



Ndivo v BASHY African Credit Limited & another (Civil Case E210 of 2024) [2024] KEMC 38 (KLR) (12 August 2024) (Ruling)

Neutral citation: [2024] KEMC 38 (KLR)

**REPUBLIC OF KENYA
IN THE MACHAKOS LAW COURTS
CIVIL CASE E210 OF 2024
CN ONDIEKI, PM
AUGUST 12, 2024**

BETWEEN

FRANCIS MUTHOKA NDIVO PLAINTIFF

AND

BASHY AFRICAN CREDIT LIMITED RESPONDENT

AND

BRIAN ELLY OPAR T/A SKYPAC CONSULT AUTIONEERS DEFENDANT

RULING

Part i: The Applicant's Case

1. On 5th July 2024, the Plaintiff/Applicant (hereinafter “the Applicant”) filed a Notice of Motion dated 3rd July 2024 under a certificate of urgency primarily seeking an order of temporary injunction restraining the Defendants/Respondents from advertising and/or auctioning the Applicant’s motor vehicles registration numbers KCG 348K Toyota Hilux and KDN 615E Subaru Exiga, pending hearing and determination of the suit; and an order of unconditional release of the said motor vehicles to the Applicant, pending hearing and determination of the suit.
2. The Application is predicated on the grounds set out on the face of the Motion and facts deposed in the Supporting Affidavit sworn by the Applicant on even date.
3. In the Motion, it is averred that the Applicant is the registered owner of the said motor vehicles and that on 19th January 2024, the motor vehicles were offered as security for a loan facility in the sum of Kshs. 1,391,200, which was advanced by the 1st Defendant/Respondent to be repaid in equal instalments of Kshs. 169,629, for a period 18 months with effect from February 2024. It is claimed that the Applicant has been servicing the loan facility and he has so far paid a sum of Kshs. 850,000 and he is not in arrears.



4. The Applicant claims that the attachment is illegal since he was served with a proclamation notice by the 2nd Respondent and demand notice by the 1st Respondent.
5. It is averred that acting on the letter of instruction from the 1st Respondent, the 2nd Respondent apparently obtained an order for police escort in Nairobi Milimani Commercial Court Misc. Application Number E1107 of 2024, without serving the Applicant.
6. It is claimed that the 1st Respondent has thus breached the fiduciary duty by failing to follow the due process.
7. In the said Supporting Affidavit, the substance of the Motion has been rehashed and the following documents exhibited: copies of the certificates of registration of the two motor vehicles marked FMN1; a copy of the letter of offer marked FMN 2; copies of bank statement, loan statement and M-pesa statement marked FMN 3a, 3b & 3c; and a Court order marked FMN 4.
8. In his Further Affidavit, the Applicant has deposed that the Replying Affidavit is replete with falsehoods and that the Replying Affidavit has been sworn by a stranger there being no evidence that the deponent is a director of the 1st Respondent. Further, the Applicant deposes that it is true that he fell into financial difficulties which resulted into loan arrears and that this fact was brought to the attention of one S. Thuku and Faith of the 1st Respondent and that they agreed that he would settle the arrears once customers paid him. It is deposed that by 26th June 2024, he had actually overpaid by KHz. 850,000, which is higher than the 848,145 which was expected from him by that date, worked as 169,629 x 5 months.
9. In his written Submissions dated 18th July 2024 and filed on even date, learned Counsel Mr. Masinde instructed by the Firm of Messieurs Wabomba Masinde & Associates, representing the Applicant, has rehashed the contents of Application and urges this Court to find that all conditions for grant of the said injunction have been met, placing reliance upon section 63(c) of the Civil Procedure Rules; Order 40 rule 1 of the Civil Procedure Rules; Giella Cassman Brown & Co. Ltd [1973] EA 358; Mrao Limited vs. First American Bank of Kenya Limited & 2 others [2003] eKLR; Nguruman Limited vs. Jan Bonde Nielson & 2 others [2014] eKLR; Joseph Siro Mosiomo vs. Housing Finance Company of Kenya [2008] eKLR; Limited and Priscah Bosibori Peter vs. Waithaka vs. Industrial and Commercial Development Corporation [2001] eKLR; and Films Rover International Limited vs. Cannon Film Sales Limited [1986] 3 ALL ER 772.
10. It is argued that since the 1st Respondent did not register a chattels mortgage, the said motor vehicles remain mere collateral and consequently, the 1st Respondent cannot lawfully exercise a power of sale.
11. Finally, it is submitted that the 2nd Respondent did not serve the Applicant with a proclamation notice and the 1st Respondent did not serve the Applicant with a demand notice in accordance with clause 11 of the offer letter.

