



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO 321 OF 2013

ALWALA CONSTRUCTION COMPANY LIMITED.....PLAINTIFF

VERSUS

SYNERGY INDUSTRIAL CREDIT LIMITED.....1ST DEFENDANT

MAJOK CONSTRUCTION COMPANY LIMITED.....2ND DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff's Notice of Motion application dated and filed on 25th July 2013 was brought under the provisions of Order 40 Rules 1, 2 and 4 of the Civil Procedure Rules, 2010 and Section 1A of the Civil Procedure Act. Prayer No (1) and part of Prayer No (2) of the said application are spent. The prayers for determination are as follows:-
 - a. Spent.
 - b. **THAT the Defendant be and is hereby restrained by itself, agents, servants or anybody acting on its behalf from selling, disposing of, advertising for sale or in any way divesting Motor Vehicle Registration No KHMA 416A pending the hearing and determination of the application and suit.**
 - c. **THAT the Defendant he and is hereby ordered to release Motor Grader Registration No KHMA 416A to the Plaintiff forthwith upon such terms as may be ordered by this Honourable Court pending the hearing and determination of the main suit.**
 - d. **THAT the Court be pleased to issue any other order or further orders including an order for costs in favour of the Plaintiff/Applicant herein.**
2. The grounds under which the said application was premised were generally that:-
 - a. **THAT the Plaintiff entered into a Hire Purchase Agreement with the 1st Defendant dated 5th August 2011 and signed on 6th August 2011 for purchase of a Motor Grader Registration No KHMA 416A which was registered in its joint name and that of the 1st Defendant.**
 - b. **THAT the consideration was for a total sum of Kshs 12,510,000/= made up of Hire Purchase Price of Kshs 9,000,000/= and Hire Charges in the sum of Kshs 3,510,000/=.**
 - c. **THAT the Plaintiff provided further securities by way of a Guarantee by the**

Directors and a Debenture over its assets.

- d. **THAT the Plaintiff was required to issue thirty six (36) post-dated cheques in the sum of Kshs 347,500/= per month from September 2011 to August 2014. The only allowable extra charges were late/delayed instalment charges of Kshs 343/=per day.**
- e. **THAT in breach of the terms and conditions of the contract, the 1st Defendant unilaterally revised the Agreed and Fixed Terms of the Contract by charging sixteen (16%) per cent on thirty four (34) instalments making a total sum of Kshs 798,755/= which caused artificial arrears. This pushed the Plaintiff to disarray and led to a serious dispute with the 1st Defendant between December 2011 and May 2013.**
- f. **THAT the Plaintiff secured a contract with KWS for grading of its roads at Tsavo West National Park but it issued cheques that were returned unpaid. As a result, penalties accrued leading to tripartite meetings between the Plaintiff, 1st Defendant and the said KWS to resolve the matter.**
- g. **THAT through M/S Whitestone Auctioneers, which did not leave an Inventory of Attachment, the 1st Defendant repossessed the said grader whereupon the Plaintiff paid a sum of Kshs 1,700,000/= to secure the release of the said grader leaving a balance of Kshs 1,696,605/=.**
- h. **THAT the 1st Defendant refused to release the said grader to the Plaintiff as a result of which it had suffered and continues to suffer losses and penalties on the sum of Kshs 1,700,000/= which it had borrowed to pay the 1st Defendant as well as the risk of losing the contract with KWS.**

