



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 353 OF 2016

JAMES BICHAGE KENYARIRI.....PLAINTIFF

-VERSUS-

CFC STANBIC BANK LIMITED.....DEFENDANT

RULING

[1] The Plaintiff, **James Bichage Kenyariri**, filed the Notice of Motion dated **24 August 2016** on **30 August 2016** under Certificate of Urgency pursuant to **Sections 1A, 1B and 3A of the Civil Procedure Act** and **Order 40 Rules 1, 2, 3 and 4** as read with **Order 51 Rule 1** of the **Civil Procedure Rules, 2010**, and the orders sought thereby are:

1) Spent

2) Spent

3) That the Court be pleased to grant an injunction restraining the Defendant and/or its agents from repossessing Scania Bus Registration Number KBY 877L pending the hearing and final determination of the suit herein.

4) THAT cost of this application be provided for.

[2] The grounds relied on in support of the application are set out in the affidavit sworn by the Plaintiff on **29 August 2016**, namely, that the Plaintiff obtained a loan from the Defendant to enable him purchase the bus aforementioned. The loan was to be repaid within a period of 36 months in instalments of **Kshs. 307,103.77** per month. The Plaintiff averred that he dutifully paid the instalments as and when due until the 14th month when he noticed from the Statements of Account that the amount of the instalments had inexplicably increased to **Kshs. 324,844.10**.

[3] It was the contention of the Plaintiff that his attempts to have an explanation from the Defendant as to why this sudden change have been to no avail, adding that this unilateral increment has caused a strain on his finances and adversely affected his payment capacity, with the result that he fell into arrears in his repayment schedule. It was further averred by the Plaintiff that it was this situation that precipitated an attempt by the Defendant, through **Keysian Auctioneers**, to have the bus repossessed on the **24 August 2016**; but because he had just made a payment of **Kshs. 255,000** towards reducing the loan account, the repossession did not take place. He thus pitched the argument that the amount owing is negligible, and that

he stood to suffer greater harm were the bus to be repossessed and sold off; hence his prayer that the Defendant be accordingly restrained pending the hearing and determination of the dispute between them.

[4] The Defendant responded to the application vide the affidavit sworn by its Legal Recoveries Officer, **Grace Mugo**, in which it was confirmed that the Defendant provided the Plaintiff with a facility of **Kshs. 12,479,177** for the purchase of the subject bus, which was subsequently registered at **KBY 877L**. It was averred that the Plaintiff made a down payment of **Kshs. 3,743,824** and that the balance was to be paid in 35 instalments of **Kshs. 307,104**, and 1 instalment of **Kshs. 310,104**, inclusive of interest. The Defendant further contended that, on the **10 July 2015**, the Plaintiff was given prior information of the change in the interest rate from 8.54% to 9.87 due to the increase in interest rates in Kenya; and that as a result of the change, the monthly instalment henceforth rose from **Kshs. 307,103.77** to **Kshs. 323,751.39** per month.

[5] According to the Defendant, the Plaintiff serviced his loan satisfactorily but ran into arrears in the course of time and was in arrears of **Kshs. 467,819.56** as at **1st September 2016**. At that point in time, the total outstanding balance of loan stood at **Kshs. 2,870,601.19**. It was thus the Defendant's contention that it was, in the circumstances, entitled to repossess the bus in accordance with **Clause 5** of the Hire Purchase Agreement; for which reason the Court was urged to dismiss the instant application with costs.

[6] The Court has carefully considered the application, the affidavits filed in respect thereof as well as the written submissions filed herein by Learned Counsel. There is no dispute that the Plaintiff did obtain a facility from the Defendant for the purchase of the subject bus, or that he serviced the loan well until around the time that the Defendant increased the monthly instalments from **Kshs. 307,103.77** to **Kshs. 324,844.10** when the account began to build up some arrears. While the Plaintiff contends that this increase of interest was unilateral and oppressive to him, the Defendant on the other hand argued that the increase was necessitated by the prevailing economic realities of the time and had been provided for in the Hire Purchase Finance Agreement.

[7] The application was brought under **Order 40 Rules 1, 2, 3 and 4 of the Civil Procedure Rules, and Rule 1 thereof** provides thus:

"Where in any suit it is proved by affidavit or otherwise--

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders."

[8] The Plaintiff has shown that the bus that is the subject of this suit is in danger of being alienated by way of repossession and sale by the Defendant; a fact that the Defendant admitted, though it contends the repossession and sale is in accord with the parties Hire Purchase Agreement. The Plaintiff further contends that the impending repossession and sale would amount to breach of contract on the part of the Defendant, for the reason that it is in respect of sums not envisaged by the parties' contract. Accordingly, the Court must now determine whether the Applicant has satisfied the conditions set out in the case of **Giella Vs Cassman Brown & Co. Ltd [1973] EA 358**, namely:

[a] That it has a prima facie case with a probability of success.

