



REPUBLIC OF KENYA



**KENYA LAW**

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**Mega Wholesalers Limited v Equity Bank Limited & 4 others (Civil Suit E044 of 2023)  
[2023] KEHC 23373 (KLR) (Commercial and Tax) (12 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23373 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT E044 OF 2023  
A MABEYA, J  
OCTOBER 12, 2023**

**BETWEEN**

**MEGA WHOLESALERS LIMITED ..... PLAINTIFF**

**AND**

**EQUITY BANK LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**VINTAGE AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT**

**PHILLIPS INTERNATIONAL AUCTIONEERS ..... 3<sup>RD</sup> DEFENDANT**

**STARTRUCK AUCTIONEERS ..... 4<sup>TH</sup> DEFENDANT**

**INTEGRA AUCTIONEERING (K) COMPANY ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. Before Court is the application dated 7/2/2023 by the plaintiff. The application is brought under Rule 12(1) of the [Auctioneers Rules](#) 1997, Order 40 Rule 1(a) and Order 51 Rule 1 of the [Civil Procedure Rules 2010](#).
2. The application seeks orders for the release of the motor vehicles Hyundai Truck registration number KCY288C and the goods contained therein by the 1<sup>st</sup> and 2<sup>nd</sup> respondent. That the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondent be restrained from impounding, repossessing or auctioning motor vehicle registration numbers; KCZ 628Q, KBX 519Y, KBB 304G, KBZ 289B, KCB 677S, KCD 688X, KCG 369F, KCU 296P, KCV 610H, KCV 789A, KCY 208F, KCY 209F, KDA 072A, KDA 074A, KCG 368F, KCH 321T, KCV 748H, KCF 171X, KBZ 626J, KCV 636H, KCT 453J, KCV 514X, KCV 927A, KCV 570X, KCD 687X, KCV 300U, KCU 050K, KCV 050K, KCV 042J, KCV 739H, KCJ 370 F, KCV 822J, KCT 959G, KCT 912M, KCS 378J, KCT 429Q, KCV 487D, KCV 926A, KCV 853H, KCX 030B, KCY 285C, KCX 662A, KCY 281C, KCV 606H, KCV, 607H, KCV 605H, KCW 203T, KCV,



023N, KCT 436Q, KCV 643H, KCS 299U, KCS 253E, KCS 954C, KCS 958C, KCR 669D, KCR 620D, KCR 630D, KCH 323T, KCR 625D, KCR 617D, KCV 695H, KCY 061Z, KCY 382F, KCB, 680S, KCW 148D, KCX 661A, KCX 695A, KCX 287J, KCX 514M, KCY 278C, KCY 279C, KCY 284C, KCY 286C, KCY 277C, KCY 280C, KCY 282C, KCX 727C, KCY 201F, KCY 202F, KCY 203F, KCY 204F, KCY 205F, KCY 206F, KCY 207F, KCY 201F, KCY 383F, KCY 384F, KCY 386F, KCY 263X, KCY 350X, KCZ 709E, KCZ 713E, KCV 647H, KCX, 149S, KCZ 904W, KCZ 342U, KCZ 089U, KCZ, 921P, KCY 385F, KCY 381F, KCY 283C, KCX 248L, KTWC 985E, KTWC 984E, KTWC 971E, KTWC 955E, KDA 079A, KDA 077A, KDA 076A, KDA 071A, KDA 075A, KDA 078A, KDA 073A, KCX 657A, KCY 767R, KDA 105A, KCX 990C, KCX 275K, KAM 484E, KAK 348D, KCZ 343U, KDB 320C, KDB 066X, KDB 067X, KDB 997N (hereinafter “the said vehicles”).

