REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 16 OF 2017

SHIVA CARRIERS LTD.....PLAINTIFF/APPLICANT

VERSUS

NIC BANK KENYA PLC.....1ST DEFENDANT/RESPONDENT

NDUTUMI AUCTIONEERS.....2ND DEFENDANT/RESPONDENT

RULING

1. The applicant herein on 9th February, 2017 filed an application of even date anchored on the provisions of Order 40 rules 1(a), 2 and 4, Order 51 rules 1 and 3 of the Civil Procedure Rules, 2010 and Sections 1A, 1B, 3, 3A and 63(c) and (e) of the Civil Procedure Act, Cap 21 and all enabling and applicable provisions of the law.

2. The applicant seeks the following orders:

(i) Spent;

(ii) That this Honourable Court be pleased to order a stay of execution of the respondent's notice to repossess dated 8th February, 2017 and/or proclamation to sale Notice to be issued (sic) or the sale thereof of any of the proclaimed motor vehicles being Car Carrier Trailer Numbers ZE 7306, ZE 8983, ZE 8982, ZE 8988, ZE 8987, ZE 8986, ZE 8984, ZE 8985, ZE 8981, ZE 8990, ZE 8989, MAN TGA, KHMA 062H, MAN TGA - KCA 577Y, KCA 533Y, KCA 540Y, KCA 566Y, KCA 530Y, KCA 696X, KCA 570Y, KCA 656X, KCA 686X, KCA 676X or any other property belonging to the plaintiff/applicant by way of a public auction or by any other means whatsoever pending the hearing and determination of this application and subsequent suit;

(iii) That the 2nd defendant/respondent herein the Auctioneer and/or its servants, agents or otherwise, be restrained by this Honourable Court, from attaching and/or selling the applicant's property vehicles being Car Carrier Trailer Numbers ZE 7306, ZE 8983, ZE 8982, ZE 8988, ZE 8987, ZE 8986, ZE 8984, ZE 8985, ZE 8981, ZE 8990, ZE 8989, MAN TGA, KHMA 062H, MAN TGA - KCA 577Y, KCA 533Y, KCA 540Y, KCA 566Y, KCA 530Y, KCA 696X, KCA 570Y, KCA 656X, KCA 686X, KCA 676X or any other property belonging to the plaintiff/applicant by way of a public auction or otherwise as indicated and/or threatened in the collection/repossession orders dated 8th February, 2017 or at any other time thereafter to dispose of, alienate, transfer and/or otherwise interfere with the plaintiff/applicant's interest in the said property, pending the hearing and determination of this application and the subsequent suit;

(iv) That pending the hearing and determination of this application and subsequent suit, the respondents by themselves, their officers, servants, agents or otherwise howsoever be restrained from selling the applicant's motor vehicles/ property by way of a public auction or howsoever at any other time hereafter to disposing off (sic), alienating, transferring and/or otherwise interfering with the plaintiff/applicant's interest in the said property;

(v) That the 1st respondent by themselves, their officers, servants, agents be compelled to furnish the plaintiff with audited statements of account to the plaintiff's outstanding arrears/ alleged debt arrears and the requisite valuation reports for the plaintiff's property the subject of the said attachment/repossession;

(vi) 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;

(vii) Spent; and

(viii) That the cost of this application be awarded to the plaintiff/applicant.

3. The application is supported by the affidavit of Rajeev Soni, the applicant's Director, which was sworn on 9th February, 2017. The 1st respondent through its Manager, Legal Services, Kelvin Mbaabu filed a replying affidavit on 18th April, 2017, to oppose the application. The applicant's Counsel thereafter filed written submissions on 5th July, 2017. The 1st respondent's Counsel filed his written submissions on 18th July, 2017. The applicant filed a supplementary affidavit on 4th September, 2017.

4. In highlighting their submissions, Ms. Muthee for the applicant stated that as at the time of filing the application more than 75% of the money advanced to the applicant had been paid which shows that the applicant continued to pay the amounts due. She submitted that the outstanding amount was Kshs. 4,331,285.24 and that the 1st respondent had in its replying affidavit brought in other facilities which were not part of this suit.

5. Counsel referred to paragraph 5 of the 1st respondent's replying affidavit in which agreement Nos. 1002749862 and 1002812874 were introduced. She stated that by so doing, the 1st respondent had deliberately hiked the amount owed by Kshs. 10,485,576.01. She argued that the said move was aimed at defeating the applicant's claim of the amount paid under the hire purchase agreements. She stated that the 1st respondent failed to avail bank statements relating to this suit.

6. It was argued that the 1st respondent in paragraphs 12 and 15 of its affidavit admitted that the applicant had been paying the amounts required. Ms. Muthee therefore submitted that Section 20(1) of the Consumer Protection Act came to the aid of the applicant who had paid more than two thirds of the amounts loaned to it. She further stated that Section 15 of the Hire Purchase Act prohibits the financier herein from repossessing the vehicles after two thirds of the facility had been paid. She indicated that the facility was for Kshs. 86,505,230/= and that the 1st respondent's claim was for Kshs. 5,300,315.15. She stated that two thirds of the said amount translates to Kshs. 57,670,153.33 while a third of the total facility comes to Kshs. 28,835,076.60. It was submitted that as at the time of filing of the suit, the amount outstanding was Kshs. 26,830,570.69 which is indicative of the fact that more than two-thirds of the facilities had been paid. Counsel submitted that for the foregoing reasons, the applicant had established a prima facie case with a probability of success.

