



Mega Wholesalers Limited v Diamond Trust Bank Limited & another (Commercial Case E181 of 2024) [2025] KEHC 508 (KLR) (Commercial and Tax) (27 January 2025) (Ruling)

Neutral citation: [2025] KEHC 508 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E181 OF 2024
JWW MONG'ARE, J
JANUARY 27, 2025**

BETWEEN

MEGA WHOLESALERS LIMITED PLAINTIFF

AND

DIAMOND TRUST BANK LIMITED 1ST DEFENDANT

DALALI TRADERS AUCTIONEERS 2ND DEFENDANT

RULING

1. The Plaintiff and the 1st Defendant (“the Bank”) are in a bank and customer relationship and between October 2018 to 2023, the Bank extended various financial facilities to the Plaintiff amounting to Kshs. 1,806,125,600.00/= and USD 535,606 which facilities were secured by Hire Purchase Agreements over the motor vehicles registration numbers KCZ W, KCZ W, KCZ W, KCZ W, KCZ V, KCZ V, KCZ V, KCZ Y, KCZ V, KCZ V, KCZ V, KCZ W, KCZ W, KCZ W, KCZ W, KCZ W, KCZ W, KCZ W, KCZ W, KCZ W, KDC Y, KBY T, KBY Q, KBY Q, KBY R, KBY U, KBY Q, KBR S, KBR S, KBR S, KBR S, KBR S and KBR S (“the motor vehicles”).
2. By a letter dated 28th March 2024, the Bank instructed the 2nd Defendant (“the Auctioneers”) to collect a sum of Kshs. 46,501,215.51/= from the Plaintiff, which the Bank claimed was owed to it by the Plaintiff and that in default, the Auctioneers were to repossess the motor vehicles pursuant to the provisions of Clause 4 of the Hire Purchase Agreements. It appears that no payment was made by the Plaintiff as the Auctioneers issued the Plaintiff with a Proclamation Notice evincing their intention to attach and auction the motor vehicles so as to recover the debt claimed by the Bank. This action prompted the Plaintiff to file the instant suit together with an application dated 11th April 2024 seeking to restrain the Bank and the Auctioneers from alienating, attaching, public sale, offering for sale, selling,



taking possession of, leasing, transferring, charging, auctioning or in any other manner interfering with the Plaintiff's use and possession of the motor vehicles.

3. The application is made under Order 40 Rule 1 & 2 and Order 51 Rule 1 Of the [Civil Procedure Rules, 2010](#), sections 1A, 1B, 3A & sections 104 and 106 of the [Land Act](#) (Chapter 280 of the Laws of Kenya) and Article 159 of the [Constitution](#) and it is supported by the affidavit sworn on 11th April 2024 by the Plaintiff's director, Abdi Mohamed Ali. The Bank opposes the application through the replying affidavit of its Legal Manager, Faith Ndonga, sworn on 22nd April 2024. At the court's direction, the parties have also supplemented their arguments by filing written submissions which I will make relevant references to later on.
4. In its application, the Plaintiff argues that the proclamation issued by the Auctioneers is irregular as the Bank has not issued the Plaintiff with the Statutory Notices and the notification to sale and that the same have never been served upon the chargor(s) and the guarantors as required by the law preceding the repossessions of the motor vehicles and as such the intended auction is unlawful. That the process sought to be relied on by the Bank in an effort to recover debt amount is legally flawed and if allowed to go unrestrained will allow it to perpetuate an illegality. The Plaintiff posits that as it stands it is negotiating with the Bank on the debt to try and restructure the said debt thus settling the matter. The Plaintiff states that the motor vehicles are the core and the centre of its air services support operations locally and that losing the motor vehicles to the Bank and Auctioneers irregularly and unprocedurally would translate to a dire situation that would be severely affected beyond redemption. The Plaintiff adds that the application will be rendered nugatory and it shall stand to suffer irreparable losses not capable of being compensated by an award of damages if motor vehicles are attached, and as such, the aforesaid intended acts and omissions of the Bank and Auctioneers should not be allowed to proceed and it is just and desirable that this court now intervenes.
5. In response, the Bank depones that under Clause 8 of the Hire Purchase Agreements, the ownership of the motor vehicles would vest in the Bank until the Hire Purchase Instalments were paid in full and the Plaintiff exercised its option to purchase. Further that the Hire Purchase Agreements provided that the motor vehicles were jointly registered in the name of the Plaintiff and Bank to safeguard the interests of the Bank and the Bank still has in its possession the original logbooks in respect to the motor vehicles. The Bank claims that in breach of the express terms of the aforesaid facilities, the Plaintiff failed and/or neglected to make payment punctually as and when the same fell due thus causing the facilities to be in arrears of Kshs. 46,501,215.51/= as at 28th March 2024. That given the unsatisfactory conduct of the Plaintiff's Loan facilities, the Bank instructed the Auctioneers to collect the arrears of due and owing from the Plaintiff and in default to repossess the motor vehicles pursuant to the provisions of Clause 4 of the Hire Purchase Agreements.
6. The Bank avers that despite receipt of the said Collection/Repossession letter the Plaintiff has still persisted in its default as attested to by its Statements of Account & Loan Statement which are in arrears of Kshs. 96,995,509.68/=. That contrary to the Plaintiff's averments, the intended repossession was to be carried out as per the terms of Clause 4 of the Hire Purchase Agreements which provides that the financed motor vehicles remain the absolute property of the Bank until the Term Loan facilities were paid in full and that the Bank had the right to repossess the motor vehicles without notice upon default in payment by the Plaintiff. As such, the Bank maintains that the intended repossession of the motor vehicles doesn't require a court order as alleged by the Plaintiff.
7. The Bank accuses the Plaintiff of misrepresentation of facts and that it is not entitled to any equitable relief sought from the court and it states that the application has no merit and is only meant to prevent the Bank from enforcing its legal right to call in its security and it urges the court to dismiss the same with costs.



