



REPUBLIC OF KENYA

High Court at Mombasa

Civil Case 36 of 2010

GLOBAL BABIPO HOLDINGS LTD.....PLAINTIFF

VERSUS

1. DIAMOND TRUST BANK (K) LIMITED

2. THAARA AUCTIONEERS.....DEFENDANTS

RULING

Before court is the applicant's chamber summons application dated 12th November, 2010 seeking the following orders:

“2. Pending the hearing and determination of this application interparties, the 1st and 2nd defendants by themselves, their agents and/or servants, or any other person authorized by them be restrained by way of a temporary injunction from further attachment of any of the plaintiff/applicant's movable property in relation to the Hire Purchase Agreement between them.

3. The defendants by themselves, their agents and/or any person authorized by them be ordered by way of a mandatory injunction restitute all motor vehicles KBF 512B/023A/593B/597B, KBD 986, ZD 0463, ZC 9864, ZC 9863 and ZC 9862.

The chamber summons was supported by the affidavit of **EVANS RUTAH WEIRE ASIIMWE**, the director of **GLOBAL BABIPO HOLDINGS LIMITED** (hereinafter referred to as the '*plaintiff company*'). This chamber summons was heard under certificate of urgency and a temporary injunction was granted by **Hon. Justice Ojwang** on 17th November, 2010 restraining any further attachment of the plaintiff company's vehicles in relation to the Hire Purchase Agreement.

Subsequently, on 9th February, 2011 the 1st defendant **DIAMOND TRUST BANK KENYA LIMITED** filed a notice of motion dated 8th February, 2011 in which the following orders were sought:

“2.THAT the Honourable court be pleased to grant an interlocutory injunction restraining the plaintiff, its agents and/or servants from taking and/or allowing in any manner whatsoever trailers registration numbers ZC 9863, ZC 9864 and ZC 0463 to leave the jurisdiction of this Honourable court pending the hearing and determination of this application.

3.THAT the Honourable court be pleased to grant a mandatory injunction compelling the plaintiff, its agents and/or servants to bring to this Honourable court’s jurisdiction and avail and/or produce trailer registration numbers ZC 9863, ZC 9864 and ZD 0463 to the 1st defendant for purposes of inspection.”

On 17th November, 2011 directions were given that the two applications were to be heard together. Parties agreed to dispose of the matter by way of written submissions. Both sides duly filed their written submissions. The matter now awaits the court’s ruling.

At the heart of this dispute are a series of Hire Purchase Agreements entered into by the parties in which the plaintiff company in the year 2008 sought and obtained various sums of money as loans from the 1st defendant (a bank) in order to purchase various heavy vehicles, machinery and equipment. The 1st defendant claims to have made substantial payments on the loans between the years 2008 to 2010. However, sometime in the year 2010 the 1st defendant instructed **THAARA AUCTIONEERS** (the 2nd defendant) to repossess the vehicles from the 1st defendant all of which were valued at Kshs. 3.5 million. The plaintiff company contends that this attachment was in bad faith and was fraudulent, and therefore filed the present suit.

I have read and have carefully considered the written submissions filed by each side. In his supporting affidavit Mr. Evans Rutah Weire Asiimwe, a director of the plaintiff company concedes that the plaintiff company did obtain a loan facility from the 1st defendant. He however insists that the 1st defendant acted fraudulently in giving instructions to the auctioneer to repossess the motor vehicles as he avers that the plaintiff had no outstanding arrears. With regard to the motor vehicles KBF 595B the plaintiff did seek to have this loan rescheduled but no agreement had been reached by the parties when the instructions for repossession were given.

The plaintiff claims that no notice was given to them before repossession and that due to this fraudulent repossession the plaintiff is unable to carry on its business.

The plaintiff submits that the actions of the 1st defendant are in breach of section 8(1)(b) of the Hire

Purchase Act which guarantees the hirer quiet possession of the item purchased.

The plaintiff further contends that the repossession order contravenes section 15(1) of the Hire Purchase Act since the plaintiff company had already repaid more than two thirds of the total amount loaned to them.

For the 1st defendant **Ms. Elizabeth Hinga** – the bank Head of Department Recovery swore a replying affidavit on 29th November, 2010 opposing the plaintiff’s application of 12th November, 2010 in which it is stated as follows:

“The plaintiff company defaulted in the payment of the loan hence the decision to repossess the vehicles.”

The following questions arise for determination by this court:

1. Is the plaintiff company entitled to injunctive orders restraining the 1st defendant and the auctioneer from further attachment of the plaintiff company’s vehicles?