AFFIDAVIT EVIDENCE

3. The Plaintiff's application was supported by the affidavit of Thomas Ondijo Owiti, its Managing Director. It was sworn on 25th July 2013 and filed on the same date. He reiterated the grounds on the face of the application and added that the breach/ variation/revision threw the Plaintiff's Hire Purchase Account into arrears within only three (3) months of the inception of the agreement. It enclosed copies of the Letter of Offer, Schedule of Repayments, Deed of Guarantee and Indemnity, Certificate of Registration of a Mortgage, Logbook of the said Grader, several letters and emails exchanged between the parties, letter and proclamation by M/S Whitestone Auctioneers in support of its case. It amended its Complaint 17th October 2013 enjoining M/S Majok Construction Company Limited as the 2nd Defendant herein.
4. In response thereto, Jacob Mbae Meme, the 1st Defendant's Legal Officer swore a Replying Affidavit on 30th September 2013. The same was filed on 1st October 2013. He confirmed that the 1st Defendant entered into an agreement with the Plaintiff and that it revised its Hire Purchase Charges to Kshs 798,755/= and informed the Plaintiff of the same.
5. He contended that the Plaintiff defaulted in making payments leading the 1st Defendant to issue a letter dated 7th February 2013 demanding payment of the arrears in the sum of Kshs 1,284,154/= indicating that it would proceed with recovery action and enforce the securities if the Plaintiff failed to pay the sum of money. He added that although the Plaintiff made attempts to regularise the accounts, it fell into arrears once again prompting the 1st Defendant to issue another demand letter on 14th March 2013 demanding payment of the sum of Kshs 967,759/= and that when the Plaintiff failed to pay the said amount, the 1st Defendant instructed M/S Whitestone Auctioneers to proclaim and attach the said Grader on 19th March 2013.
6. It was his averment that when the Plaintiff still failed to pay the outstanding sum, the 1st Defendant instructed Peter Huth and M/A Trans Europa Assessors (K) Limited to value the said Grader which it then sold and transferred to the 2nd Defendant because as the owner of the property, the 1st Defendant was entitled to sell the said Grader.
7. The 1st Defendant annexed copies of the Proposal Form executed by the Plaintiff's directors, the Letter of Offer, the Deed of Guarantee, the Debenture, the Hire- Purchase Agreement, Certificate of Registration of Agreement, Statements of Accounts, the demand letters, proclamation by the auctioneers, Investigation Report, Valuation Report, Expressions of Interest by several parties

- including the 2nd Defendant, Logbook showing the 2nd Defendant as the registered owner of the said Grader amongst other documents to support its case.
8. The 2nd Defendant filed Ground of Opposition dated 13th November 2013 on 18th November 2013. The said grounds were as follows:-
 - a. **THAT the application was bad in law, mischievous, defective and bad in faith (sic).**
 - b. **THAT the application was an afterthought and overtaken against the 2nd Defendant.**
 9. In his Supplementary Affidavit sworn and filed on 20th November 2013, Thomas Ondijo Owiti stated that the Plaintiff was forced to issue post dated cheques and that all arrears, charges for the delayed payments and unpaid cheques were cleared. He said that the Revised Charges of Kshs 798,775/= were to be recovered on a pro-rata basis and did not form part of the arrears/default as was alleged by the 1st Defendant. He added that the 1st Defendant declined to accept the Plaintiff's proposal to settle the amounts and that there was no mention of the demand letters and the Valuation Report when he visited the 1st Defendant's offices.
 10. He further contended that the Transfer Form bore no date and that the same was lodged on 5th August 2013 and transfer effected on 7th August 2013 which was way after the court had issued its orders on 25th July 2013, which was a violation of the said court order. He added that the receipt from CFC –Stanbic Bank dated 18th July 2013 evidencing payment of a sum of Kshs 1,750/= was intended to defeat the Plaintiff's letter of 18th July 2013 and the orders of 25th July 2013.

