



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE NO. 169 OF 2020**

*(Before Hon. Lady Justice Maureen Onyango)*

**NAFTALY KAIMENYI MAINGI.....CLAIMANT**

**VERSUS**

**ODEX CHEMICALS LIMITED.....RESPONDENT**

**RULING**

The application before me for determination is dated 3<sup>rd</sup> April 2020 and seeks orders restraining the respondent from repossessing motor vehicle registration number KCK 917M pending hearing and determination of the claim filed together with the application. The grounds in support of the application are listed on the face thereof as follows –

1. *That the Respondent employed the claimant in January 2017 as a Sales Representative at a monthly salary of Kshs.150,000.*
2. *That further the Respondent financed the claimant to purchase motor vehicle Reg. Number KCK 917 M.*
3. *That the claimant was to use the motor-vehicle for company/Respondents work and then claim mileage/refund.*
4. *That the Respondent was deducting a sum of Kshs.50,000 per month from the claimants salary towards payment of car loan.*
5. *That on 18<sup>th</sup> March 2020 the respondent had a meeting in which they told the claimant to defend himself on allegations of “under performance”.*
6. *That on 28<sup>th</sup> March 2020 only 10 days, the Respondent wrote to the claimant purporting to terminate his services.*
7. *That the respondent has also threatened to repossess the motor vehicle without taking into account the amount they have deducted and how much they owe the claimant.*
8. *That the Respondent actions are actuated by malice and the same are inhuman and unconscionable at this time of pandemic.*
9. *That the Respondents actions are illegal and unlawful.*
10. *That the Respondent’s action will cause irreparable loss and damage to the claimant.*

In the supporting affidavit of NAFTALLY KAIMENYI MAINGI, the claimant, he reiterates the grounds on the face of the application. He further deposes that it will be unfair and unlawful for the respondent to repossess the motor vehicle before a determination is made on the unpaid/disputed mileage refund, amount deducted so far, terminal dues and damages. He deposes that he stands to suffer irreparable damages if the respondent repossesses the motor vehicle which he believes to have fully paid for. Further, that he is willing to pay the respondent any money that may be found owing after taking of accounts.

The respondent filed grounds of opposition to the application on 14<sup>th</sup> May 2020. The same is dated 6<sup>th</sup> May 2020. The grounds of opposition are that –

1. The Notice of Motion application dated 3<sup>rd</sup> April 2020 does not disclose a prima facie case with a probability of success since the Motor vehicle the subject of the said application belongs to the Respondent, and is registered in the name of the said Respondent;

2. The services of the Claimant with the Respondent were terminated pursuant to a fair and just disciplinary process. The Claimant was given ample opportunity to defend himself. The application therefore lacks merit;
3. The Claimant has come to Court with unclean hands and is therefore not deserving of equitable relief;
4. The application filed by the Claimant is frivolous and vexatious, and abuse of the process of the Court; and
5. It is fair and just in the circumstances of this case to dismiss the Notice of Motion application dated 3<sup>rd</sup> April 2020.

The respondent further filed a replying affidavit of JACKLINE NJERI, its Human Resources Manager who deposes that the respondent advanced a loan to the claimant to buy motor vehicle registration no. KCK 917M. That to safeguard the interests of the respondent the motor vehicle was registered in its name on the understanding that it would be transferred to the claimant's name once the loan is fully paid. That the said motor vehicle is therefore the property of the respondent. That the motor vehicle facility was given to the claimant on the following terms-

- i) The Respondent would avail him a car on hire purchase terms;
- ii) The Claimant would take the said car on hire purchase and would pay Kshs.50,000 per month until payment in full;
- iii) Upon payment in full the Respondent would transfer the car to him and issue him with a log book free from all encumbrance; and
- iv) If the Claimant left the employment of the Respondent for any reason whatsoever, the Respondent would recall the loan and demand immediate loan repayment, and failing full repayment, the car would be repossessed.

