



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO. 91 OF 2017**

**AFRICON LIMITED.....PLAINTIFF**

**VERSUS**

**ECOBANK KENYA LIMITED.....1<sup>ST</sup> DEFENDANT**

**GEOFFREY KARIUKI T/A**

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

**RULING**

1. This Ruling is in respect to two applications. The application by Notice of Motion dated 24<sup>th</sup> May 2018 is filed by the Defendants, **ECOBANK KENYA LIMITED** (the bank), the 1<sup>st</sup> Defendant and **GEOFFREY KARIUKI T/A DIRECT AUCTIONEER** the 2<sup>nd</sup> Defendant. The Notice of Motion dated 27<sup>th</sup> June 2018 is filed by **AFRIKON LIMITED (AFRIKON)**, the Plaintiff.

**BACK GROUND**

2. **AFRIKON** executed a hire purchase agreement in respect to securities, being equipment, machinery, excavators, trailers and tippers. The Bank stated that the **AFRIKON** failed to comply with the terms of the restructured agreement. That because of that default the Bank, as it was entitled to, it instructed the 2<sup>nd</sup> Defendant to attach trailers, the subject of the hire purchase. **AFRIKON** alleges, in its plaint, that the Bank, in breach of the agreement failed to re-issue letter of credit to enable it to import 18 prime movers.

3. **AFRIKON** filed a suit being HCCC NO 121 of 2016 against the Bank which suit was comprised by a consent dated 4<sup>th</sup> October 2016. In that consent parties agreed to restructure **AFRIKON**'s debt amongst others. In that consent parties confirmed the debt **AFRIKON** owed the Bank was Kshs. 331,370,748.73 and USD. 11,402,847.28.

4. Thereafter **AFRIKON** filed this present suit claiming permanent injunction to restrain Defendant from repossessing, alienating, or however dealing with the trailers and other equipment attached by the Bank; an order directing the Bank to remove **AFRIKON**'s name from the Credit Reference Bureau; an order directing the Bank to render account of all money paid by **AFRIKON**; a declaration that the Bank was in breach of the contract of lending; and an order for the return of trailers excavators and other machinery to **AFRIKON**. **AFRIKON** sought, in its plaint damages for USD. 57.89 Million from the Bank.

5. This Court by the Ruling dated 30<sup>th</sup> November 2017, for an interlocutory injunction, issued restraining order against the Bank from selling, transferring, leasing or alienating the vehicle, trailers, excavators, tippers and other equipment. That injunction was issued until either this case was heard and determined or until the Bank first restructure the facility and if after restructuring **AFRIKON** defaults.

**NOTICE OF MOTION DATED 24<sup>TH</sup> MAY 2018**

6. This application as was stated before, was filed by the Bank. By it the Bank seeks orders that:

(a) AFRIKON be ordered within 7 days of the order, of the Court, to furnish to the Bank information on importation, financing of, and unpaid taxes in respect to the lot of number 349-366 in the Kenya Gazette Notice No. 3972 published in the Kenya Gazette of 27<sup>th</sup> April 2018.

(b) The order of 30<sup>th</sup> November 2017 be set aside and the Bank be allowed to realize the securities.

(c) An order directing Kenya Revenue Authority (KRA) and the Commissioner for Customs and Border Control to release to the Bank surpluses held by them to be held in an interest earning escrow account pending further orders of the Court.

7. Prayers (a) and (b) above are informed by the fact that KRA by the aforesaid Gazette Notice announced that it was auctioning, on 30<sup>th</sup> May 2018, various trucks, identified as lot No.349-366/18, which belong to AFRIKON and which the Bank deponed were charged to it through an all assets debenture.

8. AFRIKON had imported those items but had failed to pay the custom duty for them, hence the planned auction.

**NOTICE OF MOTION DATED 27<sup>TH</sup> JUNE 2018**

9. This application was filed by AFRIKON. AFRIKON seek the following prayers:

(a) That pending the hearing and determination of the application and/or the suit the Court do issue mandatory order compelling the Bank and the 2<sup>nd</sup> Defendant to return and/or release to AFRIKON vehicles and excavators and accessories.

