



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO 436 OF 2013
FAST TRACK

AMICABRE TRAVEL SERVICES LIMITED.....PLAINTIFF

VERSUS

ALIOS KENYA FINANCE LIMITED.....DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff's Amended Notice of Motion application dated and filed on 27th November 2013 was brought under the provisions of Section (sic) 159 of the Constitution of Kenya, Order 51 and Order 40 Rules 1, 2, 3, 8, 10 and 11 of the Civil Procedure Rules, 2010 and Sections 1A, 1B and 3A of the Civil Procedure Act Cap 21 and all enabling provisions of the law. Prayer Nos (1) and (2) of the said application are spent. It sought the following remaining prayers that:-
 - a. Spent.
 - b. Spent.
 - c. **THAT** this Honourable Court be pleased to grant a temporary order of injunction restraining the Defendant whether by itself, its employees, servants, agents or auctioneers from doing any of the following acts that is to say from attaching, advertising for sale, selling whether by public auction or private treaty, leasing, letting, charging or otherwise howsoever interfering with the Plaintiff's ownership, quiet use, custody, control and/or possession and/or title to the motor vehicle registration numbers KBR 990B, KBR 989B, KBR 988B, KBR 985B, KBR 984B, KBR 983B, KBR 982B, KBR 981B, KBR 979B, KBR 977B, KBR 976B, KBR 975B, KBR 973B, KBR 971B, KBR 978B, KBR 991B, KBR 987B, KBR 052P, KBR 972B, KBR 974B, KBR 968B and/or any other vehicles pending the hearing and determination of this suit.
 - d. An order directing the Defendant to provide properly reconciled accounts hereto and remove all amounts levied illegally to wit: compounded interest, penalties and collection fees.
 - e. An order restraining the Defendant either by itself or through its servants and/or agents from communicating directly or in any other manner whatsoever with the Plaintiff's client the United Nations in respect of this account.

f. Costs of this application to be paid by the Defendant.

2. The grounds under which the said application was premised were generally that:-
- a. **The Plaintiff and the Defendant entered into an agreement for a loan amounting to USD 918,229 for the purchase of tour vans and vehicles of which the Plaintiff had been paying the monthly instalments as and when the same fell due.**
 - b. **The Defendant had been levying illegal penalties and charges and using auctioneers to harass the Plaintiff and interfere with its quiet possession and use of the said vehicles.**
 - c. **That on 3rd October 2013, the Defendant levied a seven (7) day proclamation on all the vehicles which are the subject matter of this case which proclamation was intended to defeat the order of stay issued by Honourable Obulutsa in Misc Civil Application No 619 of 2013 Alios Finance Kenya Limited and Samuel Kinyua t/a Standard Commercial Investigations. Amicabre Travel Services Ltd (sic) on 1st October 2013 which order was to subsist until 17th October 2013.**
 - d. **The said proclamation was done in bad faith as the Defendant just changed auctioneers and levied another proclamation, showing unwillingness to follow due process of the law which was unjust and unfair.**
 - e. **The Defendant had been maliciously interfering with the Plaintiff's client, the United Nations and writing defamatory letters thus prejudicing the Plaintiff's business.**
 - f. **There was no agreement that the interest on penalties and other illegal charges would be compounded and no proper accounts had been furnished to the Plaintiff.**
 - g. **The activities by the Defendant had subjected the Plaintiff to irreparable loss, damage and harm hence, an interim injunction would be an effective means of preserving the subject of the suit to avert gross miscarriage of justice to the Plaintiff.**