3. The application was premised on the grounds set out on the face thereof and supported by the affidavit of Abdi Mohammed Ali dated 7/2/2023. It was the applicant’s contention that it was granted seven facilities by the 1<sup>st</sup> respondent vide a Letter of Offer dated 24/11/2021. The revolving overdraft limit was Kshs. 500,000,000/-, Non-revolving asset finance limit at Kshs. 250,000,000/-, Non-revolving usance Letter of Credit at Kshs. 250,000,000/-, term loan Kshs. 388,000,000/-, revolving insurance premium finance Kshs. 20,000,000/-, revolving short term loan limit USD 10,000,000 and finally revolving Bank Guarantees inner facility stood at Kshs. 250,000,000/- making a total of Kshs. 2,258,000,000/-.
4. According to the applicant, the facilities were secured by the several vehicles belonging to him and it was a term of the contract that extra security be provided by the Kenya Commercial Bank. That the process of having the Kenya Commercial Bank on board for issuance of security took a while and as a result, the 1<sup>st</sup> respondent informed the applicant of its breach of the loan agreement dated 24/11/2021.
5. Consequently, the applicant was informed that it would not access the overdraft facility and the 1<sup>st</sup> respondent demanded arrears amounting to Kshs. 372,461,580.87 from the revolving overdraft facility. That the parties had a meeting and it was resolved that the applicant would have access to both credit and debit and in turn the bank would recover the available balance amounting to Kshs. 104,742,342/-. That the bank would further recover 50% of the daily sale proceeds on account no 0840297456612.
6. That despite the revised agreement, the 1<sup>st</sup> respondent proceeded to instruct the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondent to prepare illegal and un-procedural warrants which were prepared without notice. Further, that at the time of seizure of Motor Vehicle Hyundai Truck Registration Number KCY 288C, there were goods on transit from the suppliers to the applicant’s shop. The applicant was also apprehensive that the 2<sup>nd</sup> respondent would impound other motor vehicles which may hamper the applicant’s business as a major distributor of food products.
7. It was contended that the applicant could not be in default as long as the amount did not exceed Kshs. 500,000,000/- which was the limit. That the 1<sup>st</sup> respondent’s actions were unlawful and meant to commercially harass the applicant.
8. The 1<sup>st</sup> respondent opposed the application vide grounds of opposition dated 23/2/2023 and replying affidavit sworn by Kariuki King’ori on even date. It confirmed having advanced the applicant credit facilities amounting to Kshs. 2,258,000,000/-.
9. On the first facility, the 1<sup>st</sup> respondent contended that it was a revolving fund of Kshs. 500,000 000/- for a period of 12 months and could be extended on its discretion. That the fund was used to finance the applicant’s working capital requirements. That the applicant was in breach of the terms and conditions



- of the offer letter by failing to ensure that there was adequate security for the outstanding facilities and reduction in banking at the 1<sup>st</sup> respondents.
10. In view of this, the 1<sup>st</sup> respondent sent a demand to the applicant for the outstanding amount of Kshs. 498,119,755/- and later on a second demand of Kshs. 372,461,580.87. That the parties agreed on a payment plan but the applicant failed to adhere to the proposal leaving the 1<sup>st</sup> respondent with no choice but to instruct the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondent to realize the securities.
  11. The 1<sup>st</sup> respondent stated that the applicant was given the 7day notice as required by Rule 12(1) of the Auctioneers Rules. It maintained that the applicant was in default of the revolving overdraft facility for failing to provide security to secure the amounts advanced. That the amount due was Kshs. 351,854,008/- and the same continued to attract interest at 13% per annum.
  12. The applicant filed a further supplementary affidavit sworn by Abdi Mohamed Ali on 16/3/2023 wherein it was stated that the applicant had never been in default of the facility. That the 1<sup>st</sup> respondent had confirmed that the applicant had only failed to comply with clause 3.1 of the facility letter. It faulted the 1<sup>st</sup> respondent for deducting 100% of the sale proceeds instead of the 50% agreed upon by the parties. That the 1<sup>st</sup> respondent was not at any risk of loss as it was a joint owner of all the 131 motor vehicles used by the applicant, had access to its accounts and had completely blocked the applicant for accessing the revolving overdraft facility.
  13. That the applicant was highly prejudiced as it could not access the bank account to trade in order to offset the amount demanded. That since the 1<sup>st</sup> respondent collects all amounts from the applicant's daily proceeds and there was no access to the overdraft facility, the applicant was unable to generate more sales. That the applicant was willing to allow the 1<sup>st</sup> respondent to collect quarterly rental income for a property known as L.R.NO 13607/206.
  14. The application was canvassed by way of written submissions which have been considered. The core issue is whether the applicant has met the threshold for an injunction.
  15. The principles applicable in application an interlocutory injunction are well settled. As held in *Giella –versus- Cassman Brown and Company Limited* (1973) E.A 385, an applicant must show a prima facie case with a probability of success, he must demonstrate that he might suffer irreparable injury, which would not adequately be compensated by an award of damages and finally, if the court is in doubt, it will decide an application on the balance of convenience.
  16. In *Mrao Limited –versus- First American Bank of Kenya and 2 Others* (2003) KLR 125, *prima facie* case was defined as 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 so as to call for an explanation or rebuttal from the latter. The peremptory evidence must show an infringement of a right.
  17. On whether the applicant has a prima facie case with a probability of success, it is not in dispute that the parties had a financial agreement by which the applicant was granted 7 facilities by the 1<sup>st</sup> respondent. The dispute ensued when the applicant was unable to provide further securities since the motor vehicles could not provide extra security. The applicant admitted to not complying with that aspect of the contract but contended that there was no default in paying the amounts due.
  18. On its part, the 1<sup>st</sup> respondent stated that since the applicant did not provide adequate security as required under the facility, the applicant was in default and 1<sup>st</sup> respondent therefore demanded a sum of Kshs. 372,461,580.87. According to the 1<sup>st</sup> respondent, the facility would become due and payable if the applicant failed to comply with one term of the facility.



