



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 14 OF 2016**

**JACKTON WIYEMA IMBWA.....APPELLANT**

**VERSUS**

**1. JAMII BORA BANK LTD.....1<sup>ST</sup> RESPONDENT**

**2. MUGANDA WASULWA T/A KEYSIAN AUCTIONEERS.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The appellant has filed a notice of motion application dated 12<sup>th</sup> January, 2016. He seeks the following:

(i) Orders of stay of the ruling and order of 22<sup>nd</sup> December, 2015 by L. W. Kabaria in Milimani Commercial CMCC No. 3123 of 2015.

(ii) Orders restraining the respondents by themselves/servants and or agents from disposing of by way of sale or otherwise motor vehicle registration number KBZ 452U.

(iii) Orders for release of motor vehicle registration number KBZ 452U (*'the motor vehicle'*) to the appellant given that the appellant is up to date with the installment payment in respect thereto.

2. The motion is premised on the grounds listed on the body of the application together with the supporting affidavit of the appellant. He stated that he obtained an asset based finance facility with the 1<sup>st</sup> respondent for a sum of KShs. 1,750,000 during the year 2014 where it was agreed that the said sum would be repaid in 36 monthly installments at the rate of KShs. 69,028/-. That even before he could take possession of the motor vehicle, the 1<sup>st</sup> respondent instructed the 2<sup>nd</sup> respondent to seize the same. That the matter was however settled. He stated that he has since made payments as agreed. That notwithstanding the aforesaid, without any warning or notice, the 1<sup>st</sup> respondent instructed the 2<sup>nd</sup> respondent to seize the said motor vehicle once again. That the said vehicle remained in custody of the respondents notwithstanding the fact that his repayments are up to date. He further stated that the first respondent also debited his account in the sum of KShs. 108,833/=.

3. It emerged from the appellant's submission that the loan facility was secured by a chattels mortgage over a new motor vehicle and was further enhanced and secured by the charging of property L.R. No. Kajiado/Kitengela/5711. That the said vehicle is a commercial vehicle operated by the appellant and whose income he used to service the facility. It was submitted that the repossession of the vehicle was irregular not only for the reason that the chattel mortgage was not properly attested, but that the said action directly contravened the terms of the facility. That page 4 of the letter of offer provides terms in case of any default. That there is no provision for repossession of the motor vehicle under any circumstances and instead, the offer provides for a penalty if there is any delay in remitting the monthly

payment. It was submitted that the appellant was only three (3) days late and therefore not in default. The appellant cited the case of **Wanjohi v. Resma Commercial Agencies Ltd & Another [1999] eKLR** on the issue of repossession. It was submitted that despite all those actions appellant has kept his accounts up to date and has maintained his facility without any arrears. The appellant further sought reliance on the principles in the case of **Giella v. Cassman Brown & Co. Ltd [1973] EA 358**.

4. The respondents filed a replying affidavit on the 25<sup>th</sup> January, 2016 sworn by Rufus Wamae Macharia. The respondents avers that the application is fatally defective as drawn and is incapable of causing orders sought to issue for the reasons that the order dismissing the application in the lower court is in the nature of negative order and as such incapable of stay; that the application does not seek for any order pending the hearing and determination of the appeal and hence serves no purpose in reference to the appeal; that prayer (4) is in the nature of a final order and granting it would essentially dispose of the appeal and indeed the suit in the lower court and hence incapable of being granted at this stage.

5. The respondents have further averred that the applicant has not met the threshold required for grant of orders of temporary injunction and mandatory injunction for the reason that at the point of the seizure of motor vehicle on the 28<sup>th</sup> May, 2015, the appellant had defaulted in his repayment of the loan facility and in the circumstances, the first respondent was justified to exercise its right of sale under clause 6 of the chattels mortgage and it was within its right to instruct the second respondent to seize the said motor vehicle.