Part ii: The Respondents' Case

12. The Application is opposed by the 1st Respondent. In his Replying Affidavit dated 15th July 2024 and filed on even date, one Bashiri Kipimo deposes that he is a director of the 1st Respondent. Mr. Bashiri has confirmed the material facts averred by the Applicant to the extent that is a loan facility. In this regard, the 1st Respondent has exhibited a loan Application form and a security agreement marked BK1. He deposes that the Applicant defaulted payment of the loan in the month of April and May and that in June, the instalment was due on 19th June 2024 but he paid of 26th June 2024. It is deposed that under clause 3 of the loan agreement, every late payment attracts 10% on a reducing balance and the



Applicant now owes the 1st Respondent Kshs. 1,729,427.66. In this regard, a loan account has been exhibited marked BK2. It is deposed that having defaulted, the 1st Respondent was within its right to realize the security in accordance with clause 4(c)(i) of the loan agreement. It is deposed that as a consequence of default, the arrears attract additional interest and penalties.

13. In his written Submissions dated 15th July 2024 and filed on even date, learned Counsel Mr. Thuku instructed by the Firm of Messieurs S.N. Thuku & Associates representing the Respondents, rehashed the contents of the Replying Affidavit. I thus find no need of reproducing the Submissions here.
14. Concerning the issue of failure to serve a demand notice, it is submitted that there was no requirement for demand notice in the loan agreement, placing reliance upon a similar finding in Jamii Bora Bank Limited and another vs. James Owek Ochieng [2020] eKLR. In this connection, it is submitted that if a demand notice is read into the loan agreement, this Court will rewrite the contract contrary to the principle that a Court cannot rewrite a contract of the parties, placing reliance upon National Bank of Kenya Ltd vs. Pipe Plastic Samkolit (K) Ltd [2002] EA 503.
15. Regarding the question of injunction, it is submitted that since the Applicant was in arrears, he is not entitled to a mandatory injunction he is now seeking, since there is no prima facie case with high prospects of success as held in Mrao Limited vs. First American Bank of Kenya Limited & 2 others [2003] eKLR.
16. It is submitted that the Applicant is bound by the contract which set out the motor vehicles as collateral, citing Megashell Transporters Limited vs. Co-operative Bank of Kenya Limited [2021] eKLR.
17. In any event, it is submitted, that the Applicant has demonstrated that he will suffer irreparable damage, citing Megashell Transporters Limited vs. Co-operative Bank of Kenya Limited [2021] eKLR; and Francis Ngarama Kiratu vs. Equity Bank Limited [2016] eKLR.
18. This Court is thus urged to dismiss the Application with costs.

Part iv: Issues for Determination

19. Commending themselves for determination - gleaned from the Notice of Motion, the Replying Affidavit, the Further Affidavit, and the rival written submissions - are three questions as follows:
 - i. First, whether the Applicant was served with a proclamation notice.
 - ii. Second, whether service of a demand notice is mandatory and if yes, whether the Applicant was served therewith and if not, the net legal effect thereof.
 - iii. Third, whether this Application has met the threshold for grant of the interlocutory injunction sought.

Part V: Analysis of the Law; Examination Of Facts; Evaluation of Evidence and Determination

20. I now embark on analysis of the law, examination of facts, evaluation of evidence and determination of the three questions, in turn.

(i) Whether the Applicant was served with a proclamation notice

21. It is not in dispute that the 2nd Respondent is a firm of auctioneers and that the 2nd Respondent did seize the said motor vehicles.



