



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA MOMBASA

CIVIL SUIT NO. 97 OF 2014

TUMAINI TRANSPORT SERVICES CO. LTD.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LTD.....DEFENDANT

RULING

1. This is a ruling on two applications for temporary injunction respectively dated 5/8/14 and 11/8/14. By the first Notice of Motion, the plaintiff sought specific reliefs as follows:

1. **THAT** for reasons to be recorded in writing, the Application herein be certified as urgent and service be dispensed with in the 1st instance.
2. **THAT** pending the hearing and determination of the Application herein, the Defendant be and is hereby restrained by itself, agents, servants or anybody acting on its behalf from selling, auctioning, disposing of, advertising for sale or in any way divesting Motor Vehicle Registration Numbers KBV 734C, KBU 903R & ZE 4151.
3. **THAT** pending the hearing and determination of the suit herein, the Defendant be and is hereby restrained by itself, agents, servants or anybody acting on its behalf from selling, auctioning, disposing of, advertising for sale or in any way divesting Motor Vehicle Registration Numbers KBV 734C, KBU 903R & ZE 4151.
4. **THAT** The defendant be and is hereby ordered to release Motor Vehicle Registration Numbers KBV 734C, KBU 903R & ZE 4151 to the Plaintiff forthwith upon such terms as may be ordered by this Honourable Court pending the hearing and determination of the main suit.
5. **THAT** the Court be pleased to issue any other order or further orders.

The grounds of the said application were set out in the application as follows:

1. Vide Hire Purchase Agreements executed on the 28th of June 2013 vide the provisions of Hire Purchase Act Chapter 507 Laws of Kenya, the Defendant agreed to finance the Plaintiff's acquisition of 2 New Isuzu Prime Movers and 2 New Tippers registered as KBV 734C, KBU 903R & ZE 4151 Respectively.
2. The Hire Purchase price was to be offset by monthly instalments which monthly instalment the plaintiff fell behind in. The Plaintiff was however willing to complete the hire purchase agreement (as is its right under Section 13 (1) (3) (b) of the Hire Purchase Act) but such right and opportunity was clogged by the Defendant.
3. The plaintiff's suit herein seeks determination of whether the Defendant's actions reflected both under the Hire Purchase Agreement and its correspondence acted to deny the Plaintiff of its rights under the Hire Purchase Agreement including the Plaintiff's right to complete the Hire Purchase.
4. Upon the Defendant's instructions, the Defendant's agent (one Ndutumi Auctioneers) repossessed the said Motor Vehicles without absolutely any notice and have purported to slate them for Public Auction on the 8th of August 2014.
5. The Hire Purchase Agreements remain unregistered and hence expressly stipulated as **unenforceable** as against the Plaintiff by the Defendant under the provisions of **Section 5 (4) (a) (b) of the Hire Purchase Act Chapter 507 Laws of Kenya**.
6. The Motor Vehicles are essential for the Plaintiff's fulfillment of a Clinker-transport contract with a cement Company and the

continued detention by the Defendant continues to, and any sale thereof shall render the Plaintiff immense damage and loss.

2. The plaintiff obtained an ex parte order on 6/8/14 but it would appear that the defendant proceeded with the sale of the suit motor vehicles as the plaintiff then filed the Notice of Motion dated 11/8/14 seeking relief as follows:

1. ***THAT*** for reasons to be recorded in writing, the application herein be certified as urgent and be heard ex parte in the 1st instance.
2. ***THAT*** this Honourable court do restrain by way of a temporary injunction the Defendant its agents servants employees from effecting any change of ownership over the Motor Vehicle Registration Numbers KBV 734C, KBU 903R & ZE 4151 pending the hearing and determination of this Application.
3. ***THAT*** this Honourable Court do restrain by way of a temporary injunction the Defendant its agents servants employees from effecting any change of ownership over the Motor Vehicle Registration Numbers KBV 734C, KBU 903R & ZE 4151 pending the hearing and determination of this suit.
4. ***THAT*** an order restraining the Plaintiff's Agents' servants, employees, and/or assigns from removing Motor Vehicle Registration Numbers KBV 734c, KBU 903R & ZE 4151 from Makupa Garage or from in any way parting with possession with the aforesaid motor vehicles.
5. ***THAT*** this Honourable Court do order that the purported Sale by way of Public Auction that occurred on the 8th August 2014 over the Motor Vehicle Registration Numbers KBV 734C, KBU 903R & ZE 4151 be declared null and void and be stayed pending the hearing and determination of this Application.
6. ***THAT*** this Honourable Court do Order that the purported Sale by way of Public Auction that occurred on the 8th August 2014 over the Motor Vehicle Registration Numbers KBV 734C, KBU 903R & ZE 4151 be declared null and void and be stayed pending the hearing and determination of this suit.
7. ***THAT*** costs be provided for.

