



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL SUIT NO. 338 OF 2013
(APPLICATION FOR TEMPORARY INJUNCTION)

ST STEPHEN'S EDUCATIONAL INSTITUTE LTD.....PLAINTIFF
VERSUS
NIC BANK LIMITED.....DEFENDANT

R U L I N G

1. The Plaintiff's application by **notice of motion** dated **16th August 2013** is for temporary injunction to restrain the Defendant from selling motor vehicle registration number KBK 684 Q pending disposal of the suit. It also seeks an order for the taking of accounts to establish the exact amount owing to the Defendant. The application is brought under **Order 40, rules 1, 2 & 4** of the **Civil Procedure Rules, 2010** (the **Rules**). **Sections 1A, 1B and 3A of the Civil Procedure Act** are also cited.
2. The grounds for the application stated on the face thereof include -
 - i. That vide a hire-purchase agreement the Defendant advanced the Plaintiff a loan of Kshs. 2,208,000/00 for purchase of the suit motor vehicle, repayable in 48 monthly instalments.
 - ii. That the Defendant repossessed the motor-vehicle and advertised it for sale on allegations that the Plaintiff's loan account was in arrears whereas it had paid a sum of KShs 2,286,010/00 towards offsetting the loan amount.
 - iii. That the Defendant has failed to provide the Plaintiff with a reconciled statement of account.
 - iv. That as the loan period lapsed in February 2014 the Plaintiff is ready to offset any outstanding amount upon reconciliation of its loan account with the Defendant.

These matters are buttressed further in the supporting affidavit.

3. The application is contested by the Defendant by a **replying affidavit** sworn by one **Henry Maina**, the Manager Legal Services of the Defendant sworn on 9th September 2013. According to the Defendant, it only charged lawful interest and other charges as provided for in the hire-purchase agreement.
4. The Defendant has further pleaded that the Plaintiff fell in arrears, and it proceeded to repossess the motor vehicle as per the agreement between the parties; that the allegations by the Plaintiff that the Defendant varied interest rates without notice and has refused to provide an account are baseless and

untrue; and that a statement of account for the period ending 23rd August 2013 is annexed showing a total overdue amount of **Kshs. 481,131.48**.

5. The Defendant's case is that its right to repossess has accrued. It is also submitted that the Plaintiff has not made out a *prima facie* case with a probability of success, and that in any event damages would be a sufficient remedy.

6. In a **supplementary affidavit sworn on 23rd September 2013**, the Plaintiff insists that the Defendant do account for the alleged penalties charged to its account. It has also annexed a copy of a deposit slip for KShs 185,000/00 into the Plaintiff's account with the Defendant. The payment was apparently made after the application at hand was filed.

7. The application was canvassed by way of written submissions which I have considered, including the cases cited. I have particularly borne in mind the principles set out in the well-known case of ***Giella – vs- Cassman Brown and Company Limited [1973] E.A 358***. Those principles are that the applicant must show a *prima facie* case with a probability of success, and that it stands to suffer irreparable harm that cannot be compensated by an award of damages. If in doubt the court will decide the application on a balance of convenience.

8. Parties are bound by their commercial agreements to which they have freely entered. They must be held up to their bargain. It is not in the realm of courts to rewrite contracts for parties. See ***Habib Bank A.G. Zurich Vs Pop in Kenya Ltd and others Civil Appeal No 147 of 1989, Court of Appeal (unreported)***.

9. On the face of it, the Plaintiff is in default. This is evident from the statement of account annexed to the replying affidavit, and the fact that the Plaintiff made some payment after filing the suit and application. But it is not clear at this stage whether the rates of interest charged by the Defendant were outside the hire-purchase agreement. That is an issue best left to the trial court.

10. It is not in dispute that the Plaintiff had paid a very substantial portion of the loan – according to it KShs 2,959,410/00 at the time of filing suit. During the pendency of this application it paid a further KShs 185,000/00, no doubt a sign of good faith. That is a total of KShs 3,144,410/00. According to the Defendant the Plaintiff was in arrears of KShs 407,493/25 at the time of repossession of the motor vehicle. Should the Plaintiff then lose the motor vehicle when what it may ultimately owe, if anything, could be very little? It would not be just to permit this.

11. I will in the circumstances allow the application and grant the temporary injunction sought. An order for accounts must await trial of the action as it is one of the reliefs sought in the plaint. Costs of the application will be in the cause. It is so ordered.

DATED AT NAIROBI THIS 11TH DAY OF MARCH 2014

H P G WAWERU

JUDGE

DELIVERED THIS 17TH DAY OF MARCH 2014