



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & TAX DIVISION
CIVIL CASE NO. 163 OF 2016

PRISCILLA MUTHONI KIONI.....PLAINTIFF

-VERSUS-

RAFIKI MICROFINANCE BANK.....DEFENDANT

RULING

1. The Application before the Court is the Plaintiff's Notice of Motion dated **14th April, 2016** and filed on **10th May, 2016**. It is expressed to be brought under the provisions of **Sections 1A, 1B and 3A** of the **Civil Procedure Act, Chapter 21 of the Laws of Kenya** as well as **Order 40 Rules 2, 4** and **Order 51 Rule 1** of the **Civil Procedure Rules, 2010**. The Plaintiff sought for the following orders:-

1. Spent

2. Spent

3. THAT a temporary injunction be issued restraining the Defendant, it's agents, servants debt collectors or anyone acting in their name from calling the Plaintiff, visiting the Plaintiff's premises or in any other way harassing, intimidating or threatening the Plaintiff pending the hearing and determination of this suit.

4. THAT the costs of this Application be provided for.

2. The application is based on the grounds set out therein and is supported by the Affidavit of the Plaintiff, sworn on **29th March, 2016**. The background to the application is that by a Loan Takeover Agreement dated **17th October 2014** whose purpose was to purchase Motor Vehicle Registration No. KBU 317Y, the Defendant advanced to her Kenya Shillings Three Million and Sixty Five Thousand Three hundred and Sixty (Kshs. 3,065,360). She however did not execute any Chattels Mortgage or Hire Purchase Agreement in favour of the Defendant over the Motor Vehicle Registration No. KBU 317Y.

3. It was further averred by the Plaintiff/Applicant that following the disbursement of the loan and the release of the aforesaid Motor Vehicle, the Defendant required her to have the motor vehicle assessed by the AA Kenya for insurance purposes and that the motor vehicle was assessed at a value of Kenya shillings Three Million Nine Hundred and Eighty Thousand (Kshs. 3,980,000/=) on **2nd February, 2015**.

4. The Plaintiff further averred that she diligently serviced the repayments in accordance with the terms of the Loan Take Over Agreement until **March 2015** when she experienced difficulties in meeting her obligations due to unforeseen circumstances. She then approached the Defendant and requested for a slight restructuring of the facility which would allow her to pay an instalment of Kenya Shillings Fifty Thousand (Kshs. 50,000/=) for the month of **March 2015** as opposed to the earlier instalment of Kenya Shillings Eighty Three Thousand (Kshs. 83,000/=). It was her contention that an agent of the Defendant advised her to pay the **Kshs. 50,000/=** pending further communication from the Defendant. She however received no further or other communication concerning her request for the restructure.

5. It is the Plaintiff's contention that on **9th April, 2015** the Defendant's Agents, without any demand for payment, stormed her place of business and purported to forcefully repossess the Motor Vehicle without any Court order. She added that thereafter, vide a letter dated **30th June 2015**, the Defendant informed her that they had auctioned the motor vehicle for **Kshs. 2,650,000/=** and that there was an outstanding amount of **Kshs. 491,258.88** on the loan account which she was required to clear.

6. The Plaintiff posits that the Defendant's purported repossession of the motor vehicle was illegal since no Chattels Mortgage was registered over the said motor vehicle and no Court order was ever issued allowing the Defendant to repossess the vehicle. It is further the Plaintiff's case that the auction was illegal as there was no Court order and that the vehicle was grossly undervalued. The Plaintiff contends that despite the foregoing illegalities, the Defendant has repeatedly employed its agents to harass and intimidate her over the alleged outstanding amount. It is, thus, the foregoing circumstances that prompted the Plaintiff to file the present application to restrain the Defendant from harassing, intimidating and threatening her pending the hearing and determination of this suit.

7. In response to the application, the Defendant filed the Replying Affidavit sworn on **14th June, 2016** by its Head of Credit, one **BENEDICT MUSEE**. It is the Defendant's position that the present application as filed is incompetent as the orders sought in the application are at variance with the prayers sought in the Plaint. The Defendant was also of the view that the orders sought are incapable of being enforced as the Plaintiff had not adduced any evidence of harassment to warrant the grant of the said orders. The Defendant averred that the Plaintiff is truly indebted to it and as such if there were any calls or visitations, the same were only for the purposes of collecting the outstanding sums. The Defendant added that barring it or its agents from visiting the Plaintiff's premises would amount to a clog on their right to recover monies lawfully due to it.

8. The application was canvassed by way of written submissions. Thus, the Plaintiff filed her submissions dated **1st August 2016** on **8th August, 2016** while the Defendant filed its submissions dated **3rd October 2016** on **4th October, 2016**. I have considered the pleadings herein as well as the written submissions by Counsel in the light of the pleadings filed herein.