10. The application is based on the grounds that this Court, by its Ruling of 30<sup>th</sup> November 2017 issued an interlocutory injunction restraining the bank from selling, transferring and leasing all the vehicles, trailers, excavators, tippers and machinery; that those vehicles, trailers; and excavators were forcefully repossessed by the Bank; and because the Bank had failed to restructure the Loan facility.

**ANALYSIS AND DETERMINATION**

11. Parties have filed numerous affidavits and submissions in respect to the above application. I confirm having read them but if I do not wish to reproduce them here. This is because they raise matters that will be under consideration when this case is finally heard. I need also to state that parties, in their affidavits and submissions, have repeated themselves.

12. By the Ruling of 30<sup>th</sup> November 2017 this Court ordered the vehicles, trailers and excavators, amongst other thing, held by the Bank not to be sold or alienated until either the loan is restructured or until the final hearing of the suit.

13. With that order in mind AFRIKON is seeking, by its application, the release of those goods to it by the Bank it is seeking a review of the order of 30<sup>th</sup> November 2017. There is no basis, before me, why I should review that order. For that reason the Notice of Motion dated 27<sup>th</sup> June 2018 is dismissed with costs.

14. The Notice of Motion filed by the Bank seek to have the excess proceeds of the auction of AFRIKONS property, held by Customs, to be placed in an escrow account.

15. In the light that AFRIKON, by the consent, in HCCC NO. 121 of 2016, acknowledge being indebted to the Bank; and because the value of assets held by the Bank has been outstripped by the interest and storage charge, the interest of justice need that a sale made of assets of AFRIKON and at least the excess proceeds of that sale be safeguarded. In making that finding I am conscious that the Ruling of 30<sup>th</sup> November recognized that default in payment, by AFRIKON to the Bank, would only occur when the loan was restructured. Each party has blamed the other of failure in achieving that restructuring. I refused to be drawn, at this stage, in that dispute.

16. Having found that the excess proceeds should be safeguarded the Bank has then partly succeeded in its prayers. The Bank's prayer for review is not merited because it fails to meet the Criteria of Order 45 of the Civil Procedure Rules.

17. The Bank having partly succeeded is entitled to half the costs of its application.

18. The orders of the Court are:

- (a) **The Notice of Motion dated 27<sup>th</sup> June 2018 is dismissed with costs.**
- (b) **Kenya Revenue Authority is hereby authorized to proceed with the auction, as the law provides, with the lot 349-366/18.**
- (c) **Any excess sale proceeds of the auction, of Lot 349/366/18, shall be paid in the joint names of Kagwimi Kang'ethe & Co. Advocates and Wamae & Allen Advocates.**
- (d) **The firms of Kagwimi Kang'ethe & Co Advocates and Wamae & Allen Advocates shall open a joint interest earning account with ECOBANK Kenya Ltd within 30 days of the release of the sale proceeds of LOT 349-366/18 by Kenya Revenue Authority.**
- (e) **That join interest earning account as ordered in (d) shall be retained until further orders of the Court.**
- (f) **The Plaintiff shall pay half the costs of the Notice of Motion 24<sup>th</sup> May 2018 to the Defendants.**
- (g) **At the Ruling of this case directions will be given to the parties to ensure expeditious hearing of this case.**

DATED, SIGNED and DELIVERED at NAIROBI this 5<sup>TH</sup> day of MARCH, 2019.

MARY KASANGO

JUDGE

***Ruling Read and Delivered in Open Court in the presence of:***

Sophie.....COURT ASSISTANT

.....FOR THE APPLICANT

.....FOR THE 1<sup>ST</sup> DEFENDANT

.....FOR THE 2<sup>ND</sup> DEFENDANT



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