LEGAL SUBMISSIONS BY THE PLIANTIFF

11. The Plaintiff filed its written submissions dated 20th November 2013 on the same date. It outlined the historical facts of the case and the chronology of how partes filed their respective pleadings, which this court noted.
12. It submitted that the 1st Defendant's act purporting to sell the said Grader through private treaty without any advertisement was illegal, irregular, unprocedural, null and void and invalid and was intended to defeat its rights under the Hire Purchase Agreement which justified a grant of injunction and nullification of any irregular sale.
13. It also contended that the 1st Defendant failed to notify it of any concluded sale and that since the offers by interested parties came between 10th July 2013 and 13th July 2013, it was not clear when the said Offers or Expressions of Interest were. It was its argument that the letters showed prior inspection, a clear demonstration of fraud, malice and collusion.
14. It was also the Plaintiff's submission that the 2nd Defendant was under a public and statutory duty to establish whether due process under the Auctioneers Rules had been followed and that having failed to do so, the 2nd Defendant was disentitled from being an innocent purchaser of value without notice. It argued that the 2nd Defendant was aware that the said Grader had a joint registration under Hire Purchase and the secret/quiet purchase and transfer showed collusion and complicity in the irregular unprocedural and void acts of the 1st Defendant.
15. It was its case that it had established a *prima facie* case with a high probability of success that would entitle it to injunctive orders as the entire sale was shrouded in total secrecy against the provisions and procedures of the Auctioneers Act and Rules and in contravention of the orders issued by the court on 25th July 2013. It argued that it stood to suffer irreparable losses and the lost opportunity, investment and contract with KWS including business losses that were not easily quantifiable and payable. It relied on the cases of **Giella vs Cassman Brown (1973) EA and Clarke & Others vs Chadburn & Others [1998] 1 All E.R 211** and the provisions of the Civil Procedure Rules, 2010 and the Auctioneers Rules, 1997 in support of its case.

LEGAL SUBMISSIONS BY THE DEFENDANT

16. On its part, the 1st Defendant submitted that the Plaintiff had not met the conditions set out in the case of **Giella vs Cassman Brown** (Supra). It argued that the Hire Purchase Agreement allowed it to vary, its interest rates. It averred that a hirer does not own the chattel but merely hires it from an owner and that when a hirer is unable to meet his obligation, all that it has to do is to return the

- chattel to the owner. It also submitted that there was no law that provided that once the said Grader was proclaimed, the same had to remain with the said auctioneers.
17. It also referred the court to the cases of **Richard Mutiso vs CFC Bank Limited (2006) eKLR** where the court held that the Hire Purchase Agreement allowed the Defendant therein to vary, reduce or increase the hire rental without informing the hirer therein and that of **Zadrack Oyaro Achoki vs Consolidated Bank (2013) eKLR** where the court held that the debtor had to either pay the loan or allow the bank therein to realise its security but could not have it both ways.
 18. It placed reliance on the case of **Ahmed Ibrahim Suleiman vs Noor Khamisi Suru (2013) eKLR**, a case also relied upon by the 2nd Defendant, where the holding was that a mandatory injunction ought not to be granted in an interlocutory application in the absence of special circumstances and only where the case was very clear.
 19. The 1st Defendant stated that although the said Grader had been sold, the Plaintiff failed to amend its Notice of Motion application to seek orders against the 2nd Defendant. It was its contention that it was not possible for the court to issue orders that would affect the rights of third parties who were not parties to a suit and that the law was clear that a court would not grant orders to restrain what had already taken place. It referred the court to the cases of **Civil Appeal No 69 of 1991 Easo Kenya Limited vs Mark Makwata Okiya** (unreported) and **Joseph Mugo vs Grace Wanjiku Njenga & Another (2013) eKLR** in this regard.
 20. It pointed out that the Plaintiff had disabled the tracking device of the said Grader and hidden it deep in a forest where it was located after investigations were carried out, which it said was contrary to Clause 4(h) of the Hire Purchase Agreement which required that the Plaintiff inform it of the physical location of the said Grader. It said that the Plaintiff had thus come to court with unclean hands which disentitled it from obtaining an injunction. It referred the court to the case of **C.A. No 84 of 2001 David Kamau Gakuru vs National Industrial Credit Bank Limited** (unreported) which it did not annex to its written submissions.
 21. It was its contention that the said Grader had a value as a result of which the Plaintiff could be compensated by way of damages. It argued that having failed to demonstrate a *prima facie* case, the court could not also grant the Plaintiff an interlocutory injunction on a balance of convenience. It also averred that the Plaintiff had failed to give an undertaking as to damages and that in any event, it was unlikely that the Plaintiff would be able to meet any damages bearing in mind its financial situation. It, however, contended that it would be able to meet such damages as it was a sound financial institution.
 22. It therefore prayed for the dismissal of the Plaintiff's application on the grounds that it was not merited, it was defective and that the same did not meet the minimum threshold of granting of an injunction.