That the claimant owes the respondent Kshs.1,600,321 which he has been unable to pay. That there is no dispute on mileage claims. That the claimant has not presented any documents to back up his statement in the memorandum of claim. That at the time of dismissal the claimant was asked to clear so that he could be paid his terminal dues but declined. That the respondent is ready to pay his dues and issue him with a certificate of service.

Jackline deposes that the claimant has come to court with unclean hands and is undeserving of the equitable relief that he seeks. That the application has no merit and ought to be dismissed with costs.

The claimant filed a further affidavit sworn on 11<sup>th</sup> June 2020 in which he deposes that he was employed in 2016 and the issue of his performance or indiscipline never arose in the year 2016, 2017 and 2018. That the envisaged Annual Performance evaluation were never done for the year 2017, 2018 and 2019.

That the claims of indiscipline and non-performance cropped up during the last 6 months of the claimant's employment which raises many questions as the claimant had worked for the Respondent for around 4 years. That the issues suddenly arose in June 2019 and from there followed many letters leading to the claimant's dismissal. That the issue of performance had been discussed and agreed between the claimant and the Executive Director that the targets were unrealistic.

That according to the letter of employment which is annexed in the supporting affidavit the respondent was to purchase the car and the claimant would pay a sum of Kshs.50,000 per month. The Respondent was to pay mileage of Kshs.50 per kilometers for a maximum of 2,000 km per month. This was stated in paragraph 3(c) of the contract letter where it is titled "*mileage*".

That contrary to what had been agreed the respondent was deducting a sum of Kshs.50,000 for car loan and a further Kshs.11,774 as interest per month which was against the original agreement and which means once accounts are taken it will be clear that the claimant paid the entire loan.

That sometime the Respondent would refuse to pay the mileage as agreed saying that no emails were provided. That subsequently the mileage payment was stopped all together and the same was substituted with daily payment of Kshs.2,500 which the claimant and the other employees protested.

That the Respondent never compensated/paid mileage as per the original agreement, which money ought to have been applied to pay for the car.

That the exact amount the respondent owes the claimant can only be ascertained after taking of accounts and/or at the hearing.

The claimant avers that he had not collected his final dues from the Respondent and which amount should be calculated to ascertain who owes the other money.

The application was at the request of the parties disposed of by way of written submissions.

According to the claimant's further affidavit sworn on 11<sup>th</sup> June 2020 and submissions of the claimant, he was paying for the motor vehicle at the rate of Kshs.50,000 per month. The respondent further recovered interest at Kshs.11,000 per month so that he paid a total of Kshs.61,000 every month. In addition, he was entitled to mileage allowance which was originally agreed on at Kshs.50 per km but was unilaterally amended to Kshs.20 per km and thereafter stopped. That the car was used for official business of the respondent and therefore the respondent was under an obligation to pay for the mileage.

It is further the claimant's submission that he was never paid terminal dues. That in his estimation if all this is taken into account, he does not owe the respondent any money.

The claimant prays for settling of accounts to determine if the claimant owes any money to the respondent.

The claimant submits that according to the principals in **Giella v Cassman Brown (1973) EA 358**, he has established a prima facie case with probability of success, and that he is likely to suffer irreparable harm. That even the balance of convenience would tilt in his favour. He submits that he uses the motor vehicle to earn a living and if it is taken away he would be rendered destitute.

The respondent submitted that the claimant is undeserving of equitable reliefs having not come to court with clean hands. That there is no dispute on mileage claims, that the claimant has not presented any documents to back up his statement and memorandum of claim. That the motor vehicle is in the name of the respondent and belongs to the respondent.

It is further the submissions of the respondent that litigation in Kenya take a long time and the status of the motor vehicle at the time of determination of the case is unknown. That the capacity of the claimant to pay the loan is also unknown. That the claimant has not made any proposal to pay whatever amount he does not contest nor called for taking of accounts. That the claimant did not disclose he had other loans with the respondent which he was servicing.