AFFIDAVIT EVIDENCE

3. In support of its Amended Notice of Motion application, the Plaintiff relied on the affidavit of Lydia Wanjiah Besseling that was sworn on 7th October 2013 and attached to the initial Notice of Motion application dated and filed on 7th October 2013.
4. She reiterated the grounds on the face of the application and explained that the Plaintiff and the Defendant signed a Hire Purchase Agreement Exhibit marked "LWB- 2". She stated that the Plaintiff would remit a sum of USD 21,385 through its bank Giro Bank but that after they changed their bank to Commercial Bank of Africa, it was agreed that the Defendant would open an Escrow Account to facilitate the payments which she said the Plaintiff had not remitted as at the time the Plaintiff filed its application on 7th October 2013. She, however, averred that the Plaintiff had continued to remit the payments from United Nations as and when the Plaintiff received the same.
5. She further stated that the Plaintiff had paid all the amounts the Defendant had demanded vide its letter of 29th April 2013 amounting to USD 33,325.19 which was evidenced in a schedule depicting the repayments. It was her contention that the levy of collection fees was unwarranted as the Plaintiff had done nothing to deserve the harassment by the auctioneers.
6. On 15th October 2013, the Defendant filed a Replying Affidavit. It was sworn by John Njenga, its Credit Manager on 10th October 2013. He deposed that the Miscellaneous application in the subordinate court mentioned hereinabove had been filed by Standard Commercial Investigators Limited who had applied for orders for police assistance to enable it repossess the aforesaid motor vehicles which the Plaintiff generally parked at UN Gigiri Complex.
7. He further said that the Plaintiff had irregularly applied for injunctive orders in the said Miscellaneous application in which Hon Obulutsa maintained the status quo pending the hearing of the application therein on 17th October 2013. It was his averment that in filing the present application, the Plaintiff had in effect, two (2) applications seeking the same relief in two (2) different courts and that since the matter was *res judicata*, the Defendant was praying that the present application be dismissed with costs to the Defendant.
8. It was his contention that the Plaintiff had not paid the instalments for the months of July, August and September 2013. He said that the Defendant raised this issue of default with the Plaintiff but that when the same was not paid, the Defendant instructed auctioneers to repossess the said

- vehicles. He further averred that the arrears and interest continued to accrue. As at the time the Defendant filed its Replying Affidavit, the said outstanding amount was said to have stood at USD 59,088.09.
9. He was emphatic that the terms of the Hire Purchase Agreement gave the Defendant unequivocal right to repossess the twenty one (21) vans without the necessity of obtaining a court order for the reason that for as long as the instalments were not fully paid, the said vehicles belonged to the Defendant and not to the Plaintiff. He was categorical that the Plaintiff was fully aware of the consequences of defaulting in payment of the instalments.
 10. He stated that the Plaintiff was truly indebted to the Defendant and that granting an injunction to the Plaintiff would be akin to giving the Plaintiff a *carte blanche* not to pay the accruing and outstanding debt, which was prejudicial and harmful to the Defendant which was in the business of asset financing upon terms that were mutually agreed upon between the Plaintiff and the Defendant.
 11. In a Supplementary Affidavit that she swore on 11th January 2014 and filed on 13th January 2014, Lydiah Besseling deponed that the Plaintiff was the owner of the vehicles and was entitled to exclusive ownership upon redemption of the loan. She was emphatic that the Plaintiff had paid all the arrears that were to be paid and that repossession of the vehicles defeated the whole purpose of the Plaintiff's contract with United Nations.
 12. She said that the delay of payments had been occasioned by the processes that the United Nations undertook to receive funds from its Head Office and that such delays had been adequately covered by the provisions in the financing agreement for interest and that having paid a sum of USD 186,456.88 and USD 11,062.45 towards interest and penalties, it was unfair for the Defendant to levy a further interest described as "penalty", a matter that compounded all the illegal charges, expenses and unlawful penalty interest. She averred that it was necessary that a proper audit be done to remove all these illegal charges.