The grounds of the said application were as follows:

- a. ***THAT*** on the 6th of August 2014, this Honourable Court granted the Plaintiff an Order restraining the Defendant from proceeding with an auction slated for the 8th August 2014 at 10.30 a.m to be held at Makupa Garage where the subject motor vehicles were being stored.
- b. ***THAT*** a Formal copy of the Order had not been issued by this Honourable Court by the morning of the auction. Nonetheless the Plaintiff instructed a process server to bring notice of the Order to the Defendant's agents. The Defendant's agents were served with;
 - i. A copy of the Handwritten Notes of the Honourable Judge granting the Order.
 - ii. A draft of the Order itself.
 - iii. A copy of the Pleadings.
 - iv. A copy of the Plaintiff's Advocates Letter.
- c. ***THAT*** in complete contravention of Section 23 (a) of the Auctioneers Act when the Plaintiff's process server together with a representative of the Plaintiff's Advocates office proceeded to the offices of the Auctioneer before the advertised time of the Auction they found the same to be non existent.
- d. When the Plaintiff's process server together with a representative of the Plaintiff's Advocate arrived at the venue of the auction and were kept outside of the Auction venue until 11.15 am when they were informed that the alleged Auction had already taken place and was concluded at 10.45 am.
- e. ***THAT*** the knowledge of the existence of an Order is as valid as the existence of the Formal Order.
- f. ***THAT*** the motor Vehicles were still at the venue and no public auction appeared to be taking place at the stipulated time or at all.
- g. ***THAT*** there is a real likelihood that the Defendants agents shall remove the motor vehicles from the Makupa Garage and/or out of the jurisdiction of this Honourable Court to defeat this Honourable Courts Orders and hence defeat the Plaintiff's claim.
- h. ***THAT*** in the premises this Honourable Court ought to direct that the Defendant and its agents from removing the subject properties from the Makupa Garage pending the hearing and determination of the Plaintiff's Application.

3. In response to the applications the defendant filed a replying Affidavit sworn by its Branch Manager, Cyrus B. Omwansa on 9/10/14 setting out its defence to the cause of action, principally in paragraph 2-23 thereof, as follows:

2. *“THAT I have had opportunity to study the Plaintiff’s application by way of Notice of Motion dated 5.08.2014 and 11.8.2014 and I have received legal advice thereon from Mr. Paul Munya Advocate for the Defendant.*

3. *THAT the plaintiff has admitted the following matters:*

a) *That the plaintiff obtained a loan facility from the Defendant for the purchase of the suit motor vehicles.*

b) *That the loan facility was secured by way of the suit motor vehicles which were duly registered in the joint name of the plaintiff and the defendant.*

c) *That the plaintiff defaulted in repaying the loan and fell in arrears of its repayment obligations.*

d) *That the defendant repossessed the suit motor vehicles in exercise of its rights under the hire purchase agreement.*

4. *THAT the main prayer in the Plaintiff’s plaint is a prayer for damages for conversion. I am advised by the defendant’s Counsel that the nature of a hire purchase contract is such that ownership of the goods does not move to the hirer until the final installment of the purchase price is paid. As such, the Plaintiff’s claim for conversion has no basis in law and in fact.*

5. *THAT the plaintiff’s entire suit and Notice of Motion Application are premised on the ground that the hire purchase agreement between the Plaintiff and the defendant is governed by the provisions of the Hire Purchase Act Chapter 507 Laws of Kenya.*

6. *THAT I am advised by the defendant’s Counsel Paul Munyao that the hire purchase agreement executed between the plaintiff and the defendant is not governed by the provisions of the Hire Purchase act, and as such the plaintiff’s suit and application is misconceived.*

7. *THAT by a letter of offer dated 27th June 2013 the Plaintiff obtained an asset finance loan facility for total sum of Ksh.18,320,00/= from the Defendant under a Hire Purchase Agreement dated 27.7.2013 to purchase 2 new Mercedes Benz Prime Movers and 2 New Tippers. I annex a letter of offer dated 27.06.2013 marked as “CBO-1”*

8. *THAT the asset finance loan facility was secured by way of the said 2 new Mercedes Benz Prime Movers Registration number KBU 903 R and KBV 734C as well as the 2 new Tippers Registration number ZE 4152 and ZE 4151 and the said assets were registered in the joint names of the Plaintiff and the Defendant. I annex hereto and mark CBO 2 and copy of the Hire Purchase Agreement executed on 27.07.2013 and copies of the logbooks for the motor vehicles.*

