



**NCBA Bank Kenya PLC v Geoffrey Kang'ethe t/a Kang'ethe
Enterprises Auctioneers & 3 others (Civil Appeal E045 of 2021)
[2022] KEHC 13267 (KLR) (Commercial and Tax) (23 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13267 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E045 OF 2021
A MSHILA, J
SEPTEMBER 23, 2022**

BETWEEN

NCBA BANK KENYA PLC APPLICANT

AND

**GEOFFREY KANG'ETHE T/A KANG'ETHE ENTERPRISES
AUCTIONEERS 1ST RESPONDENT
CRYSTAL MOTORS KENYA LIMITED 2ND RESPONDENT
DANIEL GATARI MUCHIRA 3RD RESPONDENT
ABRAHAM LENAYIA LANKEU 4TH RESPONDENT**

RULING

Background

1. The Applicant filed a Notice of Motion dated 16th June 2021 brought under Order 40 Rule 1, 43 Rule 1(u) & 51 Rule 1 of the *Civil Procedure Rules* 2010 Section 1A, 3A of the *Civil Procedure Act* and all other enabling provisions of the law seeking the following orders;
 - a. Spent
 - b. Spent
 - c. That pending the hearing and determination of this application, a temporary injunction be granted restraining the respondents either by themselves or through their agents, servants or employees from transferring, using and/or dealing with motor vehicles registration numbers KBX 718P and KBW 077D



- d. That the costs of this application be provided for
2. The application is supported by the grounds on the face of it and by the sworn affidavit of Stephen Atenya who stated that pursuant to a Chattels Mortgage agreement dated 2nd July 2013 between the applicant and the 3rd respondent the applicant has a legal and equitable interest in the subject motor vehicle and if the orders sought are not granted the motor vehicle shall be transferred to Enkay Trading.
3. The application was opposed by the replying affidavit of David Mwenda dated 5th March 2022. In it he indicated that the applicant is guilty of laches and the application is an afterthought and abuse of the court process.

Applicants Case

4. It was the applicant's case that they filed an application by way of Notice of Motion dated 5th March 2021 in commercial suit No. E277 of 2021 NCBA Bank (k) PLC v. Geoffrey Kangethe T/A Geoffrey Kangethe Auctioneers 3 Others seeking temporary injunctive orders restraining the respondents from selling, disposing off transferring using and/or dealing with Motor vehicles registration numbers KBX 718P and KBW 077D. The commercial Magistrates Court issued temporary injunctive orders dated 9th March 2021. By a ruling delivered 31st May 2021 by Hon. Ekagoni (PM) the applicants application dated 5th March 2021 was dismissed for having being overtaken by events. Being aggrieved by the ruling the applicant has filed an appeal challenging the said decision.
5. The applicant argued that the said motor vehicles are jointly registered in the name of the 3rd respondent and the applicant on one part and the 4th respondent and the applicant on the other part and having demonstrated ownership and evidence on its legal and equitable interest in the attached motor vehicles the applicant has a privileged position against the 2nd respondent.
6. Pursuant to a Chattels Mortgage agreement dated 2nd July 2013 between the applicant and the 3rd respondent, the applicant has a legal equitable interest in the attached motor vehicles. Pursuant to a hire purchase agreement dated 15th October 2013 between the applicant and the 4th respondent the applicant has a legal and equitable interest in the attached motor vehicle number KBX 718P.
7. The applicant argued that on account of the two registered loan agreements at the date of the attachment there was a legal equitable interest in the motor vehicles attached in favour of the applicant viz the equity of redemption cannot be attached and sold in an attempt to satisfy the outstanding storage charges and miscellaneous costs allegedly owed to the 2nd respondent by the 3rd and 4th respondents a position made clear by the applicant.
8. The 3rd respondent is still indebted to the applicant for an outstanding loan balance amounting to Kshs. 1,562,980 and therefore he is yet to be discharged from his obligations. Further, the 4th respondent is still indebted to the applicant for an outstanding loan balance amounting to Kshs. 3,591,829 and also yet to be discharged.