The plaintiff company has submitted that the repossession was unlawful as it was undertaken in breach of the provisions of the Hire Purchase Act Cap 507 Laws of Kenya. Section 3(1) of the said Act provides as follows:

“3(1) This Act applies to and in respect of all hire purchase agreements entered into after the commencement of this Act under which the hire purchase price does not exceed the sum of 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[my own emphasis]”

In this case the value of each vehicle/trailer has not been specified. However, a look at each hire purchase contract reveals that the cost of the item being purchased is well over the Kshs. 4.0 million set out in Cap 507. As such I do find that the Hire Purchase Act is not applicable in this case.

At the root of this dispute is the question of whether the plaintiff has paid of the hire purchase loan or not. Whilst the plaintiff company claims to have repaid over two-thirds of the amount due, the 1st defendant disputes this and claims that a substantial amount of the loan advanced remains unpaid.

The conditions upon which a court may grant an interlocutory injunction have been clearly set out in the case of **GIELLA –VS – CASSMAN BROWN 1973 E.A. 358**. It is not in dispute that the plaintiff company did enjoy a credit facility from the 1st defendant. What the parties appear unable to agree upon is the amount of arrears due and owing to the bank. As a court I am mindful of the principle that a lender ought to be able to realize his security. However, I must also weigh this as against any irreparable harm that may result to the plaintiff from the repossession and sale of the vehicles before the amount due and owing is ascertained. In my view the balance of convenience favours the plaintiff company. Therefore I am inclined to grant the plaintiff prayer for interlocutory relief pending a full determination of the suit.

However, in view of the fact that as I have stated above the **fact** of the loan is not in any dispute, I would be loathe to order the 1st defendant to restitute by way of mandatory injunction any vehicles already attached. As such, I do allow prayer (2) of the chamber summons dated 12th November, 2010 but I disallow prayer (3) of that chamber summons

2. Notice of Motion dated 8th February, 2011.

The 1st defendant filed this notice of motion seeking two main prayers:

(1)An interlocutory injunction to restrain the plaintiff company from removing trailers **ZC 9863, ZC 9864 and ZC 0463** from the jurisdiction of the court. The said trailers being the subject of the hire purchase agreement remain the property of the hirer until paid for in full. As such the said trailers must remain on hand and within the jurisdiction of the court. There exists the very real possibility that in removing these trailers to another jurisdiction the plaintiff company may in effect seek to conceal them away from the bank to prevent their being repossessed in the event that final decision is in the bank's favour.

Lastly on this point the Hire Purchase Agreement dated 19th December, 2008 expressly provides at clause (1) that the hirer agrees:

“(1) not to allow the vehicle/goods to pass out of his custody or control nor to sell, assign, pledge, mortgage, underlet land or part with possession of the vehicle/goods nor in any way deal with, dispose of or attempt to dispose of the vehicle/goods or any part of his intent therein nor to represent himself to be nor to do or suffer to be done anything whereby he may be reported to be the owner of the vehicle/goods; nor to take or send the vehicle/goods or permit the same to be taken or sent out of Kenya.” *[my emphasis]*

This latter part being an express term of the Hire Purchase Agreement is enforceable and has merit. As such I do allow prayer (2) of the notice of motion dated 8th February, 2011.

(2)Prayer that the plaintiff company do avail and produce the trailer registration numbers **ZC 9863, ZC 9864** and **ZC 0463** to the 1st defendant for purposes of inspection. As stated earlier, the hired goods remain the property of the bank until payment is made in full. The state of maintenance of the trailers is of interest to the 1st defendant as it has a direct bearing on the re-sale value of these assets should the 1st defendant need to dispose of them to recover any arrears due to them. Once again the Hire Purchase Agreement expressly obliges the hirer by clause (d):

“to keep the vehicle/goods and all parts thereof in good repair and condition and in working order and to permit the owner and persons authorized by it at all reasonable times to have access to the vehicle/goods for the purpose of inspecting the condition thereof.....” *[my emphasis]*

This being an express provision of the contract between the parties is enforceable. As such, I do allow prayer (3) of the notice of motion dated 8th February, 2011.

Finally, in summary the court makes the following orders:

(1)Prayer (2) of the chamber summons dated 12th November, 2010 is allowed whilst prayer (3) is disallowed.

(2)Prayers (2) and (3) of the notice of motion dated 8th February, 2011 are both allowed.

(3)Main suit to be set down for hearing on priority basis.

(4)Costs in the cause.

Dated and delivered in Mombasa this 10th day of April, 2013.

M. ODERO

JUDGE

In the presence of:

No appearance by either side

Court Clerk Mutisya

