REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

Civil Suit 31 of 2011

DAVID MUTUA MALII……..…PLAINTIFF

VERSUS

1. BARCLAYS BANK OF KENYA LIMITED

2. CREDIT REFERENCE BUREAU AFRICA LTD….....DEFENDANTS

Coram:

Mwera, J.

Arome for plaintiff

Mutiso for 1st defendant

N/A for 2nd defendant

Court Clerk Furaha

RULING

The Hon. Justice Ojwang, as he then was, directed the parties herein to file written submissions regarding a notice of motion dated 24th February, 2011. It was brought by the plaintiff under Order 3 rule 2, Order 40 rule 2, 4, 8 CPR, sections 3A, 63 of the CPR and section 7 of the Arbitration Act. The prayers were:

(i) that the 1st defendant bank be restrained from any move debiting the plaintiff's account held by it;

(ii) that the 2nd defendant credit reference firm be restrained from releasing to any other party the details or information regarding the plaintiff; and

(iii) that the 1st defendant do disclose the whereabouts of motor vehicle registration number KAX 435V/ZC 6229.

In the grounds it was contended that by agreement the 1st defendant extended a credit facility to the

plaintiff to be repaid whereupon the plaintiff would become the owner of the said motor vehicle, the same becoming security for the credit facility. Upon granting the facility the motor vehicle was registered in the joint names of the plaintiff and the 1st defendant. The ownership was not encumbered. That the plaintiff made payments as per the credit facility terms but he fell in arrears and the 1st defendant moved to repossess the motor vehicle. It was then sold to a third party without the plaintiff's consent. To the plaintiff, that sale was in breach of the rules of ownership since the joint ownership had no encumbrances. He was not informed of the whereabouts of the motor vehicle or the proceeds of its sale. Despite that, the 1st defendant had continued to demand payment of Shs. 9,248,364/35 as balance due on the said facility. The plaintiff as a joint owner, therefore must know the whereabouts of the motor vehicle. As a reputable businessman who may require to take credit from other banks, the threat by the 1st defendant to notify the 2nd defendant the details of the plaintiff, may end up with the 2nd defendant making such financial details known by 3rd parties to the detriment of the plaintiff. And that the 1st defendant had also threatened to bring bankruptcy proceedings against the plaintiff.

The plaintiff swore a supporting affidavit on the lines stated in the grounds. He, however, added that he had made regular repayment of the credit facility until at some point the Kenya Police seized the lorry and filed a criminal case. During that time the motor vehicle was not in use in the plaintiff's transport business and so the repayments fell in arrears. The motor vehicle was later repossessed and sold as alluded to earlier. That the truck was security for the credit facility and the 1st defendant was entitled to repossess it but not to go off and sell it and decline to disclose for how much or where the truck was. Yet the 1st defendant has gone on to demand Shs. 9.2 million plus other charges – all coming to Shs. 10.0 million. The plaintiff disputes this debt. Reference was made to the 1st defendant's letter of 15th December, 2010 wherein it was intimated that the plaintiff's financial matters could be passed to the 2nd defendant for attention. This would injure the plaintiff and so it should be restrained. That inquiries at the registrar of motor vehicles disclosed that the subject truck was still in the joint names of the plaintiff and the 1st defendant. The latter is even contemplating bankruptcy proceedings against the former.

Antony Maseno, the head of legal affairs with the 2nd defendant filed a replying affidavit arguing that the 2nd defendant was never a party to the transactions between the plaintiff and the 1st defendant. The plaintiff brought in the 2nd defendant because of an apparent threat by the 1st defendant that it could disclose his financial affairs to the 2nd defendant with a view to distribute the same to third parties, despite the Banking Act section 31 under which the 1st defendant operates. Accordingly, the plaintiff had not made out a *prima facie* case against the 2nd defendant to warrant an injunction.

Given to submit, the 2nd defendant did not do so but the plaintiff and the 1st defendant did.