LEGAL SUBMISSIONS BY THE PLAINTIFF

13. The Plaintiff's written submissions were dated 11th January 2014 and filed on 13th January 2014. It argued that it had satisfied the conditions for the granting of an interlocutory injunction as was set out in the case of **Giella vs Cassman Brown [1973] EA 358** which were that, an applicant had to show a *prima facie* case with a probability of success at the trial, that an interlocutory injunction will not be granted unless the applicant might otherwise suffer irreparable loss that cannot be compensated by way of damages and that if the court was in doubt, then it ought to grant the interlocutory injunction on a balance of convenience.
14. It submitted that the penalties charged and the compounded interest applied herein were illegal. It contended that the penalties the Defendant levied amounted to an increase in the interest rates yet the Defendant had not sought the statutory approval of the Minister for Finance as was envisaged under Section 44 of the Banking Act Cap 488 (laws of Kenya) and Regulation 2 of the Legal Notice No 34 of 12th May 2006.
15. On the issue of levying illegal charges, it referred the court to the case of **Givan Okallo Ingari & Another vs Housing Finance Company of Kenya [2007] eKLR** where the court found that the defendant therein had applied default charges on the plaintiff's account which were not permitted or provided in the charge document.
16. It further stated that that the Hire-Purchase Agreement was not registered under the Registration of Documents Act Cap 285 (laws of Kenya) or the Chattels Transfer Act Cap 28 (laws of Kenya) or the Hire- Purchase Act Cap 507 (laws of Kenya).
17. It was also its submission that the Defendant had exhibited bad faith when it instructed a different firm of auctioneers to repossess the vehicles in question when the subordinate court had in fact ordered a *status quo*. It also argued that its case was not *res judicata* as the application in the subordinate court was one where the auctioneers had sought break- in orders and that in any event, the said court did not have jurisdiction to determine the matter in view of the amounts that were in dispute. It was categorical that it had disclosed the existence of the said proceedings and that the application herein was geared towards preserving the subject matter pending the hearing and determination of the suit.
18. It averred that it had made full disclosure to the Defendant at the time of signing the contract that

- the said vehicles would be hired by United Nations which would be making the payments. It was its contention that if the Defendant was allowed to proceed with the attachment of goods which were in possession of United Nations, that would amount to a breach of diplomatic immunity of United Nations contrary to Article 32 of the Vienna Convention on Diplomatic Relations, which immunity had not been waived. It referred the court to the cases of **Gerard Killeen vs International Centre of Insect Physiology & Ecology [2005] eKLR** and **United Kingdom vs Joel Ndegwa (1982-88) 1 KAR** which were to the effect that courts will not seize or detain property which is in possession of a sovereign.
19. It submitted that the equity of redemption had not been extinguished as the contract was still in force in which case the Defendant ought not to be allowed to proceed with attachment as that would be putting a clog or a fetter on equity of redemption. It placed reliance on the case of **Sharok Kher Mohammed Ali & Another vs Southern Credit Banking Corporation Limited [2008] eKLR** in this regard.
20. It was its further argument that it had satisfied the second condition for the grant of an interlocutory injunction for the reason that losing the said vehicles would occasion the Plaintiff injury that could not be compensated by way of damages if it turned out that there were no arrears. It submitted that the loss of reputation of United Nations in the event the Defendant repossessed the said vehicles was also not a loss that could be compensated by way of damages.

LEGAL SUBMISSIONS BY THE DEFENDANT

21. On its part, the Defendant filed its written submissions dated 28th January 2014 on 29th January 2014. It submitted that the Plaintiff's application and the entire suit were frivolous and a total abuse of the court process as the Plaintiff was truly indebted to it. It pointed out that the Plaintiff had not paid the instalments for the months of July, August and September 2013 and that it had duly informed the Plaintiff of the continuing default.
22. It was categorical that it was a term of the Agreement that the facility would attract an interest charged at 13% per annum over a period of sixty (60) months and a further penalty rate of 30% per annum for any amount in arrears. It denied that the interest rates had been varied as had been alleged by the Plaintiff or at all.
23. It contended that the Plaintiff had not met the conditions set out in the case of **Giella vs Cassman Brown** (Supra) and argued that the Plaintiff had not placed any material to the court to show its fidelity to the said Agreement. It referred the court to the case of **Mrao Limited vs First American Bank Limited & 2 Others (2003) KLR 125** where the court defined a *prima facie* case as including and not confined to a genuine and arguable case.
24. It further submitted that the test for granting of an interlocutory injunction on a balance of convenience as was set out by Lord Diplock in the case of **American Cyanamid vs Ethicon [1975] 1 ALL ER 508** which was referred with approval by the Court of Appeal in **Mureithi vs City Council of Nairobi (1981) KLR 332**, did not favour the Plaintiff as the Plaintiff continued to enjoy payments from United Nations but failed to remit payments to it. It was also its contention that the fact that the Plaintiff could not pay the instalments was evident that it would not be able to compensate the Defendant.
25. Additionally, it was the Defendant's contention that the provisions of the Banking Act were not applicable herein and that the Hire- Purchase Agreement was valid under the provisions of Section 6 of the Hire- Purchase Act. It submitted that the said Hire-Purchase Agreement could not be impeached on the ground that the same had not been registered. It argued that in any event, the contract between the Plaintiff and itself was valid as they had both signed the said Hire-Purchase Agreement as was envisaged in Section 3(2) of the Law of Contract Cap 22 (laws of Kenya).
26. It denied that the issue of diplomatic immunity was applicable herein as had been submitted by the Plaintiff herein and emphasised that it was entitled to seek the repossession of the said vehicles due to the failure by the Plaintiff to comply with several notices it had sent and had been ignored by the Plaintiff.

