REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

(CIVIL DIVISION)

HCCC NO. E061 OF 2025

EXON INVESTMENTS LIMITED……..……..……

PLAINTIFF/APPLIANT

VERSUS

SBM BANK KENYA LIMITED …….1ST DEFENDANT/RESPONDENT

MUMU AUCTIONEERS…… …….2ND DEFENDANT/RESPONDENT

RULING

1. The Plaintiff/Applicant filed the Notice of Motion dated **22nd July 2025** seeking the following orders;

(1) Spent;

(2) Spent;

(3) Pending the hearing and determination of this suit, an order of injunction be granted restraining the Defendants by themselves, their agents Mumu Auctioneers, their officers, servants or any other person acting on behalf of the defendants from repossessing, auctioning and/or selling the Plaintiff's motor vehicles namely KBY 165U, KBY 166U, KCF 409Y, KCF 413Y, KCF 416Y, KCF 417Y, KCF 731M, KCF 732M, KCF 733M, KCF 734M, KCF735M, KCF 736M, KCF 738M, KCF 739M,

KCF 740M, KCF 742M, KCF 743M, ZE 6537, ZE 6538, XF 2631, ZF 2646, ZF 2647, ZF 2648, ZF 2651, and ZF 2655; and

(4) Costs of this application should be provided.

2. The grounds upon which the application is sought are that the plaintiff is the owner of the subject motor vehicles. The plaintiff, through an affidavit sworn by its director, Mr **Ateet Dinesh Jetha**, averred that the 2nd defendant, acting on the instruction of the 1st defendant, illegally repossessed some of the plaintiff's motor vehicles without any default on its part and in disregard of the lawful procedure. It was further averred that the plaintiff had made payments, and the loan account was not in arrears.

3. The plaintiff stated that, contrary to section 20(1) of the Consumer Protection Act, the defendants were attempting to repossess the goods when the borrower had paid more than 65% of the total purchase value.

4. The Plaintiff stated that it would suffer irreparable damage if the orders sought were not granted, as the subject motor vehicles would be sold, which action was irreversible.

5. The application is opposed. The 1st Defendant, SBM Bank, filed a Notice of Preliminary Objection dated **31st July 2025,** vide which it

denied that this Court has jurisdiction to hear and determine the matter on the ground that the same is *res judicata,* as a similar matter was heard and settled in **Mombasa High Court HCCC No E006 of 2023; Exon Investment Ltd v SBM Bank Kenya Ltd**. Further, it was stated that the plaintiff did not disclose the existence of the said case. The defendants impugned the manner in which the Plaintiff filed 2 applications, to wit, on **22nd** and **30th July 2025**.

6. In a replying affidavit sworn on **8th August 2025** and sworn by Ms **Egidia Mecha**, the Recoveries Manager of the 1st defendant herein, she stated that there was a previous suit between the parties hereto. She noted that the loan account of the plaintiff was in arrears to the sum of **US$335,250,** approximately **Kes.46,177,383.20,** and was overdrawn to the tune of **Kes.13,357.50**. It was stated that the amount disbursed was **Kes.56,836,000.00,** meaning that the plaintiff had only made a payment of approximately 21% of the total debt.

7. Ms. Mecha deposed that there was a mediation settlement agreement entered into on **30th April 2024,** which was adopted by the Court on **7th May 2024,** under which the plaintiff was to pay **Kes.30,000,000.00** over a period of 12 months.

8. She denied that the plaintiff was entitled to protection under the Consumer Protection Act or the Hire Purchase Act, as the payments made amounted to approximately 21% of the amount disbursed and not 90.77% of the debt, as alleged.

9. She prayed that the applications be dismissed with costs.

10. The application was heard on **13th August 2025**. Mr Karina, for the plaintiff, and Mr. Akello, for the Respondents, made their respective submissions.

11. Mr. Karina submitted that this matter isn't res judicata as this cause was independent of the earlier one. In the previous matter, the complaint concerned the respondents' actions in 2023. He urged that the previous matter was settled, and the parties entered into a mediation settlement agreement. The Court thereafter became functus officio. Counsel submitted that the plaintiff has a right under Article 27 of the Constitution to benefit from the protection of the law, and under Article 48, the plaintiff has a right to access the Court.

12. It was submitted that the respondents did not issue the necessary notices and unlawfully sold the plaintiffs' motor vehicles. By so doing, they deprived the plaintiff of the right to redeem the

security or to pay the loan. Counsel urged that it wasn't clear how much was owed as a loan; whether it was **Kes.46,000,000./-** or **Kes.33,000,000/-**. Mr. Karina submitted that, having entered into a mediation settlement agreement, the 1st defendant was estopped from claiming the original amount. He urged that the plaintiff had paid over 65% of the loan and was therefore protected by the Consumer Protection Act. He submitted that the defendants had no right to violate the law.