The respondent relies on Articles 159(2) and 40 of the Constitution of Kenya, 2020, **Giella v Cassman Brown, Mrao Limited v First American Bank of Kenya, Kenleb Cons Limited v Gatitu Service Station Limited & Another** and **Francis Munyoki Kilonzo & Another v Vincent Mutua Mutiso** and prays that the application be dismissed with costs.

### **Determination**

The principles for grant of interim injunction were set out in the case of **Giella v Cassman Brown & Co. Ltd [1973] E.A 358**, that;

*"The conditions for the grant of an interlocutory injunction are now, I think, 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 be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide the case on a balance of convenience."*

Prima facie case was defined in **Mrao Ltd v First American Bank of Kenya Ltd** (supra) as;

*"A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."*

The Court of Appeal further addressed itself thus,

*"The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive ..."*

The Respondent submits that in this case it is in a position analogous with a mortgagor. It is owed money by the Claimant. The only issue that the Claimant has raised is that there is dispute as to the amount of money due to the Claimant. In similar vein a dispute as to amount due cannot be a ground for granting an injunction.

The respondent relies in the case of **Kenleb Cons Ltd v New Gatitu Service Station Ltd & another, (1990) eKLR** where the court held as follows on what a party seeking an injunction must demonstrate;

*"To succeed in an application for injunction, an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must also show he has a right legal or equitable, which requires protection by injunction."*

The respondent further relies on the decision in the case of **Francis Munyoki Kilonzo & Another v Vincent Mutua Mutiso [2013] eKLR**, Mutende J. rendered herself as follows:-

*"An applicant seeking such orders must come to court with clean hands. The maxim of equity on the principle of equity is expressed as follows, "No one is entitled to the aid of a court of equity when that deed has become necessary through his or her own fault...a court of equity shall not assist a person in extricating himself or herself from the circumstances that he or she has created..."*

In the replying affidavit, the respondent states that the claimant owes it Kshs.1,600,321 which amount has been claimed in the counter claim. No breakdown has been given by the respondent of how this amount was arrived at even though the claimant has contested the same. The respondent further conceded to not having paid the claimant his terminal dues or issue to him a certificate of service because he has not cleared with the respondent.

Again, no tabulation was given of the terminal dues of the claimant held by the respondent. The claimant stated he is willing to settle any amount he owes to the respondent once accounts have been settled. He states that taking away the motor vehicle would render him a

destitute as he uses the car to earn a living.

From the facts of the case, it is not disputed that the respondent advanced a loan to the claimant to purchase the motor vehicle and the only reason it is registered in its name is as security for the loan.

From the foregoing, I find that the claimant has established a prima facie case that the respondent owes him some unascertained amount of money which may reduce the decretal sum substantially. Further, this sum claimed by the respondent from the claimant is the subject of counter claim.

Under Section 10 and 74 of the Employment Act, it is the respondent who is supposed to keep and submit records to court of the amounts due and or owed by the claimant with certainty. It cannot be heard to say the claimant has not produced records which are in its possession and which it is under a statutory obligation to produce.

Further should the respondent be allowed to repossess the car the claimant would suffer irreparable harm and would be rendered destitute. The respondent is not a commercial bank or financial institution and cannot rely on the determination in **Mrao Limited** to the effect that a mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute. The respondent cannot benefit from the statutory rights of a mortgagor as it is not one.

The respondent's averments that the claimant was servicing other loans has not been pleaded in the replying affidavit. It has only been raised by the respondent. The undisclosed loans are not claimed in the defence and counterclaim.

For the foregoing reasons, I find that the claimant has established a prima facie case that has likelihood of success. I further find that he stands to suffer irreparable loss should his prayers in the application not be granted.

### **Conclusion**

Having made the findings above, I make the following orders –

- 1. The respondent be and is hereby restrained from repossessing motor vehicle registration number KCK 917M pending the hearing and determination of the claim herein.**
- 2. The costs of this application shall be in the cause.**

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 24<sup>TH</sup> DAY OF JULY 2020**

**MAUREEN ONYANGO**

**JUDGE**

### **ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court. In permitting this course, the court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on the court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**