LEGAL ANALYSIS

27. The court identified the questions of the applicability of the Banking Act and the Vienna

Convention on Diplomatic Relations as preliminary issues that required to be dealt with right at the outset so as to address the substantive issue of whether or not the Plaintiff was entitled to an interlocutory injunction pending the hearing and determination of this suit.

28. It is evident from the facts of this case that the Defendant was carrying out Hire Purchase business. The question of whether or not the Hire-Purchase Act was applicable in the circumstances of this case will be addressed hereunder. However, to understand what Hire-Purchase business was, the court deemed it worthwhile to consider the definition in the said Act. Under Section 2 (1) therein, hire-purchase business has been defined as:-

“a business, whether carried alone or with other business, of entering into hire-purchase agreements, whatever the hire-purchase price under any agreement.”

29. Perusal of the agreement that was entered into between the Plaintiff and the Defendant shows that the same was a Hire-Purchase Agreement. The Plaintiff did not provide the court with any evidence to the contrary. It is therefore the view of the court that the provisions of the Banking Act would not be applicable in the circumstances of this case as the transaction the Defendant was carrying out herein was not in the nature of a banking business. The Plaintiff's submissions that the Defendant contravened the provisions of Section 44 of the Banking Act and the aforesaid Legal Notice would not find favour with this court.

30. The Hire-Purchase Agreement was between the Plaintiff and the Defendant. The Letter of Offer dated 21st December 2011 shows that the Plaintiff was the borrower of a sum of USD 918,299 while the Defendant was the financier. There is no evidence that the Plaintiff enjoyed diplomatic status or that it began to enjoy the same as is contemplated under the Vienna Convention on Diplomatic Relations once it entered into a contract with United Nations.

31. For the reason that United Nations was not privy to the said Hire-Purchase Agreement, the court hereby rejects the Plaintiff's assertions that any repossession of the said vehicles by the Defendant amounted to a breach of diplomatic immunity as it alleged or at all. The said Convention was not applicable or relevant in these proceedings.

32. The more substantive issue herein is whether or not the Plaintiff was entitled to an interlocutory injunction pending the hearing and determination of the suit herein. It does appear to this court that the bone of the Plaintiff's contention was that the Defendant varied the interest rate when it charged illegal penalties and compounded interest charged monthly in addition to charging unwarranted collection charges.

33. As can be seen hereinabove, the Plaintiff submitted that the penalties the Defendant levied amounted to an increase in the interest rates. In Paragraphs 22 and 23 of its Supporting Affidavit, the deponent deposed as follows:-

“22. THAT I have looked at the statement of accounts provided by the Defendant and I have noticed the following charges:-

- a. **Penalty Interest Charges**
- b. **Collection charges**
- c. **Compound interest charged monthly.**

23. THAT we did not contract to pay these charges and they are being levied arbitrarily.”

34. A perusal of the Letter of Offer dated 21st December 2011 and marked as Exhibit LWB- 1) attached to the said Supporting Affidavit provided as follows:-

“Interest will be charged at a rate of 13% per annum over the period of 60 months. A penalty rate of 30% p.a. will apply for any amount in arrears.”