Analysis and Determination:-

8. I have gone through the parties' pleadings and submissions. The main issue for the court's determination is fairly straightforward and as submitted by the Plaintiff, it is whether the Plaintiff has met the threshold to be granted an injunction. The parties agree that the Plaintiff is required to satisfy the conditions set out in the case of *Giella v Cassman Brown & Co., Ltd.* [1973] E.A. 358 by demonstrating a prima facie case with a probability of success, that it will suffer irreparable injury which would not adequately be compensated by an award of damages and that if the Court is in doubt, it should decide the application on the balance of convenience. These conditions are to be applied as separate, distinct and logical hurdles which the Plaintiff is expected to surmount sequentially which means that if it does not establish a prima facie case then irreparable injury and balance of convenience do not require consideration (see *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2013] KECA 347 (KLR)).

9. I am in agreement with the parties' submissions that as to what constitutes a prima facie case, the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KECA 175 (KLR) explained as follows:-

A prima facie case in a civil application includes but is not confined to a "genuine and arguable case." It is a case 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.

10. A prima facie case flows from what has been pleaded in the plaint, the averments which I have summarised above. The Plaintiff's grievance is that the Defendants failed to issue and serve them with the requisite statutory notices and that the proclamation notice issued to it is irregular and unprocedural. It is not in dispute and as stated in the introductory part, the facilities advanced to the Plaintiff were secured by Hire Purchase Agreements over the motor vehicles. The Plaintiff has also expressly admitted that it is indebted to the Bank and that negotiations are ongoing as to restructuring the debt. As the Plaintiff is clearly in default, Clause 4 of the Hire Purchase Agreements provides for the consequences as follows:-

4. If the Hirer shall: -

- a. Fail to pay any of the Hire installments or any part thereof on the due date; or
- b. fail to pay to the Owner on demand any sum due by him.....

...then upon any such event without prejudice to the Owner's right to arrears of the Hire Installments or payment of interest or any other sums due by the Hirer under this Agreement or to damages for breach of this Agreement, the Owner shall be entitled immediately to terminate this hiring without notice to the Hirer and to retake possession of the Vehicle/goods for which purpose the Hirer hereby authorizes the Owner or its servants or agents to enter upon any premises upon which the Vehicle/ Goods may be standing at that time and to seize and take away the same at the expense of the hirer and if such expense is not paid within seven days of demand to bear interest at the ruling rate from the date of demand to the date of payment.

11. The aforementioned provision states that the Bank will be entitled to repossess the motor vehicles the moment an instalment or demand remains unpaid and the Bank is also not required to give any notice to repossess the motor vehicles. I therefore wonder what 'statutory notices' the Plaintiff was referring to or expecting when the contracts regulating their relationship with the Bank provide no



such requirement before repossession. In any event, the Plaintiff is in possession of the Bank's letter of 28th March 2024 and was thus aware of the extent and consequences of default which were stipulated in the Hire Purchase Agreements and the Bank could not be faulted for exercising its contractual right under the said Agreements (See *Diamond Trust Bank Kenya Limited (Formerly Diamond Trust of Kenya Limited) v Jaswinder Singh Enterprises*[1999] KECA 202 (KLR))

12. The aforementioned conclusion is evidence enough that the Plaintiff has no prima facie case against the Bank. It is clearly in debt, the Bank exercised a contractual right by seeking to repossess the motor vehicles and it did not require to issue any notice before it could repossess the same. Restraining the Bank from exercising its rights under the Hire Purchase Agreements would be tantamount to the court infringing on its contractual rights of repossession of the motor vehicles when the Plaintiff has defaulted in the payment of the instalments as and when the same became due. The Plaintiff cannot fail to meet its financial obligations to the Bank and still expect to retain the motor vehicles. It must either pay the monies as it still has the right of redemption or return the same. It cannot have its cake and eat it too (See *Amicabre Travel Services Limited v Alios Kenya Finance Limited* [2014] KEHC 4671 (KLR).
13. On the contention that the Plaintiff is disputing the amount claimed by the Bank, it is now settled that a court cannot grant an injunction restraining the Bank from exercising its contractual or statutory right merely because there existed a dispute regarding the amounts due under the contract (see J. L. *Lavuna and Others v Civil Servants Housing Co. Ltd. & Savings And Loan Kenya Ltd* [1995] KECA 111 (KLR). On the averment that losing the motor vehicles to the Bank would translate to a dire situation that would be severely affected beyond redemption, it should not be lost that once the Plaintiff offered the motor vehicles as security for the facilities granted to it, it must have been aware that the same became commodities for sale and damages are always foreseeable. There is no property, however sentimental or peculiar, that is incapable of being valued and damages awarded for it (see *John Nduati Kariuki t/a Jobester Merchants v National Bank of Kenya Ltd* [2006] KECA 219 (KLR)). In any case, I am in agreement with the Bank that the balance of inconvenience tilts in favour of the Bank as the motor vehicles which are acting as a security for the loans are depreciating assets while the Term Loans continue to accrue interest and that very soon the value of the motor vehicles will be outstripped by the loan arrears hence defeating the Bank's security.

Conclusion and Disposition:-

14. The upshot is that the Plaintiff's application dated 11th April 2024 has no merit and is hereby dismissed with costs. The interim orders in place are discharged forthwith.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF JANUARY 2025

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

1. Ms. Okoth for the Plaintiff.
2. Ms. Kavata holding brief for Mr. Kisinga for the Defendants.
3. Amos- Court Assistant

