



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 112 OF 2016

SHIVA CARRIERS LTD.....PLAINTIFF

VERSUS

1. IMPERIAL BANK LIMITED

2. KINYUA & CO. AUCTIONEERS.....DEFENDANT

R U L I N G

1. On 26/6/2018, counsel attended court to highlight the submissions filed but owing to workload the same was stood over to the 29/8/2018. The submissions to be highlighted concerned the application dated 15/11/2016 and were respectively filed on the 30/6/2017 by the plaintiff and on the 27/3/2017 by the defendant.

2. The Application sought orders that the Notice to repossess, sell, alienate and intimidation of the plaintiff with sale be restrained and an injunction pending hearing of the application and suit and for orders that the defendant/respondent be compelled to furnish the plaintiff/applicant with audited statement of accounts of the arrears and valuation reports together with release of all log books not forming part of the finance fleet.

3. The application was supported by the Affidavit of one SAM MACHIO which basically reiterated the grounds upon which the application is based. Those grounds are that the defendant intends illegitimately repossess and sell the plaintiff's property over and above the 10 motor vehicles purchased pursuant to a hire purchase agreement entered into in or about 2013. The salient terms of that agreement were that the total facility was Kshs.58,007,250/= for a period of 36 months on agreed interest rates and instalments.

4. It was a further ground that the plaintiff strived to meet the terms despite harsh economic times till October 2015 when the plaintiff suffered huge financial arises and the defendant was placed under receivership but the plaintiff had paid about 67% of the sum due.

5. As a consequence of the said difficulties the defendant demanded from the plaintiff payment of the sum then due which demand initiated correspondence and meetings by which the plaintiff proposed to settle the sum by financial assistance from the Diamond Trust Bank on condition that the logbooks are released unconditionally but before the final position could be communicated to the plaintiff the 2nd defendant was instructed to repossess 30 vehicles belonging to the plaintiff to recover some disputed balance of Kshs.41,810,384.71.

6. To the plaintiff that action was rush and unjustified because 20 out of the 30 vehicles proclaimed had been paid for in full but the logbook remained with the 1st defendant. The plaintiff then contends that it is willing and prepared to pay the sum due upon reconciliation of the books and even to surrender the 10 vehicles which have not been paid for in full.

7. For those reasons, the plaintiff contended that its rights had been and would continue to be violated and breached unless the orders sought were granted. The application was supported by the Affidavit of SAM MWACHIO, as aforesaid, which annexed and exhibited proclamations, valuation reports, the letter of offer for the facility duly signed and schedule for repayment of the facility.

8. When served with the Application, the defendant filed grounds of opposition which contended that this court lacks jurisdiction to entertain the matter that the suit as framed is bad in law and a candidate of being struck out and that even if the court had the requisite jurisdiction no injunction should issue as the plaintiff has admitted the debt and has failed to demonstrate the pre-requisites of grant of an injunction.

9. Both parties filed written submissions although on the date set for highlighting those submissions only the plaintiff/applicant attended and the matter proceeded the court having taken note that the date was taken by consent and the defendant had filed written submissions.

Submissions by the Applicant

10. Having set out the facts, the plaintiff set out issues for determination to be:-

- Whether the court is clothed with jurisdiction?
- Whether the pre-requisites of grant of an injunction have been met who should pay the costs.

11. On lack of jurisdiction anchored on Section 46(1) of the Kenya Deposit Insurance Act, the plaintiff contends that the Act does not insulate the corporation from suits where it violates the law or its mandate; that the corporation has not been sued and that the Act does not provide avenue for dispute resolution and therefore may be seen to defeat access to justice if construed in the manner proposed by the defendant.

12. On whether there is demonstrated an arguable case, counsel made submissions that the defendant improperly exercise its rights to vary interests and charged a rate higher than the contractual rate and unknown to the plaintiff and without notice. On that account the decision in **Francis J. Kamau/Chatha vs HFCK [2014] eKLR** was cited to court for the proposition that where there is variation of interest rate without notice the client has a prima facie case for such act being unlawful. The plaintiff then made reliance upon the provisions of the consumer protection Act in particular Section 61-66 to the effect that the bank did not meet its obligations to the plaintiff under that law.

13. Reliance was then placed on the decision in **Givan Okalo Ingari vs HFCK [2007] 2 KLR 232** for the proposition that charges and interests debited into a customers account without his consent and outside the contractual terms were a hindrance and fetter to the performance by the borrower of his part of the bargain, were inequitable and therefore a clog on the equity of redemption.

14. On whether damages would be an adequate remedy, counsel took the view that to allow the defendant proceed with recovery of the improperly imposed obligation would to bless illegal acts by the defendant. For those reasons, the plaintiff contended that it is entitled to the injunction sought together with costs.