35. Clauses 3(d) and (e) of the said Hire-Purchase Agreement provided for the levying of specified interest at rates which the Defendant could vary in its absolute discretion and payment of interest at the Late Repayment Rate specified in the Schedule. The court did, however, not have the benefit of seeing the said Schedule to verify the rates. Suffice it to state that the said Hire-Purchase

- Agreement provided for the said levies.
36. On page 2 of Exhibit marked "LWB-9", the loan advanced to the Plaintiff was said to have been USD 918,298.63. The total interest was indicated as USD 335,348.57 giving a total repayment of USD 1,253,647.20. This is the total amount the Plaintiff would have been expected to pay at the end of sixty (60) months, given as December 2016. The repayment for each of those months stood at USD 20,894.12 in the event there were no penalties for late payment or other applicable charges. The interest rate and penalty on default therein were shown as 13% and 30% respectively.
37. The Loan Statement Movement which appeared to be part of Exhibit marked "LWB-9" shows that penalties accrued severally. Between the months of May 2012 and June 2013, the Defendant sent the Plaintiff invoices for the sum of USD 21,385. This is the amount that the Defendant said was the Hire Purchase Charges in Paragraph 13 of its Replying Affidavit.
38. The said Loan Statement Movement indicated that the outstanding balance was USD 25,977.29 as at June 2013. The Plaintiff contended that it paid the amount the Defendant demanded in its letter dated 29th April 2013. The amount demanded was shown as USD 33,225.19 which it said was paid as was evidenced in the said Loan Statement Movement. The Defendant did not deny that the Plaintiff had paid the payments until June 2013.
39. The Defendant's claim was for the months of July, August and September 2013 which it said the Plaintiff had not paid despite notices to do so. The Plaintiff did not provide proof that it had paid the same. The Plaintiff did not also demonstrate to the court that the charges that the Defendant levied were illegal or that the same were not envisaged in the said Letter of Offer and Hire-Purchase Agreement. The burden was upon the Plaintiff to demonstrate this aspect at the very outset of its case. It was not sufficient for it to allege that fact and not provide proof for the same.
40. 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 time, the court would not have had an opportunity to listen to all the evidence in support of each party's case. This is a burden that lies on the applicant. Having failed to rebut the Defendant's assertions, the only inference the court can make is that the said instalment remained unpaid.
41. The consequences of default of the payment of the instalments were set out in Clause (7) of the said Hire-Purchase Agreement. The said clause provided that termination the owner, in this case being the Defendant, could terminate the Agreement in the following circumstances:-
- a. **The Owner may, on the happening of any of the events specified in clause 7 (b) below without notice to the Hirer immediately terminate the hiring of the Goods in consequence of which the Hirer shall no longer be in possession of the Goods without the consent of the Owner and the Owner shall have the right to immediately retake possession of the Goods.**
 - b. **The following are the events referred to in clause 7(a) above:-**
 - i. **Any instalment or other sum payable hereunder by the Hirer remaining unpaid after the expiry of Fourteen (14) days of becoming due...."**
42. It is abundantly clear from the provisions of Clause (7) hereinabove that the Defendant was entitled to repossess the said vehicles the moment any one (1) instalment or payment repaid unpaid fourteen (14) days after it became due and was not required to give any notice to repossess the vehicles. The Plaintiff did not therefore demonstrate that it had a *prima facie* case with a probability of success during the trial.
43. The Hire-Purchase Act was not applicable in the case herein for the reason that the Hire-Purchase Price was in excess of Kshs 4,000,000/= and the Plaintiff was a body corporate. The ouster of the Hire-Purchase Act can be seen in Section 3 (1) of the Act which provides as follows:-

"This Act applies to and in respect of all hire-purchase agreements entered after the commencement of this Act under which the hire-purchase price does not exceed four million shillings or such other higher or lower sum as the Minister may, after taking into account market forces from time to time prevailing, prescribe other than a hire-purchase

agreement in which the hirer is a body corporate, wherever incorporated:

Provided that monetary limitation does not apply so as to affect the definition of hire-purchase business.”

