



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO. 496 OF 2015 [FAST TRACK]

JAMLICK MURIITHI GICHOHI T/A JAMPHARM CHEMIST...PLAINTIFF

-VERSUS -

CREDIT BANK LIMITED.....DEFENDANT

RULING

1. The plaintiff's application dated 12th October 2015 sought 2 injunctive reliefs. The first injunction is intended to restrain the defendant from;

“Selling, seizing, hiring, advertising, disposing, alienating or in any other manner dealing with the motor vehicle Isuzu FVZ TRUCK plate number[particulars withheld]?”.

2. And the second injunction is intend to compel the defendant;

“To forthwith release the said motor vehicle to the plaintiff unconditionally or upon such terms as this Honourable Court deems just and appropriate?”.

3. The motor vehicle in issue was purchased with funds which the plaintiff, **JAMLICK MURIITHI GICHOHI** Trading As **JAMPHARM CHEMIST**, had borrowed from the defendant, **CREDIT BANK LIMITED**.
4. It is common ground that on 10th July 2014 the parties executed a contract pursuant to which the defendant was to lend to the plaintiff the sum of Kshs. 8,568,000/-. The said funds were to be used to purchase the motor vehicle in issue.
5. The loan was repayable by monthly installments of Ksh. 260,978/, over a period of 48 months.
6. It is the plaintiff's case that he had dutifully serviced the loan. Therefore, he was surprised when the defendant caused auctioneers to seize the truck, without any prior notice. The date when the truck was seized is 17th September 2015.
7. According to the plaintiff, the defendant's right to seize the vehicle had not crystallized, as per the terms and conditions of the contract between the parties. Therefore, the plaintiff submitted that the re-possession of the vehicle was unlawful, unwarranted and unprocedural.
8. It is the plaintiff's position that he was entitled to the quiet possession of the vehicle notwithstanding that he had pledged the said vehicle as security for the loan facility which the defendant had granted him.
9. Therefore, when the defendant repossessed the vehicle without notice and when the defendant insisted on continuing to detain the said vehicle, the plaintiff submitted that the defendant's actions smacked of impropriety, illegality, arbitrariness, manifest injustice, impunity, irregularity,

- oppression and frustration of the plaintiff's legitimate expectation.
10. It was for that reason that the plaintiff asked this court to intervene, so as to protect him.
 11. The vehicle was said to be the plaintiff's primary source of income, which then made it possible for him to service the loan facility. Therefore, the plaintiff sought the mandatory injunction to compel the defendant to release the vehicle to him.
 12. In turn, the plaintiff pledged to continue to honour his contractual obligations.
 13. To support the application, the plaintiff exhibited the contract document dated 10th July 2014; statements of his bank account at Credit-Bank Limited and a bank deposit slip for Kshs. 200,900/- which was paid into his account on 19th September 2015.
 14. In the light of the payment of Kshs. 200,900/- into his account, the plaintiff submitted that he had settled the arrears due to the defendant.
 15. By virtue of that contention, the plaintiff is deemed to have admitted that he had been in arrears. In order for him to have been in arrears, it means that the plaintiff cannot have been remitting the monthly installments dutifully, as and when the said installments fell due.
 16. The plaintiff provided the court with statements of his bank account No. [particulars withheld], for the period between January and October, 2015. The said statement of account was intended to demonstrate that the plaintiff was servicing his loan appropriately.
 17. A look at the said statement of account reveals information which does not support the plaintiff's claim. I say so because the column reflecting the balances is generally in credit, whilst the loan account ought to have had debit balances.
 18. In the said statement, there is a credit of Kshs. 8,568,000/- on 21st February 2015, which is described as a Loan Disbursement. On that same date, that amount was paid out from the account.
 19. The defendant explained that the statement of account which was exhibited by the plaintiff was actually a current account, as opposed to the loan account.
 20. The defendant further stated that the Loan Account was Account No. [particulars withheld]. In that account, it is shown that a sum of Kshs. 8,568,000/- was disbursed as a loan on 21st January 2015. The said disbursement immediately resulted in an equivalent debit balance in the Loan Account.
 21. The plaintiff did not challenge that statement of account when it was served upon him.
 22. In the event, I hold, on a *prima facie* basis, that the plaintiff had deliberately presented the court with the wrong statement of account, in an attempt to mislead the court.
 23. A perusal of the Loan Account shows that the plaintiff made the following payments in the specified months;

a. February 2015	Kshs. 260,977.70
b. March 2015	Kshs. 266,577.00
c. April 2015	Kshs. 260,543.22
d. May 2015	Kshs. 261,568.58
e. June 2015	Kshs. 202,702.21
f. July 2015	Kshs. 59,720.50
g. August 2015	Kshs. 163,332.80