9. *THAT the Hire Purchase Agreements were duly registered on 28.08.2013. I attach hereto and mark CBO 4 a copy of the Certificates of Registration.*

10. *That, as admitted, the Plaintiff defaulted in repayment and/or servicing the said asset financed loan facility in breach of the conditions of the said Hire Purchase Agreement and Facility and the defendant issued the plaintiff with demands to regularize his account. I annex hereto demand letters served upon the plaintiff and mark them as “CBO-5”*

11. *THAT the Plaintiff has expressly admitted that the loan was not serviced, that there was and there remains a default on the loan repayment.*

12. *THAT under the terms of the hire purchase agreement, the defendant was entitled to repossess the suit motor vehicles from the defendant without notice in the event of default and breach of the agreement.*

13. *THAT I confirm that on 6.03.2014 the Plaintiff wrote to the Defendant and admitted its default position and pledged to regularize the account which it has not done to date. I annex hereto and mark CBO 6 the plaintiff’s letter dated 6.03.2014.*

14. *THAT owing to default on the part of the plaintiff, the Defendant became entitled to exercise their right to repossess the suit motor vehicles in an effort to recover the loan amount.*

15. *THAT on or about 16.04.2014 the Defendant instructed, M/S. Ndutumi Auctioneers to repossess and sell the Plaintiff’s motor vehicles registration nos. KBU 903R, KBV 734C, ZE 4152 all registered in the joint names of the Plaintiff and the Defendant. I annex copy of the letter of instruction dated 16.04.2014 marked as “CBO-7”.*

16. *THAT on 16.04.2014, Ms. Ndutumi Auctioneers served upon the Plaintiff a Proclamation of Sale of Movable Property proclaiming motor vehicles registration number KBU 903r, KBV 734C, Trailer Number ZE 4151 and ZE 4152. I annex hereto and mark “CBO-8” a copy of the proclamation notice dated 16.04.2014.*

17. *THAT the Plaintiff failed to regularize its loan account and the Bank’s auctioneers reposed motor vehicle registration number KBU 903R on 24.4.2014.*

18. THAT upon repossession of the said motor vehicles and Trailer, a sale by Public Auction was advertised in the Daily Nation of 30.06.2014 AT 10.30am at NEO MAKUPA GARAGE. I annex a copy of the newspaper advertisement marked as “CBO-9”.

19. THAT on 08.08.2014 at 10.30am, the Public Auction was conducted at the premises of Neo Makupa Garage where motor vehicles KBU 903R and KBV734C attracted bids and were sold to the highest bidder one Mr. Hassan Mohamed Hassan at Ksh. 2,170,000/= respectively and the auction was sully concluded at 10:45am. Motor Vehicle/trailer ZE 4152 did not attract any bids. I annex a true copy of the Memorandum of Sale issued by Ndutumi Auctioneers dated 08.08.2014 marked as “CBO-10” and the auctioneer’s affidavit marked as “CBO-11”.

20. THAT I am informed by the Defendant’s auctioneer, one LEONARD JOSEPH WANJOGU T/A NDUTUMI AUCTIONEERS which information I believe to be true that he was served with this Honourable Court’s handwritten proceedings on 08.08.2014 at 11.15 am, half an hour after he had sold the subject motor vehicles, purporting to notify him of stay orders stopping the auction and which he dully received ‘under protest’ as the Public Auction had already taken place and concluded at 10.45 a.m., where the said motor vehicles had already been sold to an innocent 3rd party for value.

21. THAT on 13.08.2014, the Defendant was served with a Court Order dated 06.08.2014 issued on 08.08.2014 purporting to stop the auction and a letter dated 12.08.2014 from the Plaintiff’s advocates. This was five (5) clear days after the auction had already been conducted on 08.08.2014. I annex a copy of the order marked as “CBO-12”.

22. THAT the Defendant was served with another Court order dated 11.08.2014 and issued on 14.08.2014 on the 15.08.2014 stopping the lawful transfer of the above motor vehicles to the rightful new owner as per the Memorandum of Sale. I annex a copy of the Order marked as “CBO-13”.

23. THAT therefore the Plaintiff delayed in serving the orders of the Court and by the time the Plaintiff served the Court order upon the Bank and the Auctioneer, the suit motor vehicles and already been sold by Public Auction.”

4. Counsel for the plaintiff and for the defendant thereafter filed written submissions respectively dated 23/3/15 and 18/3/15.

5. In determining the application for temporary injunction pending trial, the court must consider whether plaintiff has prima facie or arguable case and whether damages would be adequate relief, and if in doubt whether the balance of convenience justify the grant of the interlocutory injunction. See *Giella v. Cassman Brown* (1973) EA 358.