13. Mr Karina prayed that the application be allowed. It was his view that the doctrine of *res judicata* could not be the basis of a preliminary objection, as matters of fact would have to be established.

14. Mr Akello, for the defendants, opposed the application. He relied on the affidavits sworn on **8th** and **11th August**, and on the skeleton submissions dated 11th August 2025. He submitted that the application was res judicata and res subjudice as it was similar to HCCC No E006 of 2023 and was between the same parties.

15. He contended that there had been material non-disclosure as the previous suit wasn't disclosed. He urged that the mediation process birthed a mediation settlement agreement, which included a default clause permitting the 1st respondent to sell the property in

the event of default. Mr. Akello averred that the plaintiff was in massive arrears. That being the case, the 1st respondent was lawfully entitled to sell the security properties. Counsel stated that contrary to what was averred, only 19% of the arrears had been paid.

16. Counsel for the defendants denied that the parties entered into a hire purchase agreement. For that reason, the provisions of the Hire Purchase Act and the Consumer Protection Act were inapplicable. He contended that the requisite notices had been issued and that no further notices were required.

17. Mr Okello further contended that there was no prima facie case with probability of success. It was urged that the Court dismiss the application with costs.

18. I have considered the applications and the responses thereto, the submissions of the parties, the documentary evidence, as well as the applicable law. In my view, the issues calling for determination are the following: -

i. Whether the suit is res judicata;

ii. Whether the provisions of the Consumer Protection Act are applicable to this matter;

iii. Whether there is a prima facie case with probability of success;

iv. Whether the plaintiff can be compensated by an award of damages; and

v. Where the balance of convenience lies.

19. The doctrine of *res judicata* is set out in section 7 of the Civil Procedure Act. The said section states in part that: -

> **"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court…"**

20. The doctrine was discussed in the case of ***in re Estate of Riungu Nkuuri (Deceased)*** **[2021] eKLR,** wherein the court stated as follows:-

> **"The test for determining the Application of the doctrine of res judicata in any given case is spelt out under Section 7 of the *Civil Procedure Act*. In *Independent Electoral & Boundaries Commission v Maina Kiai & 5 others* [2017]**

eKLR, the Supreme Court, while considering the said provision, held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:"

(a)The suit or issue was directly and substantially in issue in the former suit.

(b)That former suit was between the same parties or parties under whom they or any of them claim.

(c)Those parties were litigating under the same title.

(d)The issue was heard and finally determined in the former suit.

(e)The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

21. Whereas it is true that the previous suit exists and was between the same parties and arose out of the loan obligations, the said matter was settled by way of a mediation settlement agreement. The plaintiff appears not to have met the obligations under the said agreement. This led to the current recovery action. In my view, the current recovery process and the alleged infractions are a new cause of action. For that reason, I am unable to agree that the matter is *res judicata*.

22. I have perused the plaint as well as the application. I note that the plaintiff failed to disclose the prior suit. The importance of disclosure of material information cannot be overemphasized. A party seeking interim relief ought to disclose all material facts so that the court can determine whether, in the circumstances of any given case, issuance of the orders sought is warranted.

23. Since the Applicant seeks injunctive relief, I must consider whether the test in **Giella v Cassman Brown & Co. Ltd (1973) E.A. 358** was met and whether, therefore, injunctive relief may issue. In the said case, Spry, V.P., stated as follows at page 360:-

> ***"The conditions for the grant of an interlocutory injunction are now 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 the case on the balance of convenience."***

24. The Court of Appeal expounded on the said requirements in the case of **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] KECA 606 (KLR).** The said Court held that the 3-point test

above was to be considered sequentially. The Court observed that:

"In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

(a) establish his case only at a *prima facie* level,

(b) demonstrate irreparable injury if a temporary injunction is not granted, and

(c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See **Kenya Commercial Finance Co. Ltd V. Afraha Education Society** [2001] Vol. 1 EA 86. If the applicant establishes a *prima facie* case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no

interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage.

If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a *prima facie* case does not permit *"leap-frogging"* by the applicant to injunction directly without crossing the other hurdles in between.

It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted."

25. Did the Applicant meet the above 3-point test? The first matter is whether there is a prima facie case before the Court. What amounts to a prima facie case was defined in the case of **Mrao Ltd vs First American Bank of Kenya Ltd [2003]eKLR**, as being:

"... I civil cases, it is a case in which, on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a legal right which has

apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

26. The plaintiff/applicant borrowed a loan. The loan account is currently in default. Notices were issued to it, as evidenced by the annexures to Ms Egidia Mecha's affidavits.