The plaintiff maintained that their credit facility agreement provided for arbitration in the event the parties fell in dispute regarding the operation of the facility. There was narration of how the parties entered the credit facility and were jointly registered owners of the truck which was the security for the facility. That when default occurred and the 1st defendant repossessed and sold the truck, that was in breach of the parties' agreement. The plaintiff was still a joint owner. It was claimed that there were discrepancies in the way the plaintiff's account was kept by the 1st defendant resulting in figures that did not clearly state the level of his indebtedness. Then despite the assertion by the 2nd defendant that matters relating to the transactions herein were governed by provisions of section 31 of the Banking Act, the court heard that in the event that defendant divulged that information, that would injure the credit worthiness of the plaintiff with other financial institutions.

The 1st defendant told the court that the operative agreement stipulated that the plaintiff do regularly repay the credit facility which started off at Shs. 6,598,240 million. The truck in question was the security thereof. The 1st defendant had the right to realize it in the event of default. The plaintiff had admitted in his application that he defaulted. The truck was seized.

That the credit facility was subject to interest at 18% and that was what the 1st defendant had debited the account with – no other sums. This was a contractual aspect of the credit the court should not stop. The interest rate was not illegal or unlawful. This had been alluded to in the 1st defendant's replying affidavit filed in court on 5th April, 2011. Therein it was stated that truck/trailer was sold for Shs. 2.2 million which was credited to the plaintiff's account. He did not dispute this.

The court was told that section 31 (4) of the Banking Act set out the duties of the 2nd defendant including collecting prescribed credit information on clients of institutions licensed under that Act and disseminating it amongst such institutions for use in the ordinary course of business subject to such conditions or limitations as were prescribed. That this court could not bar doing what the law mandated and same was being done within that law.

Moving to the prayer to go to arbitration, the 1st defendant's position was that as per section 6 of the Arbitration Act, an appearance had been entered and a defence filed, and that was it.

In reply to the 1st defendant's submission, the plaintiff argued that it had only some of the bank statements in its possession while the bank had the rest. Without pointing out specific incidents, it was claimed that the defendant made double entries of interest debits in the plaintiff's account. And that the 1st defendant's appreciation of section 6 (1) of the Arbitration Act was faulty – i.e. regarding invoking the arbitration clause. The plaintiff also asserted that this court had authority to halt levying of interest debits ,if disputed. And order should issue for their review/scrutiny so that they are entered on a monthly basis.

After appreciating all the above, this court is minded to stated at this point that the plaintiff was granted credit by the 1st defendant, to be serviced as agreed. The truck stated here was the security. The plaintiff has admitted that he defaulted in servicing the loan and the 1st defendant took the motor vehicle/security and sold it. The defendant saw that as a unilateral act. He claimed that the workings in his account were not clear to him and he suspected some unwarranted additions that became a burden on him. The 1st defendant has stated that only contracted interest was levied on the account and nothing else. That cannot be halted by the court.

In the light of all this, this court finds that the injunction orders cannot issue because there was a loan taken, a default occurred and the security was sold by the lender. It has not been shown that charges other than the contracted interest have been factored in the subject debt which this court should stop. It has not also been shown that defaulting to repay can form a basis for arbitration. A default to repay can hardly pass as a dispute, difference or question arising or affecting the parties' rights and liabilities under the agreement of the parties herein signed on 20th March, 2007. It constituted a fundamental breach of the agreement. However, if the above position be incorrect, this court's opinion is that all the parties are acting within the limits of the Banking Act and the credit facility agreement, then on proof of any default/breach at the trial, that court will consider and probably order an appropriate remedy. This application is dismissed with costs.

In the next thirty (30) days the parties should comply with Order 11 CPR regarding filing/serving witness statements, bundles of paginated documents plus issues in readiness of trial of this suit.

Delivered on 3rd July, 2012.

J. W. MWERA

JUDGE