Prima facie case

6. The plaintiff’s case has failed to establish a *prima facie* or arguable case for principally two (2) reasons. First, the only substantive relief sought in the Plaintiff dated 5/8/14 is a prayer for General Damages for conversion clearly indicating that an award of damages, even in the eyes of the plaintiff, would be adequate compensation for the damage alleged in the plaint. How would such a suit then support an application for interlocutory injunction to restrain sale of the motor vehicles?

7. The fact of the repossession of the motor vehicles and thereafter sale is specifically pleaded at paragraphs 7 and 8 of the plaint as follows:

“7. The plaintiff signified its intention to complete the Hire Purchase Agreement and as it was in the process of so doing, the defendant reduced the notice period initially issued and, without further notice, repossessed the motor vehicles thereupon and has threatened to auction off the same.

8. The plaintiff’s claim against the Defendant Company is for the loss and damage occasioned by the Defendant encumbering and clogging the plaintiff’s right to complete the Hire Purchase Agreement which right is secured in favour of the plaintiff under section 13 (1) (3) (b) of the Hire Purchase Act chapter 507 laws of Kenya.”

No prayer for the return of the vehicles or for injunction against the imminent sale thereof was made in the Plaintiff. I would consider that on the basis of the pleadings for damages for conversion without any prayer for injunction to prevent sale of the vehicles or restoration of possession, the plaintiff’s plaint does not establish a *prima facie* basis for the grant of the interlocutory motion for injunction.

8. Secondly, the plaintiff’s case does not appear to be properly founded on the provisions of the Hire Purchase Act on the right to complete under section 13 (3) (b) thereof. On the case law authority of *Taawawa Supermarket Ltd v. Fina Bank Ltd* (2010) eKLR and *Trust Bank Kenya Ltd (Formerly Diamond Trust of Kenya Limited) v. Jaswinder Signh Enterprises* (1999) eKLR, the Hire Purchase Act does not apply to body corporates such as the plaintiff. See also section 3 of the Act. The right to complete under section 13 (3) (b) of the Act pleaded by the plaintiff in its plaint is, therefore, not available to the company and it is, consequently, non-suited for purposes of a cause of action upon which the prayer for injunction may be founded. Owuor, JA in the *Trust Bank* case discussed the object of the Act admirably as follows:

“The Act does not apply where the hirer is a body corporate. Our Act is drawn from the English Statute of 1965. The English Act expressly provides that it does not apply to agreements where the hirer is a body corporate. The reason for this is that body corporates are deemed to be sophisticated enough when entering into commercial transactions and therefore with more bargaining power. The Act is instead meant to provide statutory protection to hirers who are individual traders from exploitation by hire-purchase companies.

In Kenya situation, the Act was meant to protect, as it should, the small man or woman who goes to buy the common household goods eg. A bicycle, television e.t.c. Indeed that is why a monetary limitation was placed on the applicability of the Act.”

9. In addition, even of the right to complete under the Hire Purchase Act applied, there was no evidence of payment or tender of the balance of the purchase dues, as required by section 13 (3) (b) of the Act. The plaintiff's claim of denial or clogging of the right to complete would appear to be unfounded on the evidence.

10. On the question of balance of convenience, there is no dispute that there was a sale of the vehicles, the issue is whether the sale was done at the appropriate time and whether the defendant's auctioneer had knowledge of the court order restraining the sale. Such are matters for determination by the trial court upon evidence. However, if the sale was wrongful, the loss and damage to the plaintiff may, as held above, adequately be compensated by an award of damages.

11. Moreover, the plaintiff admits that it defaulted in payment of its hire purchase installments and the defendant bank was within its right under the Hire Purchase Agreement to repossess the vehicles in accordance with the Hire purchase Agreements. The balance of convenience clearly lies in upholding the contracts of Hire Purchase between the Plaintiff and the Defendant.

12. Finally, the purchasers of the vehicle at the public auction or private treaty, as alleged by the plaintiff, and who have acquired title to the vehicles were not joined as parties to the suits, and the application for injunction is to extent that the motor vehicles were already sold, rightly or wrongly, overtaken by events.

Orders

13. Accordingly, for the reasons set out above, the two applications for injunction herein are dismissed.

14. Costs in the cause.

Order accordingly

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 11TH DAY OF OCTOBER 2018.

E.K. OGOLA

JUDGE

Appearances

M/s Khaminwa & Khaminwa, Advocates for the Plaintiff

M/s Munyao Muthama & Kashindi, Advocates for the Defendant