Respondents Case

9. It was the respondent's case that the motor vehicles subject to the suit KBX 718P and KBW 077D were owned by the 3rd and 4th respondent and were subject to a Chattels Mortgage agreement with the applicant as security for loans. The 2nd respondent owned a garage undertaking repairs to vehicles at a fee and the vehicles were independently delivered to the 2nd respondents for various repairs that were effected. A fee note was raised for the work done to the vehicles and invoices sent to the 3rd and 4th respondents for settling and were never honoured.



10. The 2nd respondent issued demand letter for payment which the applicant responded vide a letter dated 4th September 2020 indicating that they will respond to the demand in 14 days. The applicant vide an email received on 5th October 2020 suggested a meeting to amicably resolve the situation. The meeting was held where they made resolutions. The applicant thereafter reneged on it and failed to honour payment to the 2nd respondent and instructed the 1st respondent to proceed and recover amounts by issuing a notice of disposal of uncollected goods pursuant to Section 7 of the [disposal of Uncollected Goods Act](#). The applicants did not honour the notices prompting the 1st respondent to issue a 30 day notice to the applicant.
11. An auction thereafter took place and a certificate of sale issued. The applicant then served them with orders of the court barring disposal of the vehicles on 9th March 2021 a day after the auction had occurred and the vehicle sold. The orders were therefore overtaken by events as the vehicle was sold a day before the orders were issued.

Issues for determination

12. Having considered the application and response by the parties the issue for determination is;
 - a. Whether a temporary injunction should issue against the defendant?

Analysis

13. The applicant sought a temporary injunction against the transfer and use of motor vehicles registration numbers KBX 718P and KBW 077D. The application was brought under Order 40 Rule 1, 43 Rule 1(u) & 51 Rule 1 of the Civil Procedure Rules 2010 Section 1A, 3A of the [Civil Procedure Act](#) seeking injunctive reliefs.
14. In accordance with the case of *Giella –vs- Cassman Brown* (1973) E.A 358, the Applicant must establish the following conditions precedent for grant of an interim injunction:
 - a. A prima facie case with a probability of success;
 - b. Demonstrate that he shall suffer irreparable harm that cannot adequately be compensated by an award of damages;
 - c. Where there is doubt, the Court will decide the Application on a balance of convenience
15. The applicant argued that it has established prima facie case as it has a legal equitable interest in the attached motor vehicles on account of the two registered loan agreements. The 3rd respondent is still indebted to the applicant and the outstanding loan balance is the sum of Kshs. 1,562,980 while the 4th respondent has an outstanding balance of Kshs. 3,591,829.
16. On the other hand it was the respondents case that they had made resolutions which the applicant did not honour;
17. In consideration of the above arguments it is this courts view that the applicant has established a prima facie case and the issues that have been raised by the parties can only be fully dealt with during the hearing of the suit.
18. On the whether the applicant will suffer irreparable harm, it was the applicant’s argument that if the orders sought are not granted the appeal will be rendered nugatory as the subject vehicles will be transferred to Enkay Trading. It is however this court view that the applicant has not demonstrated that it is likely to suffer irreparable harm that cannot be compensated by an award of damages.



19. On whether the balance of convenience tilts in favour of the applicant? The applicant has argued that it issued a loan to the respondents that has never been fully repaid. The respondents on the other hand have argued that they had a resolution with the applicant which it never honoured.
20. In light of the above, this court is satisfied and finds that the balance of convenience tilts in favour of granting the injunction sought.

Findings And Determination

21. For the foregoing reasons this court makes the following findings and determinations;
 - i. The Applicants' Application is found to have merit and it is hereby allowed;
 - ii. That pending the hearing and determination of this appeal, a temporary injunction be granted restraining the 1st and 2nd respondents either by themselves or through their agents, servants or employees from transferring, using and/or dealing with motor vehicles registration numbers KBX 718P and KBW 077D
 - iii. The applicant to provide the respondent with a written undertaking within seven (7) days for damages and costs.
 - iv. The applicant to prosecute its appeal within twelve (12) months of issuance of this order.
 - v. Each party to bear its own costs.
 - vi. Mention on 25.10.2022 for directions on the Appeal

Orders Accordingly

DATED SIGNED AND DELIVERED ELECTRONICALLY THIS 23RD DAY OF SEPTEMBER, 2022.

HON.A.MSHILA

JUDGE

In the presence of;

Mwenda for the Respondents

No appearance for the Applicants

Lucy-----Court Assistant