22. The first crux of this Application is that seizure of the two motor vehicles was illegal for failure to serve the Applicant with a proclamation notice (by the 2nd Respondent).
23. In the Replying Affidavit, the Applicant's affidavit evidence in this regard is not controverted.
24. What is contemplated by law to amount to a lawful attachment of moveable property? Concerning non-perishable goods, rule 12 of the Auctioneers Rules provides that "(1) Upon receipt of a Court warrant or letter of instruction the auctioneer shall in case of movables other than goods of a perishable nature and livestock— (a) record the Court warrant or letter of instruction in the register; (b) prepare a proclamation in Sale Form 2 of the Schedule indicating the value of specific items and the condition of each item, such inventory to be signed by the owner of the goods or an adult person residing or working at the premises where the goods are attached or repossessed, and where any person refuses to sign such inventory the auctioneer shall sign a certificate to that effect; (c) in writing, give to the owner of the goods seven days notice in Sale Form 3 of the Schedule within which the owner may redeem the goods by payment of the amount set forth in the Court warrant or letter of instruction; (d) on expiry of the period of notice without payment and if the goods are not to be sold in situ, remove the goods to safe premises for auction; (e) ensure safe storage of the goods pending their auction; (f) arrange advertisement within seven days from the date of removal of the goods and arrange sale not earlier than seven days after the first newspaper advertisement and not later than fourteen days thereafter; (g) not remove any goods under the proclamation until the expiry of the grace period. (2) If on the expiry of the period of notice, the auctioneer finds that there are other goods belonging to the judgement debtor— (a) which were not pointed out by the decree holder and proclaimed earlier in his proclamation; or (b) which have been removed by the judgment debtor, or cannot be found, the auctioneer shall file an Application in Court seeking leave of the Court to be allowed to attach any other movable properties of the judgement debtor pointed out by the decree holder. (3) An Application under paragraph (2) shall be by motion by way of a miscellaneous Application supported by an affidavit in a competent Court, and in the case of distress for rent, repossession and attachment, may be heard ex parte. (4) Where orders obtained by a judgement debtor staying execution and served on an auctioneer are subsequently vacated, the auctioneer shall— (a) where the warrants of attachment and sale, or letter of instruction, are still valid, proceed with execution in compliance with these Rules; (b) where the warrants of attachment and sale have expired, apply for extension of the warrants for a period not exceeding forty-five days, within which he shall finalize execution; (c) where fresh warrants of attachment and sale or letter of instructions are issued with new figures, proceed in the manner provided in these Rules in respect of a fresh warrant."
25. The issue whether or not it is obligatory upon an auctioneer to serve a proclamation notice upon the debtor, is not novel. It arose in *NCBA Bank PLC vs. Cyrus Ndung'u Njeri t/a Digital Tours And Logistics* [2021] eKLR, Odunga, J. affirmed the judicial view of the lower Court to the effect that although the *Movable Property Security Rights Act*, is silent on whether a proclamation notice is mandatory in exercising the post-default rights of a lender, once an auctioneer is instructed, it must act within the Auctioneers Licencing Act. It was stated at paragraph 45 as follows: "... while conceding that Sections 65 and 66 of the Movable Properties Securities Act are silent on whether a Notice of Proclamation is requisite or not before exercise of a lender's Post Default Rights, the Respondent noted that the trial magistrate correctly observed that the Appellant, by choosing to engage an auctioneer in the repossession process, rendered the said process subject to the provisions and requirements of the *Auctioneers Act* and Rules which make it mandatory for the appointed agent (i.e. auctioneer) to issue a proclamation notice prior to repossessing a chattel such as the motor vehicle in question. According to the Respondent it is gainsaid that the purpose or rationale for issuing such a notice is to inform the



defaulting party the extent of the default and what is required of him (including the auctioneer's costs) in order to redeem the repossessed chattel." This Court concurs with this judicial view.