19. According to clause 3.1 of the facility letter, the applicant was obligated to have an inter-lenders agreement between the 1<sup>st</sup> respondent and the Kenya Commercial Bank (KCB) and Gulf African Bank Limited as borrower's bankers and co lenders. That was not done because according to the applicant, KCB took time to get back at him. Clause 5.1 of the facility letter which constituted the contract, provided that in the event of breach of any clause of the contract, the facility would immediately become payable and the borrower obligated to pay the bank all the outstanding sums.
20. I have considered the fact set out in the application, in order to establish whether the applicant is deserving of the orders sought, it must demonstrate the existence of a right that had been infringed or was likely to be infringed by the respondents. I note that the applicant faulted the 1<sup>st</sup> respondent for taking 100 percent of the sale proceeds instead of 50%.
21. There was an allegation that the applicant had reduced bankings in the account(s) held by the 1<sup>st</sup> respondent. There was no evidence that the applicant had defaulted in making the daily payments and that the contract did not set out the time limits for complying with the provision for additional security.
22. However, I have considered that the facility was advanced in or about November, 2021. The provision of the additional security should have been within a reasonable time. The applicant came to Court in February, 2023. Obviously, there was a delay of over a year. That by any standards, considering the amount involved, cannot be held to be a reasonable period. The 1<sup>st</sup> respondent needed the comfort of an additional security. The failure to provide the same amounted to a breach of the terms of the contract. No prima facie case has been established.
23. As to whether the applicant would suffer loss that cannot be compensated, the answer is to be found in the what the Court of Appeal stated in the *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR that: -

“If the applicant establishes a prima facie case that alone is not sufficient to grant an interlocutory injunction, the Court must further be satisfied that the injury the applicant 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. 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.

...

On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”



24. The purpose of that security was to give the bank the opportunity to recover its monies in the event of default. The applicant argued that the vehicles are registered in both its and the 1<sup>st</sup> respondent's names. That for lack of further credit, its business was being affected.
25. In my view, the fact is that there has been breach of the contract between the parties. The outstanding amount continue to attract interest and the same not being sufficiently serviced, the same would soon outstrip the value of the said vehicles whereby the bank would left holding security that cannot cover the outstanding debt. The applicant, in my view, has not demonstrated the nature and extent of loss that is irreparable, that it stands to suffer if the injunction sought is not granted.
26. In any event, the balance of convenience tilts in favour of the bank recouping its outlay.
27. In the premises, the application dated 7/2/2023 is found to be without merit and is dismissed with costs.

It so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 12<sup>TH</sup> DAY OF OCTOBER, 2023.**

**A. MABEYA, FCI Arb**

**JUDGE**