Submissions by the defendant

15. For the defendant written submissions were offered to the effect

that the court lacks jurisdiction to entertain the suit on the basis of the provisions of Section 46 Kenya Deposit Insurance Act and cited to court the words of that provision as well as the decided case of **owners of motor vessel Lilian "s" vs Caltex Oil (k) the 1989 KLR** for the proposition that where the court has no jurisdiction it downs its tools.

16. On the merits it was contended that the plaintiff has admitted the debt and therefore no injunction can issue to him because he has come to court with unclean hands. The decisions in **Al-jalal Enterprises Ltd vs Gulf Africa Bank Ltd [2014] eKLR**, **Morris & Co. Ltd vs KCB (2003) eKLR** and **Bii vs KCB [2001] KLR 458** for the proposition that failure to pay a debt due and the dispute as to the sum due are not a basis to grant an injunction and that a property offered as Security becomes a commodity for sale hence can be compensated by damages.

17. The defendant equally cited to court the decision by Emukule J, in **Daniel Ndege Ndirangu vs Barclays Bank (K) Ltd** for the proposition that where a property is charged, damages are foreseeable and that of **Kenya Breweries Ltd vs Washington Okeyo [2002] eKLR**, for the proposition that an injunction will not issue in favour of a party who has breached a contract. It was equally submitted that the court should observe the restraint from seeking to re-write a contract between the parties with two decisions being cited; **NBK vs Pipeplastic SomKolit (K) Ltd** and **Fina Bank Ltd vs Spares of Industries Ltd [2001] eKLR** for the proposition that parties are bound by terms of their contract and that it is not part of equity's duty to relieve a party from a bad bargain in all circumstances.

18. On whether the plaintiff had met the thresholds for grant of an Injunction submissions were made with a stress that no prima facie case has been demonstrated as the debt remain unpaid and lastly that the assets being shielded have known values and damages would be adequate compensation hence even the balance convenience tilts in favour of the sale being allowed to proceed.

19. Importantly though, the defendant steered clear from the provisions of the Consumer Protection Act and its application to the dispute at hand.

Issues for determination

20. A perusal of the pleadings filed together with the papers filed with the application and in opposition to it, at this juncture, sieve only two issues for determination; *whether or not the court has jurisdiction and if the plaintiff is entitled to an order of a temporary injunction pending determination of the suit.*

Analysis and determination

21. As pleaded the suit faults the defendant for seeking to sell the property financed by it pursuant to asset finance together with others not so financed. The complainant seems to be that the defendants are seeking to reposses vehicles including those not financed and registered in joint names. It is that dispute the defendant contends is outside the jurisdiction of this court because Section 46 of Kenya Deposit Insurance Act says no injunction can issue against the defendant. That provision cited says:-

“Actions against the Corporation

(1) Where the Corporation or the appointed person, as the case may be, has assumed control of an institution under [section](#)

44(2)(b)—

(a) no injunction may be brought or any other action or civil proceeding commenced against the Corporation or the appointed person in respect of the assumption of control;

(b) no creditor has any right of set-off against the institution, which for greater certainty, does not include the consolidation of accounts maintained in the normal course for the purpose of providing clearing and settlement services or other services referred to in section 48; and

(c) no person may terminate or amend any agreement with the institution or claim an accelerated payment under any such agreement with the institution by reason only of—

(i) the insolvency of the institution;

(ii) a default, before the assumption of control under section 44(2)(b) by the Corporation or the appointed person, as the case may be, takes effect, by the institution in the performance of its obligations under the agreement; or

(iii) assumption of control under section 44(2)(b) by the Corporation or the appointed person, as the case may be, as from the date of the assumption of control of the institution.

(2) Subsection (1) shall not prevent any person who sustains losses from any action of the Corporation or the appointed person from instituting an action for damages for the losses suffered by such person.

(3) Notwithstanding any action instituted pursuant to subsection (2), the Corporation or the appointed person shall continue to exercise any or all of its powers under this Act”.

22. My reading of the provision, beyond subsection 1 cited by the defendant, is that it does not exclude court’s jurisdiction to entertain and determine any suit against the corporation. I construe the provision to only bar the court from entertaining a suit and issuing orders of injunction to interfere with the assumption of control of the affected institution and no more. The provision however allows the institution of suits by any person for recovery of damages occasioned by actions of the corporation or the appointed person.

23. The suit before me is a suit not resisting the taking over of the control by the corporation or the appointed person. All the suit seeks is a determination of the question whether the sum claimed by the institution now under receivership is accurately due. I do not agree that the court’s jurisdiction for the cause of action pleaded has been ousted.

24. For a provision of a statute to be construed to oust the jurisdiction of the High Court, the law is that the intention to oust must be clear and meriting no elaborate arguments. In the case of *Standard Ltd & 2 Others vs Christopher Ndorathi Murugaru [2016] eKLR*, the Court of Appeal said of jurisdiction:-

“...an ouster clause in clear, firm and unequivocal language will be given effect subject to satisfying a number of considerations”.

