Giella. The Respondent relied on the cases of; Amicabre Travel where it was held that unless the Plaintiff proves payment of the sum sought, an injunction order cannot issue.

19. It was submitted a dispute as to the amount due cannot be a ground for grant of an injunction order as held in the case of; Awala Construction Company Kenya Limited vs Synergy Industrial Credit Limited (2014) eKLR. It was argued that, where the orders of injunction are used to intimidate or oppress the other party, they will be discharged as held in the cases of; Barclays Bank of Kenya Limited vs Abdi Abshir Warsame & Another (2008) eKLR and Mobil Kitale Service Station vs Mobil Oil Kenya Ltd & Another 1 KLR (2004).

20. I have considered the application in total and I find that the Applicant is seeking for a permanent injunction under prayer (4) of the application at an interlocutory stage. It seeks for the same prayer in the final prayers in the plaint under paragraph 11 (a) of the Plaint dated 22nd November 2018. In the same vein, the prayers (5), (6) and (7) of the application are similar in all aspects with prayers under paragraph 17(b), (d) and (c) of the plaint. Therefore, on that ground alone, the court cannot grant the orders sought for. If the court were to grant the said prayers or any of them, at this stage, the entire suit will have been concluded at an interlocutory stage and/or affidavit evidence.

21. Be that as it were, even if the court were to consider the prayers on merit, I find that, first and foremost, the prayer seeking for an order to compel the Respondent to release log books held as security can only be granted as a final prayer, once the court has heard the matter fully to established whether the parties have fully discharged their obligations under the subject Hire Purchase Agreements.

22. Similarly, the prayer seeking for an injunction requires the Applicant to establish that it has a prima facie case with high probability of success. I have considered the materials placed before the court, it does appear the contested issue is whether the Applicant has fully repaid

the amount advanced together interest or not, and/or whether the Respondent has levied illegal interest. Whatever the case maybe, these issues cannot be fully determined on affidavit evidence.

23. Be that as it were, as properly submitted by the Respondent, a dispute as to the amount owing between a borrower and a financier cannot be of a ground for issuance of an injunction order. In my considered opinion, the rationale thereof is that this is an issue of accounts. Thus if the parties cannot resolve the issue of accounts by reconciling their disputed figures, they can get persons qualified in that field (e.g. Accountants) to assist them.

24. Further, the issuance of an injunction in such a case does not benefit the parties if the account continues to accrue interest and eventually it is established that there was default, the party enjoying the restraining order, suffers detriment, due to accommodated interest on the other hand, the opposing party is denied of its right to recover the sums due and if eventually the matter is determined in its favour, the security may have eventually been depleted by increased interest in the meantime.

25. To the contrary, if the creditor is not restrained and the assets are sold, so long as they have an economic value, the borrower can compensate monetary terms or damages adequately. Further, it suffices to note that, an injunction is an equitable remedy granted in cases where the grant of damages is not adequate. Further, an analysis of the documents relied on by both parties reveal that the parties indeed entered into the Hire Purchase Agreements and loans advanced. The Plaintiff did not provide the statements and/or evidence of repayment of the loan. To the contrary, the Respondent has produced statements reflecting arrears and/or correspondences to make good the arrears. In that case, it is in the interest of justice to hear and determine the main matter on a priority basis. I further note that, the Respondent is apprehensive that any further delay in hearing the matter will render the subject matter obsolete or disputed.

26. In that regard and in the interest of justice, I make the following orders;

(a) The parties shall file and serve the documents, they are relying on to prosecute their respective case within thirty (30) days of the date of this order and take a mention date before the Honourable Deputy Registrar on the immediate following the expiry of the thirty (30) days for Case Management Conference; that is on 13th December 2019;

(b) In the meantime, each party to file and serve their statement of account within seven (7) days of the date of this order state the amount advanced, repaid, outstanding and/or arrears if any . this will enable the court to determine the orders to make in relation to payment of any sums (if any) that are due and owing;

(c) In the meantime, there will be no disposal of any of the motor vehicles that are a subject of these proceedings by either party. The Applicant shall remain liable for any maintenance and devaluation in the motor vehicles;

(d) The parties should discuss the accounts too. If the parties do not agree on the disputed sums, then the order of the court after the seven (7) days in addition to an order as to what sums are owing will be to order that motor vehicles be detained in the yard of a third party to be held at the cost of the defaulting party once the suit is heard and determined;

27. The costs of the application will abide the outcome of the suit.

28. Those then are the orders of the court.

Dated, delivered and signed in an open court this 12th day of November 2019.

G.L. NZIOKA

JUDGE

In the presence of:

Mr. Angaya for the Plaintiff

Ms. Gachomba for Ms. Asili for the Defendant

Dennis -----Court Assistant