27. The claim that the Consumer Protection Act applies in this case is without basis, as this was a loan and not a hire purchase contract. This is clear from the definitions given in the said Act. Section 20(1) of the Consumer Protection Act provides that:-

"Where a consumer under a future performance agreement has paid two-thirds or more of his or her payment obligation as fixed by the agreement, any provision in the agreement, or in any security agreement incidental to the agreement, under which the supplier may retake possession of or resell the goods or services upon default in payment by the consumer is not enforceable except by leave obtained from the High Court."

"Future performance agreement" is defined as:-

""future performance agreement" means a consumer agreement in respect of which delivery, performance, or

payment in full is not made when the parties enter the agreement."

On the other hand, "consumer agreement," means an agreement between a supplier and a consumer in which the supplier agrees to supply goods or services for payment."

28. Given that the plaintiff/applicant was in default, and notices having been issued, I am not convinced, on a prima facie basis, that there is a case with a possibility of success. I have warned myself that the matter has not been heard on the merits and that the court may reach a different conclusion upon hearing the parties on the merits.

29. Even assuming I was wrong, and that there was indeed a prima facie case, as the applicant showed that its loss would be incapable of compensation by an award of damages? What amounts to an irreparable injury incapable of compensation was defined in the case of **Pius Kipchirchir Kogo vs Frank Kimeli Tenai [2018]eKLR** as:-

"Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that

irreparable injury will occur to him if the injunction is not granted, and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury…"

30. The dispute between the parties is of a commercial nature. The terms of the said contract are well set out in the contract. The 1st defendant is a licensed bank regulated by the Central Bank of Kenya. I have no reason to doubt that it is well-capitalized and quite capable of compensating the plaintiff/applicant should the latter's suit succeed.

31. Given those circumstances, I am of the opinion that any damage suffered by the plaintiff/applicant would be capable of compensation by an award of damages.

32. Having found as such, there is no need for me to consider where the balance of convenience lies. In deciding this way, I am guided by the Court of Appeal's decision in the **Nguruman case (supra).**

33. The upshot of the foregoing is that I am not convinced that there is a case for the grant of orders of injunction. Consequently, I dismiss the application dated **22nd July 2025.**

34. I will now turn to the issue of costs. Section 27(1) of the Civil Procedure Act provides that:

> ***"Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purpose aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers. Provided that the costs of any action, cause, or other matter or issue shall follow the event unless the court or judge, for good reasons, otherwise orders."***

35. The foregoing provision has been the subject of interpretation by the Courts. In **Limuru Country Club &6 others v Rose Wangui Mambo 15 others [2019] KECA 101 (KLR),** the Court of Appeal cited with approval the Supreme Court of Uganda case of **Impressa Ing Fortunato Federica v Nabwire (2001] 2 EA 383,** where it was held that:-

> ***"The effect of section 27 of the Civil Procedure Act is that the Judge or court dealing with the issue of costs in any***

suit, action, cause or matter has absolute discretion to determine by whom and to what extent such costs are to be paid; of course, like all judicial discretions, the discretion on costs must be exercised judiciously and how a court or judge exercises such discretion depends on the facts of each case. If there were a mathematical formula, it would no longer be discretion... while it is true that ordinarily, costs should follow the event unless for some good reason, the court orders otherwise, the principles to be applied are- (i) under section 27 (1) of the Civil Procedure Act, costs should follow the event unless the court orders otherwise. This provision gives the judge discretion in awarding costs, but that discretion has to be exercised judicially. (ii), a successful party can be denied costs if it is proved that but for his conduct the action would not have been brought..."

36. In the case of **Party of Independent Candidate of Kenya & Another v Mutula Kilonzo & 2 Others HCEP No. 6 of 2013**, it was held:

" It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place, the award of costs is a matter in which the trial Judge is given discretion (Fripp v Gibbon & Co., 1913AD D 354). But

this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at....n the second place, the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so."

37. Is there a reason to depart from the general rule in this case? I am afraid not.

38. I therefore award the 1st and 2nd defendants/respondents costs of the application.

39. It is so ordered.

Dated and **signed** this **11th** day of **November 2025**. Delivered virtually through **Microsoft TEAMS.**

Gregory Mutai

JUDGE

In the presence of:-

Mr Kariuki, holding brief for Mr Karina, for the Plaintiff/Applicant;

Mr Akello for the Defendants/Respondents; and

Arthur – Court Assistant.