LEGAL SUBMISSION BY THE 2ND DEFENDANT

23. The 2nd Defendant's written submissions were dated and filed on 4th December 2013. It stated that it was never a party to the agreement between the Plaintiff and the 1st Defendant that the Plaintiff voluntarily entered into. It also contended that the Plaintiff had admitted the default of the monies due to the 1st Defendant in its affidavits whereupon it subsequently purchased the said Grader at a price that was mutually agreed upon. It argued that it was a purchaser for value and had been in possession of the said Grader since the suit herein was filed as a result of which the application herein had already been overtaken by events.
24. It urged the court to adopt the holding in the case of **Mrao Limited vs First American Bank of Kenya Limited & 2 Others [2003] KLR 125** where the court therein observed as follows:-

“... If courts are going to allow debtors to avoid paying their debts, by taking some of their defences...for instance challenging the contractual interest rates, banks will be crippled if not driven out of business...”

25. It also referred the court to the case of **HCCC No Dr Simon Waiharo Chege vs Paramount Bank of Kenya Limited** (unreported) where Ringera J (as he then was) held that:-

“...On the amounts of debt outstanding, the authorities are unanimous that a mortgagor cannot be restrained by injunction from exercising a statutory power of sale which has arisen merely because the amount due is in dispute...”

26. Further It placed reliance on the several cases where the *stare decisis* was that the court's function was to expose what has been agreed upon by the parties and not what the court thought ought to have they been fairly agreed by them.
27. It was its submission that the Plaintiff had not demonstrated that damages would not be an adequate compensation if the injunction was not granted or that together with the 1st Defendant they would be incapable of compensating the Plaintiff for its loss. In addition, it further argued that the injunction could not be granted on a balance of convenience as it was in possession of the said Grader and that in any event, the Plaintiff had not come to court with clean hands disentitling it to the granting of an equitable remedy.
28. It therefore prayed for the dismissal of the Plaintiff's application with costs to itself and the 1st Defendant.

PLAINTIFF'S REPLY TO THE 1ST DEFENDANT'S SUBMISSIONS

29. The Plaintiff's written submissions in response to those of the 1st Defendant were dated and filed on 5th December 2013. It pointed out that it was not true that it had hidden the said Grader as the Proclamation showed that the same was done on 14th March 2013 while the auctioneers' letter was dated 12th April 2013. It also argued that the Investigation Report was done after the said Grader was repossessed and was meant to burden it with further costs.
30. It was its further argument that there was no evidence that the transfer of the said Grader was effected to the 2nd Defendant on 18th July 2013 and that the said transfer was an afterthought and a fabrication meant to defeat the proceedings and the court order.
31. It was categorical that the provisions of the Hire Purchase Act were not applicable in the matter herein as the same did not apply where the parties were limited liability companies and where there was joint registration on the logbook.
32. It contended that this was a case where the 1st Defendant had flouted all known and legal principles, provisions of the Auctioneers Act and defied court orders rendering it necessary for the court to grant it a mandatory injunction.
33. It was also its submission that damages were not easily quantifiable for the reason that, although the value of the said Grader was known, the business it was involved in with KWS was much more and the ruining of its business could not be quantified.

LEGAL ANALYSIS

34. The law is that an injunction is granted to an applicant to preserve subject matter pending the hearing and determination of an action. The applicant must demonstrate a *prima facie* case with probability of success, satisfy the court that it would suffer irreparable damage which would not be adequately compensated if the court did not grant the injunction and that if the court is in doubt, then it should decide the case on a balance of convenience in its favour.
35. These main principles were clearly spelt out in the case of **Geilla vs Cassman Brown** (Supra) in which the court held as follows:-

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

36. The court requires tangible evidence when considering an application for interlocutory injunction pending the hearing and determination of the suit. It is therefore incumbent upon an applicant to

submit a cogent case during the interlocutory stage to show that it has an arguable case. This is important because at this juncture, the court would not have had an opportunity to listen to the evidence in support of each party's case. This is a burden that lies on the applicant.

37. This position was well captured in the case of **Civil Application Nai No 140 of 1995 Uhuru Highway Development Limited vs Central Bank of Kenya & Others** (unreported) where the Court of Appeal held as follows:-

“...it must be clearly understood that a party who goes to a judge in the absence of the other side assumes a heavy burden and must put before the judge all the materials, including even material which is against his interest...”