24. That shows that in the months of February, March, April and May 2015, the plaintiff was generally up-to-date in remitting the monthly installments.
25. However, in June, July and August, 2015, the plaintiff did not meet his obligations.
26. Pursuant to the Terms and Conditions of the contract between the parties; if the installments were in arrears for 2 months, the bank was entitled to commence the process of recovery.
27. Therefore, on a *prima facie* basis, the bank was entitled to commence the process of recovery after the plaintiff had fallen into arrears for over 2 months.
28. The question to be answered is as regards the nature of the process of recovery, which the parties agreed to.
29. According to the plaintiff, the defendant did not have an automatic right to repossess the vehicle. The plaintiff submitted that the defendant would have had to institute proceedings to recover the vehicle.
30. In **STANDARD CHARTERED ESTATE MANAGEMENT LTD Vs DAVID MARIRU MWANGI CIVIL APPEAL No. 187 of 1997**, the contract did not incorporate a provision

authorizing the lender to repossess the vehicle. That prompted Aganyanya J to say the following;

“Worse still, no chattels mortgage was created over this loan, thus depriving the appellant of the right to repossess the motor vehicle. That the appellant had been registered as co-owner of the motor-vehicle was not sufficient to enable it resort to repossession of the motor vehicle because the respondent’s services had been terminated?.

31. Meanwhile, in **SIMON MUIRURI WANJOHI Vs RESMA COMMERCIAL AGENCIES LTD & ANOTHER, CIVIL APPEAL No. 91 of 2002**, the court noted that the contract between the parties had incorporated a provision which authorized the seller to repossess the vehicle if the buyer defaulted. However, the agreement was not registered. Kimaru J. held as follows;

“In the event of breach of the said agreement, the 1st Respondent was required to seek the intervention of the law and not to use the law of the jungle to take away the Appellant’s property. In the absence of a duly registered chattel’s mortgage, I do hold that the 1st Respondent’s action in repossessing the said motor vehicle was unlawful?.

32. In this case, the contract document expressly stated, at clause 7(D), which addressed the securities to be provided by the plaintiff, that;

“Chattels Mortgage over the motor vehicle, NEW Isuzu F VZ TRUCK being purchased/financed for an aggregate amount of Kshs. 8,568,000.00 plus interest to be executed in the presence of an advocate (To be Obtained)?

33. That means that the parties were fully alive to the need for the Chattels Mortgage to be executed.

34. And the law provides that the Chattel’s Mortgage should then have been registered, as a prerequisite to the lender obtaining legal authority to repossess the motor vehicle if the borrower breached the terms of the contract.

35. The defendant has not provided the court with any evidence to show that the Chattel’s Mortgage was executed and was thereafter duly registered.

36. Therefore, on a *prima facie* basis, I find that there was no registered chattel’s mortgage, which could have given to the defendant the requisite legal authority to repossess the motor vehicle in issue.

37. On that ground, the plaintiff’s claim has a probability of success.

38. Secondly, if the vehicle was sold by the defendant pursuant to a wrong repossession, that would cause serious loss and damage to the plaintiff.

39. I would not go as far as saying that such loss and damage would be incapable of being compensated by an award of damages. But the court cannot permit the defendant to continue holding the vehicle when the repossession, although deserving, was carried out irregularly.

40. In the circumstances, I order that the plaintiff should, within the next 2 months, clear all arrears. For the avoidance of any doubt, the arrears will be inclusive of not only the sums already outstanding but also such sums as will become due and payable within the said two months.

41. Meanwhile, the defendant will immediately release the truck to the plaintiff.

42. The plaintiff is required to comply with all the terms and conditions of the contract, including, but not limited to always ensuring that the tracking device on the truck was functioning properly.

43. The costs of the application shall be in the cause in the substantive suit. I so order because the plaintiff had, by defaulting, brought upon himself the action which was undertaken by the defendant. The only default on the part of the defendant was in not either registering the chattels mortgage or in first seeking orders of the court, to permit it to repossess the truck.

44. In the event that the plaintiff does not clear the arrears within the 2 months, as ordered, the defendant will be at liberty to take appropriate legal action to repossess the vehicle or to recover the outstanding loan through any other lawful means.

DATED, SIGNED and DELIVERED at NAIROBI this 9th day of February 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of:

Kago for the Plaintiff

Samuel Maina for the Defendant

Collins Odhiambo – Court clerk.