



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO.157 OF 2013

BALVINDER PAL SINGH S/O SURJIIT SINGH.....1ST PLAINTIFF

COUNTY MOTORS LIMITED.....2ND DEFENDANT

VERSUS

EQUITY BANK LIMITED.....DEFENDANT

RULING

1. **Equity Bank Ltd**, the Defendant, vide notice of motion dated 22nd March 2017, seeks for five prayers against **Balvinder Pal Singh S/O Surjit Singh** and **Country Motors Ltd**, the 1st and 2nd Plaintiff respectively. The prayers are as summarized hereinbelow;

- i) Application be certified urgent and in the first instance heard exparte.
- ii) Discharge, vary and or set aside the injunctive orders issued on the 29th January 2015 pending the hearing and determination of the application.
- iii) Discharge, vary and or set aside the injunctive orders issued on 29th January 2015 pending the hearing and determination of this suit.
- iv) Defendant be awarded punitive costs.
- v) Any other orders the court deems fit.

The application is based on seven grounds marked (a) to (g) on the face of the notice of motion which is also supported by the affidavit sworn by Steve Biko, the credit manager with the Defendant, on the 6th March 2017.

2. The application is opposed by the Plaintiff through the affidavit sworn by Prithpal Singh Pandhal, a director with the 2nd Plaintiff, on the 12th April 2017. The said affidavit is erroneously headed “**supporting**” instead of “**replying**” affidavit.

3. The notice of motion came up for hearing on the 10th May 2017 when Mr. Walukwe and Mr. Menezes for the Defendant and Plaintiffs respectively made their oral submissions.

4. The following are the issues for the court’s determination;

- a) Whether the Plaintiffs have breached the orders of 29th January 2015.
- b) Whether the Defendant has established a case for review of the orders of 29th January 2015.
- c) Who pays the costs.

5. The court has carefully considered the grounds on the notice of motion, the affidavit evidence, submission by counsel and come to the following determinations;

- a) That in its ruling dated 29th January 2015 granting the Plaintiffs application for injunctive orders dated 17th June 2013, the court directed as follows;

“74. But the injunctive relief granted herein will not be unconditional. It has been alleged that the Plaintiffs have stopped payments. The Plaintiffs came to court because contrary to Defendant’s assertion, they felt they were upto date in payments at that point in time. They did not come to court because they had finished all payments. In essence therefore, the Plaintiffs still owe the Defendant. The allegation that payments have stopped have not been denied or controverted. The Plaintiffs have absolutely no legal justification to stop paying. The Injunctive relief granted herein risks being discharged at the option of the Defendant should payment not resume one month after delivery of this ruling.”

That it is the Defendant’s case that the Plaintiffs have since the delivery of the said ruling “incessantly defaulted in their repayment of the loan facility” and “have continued to use the court order issued on the 29th January 2015 as a basis to frustrate the Applicant herein from realizing the amount due and owing.” That even though the Plaintiff’s position is that they were not in arrears as of the date of the ruling of 29th January 2015 as they have been paying Ksh,1,800,000/= per month instead of Ksh.1,601,957/= agreed in the letter of offer dated 21st February 2011, the court had in its ruling found that they still owed the defendant and should continue with payments as they had “No legal justification to stop paying.” That finding by the court is yet to be overturned.

- b) That the Plaintiffs have availed a copy of a report done for them by the Interest Rates Advisory Centre on their account with the Defendant from 31st May 2006 to 30th September 2016. That report covers a wider period than the earlier report obtained from Dhadialla Associates which had been presented during the hearing of their application dated 17th June 2013, that was the subject matter of the ruling dated 29th January 2015. The report by Interest Rates Advisory Centre does not in any way confirm that the plaintiffs have been making their contractual monthly payments as directed by the court in the aforementioned ruling. That report does not amount to a variation of the said court order.

- c) That the Defendant has exhibited a copy of 2nd Plaintiff Bank statement on A/C No.[...] marked **“SB 1(a)”** covering the period of 15th November 2013 to 7th February 2017 which clearly shows that there were 22 payments between 5th March 2015 and 31st October 2016 of amounts ranging from Ksh.853,852.20, made on the 18th March 2016, to Ksh.1,799,985/= made on the 31st March 2015. The statement also shows that some of the payments were reversed. That also availed by the Defendant is a copy of the 2nd Plaintiff statement on account No.[...] covering the period from 15th November 2013 to the 10th February 2017 with payments ranging from Ksh.14.30 and Ksh.2789.60 on the 5th March 2015 and 29th November 2013 respectively to Ksh.1,845,523.25 of 27th January 2017 which was reversed on the same date.

- d) That the Defendant has provided a schedule with details of nine payments made by the Plaintiffs between 3rd November 2015 to 1st November 2016 which were reversed due to lack of sufficient funds. That though the Plaintiffs response is that the cheques that were dishonoured were subsequently replaced and payments made, no particulars of the replacement cheques and payments

were availed to this court. The fact that most of the payments were of amounts less than Ksh.1,601,957/=, that had been agreed in the letter of offer dated 21st February 2011, and that the bank statements indicate no payments were made in some months, leads the court to agree with the Defendant that the Plaintiff are in arrears in monthly payments which amounts to a breach of the conditional order of 29th January 2015.

e) That the Defendant has established that the Plaintiffs have not entirely complied with the conditional injunctive order of 29th January 2015 and their application dated 22nd March 2017 has merit.

6. That in view of the finding above, the Defendant's notice of motion dated 22nd March 2017 is allowed in terms of prayer 3 to the extent that the order of 29th January 2015 is hereby varied to allow the Defendant to be at liberty to issue the Plaintiffs with the statutory notices in respect to any arrears of payments that has fallen due or may fall due, notwithstanding this suit being pending in court. The Defendant is also awarded costs of the notice of motion.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 4TH DAY OF OCTOBER 2017

In presence of;

Plaintiffs Absent

Defendant Absent

Counsel Mr Onyango for Menezes for Plaintiff/Respondent

S. M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

4/10/2017

4/10/2017

S.M. Kibunja Judge

Oyugi court assistant

Mr. Onyango for Menezes for Plaintiffs/Respondents

Court: Ruling dated and delivered in open court in presence of Mr. Onyango P.D. for Menezes for the Plaintiffs/Respondents.

S. M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

4/10/2017