38. The court has noted that Clause 4 (b) of the Hire-Purchase Agreement dated 8th September 2011 stipulated that the 1st Defendant could automatically levy a minimum three (3%) per cent per month compounded, as late payment charges against the total outstanding sum until it had received and acknowledged the said total outstanding sum and that the applied rate would vary or be revised from time to time at its sole discretion with or without necessarily informing the Plaintiff. The Letter of Offer also provided that the 1st Defendant could revise, at its own sole discretion, the Hire Charges on the facility (ies) without prior notice to the Plaintiff.
39. The letter dated 1st November 2011 attached to the 1st Defendant's Replying Affidavit marked as Exhibit 'JMM 8' alluded to a sharp rise in the interest rate. It is not clear from the documentation that was placed before the court whether the Hire Purchase Charges, Hire Purchase Rates and Interest rates referred to one and the same thing. The Plaintiff did not submit on this issue making it difficult for the court to speculate on what exactly Hire Charges referred to.
40. It, however, did admit in Paragraph 7 of its written submissions dated and filed on 5th December 2013, which submissions were in response to the 1st Defendant's submissions, that the 1st Defendant had a right to vary interest. It said that its dispute was actually in respect of the demand of the increased charges of Kshs 798,755/= in thirty (30) days.
41. It will suffice for the court to only note and make the observations as aforesaid but say no more about it, since this was not an issue that was in contention or for determination herein. In addition, while noting the Plaintiff's submissions that the Hire Purchase Act was not applicable herein, the court does not deem it necessary to address the same as it was also not an issue that was placed before it for determination.
42. Turning to what is relevant before this court is that a perusal of the documentation in this matter shows that it was not in dispute that the Plaintiff was in default of certain monies. This is borne out of the averments in Paragraphs 11 and 12 of its Supporting Affidavit where it stated that it borrowed a sum of Kshs 1,700,000/= to pay the 1st Defendant so as to secure the said Grader. This is a fact that it also admitted in its written submissions dated and filed on 5th December 2013 when it stated that **“the Plaintiff paid the installments from September 2011 to February 2013 and even tendered arrears to regularize the debt.”**
43. As was correctly pointed out by the 1st Defendant, it is the duty of courts to respect contracts entered into by parties and not to re-write their contracts. The consequences of default of payment were clearly captured in Clauses 6 and 7 of the said Hire Purchase Agreement which was duly executed by the Plaintiff and the 1st Defendant. The court cannot therefore depart from the terms thereof. The same provided as follows:-

6. If the Hirer shall:-

(i) Default in payment of any sum payable pursuant to this agreement...

THEN without prejudice to any of the existing obligations of the Hirer to the owner and also without prejudice to any of the other remedies, rights and entitlements of the owner herein contained, the owner shall by written notice determine this agreement and the Hirer shall thereupon be no longer in possession of the goods without the consent of the owner.

PROVIDED and it is hereby expressly agreed and understood that should any of the things set out in clauses (i)...happen, then this agreement shall automatically determine and the owner shall, without prior notice, be entitled to immediate repossession of the goods and without prejudice to the provisions of clause 7 below, neither party shall have any or any further rights under this agreement.

44. Clause 7 further stipulated as follows:-

“Notwithstanding the provisions of clause 6 above but without prejudice thereto upon termination of this agreement for any of the reasons aforesaid, the owner shall be entitled to immediate repossession of the goods with or without prior notice or demand and the Hirer shall, in addition...be liable in respect of:-

- a. **All the unpaid or due arrears of hire charges including all the interest and other charges levied thereon as provided for in this agreement up to the date of termination.**
- b. **All outgoing payable in respect of the goods including but not limited to, repair and maintenance costs, storage charges, license and rates fees.**
- c. **The cost of all reasonable work to be undertaken or carried out on the goods to render them in a good and serviceable condition or as near possible to the condition in which the goods were at the time the same were let to the Hirer.**

PROVIDED that if the value of the goods upon repossession and sale shall exceed in value the total amount payable to the owner as hire-charges inclusive of all interest and charges hereabove set out, then the excess proceeds shall be paid to the Hirer. PROVIDED further that in computing the total amount due to the owner in the event of premature termination of this agreements due regard shall be heard for the loss of profit suffered by the owner by reason of the agreement, not being completed.”