[b] That it stands to suffer irreparable injury which would not adequately be compensated by an award of damages unless a temporary injunction is granted in the interim.

[c] That the balance of convenience is in its favour.

[9] The Plaintiff in his written submissions filed herein on **27 October 2016** placed reliance on **Section 15(1) of the Hire Purchase Act, Chapter 507 of the Laws of Kenya**, and posited that, having reduced the loan from **Kshs. 10,000,000** or thereabouts to **Kshs. 2,000,000**, the Defendant had no right to repossession, and could only sue for recovery of the balance. The provision aforementioned reads:

"Where the goods have let under hire purchase agreement and two thirds of the hire purchase price has been paid, whether in pursuance of the agreement or of a judgment or otherwise, or has been tendered by or on behalf of the hirer or a guarantor, the owner shall not enforce any right to recover possession of the goods from the hirer otherwise than by suit."

[10] I would agree with the Defendant that the Plaintiff cannot find succor in the aforementioned provision granted the **Hire Purchase Act** was intended to regulate only certain hire purchase agreements, but not all; for instance, **Section 3(1)** thereof provides that:

"This Act applies to and in respect of all hire-purchase agreements entered into after the commencement of this Act under which the hire purchase price does not exceed the sum of four million shillings or such other higher or lower sum as the Minister may after taking into account market forces from time to time prevailing, prescribe other than a hire purchase agreement in which the hirer is a body corporate..."

It is manifest that since the agreement herein falls outside the ambit of the **Hire Purchase Act**, the Plaintiff's argument pertaining to **Section 15** of the **Hire Purchase Act** is untenable.

[11] As to the Plaintiff's argument that the Defendant's unilaterally increased the interest rate applicable, it is noteworthy that in the Defendant's Letter of Offer dated **17 February 2014**, it was made clear that one of the terms of the agreement would be that the Bank reserved the right to vary interest charges, at its sole discretion and at any time during the tenure of the loan. Moreover, in the Hire Purchase Agreement dated **31 March 2014**, the Defendant specifically agreed to pay interest at the agreed rate or such higher rates as the Defendant would determine, for **Clause 2(c)** thereof states:

"The Hirer agrees;

...

To pay interest at the rate of B + 1% per annum flat/reducing or at such other rates per annum as the Owners shall determine in their sole discretion from time to time, which shall be calculated on the basis of a 360 day year and shall accrue from day to day. The interest rate shall be determined by the Owners and shall be final, conclusive and binding upon the Hirer."

[12] It may now seem iniquitous, from the Plaintiff's standpoint, for the Defendant to seek to repossess the motor vehicle, having been paid over **Kshs. 10,000,000** of the purchase price, with only **Kshs. 2,000,000** to go. But the fact is, the Defendant is merely out to enforce the terms of their engagement. In the case of **Fina Bank Ltd vs Spares & Industries Ltd [2000] eKLR**, the Court of Appeal reiterated the oft-repeated principle that where a party has a statutory right of action, the Court will not usually prevent that right being exercised unless the right is being exercised oppressively. There is no indication herein that the Defendant went about the attempted repossession in an oppressive manner.

[13] Thus, the Court is far from convinced that the Plaintiff has made out a prima facie case in the sense explicated in **Mrao Limited Vs First American Bank Of Kenya Limited & 2 Others [2003]eKLR**. In that case the Court had this to say with regard to what amounts to a prima facie case;

"...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 exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter...a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case."

[13] The foregoing being my view of the matter, I find it superfluous to consider whether the Plaintiff risks suffering irreparable harm, or on which side the balance of convenience falls, granted that the 3 conditions set out in **the Giella Case** are sequential and are to be applied as separate distinct and logical hurdles, as elucidated in the Case of **Nguruman Limited Vs Jan Bonde Nielsen & Others [2014] eKLR** thus:

"It is established that all the above three conditions and stages are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially...if prima facie case is not established, then irreparable injury and balance of convenience need no consideration..."

[14] Given the facts of this case, I have no hesitation in endorsing the observations made by **Lenaola, J** (as he then was) in **Jopa Villas LLC vs Overseas Private Investment Corporation & 2 Others [2009] eKLR** thus:

"...the Applicant is running away from the obligations lawfully imposed and with its knowledge and participation. Courts should not aid it in that quest but will instead uphold the rights of the 1st Defendant to recover the monies lawfully advanced... Our Courts must uphold the sanctity of lawful commercial transactions..."

[15] The foregoing being my view of the matter, I would dismiss the Plaintiff's Notice of Motion dated **29 August 2016** with costs.

Orders accordingly.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF JANUARY 2017

OLGA SEWE

JUDGE