44. The court therefore takes the view that it was not necessary that the Hire-Purchase Agreement to be registered under the Hire-Purchase Act before the Defendant repossessed the said vehicles as the said Act was not applicable herein. This was a conclusion that the Court of Appeal made in **Civil Appeal No 285 of 1998 Diamond Trust Bank Kenya Limited and Jaswinder Singh Enterprises (1999) eKLR** before the amendment of the current Act, when it found that the Hire-Purchase Agreement therein was not regulated by the said Act and that it was not necessary for the agreement therein to have been registered before the Lender therein repossessed the vehicles therein. The court stated as follows:-

“ My understanding of the section (section 2(1)) emphasis by court) is that the Act does not apply to a contract of hire-purchase when the hire-purchase is in excess of Kshs 300,000/=...In the result the respondent was not protected by the provisions of the Act and could not therefore obtain an injunction on that basis...This section therefore excludes all the agreements where the hirer is a body corporate from the protection of the Act...Thus the respondent’s grounds that the contracts were not registered...could not be grounds for injunction.”

45. The Plaintiff would thus not have been entitled to the granting of an interlocutory injunction on the ground that the said Hire-Purchase Agreement was not registered as it alleged or at all for the reason that the contractual obligations under the said Hire-Purchase Act did not become extinguished merely because the same was not registered.

46. Similarly, the non-registration of the Hire-Purchase Agreement under the Registration of Documents Act or the Chattels Transfer Act as was alleged by the Plaintiff were not applicable in the circumstances of this case and did not therefore affect the enforceability of the said Hire-Purchase Agreement. The Hire-Purchase Agreement was not a document that was required to be registered under Section 4 of the Registration of Documents Act and neither were the said vehicles chattels within the meaning of the chattel capable of registration under the Chattels Transfer Act. As registration of the Hire-Purchase Agreement under any of the Acts was also not condition precedent before the Defendant could repossess the said vehicles, the court therefore rejects the Plaintiff’s submission that the said Agreement ought to have been registered therein.

47. In any event, the Defendant did not purport to be exercising its rights under any of those Acts and for that reason, the same were not relevant in the circumstances of this case. The long and short of this is that even if the Hire-Purchase Agreement was governed by any of the Acts mentioned by the Plaintiff, the same could not affect the enforceability of the said Agreement as the court held in the case of **HCCC No 253 of 2007 Davis Mburu Kamau vs National Industrial Credit Bank Limited (2010) eKLR**.

48. While the court has the power to exercise its equitable jurisdiction where one party takes advantage of the other as far as contractual obligations are concerned, the court must only do so with a lot of caution and trepidation. This is because it is the duty of courts to respect contracts entered into by parties and not to re-write the same.

49. The Plaintiff and the Defendant voluntarily entered into a contract which regulated and continues to regulate their relationship. The discretion by the Defendant to vary its rates without notice to the Plaintiff was an express term in the Hire-Purchase Agreement. Restraining the Defendant from exercising its rights under the Agreement would be tantamount to the court infringing on the Defendant’s rights of repossession of the vehicles when the Plaintiff had defaulted in the payment of the instalments as and when the same became due.

50. The Plaintiff cannot fail to meet its financial obligations to the Defendant and still expect to retain the said vehicles. It must either pay the monies as it still has the right of redemption or return the same. It cannot have its cake and eat it too.

51. In addition, it is the conclusion of this court that it cannot grant an interlocutory injunction in favour of the Plaintiff on the ground that there existed a dispute regarding the amounts unless he

could provide proof that no monies were due from it to the Defendant or that there were demands of illegal or unlawful payments by the Defendant. The Plaintiff did not demonstrate any of these circumstances. A similar holding was made by the Court of Appeal in **Fina Bank vs Romak Limited (2001) EA 65.**

52. The court finds that granting an interlocutory injunction pending the hearing and determination of this suit would actually be prejudicing the Defendant's interests bearing in mind that there are accruing charges. The danger of granting an interlocutory injunction is that the outstanding amount could very well outstrip the value of the securities that the Defendant holds to its detriment.
53. While the subject matter of these proceedings are motor vehicles and not a suit property as was in the case of **Andrew Muriuki Wanjohi vs Equity Building Society Limited & 2 others [2006] eKLR**, the court finds the holding in the said case to have been relevant in the circumstances of the case herein. In that case, Ochieng J stated as follows:-

“... In my considered view, if the 1st and 2nd Defendants were restrained from selling off the property until the suit was heard and determined, there is a very real risk that the debt may outstrip the value of the property as the borrower has not made repayments for more than three years...”

