



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 439 OF 2016

ARENEN HOLDING LIMITED.....PLAINTIFF

-VERSUS -

DIAMOND TRUST BANK KENYA LIMITED.....DEFENDANT

RULING.

1. The plaintiff is seeking an Interlocutory Injunction to restrain the defendant from;

“claiming or commencing any precipitate action in respect of any amounts due and owing under a Hire Purchase Loan Agreement executed between the plaintiff and the Defendant on the 19th of June 2015 and/or any personal guarantees given by the Directors of the Plaintiff thereunder”.

2. Secondly, the plaintiff sought a temporary injunction to restrain the defendant from writing to any Credit Reference Bureaus in respect of the plaintiff’s credit-worthiness.

3. The application was supported by the affidavit of **ROHIT MEDIRATTA**, the Managing Director of the plaintiff.

4. The plaintiff’s case is that there is a Purchase Agreement between it and the defendant. The subject matter of the said Agreement are 8 trucks for which the defendant was providing funds, to enable the plaintiff purchase.

5. It is the plaintiff’s further case that the trucks had been the subject matter of an earlier Agreement between the defendant and **CARGO LOGISTICS LIMITED**. However, when the said Cargo Logistics Limited defaulted, the trucks were repossessed by the defendant.

6. According to the plaintiff, it was the obligation of the defendant to ensure that the trucks were handed over to the plaintiff.

7. The plaintiff intended to utilize the trucks in operating a transportation business, and then use proceeds from that business to service the loan facility.

8. But although the defendant had led the plaintiff to believe that it would put the trucks into the hands of the plaintiff, that did not happen. Therefore, the plaintiff complained that the defendant had made a misrepresentation.

9. The plaintiff's further complaint was that although the defendant had not made available the trucks, it had now threatened to commence action to recover the facility which it had given to the plaintiff.

10. The plaintiff submitted that unless the defendant was restrained by an injunction, it would take action which would cause the plaintiff to suffer irreparable loss.

11. Furthermore, the defendant had already written to some Credit Reference Bureaus, informing them that the plaintiff was a defaulter.

12. As the plaintiff believes that it is the defendant who had precipitated the defaults which it was now blaming the plaintiff for, it should not be permitted to gain mileage from its own fault.

13. In the face of the deposition filed by the plaintiff's Managing Director, the defendant did not file any replying affidavit. Accordingly, I find that the facts set out by the plaintiff were uncontroverted.

14. However, the defendant submitted that the trucks were available for collection from the defendant.

15. Although the defendant indicated that the trucks were available and that the plaintiff could arrange to collect them, the plaintiff has provided evidence to show that there were challenges facing the plaintiff.

16. Email communication dated 8th and 9th April 2016 indicated that the proprietor of the garage where one of the vehicles was parked, was demanding payment for storage charges.

17. Bearing in mind the fact that the Hire Purchase Agreement is dated 19th June 2015, that implies that about 10 months later, the plaintiff was yet to receive the vehicles which were the subject matter of the Agreement.

18. At paragraph 11 of the Complaint, it was asserted that the plaintiff had never obtained the physical possession of the trucks.

19. As the plaintiff contends that it was one of the terms of the Agreement that the defendant should hand over possession to the plaintiff, it was submitted by the plaintiff that the Agreement stands rescinded.

20. In my considered view, founded upon the uncontroverted evidence adduced by the plaintiff, I find, on a *prima facie* basis, that the defendant did not discharge its contractual obligations to the plaintiff, when it failed to hand over the trucks to the plaintiff.

21. By a letter dated 12th August 2016, the defendant gave Notice of its intention to;

“...take such further steps as it may deem necessary, including instituting legal proceedings...”

22. I believe that it is because the defendant did not specify the “*such further steps*” which it contemplated taking that the plaintiff's application for an Interlocutory Injunction was worded very broadly. The application is for orders intended to stop the defendant from claiming or commencing any precipitate action.

23. As the defendant submitted, such a relief is so indeterminate that it would be inappropriate to grant. It would be inappropriate because an order which had no defined boundaries may be construed to curtail the rights of the defendant from doing everything, including things which were lawful, acceptable and justifiable

24. To the extent that the defendant threatened to institute legal proceedings, I find that that cannot possibly be prejudicial to the plaintiff. When a party asserts a legal right against another person, and he does so by instituting legal proceedings, he would be providing the other person with an opportunity to

respond to the claim.