26. This Court finds no difficulty in concluding that the auctioneer disregarded its obligation under rule 12(1)(b)&(c) of the Auctioneers Rules. Instead, selectively and conveniently jumped the gun to rule 12(1)(d) of the Auctioneers Rules. In any event, no evidence was exhibited in this regard. Nothing would have been easy than to exhibit evidence of compliance with the said rules.
27. On this ground alone, the attachment was illegal and resultantly void and as Lord Denning elegantly put it in *Benjamin Leonard Mcfoy vs. United African Company Limited (UK)* [1962] AC 152, "If an act is void, then it is in law a nullity. It is not only bad ...and every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

(ii) Second, whether service of a demand notice is mandatory and if yes, whether the Applicant was served therewith and if not, the net legal effect thereof

28. The second crux of this Application is that seizure of the motor vehicles was illegal for failure to serve the Applicant with a demand notice (by the 1st Respondent).
29. Again, in the Replying Affidavit, the Applicant's affidavit evidence in this regard is not controverted. The 1st Respondent deposes that it was not necessary to do so, since it was made a condition precedent in the loan agreement.
30. Does the law speak to this issue? The governing law is the *Movable Property Security Rights Act*, Cap 499A (which repealed the Chattels Transfer Act). Section 67 of the Act provides that "(1) If there is a default with respect to any obligation, the secured creditor shall serve on the grantor a notification, in writing or in other form agreed between the parties, to pay the money owing or perform and observe the agreement as the case may be. (2) The notification required under subsection (1) shall adequately inform the recipient of the following matters— (a) the nature and extent of default; (b) if the default consists of non-payment, the actual amount and the time by the end of which payment must be completed; (c) if the default consists of the failure to perform or observe any covenant, express or implied, in the agreement, the act the grantor must do or desist from doing so as to rectify the default and the time by the end of which the default must have been rectified; (d) the consequence that if the default is not rectified within the time specified in the notification, the secured creditor will proceed to exercise any of the remedies referred to in section 65; and (e) the right of the grantor in respect of certain remedies to apply to the Court for relief against those remedies. (3) If the grantor does not comply within the time period indicated in the notification after the date of service of the notification, the secured creditor may— (a) sue the grantor for any payment due and owing under the agreement; (b) appoint a receiver of the movable asset; (c) lease the movable asset; (d) take possession of the movable asset; (e) sell the movable asset; or (f) pursue any of the remedies under section 65. (4) The Cabinet Secretary may prescribe the form and content of a notification to be served under this section."
31. It follows that although it was not a condition precedent in the agreement, it is a condition precedent in the said Act, and having applied the operative word shall, the said condition precedent is obligatory and read into the said agreement.
32. Again, this Court finds no difficulty in concluding that the 1st Respondent disregarded its statutory obligation under section 67(1) of the Movable Property Security Rights, rendering all subsequent steps by the 1st Respondent including instructions issues to the 2nd Respondent, illegal and void, which translates into a nullity within the meaning assigned in *Benjamin Leonard Mcfoy vs. United African Company Limited (UK)* [1962] AC 152.



33. Consequently, this Court finds an academic exercise to analyze question (iii).
34. However, it's instructive to underline had this Court proceeded to analyse question (iii), having raised a serious question to be tried – within the meaning assigned in American Cyanamid Co vs. Ethicom Ltd [1975] AC 396 - namely whether a lender who failed to register security rights in movable assets can properly so exercise a statutory power of sale without a Court action, this Court would have issued an injunctive relief, if only to shun the imminent prospect of a wrongful sale of the said motor vehicles.

Part vi: Disposition

35. Wherefore this Court:
- i. Declares that the seizure of motor vehicles registration numbers KCG 348K and KDN 615E by the 2nd Respondent illegal and void amounting to a nullity.
 - ii. Orders the Respondents to release motor vehicles registration numbers KCG 348K and KDN 615E, not later than 9th August 2024 at 1200 hours.
 - iii. Directs that the costs of this Application shall be borne by the 1st Respondent and since the actions were illegal, it shall no way be loaded to the said loan.
 - iv. Considering the fact that the 2nd Respondent flagrantly infringed the law, it's not entitled to the auctioneers fees and charges.

DELIVERED, SIGNED AND DATED IN OPEN COURT AT MACHAKOS LAW COURTS THIS 12TH DAY OF AUGUST,2024.

.....

C.N. ONDIEKI

PRINCIPAL MAGISTRATE

Advocate for the Plaintiff & Applicant:.....

Advocate for the Defendants/Respondents:.....

Court Assistant:.....