24. In coming to that conclusion the Court of Appeal was guided by the decision of Supreme Court in *Judges and Magistrates vetting Board vs the Centre for Human Rights & Democracy S.C. Petition No. 13A, 14 & 15 of 2013*, where the court observed that ouster clauses must be interpreted and construed strictly because they had the effect of curtailing the jurisdiction of the court and render the relevant matter non-justiciable before the courts.

25. Being guided by those decisions, I do find that there is no clear, firm and unequivocal language in Section 46 or indeed any other provision in the Kenya Deposit Insurance Act that ousts the jurisdiction of the court in this matter. Consequently the objection lacks merit and the same is dismissed.

Has the plaintiff met the threshold for grant of temporary injunction?

26. While the tests set in *Giella vs Casman Brown [1973] E A 358*, remain the yardstick for considerations of an injunction pending suit, it is also true that those considerations must be applied to the facts of each case. The question to be asked always is whether the plaintiff has demonstrated that the defendant has threatened to violate or has in fact violated a legal right and intends to perpetuate the violation. I understand the principles to ask the question whether there is a right that is open to violation unless the injunction be granted.

27. Here the plaintiff says the defendant intends to repossess some 30 motor vehicle yet the only document shown to found the contract between the parties relates to the finance and purchase of some 10 motor vehicle. There is no attempt by the defendant to show that more than 10 motor vehicles were financed or otherwise pledged to the defendant and therefore are liable to repossession upon default.

28. There is also the allegation by the plaintiff that the defendant failed in its obligations to the plaintiff pursuant to the provisions of the consumer protection Act as far as disclosures are concerned. That charge has not been answered at all by the defendant. One needs not isolate more issues to demonstrate a prima facie case. Even one issue is enough if on it a tribunal or judicial mind properly directing itself can conclude that there is a right that apparently, on the basis of materials presented, has been infringed. In *Mrao Ltd vs First American Bank of Kenya Ltd [2003] eKLR*, the Court of Appeal gave this determination of a prima facie case which I find myself bound to follow:-

“...In civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exist a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

29. I am convinced that the two issues I have isolated above sufficiently demonstrate a prima facie case that at trial the defendant will need a chance to explain. That need for an explanation is enough for a court to say that let the status quo now prevailing be maintained by way of a temporary injunction pending such explanation at the hearing and determination after the explanation.

30. Once a plaintiff demonstrates a prima facie case, I do think that the second requirement as to inquiry if damages would be an adequate remedy need not necessarily be a major consideration in all cases. Like in this case, can be acceptable that merely because the defendant financed the plaintiff in the purchase of some 10 vehicles which were then registered into joint names, the defendant then accrued all and every right to the plaintiffs' other assets without such being made property of the defendant as to entitle it to the right to repossess? I do not think so. Even if the defendant was to maintain that the sale of the financed assets were not realize its full debt, it cannot just seek to repossess what does not belong to it.

31. Repossession as opposed to attachment must be seen for what it is - regaining possession of what lawfully belongs to the person seeking to so regain. Where there is no legal title, the creditor has to sue for recovery and not just take away the debtors property at will. That would be arbitrary and fly in the face of due process and right to be heard.

32. To say that in such situation the defendant should be allowed to employ the law of the jungle merely because it shall pay damages is not to this court the way a civilized society should work. It would fly in the face of the law guaranteeing equal treatment before the law because every party able to pay damages would be free to infringe on others rights and proclaim the financial ability to pay. In the *Victoria Pumps Ltd vs Kenya Ports Authority and 4 Others [2015] eKLR*, the court said:-

“In those circumstances I find that the plaintiffs loss as far it touches on his right to be heard goes to the very root of administration of justice and that the defendant or any them ought not to be allowed to disregard the law with abandon merely because they are capable of paying damages. To me that would create a situation and state where the financially strong would be above the rule of law merely by courtesy of their ability to pay damages. That to me would ran affront the provisions of Article 27 of the Constitution. I therefore find and hold that the plaintiff's injury in this regard would be incapable of adequate compensation by an award of damages”.

33. But, here the defendant has been placed under receivership. I do appreciate the law under the companies Act, the general insolvency provisions and even the Kenya Deposit Insurance Act to be that an institution can only be placed under receivership when it is not able to conduct its financial affairs properly. With that in mind, while the receivership by the Kenya Deposit Insurance Corporation remain in place, can it be said that the defendant is solid and able to pay any damages once the suit is over and in event the suit succeeds? I do not see such certainty here.

34. For the foregoing reasons, I do find that on the material availed the plaintiff is entitled to an order of injunction against the defendant and restraining it from repossessing, seizing, selling or disposing any of the listed motor vehicles in the documents “DS-1” pending the hearing and determination of the suit.

35. I however decline to issue the other orders sought for I think and hold the view that once I give the injunctions as to preserve the substratum of the dispute, the rest of the issues are due for determination upon tender of evidence.

36. I award the costs of the application to the plaintiff.

Dated and Delivered at Mombasa this 2nd day of November 2018.

P.J.O. OTIENO

JUDGE