45. There cannot have been a clearer admission by the Plaintiff of the outstanding amount as seen in Paragraph 42 hereinabove. It does appear to the court that it was sufficient that there be a default of any sum payable under the agreement for the 1st Defendant to commence recovery proceedings. In view of the fact that there were outstanding amounts, the 1st Defendant was therefore entitled to enforce the terms of its contract to recover the amounts owed to it by the Plaintiff. This repossession could be with or without prior notice as was stipulated in Clause 7 of the said Hire-Purchase Agreement.

46. A dispute regarding the amount that was due would not be an adequate reason for a court to grant an injunction where a party can be compensated by way of damages as can be seen in the case of **HCCC No Dr Simon Waiharo Chege vs Paramount Bank of Kenya Limited** (Supra) where it was held that a dispute regarding the amount due would not be reason enough for a court to grant an injunction in favour of an applicant. In any event, the Plaintiff did not demonstrate to this court that it overpaid any monies and/or that if it overpaid the same, it would not be able to recover the same from the 1st Defendant.

47. The said Grader had a value that could be ascertained and damages paid for the same. The Plaintiff's argument that the loss of business with KWS was loss that could not be compensated by way of damages if the injunction was not granted would not fall squarely within the criteria set out in the case of **Giella vs Cassman Brown** (Supra).

48. In this regard, the court has come to the conclusion that a dispute of the amount due or any of reasons adduced by the Plaintiff to demonstrate how the arrears came about would not be sufficient reasons to persuade this court to grant it an injunction. The Plaintiff's application would thus fail on this ground in the first instance.

49. However, going further, it is also evident from the terms of the Hire-Purchase Agreement that the 1st Defendant was under no obligation to dispose of the said Grader by way of public auction, once it repossessed the same. There was also nothing that prohibited it from taking actual possession of the same once it was proclaimed and attached by the said auctioneers as was alleged by the Plaintiff. The court therefore rejects the Plaintiff's argument in this regard.