9. First and foremost, a preliminary issue was raised by the Defendant in its replying affidavit to the effect that the orders sought for in the present application are not tenable for the reason that they are at variance with the prayers sought in the Plaint. A look at the Plaint filed herein on **10 May 2016** shows that the Plaintiff is seeking, *inter alia*, a declaration that the sale of the motor vehicle was illegal and that the same was grossly undervalued, therefore entitling her to damages of Kshs. 1,300,000/= being the difference between market value of the vehicle and the auction price.

10. The application seeks a temporary injunction to restrain the Defendant, its agents, servants debt collectors or anyone acting in their name from calling the Plaintiff, visiting the Plaintiff's premises or in any other way harassing, intimidating or threatening the Plaintiff pending the hearing and determination of this suit. It is obvious therefore that there is no prayer for a permanent injunction as would be expected. It is however the Plaintiff's contention that the harassment sought to be restrained is in connection with what the Defendant contends to be a balance of the loan.

11. Order 40 Rule 2 of the Civil Procedure Rules, under which the instant application has been brought provides thus:

"In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, any injury of a like kind arising out of the same contract or relating to the same property or right." (emphasis added)

Accordingly, it is imperative that the object of the suit be for restraining the Defendant in some way. In this respect I would agree with the views expressed by **Ringera J**, in the case of **Dismas Oduor Owuor Vs Housing Finance Co. (K) Ltd, HCCC No. 630 of 2001** that an interlocutory injunction should not issue in a situation where the prayers in the Plaint are at variance with what is sought in the interlocutory application. The same viewpoint was expressed by **Sitati J**, in **Gorasiya Hiteshi Ramji & Another vs Anil Ratilal Tailor t/a Imperial Primary School [2014] eKLR** thus:

"whereas it appears on the face of it that the plaintiffs have a prima facie case against the defendant, the remedy for their complaints is not an injunction. It is clear from the affidavits that the plaintiffs are seeking payment of a specific amount in the sum of Kshs. 20,018,029.00 and in addition thereto they want to be paid general damages for breach of contract. It is therefore clear to the court that the injury that may be suffered by the plaintiffs in this case is not such as would not be adequately compensated by damages. In fact the reliefs in the plaint are geared towards compensating the plaintiffs by way of damages...It is also clear to this court that the prayers sought in the plaint are at variance with the prayers sought in the application, and such variance is a good enough reason for the plaintiffs to be denied the prayers sought in the application."

I would be of the same mind, noting that the facts hereof are on all fours with the facts of the above mentioned case.

12. Thus, even if I were to find that the application is competent, it cannot be said that the Plaintiff has satisfied the conditions for the grant of a temporary injunction as set out in the case of **Giella vs Cassman Brown & Co. Ltd [1973] EA 358**, namely:

- 1. A prima facie case with probability of success**
- 2. Irreparable injury which cannot be compensated by an award of damages; and**
- 3. That the balance of convenience is in her favour.**

13. The Plaintiff's case essentially is that the Defendant and/or its agents have been visiting her premises, harassing and intimidating her, and so she seeks an injunction to restrain the Defendant and its agents from harassing and intimidating her over any alleged outstanding amounts pending the determination of the suit. She concedes that she entered into a loan agreement with the Defendant, and that she defaulted in making repayments; for which reason the subject motor vehicle was repossessed and sold to recover the loan. Apart from her averments of harassment, there is no tangible evidence availed to prove the same. On the other hand, the Defendants posturing was that any visits to the Plaintiff's premises by its agents were purely for purposes of collecting the outstanding amount owed to them.

14. I find instructive the words of **Lord Diplock** in the case of **American Cyanamid Co. vs. Ethicon [1975] AC 396**, that:

"The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial... If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage."

15. It would hardly amount to a violation of the Plaintiffs rights for the Defendant to demand from her the repayment of sums of money due to the Defendant on account of the Plaintiff's own default, nor would it be offensive for the Defendant's agents to visit her premises to repossess the subject motor vehicle, as the Defendant is said to have done. I am therefore not satisfied that the Plaintiff has shown a prima facie case in this regard. In any event, the motor vehicle that was the subject of the loan agreement having been repossessed and sold, the remaining aspects of the dispute revolve around the Plaintiff's claim for damages to which the orders sought are merely ancillary.

16. In the result, it is my considered finding that the Plaintiff's application dated **14 April 2016** lacks merit, and the same is hereby dismissed with costs.

Orders accordingly.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 4th DAY OF NOVEMBER, 2016

OLGA SEWE

JUDGE