6. The respondents on their part submitted that the application herein is fatally defective for the reasons, first, that the appellant seeks for an order staying the order/ruling which ruling is the one that dismissed the appellant's application. That the order is negative in nature and such cannot be stayed. That there is no positive act contemplated by the ruling of the court for an order of stay to be issued. On this the respondents cited **Co-operative Bank of Kenya v. Banking Insurance & Finance Union (Kenya) [2015] e KLR**. Secondly, that the appellant has not sought for an order pending he hearing and determination of the appeal. That since there is no equivalent prayer pending the hearing and determination of the appeal, this court cannot make such an order. In this regard the respondents relied on the case of **Atlas Copco Customer Finance Ltd v. Polarize Enterprises Limited [2014] eKLR**. In response to the claim that the repossession by the respondents was illegal as the chattels mortgage was not attested to and that the appellant was not in default as per the provisions of the letter of offer, it was argued that that submission was far from the truth in view annexure RMW 2. That it is very clear that the chattels mortgage was indeed duly dated, signed, attested to and registered. With regard to the claim that the appellant was not in default in terms of the letter of offer, it was submitted that that was a constricted view of the entire contract. It was submitted that the same letter provided as follows under the clause 'inconsistency': "*in the event that any provision of this letter shall be inconsistent with any provision contained in the security document, the relevant provision of the security document will prevail and such an inconsistent provision of the letter shall be construed and read as subject to the relevant provision in the security document.*" That while it may be the case that the clause on 'events of default' states that the borrower having failed to pay the principal within fourteen (14) days of the due date is what constitutes an event of default, this provision is subject to the relevant provision in the chattels mortgage which is clause 6 of the same that provides thus in so far as it is pertinent. It was submitted that a wholesome view of the agreement between the parties and in the context of the appellant's own admission that he was late in the repayment of the facility by only three (3) days, leads to only one conclusion that the appellant was in default and the respondents were justified in repossession the vehicle. It was finally submitted that the decision of **Wanjohi v. Resma Commercial Agencies Ltd** (supra) relied on by the appellant was distinguishable. That the latter case relate to repossession without a validly registered chattels mortgage while in the instant case the chattels mortgage is registered.

7. I have considered the motion herein. On the respondent's contention that the prayer does not seek for an order pending the hearing and determination of the appeal, I am of the view that the same is a technical error that should not be allowed to lock out the appellant. It can be inferred from the motion that the appellant seeks orders pending the hearing and determination of the appeal and I am therefore in view of Article 159 (2) (d) inclined to consider the prayer as though pending hearing and determination of the appeal.

8. The next thing for this court to consider is whether or not the appellant has satisfied the ingredients in **Giella v. Casman Brown & Co. Ltd [1973] EA 358** for granting of an interlocutory injunction. The ingredients are that the applicant must show a prima facie case with probability of success, that if the interlocutory injunction is not granted he stands to suffer irreparable loss and if the court is in doubt, it shall grant an injunction on a balance of convenience. The appellant stated that the 1<sup>st</sup> respondent financed him to buy the motor vehicle and he was under duty to make monthly payments. That he delayed by three (3) days in making an installment and the respondents seized the vehicle. He stated that the said vehicle remained in custody of the respondents notwithstanding the fact that his repayments are up to date. A fact which has not been rebutted by the respondents. Although the agreement allows the respondents to repossess the vehicle in the event of a default, the appellant is at the moment not in arrears. In view of that I find that the appellant has established a prima facie case against the respondents.

9. Regarding the issue of whether the appellant has an arguable appeal, I note that the issue of the validity of the chattels mortgage has been raised and whether the repossession of the aforesaid motor vehicle was lawful or not. These issues can only be determined in the appeal after the substantive hearing. At the moment, I can only say, the appellant has established a prima facie case with a probability of success and in the premises the application dated 12<sup>th</sup> January, 2016 is hereby allowed in terms of prayer 3 pending the hearing and determination of the appeal. Costs of the application to abide the outcome of the appeal.

Dated, Delivered and Signed at Nairobi this 9<sup>th</sup> day of February, 2017.

**L. NJUGUNA**

**JUDGE**

***In the presence of***

..... ***for the Applicant.***

..... ***1<sup>st</sup> for the Respondent.***

..... ***2<sup>nd</sup> for the Respondent.***