7. It was contended that the hire purchase agreement was not registered within thirty days of it being signed as required under the provisions of Section 5(1) of the Hire Purchase Act and as such, the agreement was unenforceable and the 1st respondent could not enforce its right to repossess without first seeking leave of the court to do so.

8. Counsel for the applicant argued that the bank interest rate was changed from 8% to an unknown amount without notice to the applicant. She was of the view that the Hire Purchase Act incorporates the law that increase in interest rates should not be exercised capriciously and arbitrarily. She relied on the case of **Francis Joseph Kamau Ichatha vs HFCK** [2014] eKLR, to support the said submission. It was contended that any interest so paid, violates the provisions of Section 61(1)(a) of the Consumer Protection Act, which relates to legal charges that are not reasonable.

9. The provisions of Sections 66(1) and (2) of the said Act were also cited to show that the respondent failed to deliver a disclosure notice to the applicant. Section 66(3) of the Consumer Protection Act was referred to and a submission was made to the effect that the 1st respondent failed to inform the applicant that it had insufficient funds to service the charges due. She relied on the case of **Givan Okallo Ongari and Another vs HFCK**, [2007] 2 KLR 232, on the need to inform the applicant of additional charges.

10. In submitting on the principle of irreparable loss, Counsel for the applicant was of the view that the 1st respondent had made it impossible to determine the actual charges owing and due to variation of interest rates, had kept the applicant in permanent debt. She argued that if the application was not allowed, the 1st respondent would unfairly benefit from the capricious charges levied.

11. She further stated that the applicant sought reconciliation of accounts on the exact amount due from it. It was argued that if the 1st respondent was allowed to levy the illegal amounts, the applicant would lose what it had already paid. Further, the applicant would suffer the loss of securities which would be sold to *bonafide* purchasers for value without notice.

12. In concluding her submissions, Ms Muthee argued that the 1st respondent by failing to attach its statements of accounts to its replying affidavit had failed to controvert and substantiate the amounts it was claiming in detail. She prayed for preservation of the subject matter of the suit as the applicant had been making payments.

13. Mr. Oledi, Learned Counsel for the 1st respondent relied on their written submissions and replying affidavit. He cited the case of **Giella vs Cassman Brown** [1973] EA 358 in stating that the applicant had failed to establish a prima facie case with a probability of success. He submitted that statements of accounts were attached to its replying affidavit as annexure AM4. Counsel stated that Section 3(1) of the Hire Purchase Act does not protect the applicant as the provisions thereof state that any advance above Kshs. 4 Million is not subject to the said Act.

14. He stated that the amount outstanding was Kshs. 5,318,313.35 which came to a total sum of Kshs. 26,830,570/= including interest. He relied on the case of **Mrao Limited vs First American Bank of Kenya Ltd and 2 Others** [2003] eKLR to show that the applicant had not established a genuine and arguable case which on the material presented before the court, a tribunal properly directing itself would conclude that there exists a right which had been infringed by the 1st respondent, to call for an explanation from it.

15. It was submitted that the applicant did not prove that it will suffer irreparable loss and nothing showed that damages would not be sufficient to compensate the applicant if the motor vehicles were to be sold as per the hire purchase agreement. Counsel relied on the case of **Motex Commercial Supplies Ltd vs Euro Bank Ltd (in liquidation)** [2008] eKLR, on the duty of the court to enforce or legitimize what parties agreed on. He further stated that the consequences of breach of the agreement were disclosed thereon.

16. In response to the foregoing, Ms Muthee stated that the statements of account availed did not relate to the subject matter before court. She indicated that the authorities cited by Mr. Oledi relate to different circumstances as a court can only enforce what is legal but illegal acts are usually voided.

17. Counsel submitted that the taking of the applicant's securities would interfere with its rights yet the respondent had not shown the prejudice it would suffer.

ANALYSIS AND DETERMINATION

The issue for determination is if the applicant has satisfied the conditions for grant of an interim injunction.

18. In order for the orders sought to be granted, the applicant has to satisfy this court that it has met the conditions laid out in the case of **Giella vs Cassman Brown and Co. Ltd** [1973] EA 358, which states as follows:-

> ***"The conditions for granting a temporary injunction in East Africa are well known and these are first the applicant must show a prima face case with a probability of success, secondly an interlocutory injunction will not normally be granted unless the applicant might other 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 convenience."***

19. I have read not once, or twice but thrice the supporting affidavit of the applicant but the issue of variation of interest by the 1st respondent has not been deposed to. I have also gone through the plaint but no averment has been made on the issue of variation of interest, without notice being given to the applicant. It is therefore obvious to this court, that the Learned Counsel for the applicant by bringing in the issue for capricious increase of interest rates, was introducing a new issue through her written submissions. The said issue was not pleaded, the applicant is therefore shut out from springing the said submission from nowhere.