25. The Judiciary and any other lawfully established tribunal which has the responsibility and mandate to adjudicate between two or more persons who have disputes are intended to undertake that task whenever called upon. Therefore, in general terms, it would be wrong to stop any person from instituting legal proceedings.

26. Pursuant to Article 25 of the Constitution of Kenya, the people of Kenya expressly stated that the right to a fair trial shall not be limited.

27. Therefore, an order which would place a hurdle in the path of a party who wishes to institute legal proceedings should be frowned upon.

28. The alternative to legal proceedings is an invitation to lawlessness and disorder. That alternative would also constitute a violation of Article 50 (1) of the Constitution, which states as follows;

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body”.

29. That is all the more reason why this court rejects the plaintiff’s call to grant an injunction which would, inter alia, stop the defendant from exercising its constitutional right.

30. Meanwhile, as regards the information which the defendant could provide to the Credit Reference Bureaus, the plaintiff has stated that the defendant has already given out the information to 3 different such entities.

31. Therefore, the plaintiff has moved to court after the event.

32. There is no indication that the defendant intends to relay any other or further information about the plaintiff to the same or any other Credit Reference Bureaus.

33. The plaintiff expressed fear that if information about it is relayed to Credit Reference Bureaus that was likely to damage the image of the plaintiff and deleteriously affect its credit worthiness rating.

34. As the defendant communicated with the 3 bureaus on 16th August 2016, it would have been expected that if any damage could have been caused by the communication, it would have already taken place by October 2016, when the plaintiff came to court.

35. My understanding of the plaintiff’s case is that if there was any default on the plaintiff’s part, in remitting payments to the defendant, such default was directly attributable to the defendant’s failure to give possession of the trucks to the plaintiff.

36. But it cannot be ignored that whilst the contract was signed on 9th June 2015, it was not until 27th October 2016 that the plaintiff filed suit against the defendant.

37. It has not been explained why the plaintiff did not move to court sooner, when it had become apparent that the defendant had failed to hand over the trucks to the plaintiff.

38. The Notice by the defendant, threatening to take legal action is dated 12th August, 2016 whilst the letter to the Credit Reference Bureaus is dated 16th August 2016.

39. In effect, the plaintiff did not take action with such sense of urgency as would have been expected if it was facing imminent danger of economic destruction coupled with loss of reputation.

40. Meanwhile, the court have noted that the Credit Reference Bureau Regulations, 2008 provide a statutory remedy for any person who has a grievance with respect to information held by any Credit Reference Bureau.

41. In **AMY KAGENDO MATE Vs PRIME BANK LIMITED & ANOTHER PETITION No. 17 of 2013**, Mumbi Ngugi J. quoted with approval, the following words of Majanja J. in Kennedy Nyagudi Vs. Central Bank of Kenya & Others, Petition No. 209 of 2012;

“The provisions I have cited, (being Regulation 20 of the Banking [Credit Reference Bureau] Regulations, 2008), clearly show that the Regulations provide for relief to any customer who is aggrieved by the wrong and erroneous information. The petitioner’s grievances fall within these provisions and he is entitled to invoke the statutory procedure provided”.

42. If the plaintiff had taken appropriate action, by notifying the bureaus about any inaccuracies, the said bureaus would have had as to address the plaintiff’s concerns.

43. It must also be noted that Regulation 18 of the Credit Reference Bureau Rules imposes an obligation on the defendant to report to the Credit Reference Bureaus, about their customer’s credit rating.

44. Therefore, it would be improper for the court to order the defendant to stop discharging its obligations.

45. For all the foregoing reasons, I find that the plaintiff has not proved, on a *prima facie* basis, a case with a probability of success.

46. In the circumstances, I find no merit in the plaintiff’s application for interlocutory reliefs. I therefore dismiss the plaintiff’s application dated 27th October 2016, with costs to the defendant.

DATED, SIGNED and DELIVERED at NAIROBI this 14th day of March 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Khan for the Plaintiff

Shah for the Defendant

Collins Odhiambo – Court clerk.