54. Both parties were *ad idem* that 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 if the court is in doubt, then it should decide the case on a balance of convenience. These principles were clearly spelt out in the case of **Geilla vs Cassman Brown** (Supra) in which it was held that:-

“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.”

55. As the power to grant an interlocutory injunction is a discretionary one, it must be based on the law and evidence. So long as the Plaintiff defaulted in the payment of Hire-Purchase Price and the instalments remained unpaid, the Defendant was entitled to repossess the said vehicles as it remained the owner of the same until such time that the Plaintiff paid the entire Hire-Purchase Price. The court did not find that the Defendant was clogging or fettering the Plaintiff's rights of redemption of the said vehicles.
56. Further, the loss of the reputation of United Nations as was alleged by the Plaintiff would not be a ground under which the court could grant the Plaintiff injunctive orders herein. The Plaintiff ought to have provided the court with documentation to demonstrate that its not remitting the instalments for the months the Defendant was claiming was dependent on the opening of an escrow account. In the absence of any such proof, it is the finding of this court that the fact that the Plaintiff had not remitted the instalments on the basis that the Defendant had not opened an escrow account would also not have been a ground under which the court could grant the Plaintiff an interlocutory injunction.
57. Having considered the parties' affidavits, the written and oral submissions and the case law in support of their respective case and having applied the principles of granting interlocutory injunction pending the hearing and determination of the suit herein, this court has come to the conclusion that the Plaintiff was not able to demonstrate that it had a *prima facie* case with a probability of success at trial as was set out in the case of **Giella vs Cassman Brown** (Supra).
58. This is therefore not an appropriate case for the court to exercise its discretion in favour of the Plaintiff herein. In view of the fact that the Plaintiff was not able to demonstrate a *prima facie* case with probability of success at trial, the question of compensation by way of damages if the

- interlocutory injunction was not granted would also not arise. The balance of convenience in this case tilts to the Defendant herein.
- 59.The above notwithstanding, it is of paramount importance that the Plaintiff be furnished with a Statement of Accounts with a view to getting sufficient information of the exact sum that is due from it to the Defendant. The court has merely found the necessity of the Defendant furnishing the Plaintiff with Statements of Accounts out of abundance of caution and not on the basis that the Plaintiff had satisfied the court that the Defendant did not furnish it with Statements of Accounts. The court finds that no prejudice will be suffered by the Defendant in the event it was ordered to furnish the said Statements of Accounts to the Plaintiff.
- 60.In view of the fact that the Plaintiff did not place any material to the court to show that the Defendant was communicating directly with United Nations, the court is not inclined to grant Prayer No (5) of the application herein. Suffice it to state that the Defendant would be well advised to communicate with the Plaintiff through its advocates as United Nations was not privy to the contract the Defendant entered into with the Plaintiff.

DISPOSITION

- 61.For the reasons foregoing, only part of Prayer No (4) of the Plaintiff's Amended Notice of Motion application dated and filed on 27th November 2013 has been granted herein. For the avoidance of doubt, the part of Prayer No (4) that has been granted is that of the Defendant being ordered to furnish the Plaintiff with the reconciled accounts and not on the removal of amounts that had allegedly been levied illegally as no evidence was submitted by the Plaintiff to prove the same.
- 62.The court did not find merit in Prayer Nos (3) and (5) of the said application and the same are hereby dismissed. In the circumstances foregoing, the *status quo* order issued by Havelock J on 7th October 2013 is hereby discharged and/or vacated. The Defendant's costs of this application shall be borne by the Plaintiff.
- 63.It is so ordered.

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

J. KAMAU

JUDGE