20. The 1st respondent in paragraph 4 of its replying affidavit has drawn a schedule of various hire purchase agreements signed between the applicant and the 1st respondent. It also attached some statements of accounts as well as repossession orders. The said statements reflect that the applicant has on a regular basis paid monthly deposits geared towards offsetting the amount due to the 1st respondent. The applicant on its part attached statements of accounts to indicate the payments it has made to the 1st respondent.

21. In the said schedule at paragraph 4, there is agreement No. 1002749862 for "various" units. The identity of the units is not disclosed. The amount being claimed for the said undisclosed units amounts to Kshs. 10,485,576.01. In its affidavit, the 1st respondent in paragraph 5 deposes that the motor vehicles in respect to agreements Nos. 1002749862 and 1002812574 were securities for a commercial loan advanced to the applicant.

22. The 1st respondent's introduction of the commercial loan into this application brought in a different trajectory. This is for the reason that the applicant's plaint and the supporting affidavit revolve around the issue of hire-purchase agreements. That in itself shows that the 1st respondent is not sure footed in its response to the application by the applicant. Having analyzed the annexures to the affidavits filed by the two parties, I am satisfied that the applicant has made out a prima facie case with a probability of success.

23. Ms. Muthee relied the provisions of Section 20 of the Consumer Protection Act which states as follows:-

> ***"(1) Where a consumer under a future performance agreement has paid two - thirds or more of his or her payment obligation as fixed by the agreement, any provision in the agreement, or any such security agreement incidental to the agreement, under which the supplier may retake possession of or resell the goods or services upon default in payment by the consumer is not enforceable except by leave obtained from the High Court.*** (emphasis added).
>
> ***(2) Upon an application for leave under subsection (1), the court may in its discretion, grant leave to the supplier or refuse leave or grant leave upon such terms and conditions as the court considers admissible."***

24. The applicant's deponent in paragraph 2 of his affidavit deposed to the fact that the applicant had paid 75% of the loan facility by the time the repossession orders were issued. In response to the said paragraph, the 1st respondent in paragraph 17 of its affidavit states that in line with the hire purchase agreement entered into by the parties, it has a right to terminate the hiring of goods upon default of payment by the applicant and to repossess the goods. The foregoing response is indicative of the fact that the 1st respondent did not controvert the applicant's assertion that it had paid 75% of the credit facility. It is this court's finding that the foregoing assertion was such a cardinal point in this application and the1st respondent should not have glossed over it.

25. The preamble of the Consumer Protection Act indicates that it is ***"An Act of parliament to provide for the protection of the consumer, prevent unfair trade practices in consumer transactions and to provide for matters connected therewith and incidental thereto."***

26. The provisions of Section 20 of the Consumer Protection Act are aimed at protecting a person or entity such as the applicant which has paid the bulk of the loan advanced to it as it would result in inscrupulous lenders looking for reasons to call off loans when the entire amount is just about to be fully settled. It is the finding of this court that the said provisions are applicable in this instance and that the 1st respondent should have obtained leave of the court before moving to repossess the motor vehicles in issue.

27. The said motor vehicles are used by the applicant in its business enterprise. If all the said vehicles were to be repossessed when such a huge amount has been paid to the respondent, it is evident that the applicant's business would be jeopardized to a position where it may be

unable to recover in future. It is the finding of this court that the applicant is bound to suffer irreparable injury as its business would crumble, yet the outstanding amount is disputed due to lack of full statements of accounts. This is further compounded by the addition of the commercial loan to the amounts owing from the hire purchase agreement.

28. Although the 1st respondent is a bank that has money that it would compensate the applicant with, if the suit was to be successful, some courts have held that orders of an injunction should not merely be granted on the basis of one party having financial muscle over another. In the case of Joseph **Siro Mosioma v HFCK & 3 others, Nairobi HCCC NO. 265 OF 2007 (UR), Warsame J (as he then was) while citing** with approval the case of **Olympic Sports House Limited vs School Equipment Center Ltd [2012] eKLR, stated** as follows:-

> ***"On my part let me restate that damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be substitute for the loss which is occasioned by a clear breach of the law, in any case, the financial strength of a party is not always a factor to refuse an injunction. More so a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction."***

29. The issue of whether or not the provisions of Section 5(1) of the Hire Purchase Act were flouted is a matter for the court to determine at the hearing of the suit. In addition to the submissions made by Counsel on record, I have considered the authorities that were relied on, this court is not in doubt that the applicant is deserving of the orders sought. The result is that the application dated 9th February, 2018 is hereby allowed in its entirety. Costs are awarded to the applicant.

DELIVERED, DATED and SIGNED at MOMBASA on this 12th day of October, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

Ms Ogoti holding brief for Ms Muthee for the plaintiff/applicant

No appearance for the defendant/respondent

Mr. Oliver Musundi - Court Assistant