50. It is correct as was pointed out by the Defendants that the Plaintiff's application has already been

- overtaken by events and that it would be futile for the court to issue orders in vain. It was evident from the Logbook furnished by the 1st Defendant that the said Grader was presently registered in the name of the 2nd Defendant. The said Logbook was dated 18th July 2013 which was before the court granted the orders on 25th July 2013.
51. Injunctive orders are meant to restrain a particular act, commission or omission. However, what the Plaintiff was seeking to restrain had already taken place. The court cannot therefore grant Prayer No 2 of the Plaintiff's application to restrain the 1st Defendant from selling, disposing of and advertising the said Grader as it had already been transferred to the 2nd Defendant. As regards Prayer No 3, the 1st Defendant cannot also be ordered to release the said Grader to the Plaintiff as it was now in the possession of the 2nd Defendant.
52. The court hastens to point out that this was an averment that the Plaintiff did not rebut. In the absence of any evidence to the contrary, the court can only make an inference that the 2nd Defendant was in possession of the said Grader at the time the Plaintiff filed the suit herein.
53. The Plaintiff had an option to amend its application to seek appropriate orders against the Defendant but it failed to do so. Granting the orders as drafted would be merely an academic exercise and foolhardy as the facts of the case are clear to this court.
54. From the facts of the case herein, the 2nd Defendant was for all purposes, a *bona fide* purchaser of the said Grader. The court is not persuaded by the Plaintiff's assertions that the 2nd Defendant knew that the said Grader had a joint registration under Hire Purchase and ought not to have purchased the same. The 2nd Defendant was not under any legal obligation to enquire whether or not the aforesaid auctioneers had complied with the provisions of the Auctioneers Rules, 1997. In any event, the Plaintiff did not expound on how the said auctioneers acted contrary to the said Rules or the laid down procedures so as to make a finding that the Defendants had colluded or acted fraudulently as had been submitted by the Plaintiff.
55. The Plaintiff failed to demonstrate that the sale of the said Grader was secret/quiet and that the transfer showed a collusion and complicity in the irregular unprocedural and void acts of the 1st Defendant as it alleged or at all.
56. Hence, after a careful analysis of this matter and having considered the parties' affidavits, the written and oral submissions and the case law in support of their respective cases and having applied the principles of granting interlocutory injunction pending the hearing and determination of the suit as set out in the case of **Giella vs Cassman Brown** (Supra), this court is not satisfied that this is an appropriate case in which it can exercise its discretion in favour of the Plaintiff herein for the reason that the Plaintiff did not demonstrate that it had established a *prima facie* case with a probability of success.
57. Accordingly, the court finds that the question of the Plaintiff suffering loss that cannot be compensated by way of damages if the interlocutory judgment was not granted would not arise. The Plaintiff's argument that the business with KWS was worth so much and that the ruining of its business amount to loss that was not quantifiable would not find favour with this court for the simple reason that it was the one that defaulted in the Hire Purchase Agreement in the first place.
58. Further, the court entertains no doubt in its mind as what the actual position really is and in the circumstances, it is not persuaded that it ought to grant the Plaintiff an interlocutory injunction in its favour on a balance of convenience. In fact, the balance of convenience tilts in favour of the 2nd Defendant who has since been the registered owner before the filing of the suit herein.
59. For the reason that the court has found that the Plaintiff did not show a *prima facie* case with a probability of success, no mandatory injunction can be granted. The reason why a mandatory injunction cannot be granted to the Plaintiff has been given in Paragraph 51 hereinabove.
60. In conclusion, the court noted from the pleadings and written submissions that the subject value of the matter herein is well within the pecuniary jurisdiction of the subordinate court, which has a jurisdiction of Kshs 7,000,000/=. The amount that the 1st Defendant had demanded from the Plaintiff in its demand letter dated 30th May 2013 was a sum of Kshs 1,696,605/=. This is confirmed from the averments in the Plaintiff dated and filed on 25th July 2013, Amended Plaintiff and Reply to Defence both dated September 2013 and filed on 26th September 2013. Evidently, in the Amended Defence and Counter-Claim dated 17th October 2013 and filed on 24th October 2013,

- the 1st Defendant had claimed a sum of Kshs 354,996/= from the Plaintiff amongst other reliefs.
61. It is not clear from the orders sought in the Plaintiff's Complaint dated and filed 25th July 2013 why the Plaintiff opted to file the suit herein in the High Court of Kenya Commercial & Admiralty Division when it ought to have rightly filed the same in the subordinate court. The Practise Directions Relating to the Filing of Suits, Applications and Reference Gazette Notice 1756/2009 are clear that the place of suing is determined in accordance with the provisions of Sections 11-18 of the Civil Procedure Act Cap 21 (Laws of Kenya) and not according to the convenience of a plaintiff. In fact, under the said Practise Rules, the court has an option to strike out any pleadings which have been filed in the wrong court.
62. However, bearing in mind that parties ought to be given a fair and reasonable opportunity to present their cases, this court will not strike out the Plaintiff's suit. It will instead make appropriate orders pursuant to powers conferred upon it under Section 18(1)(b)(ii) of the Civil Procedure Act.

DISPOSITION

63. For the reasons foregoing, the Plaintiff's Notice of Motion application dated and filed on 25th July 2013 is not merited and the same is hereby dismissed with costs to the Defendant. For the avoidance of doubt, the costs of this application will be assessed on the scale applicable for the High Court proceedings.
64. In the circumstances foregoing, the order for temporary injunction issued by Kimondo J on 25th July 2013 is hereby discharged and/or vacated.
65. The court hereby makes an order for a transfer of this suit to the Chief Magistrate's Court Milimani Commercial Courts, Nairobi for hearing and final determination. The Deputy Registrar of the High Court of Kenya Commercial & Admiralty Division to facilitate the transfer of the said file.
66. It is so ordered.

DATED and DELIVERED at NAIROBI this 12th day of JUNE 2014

J. KAMAU

JUDGE