



**Nganga & another v Standard Group PLC & 2 others (Commercial Case E417 of 2023)
[2024] KEHC 11444 (KLR) (Commercial and Tax) (25 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11444 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E417 OF 2023
AA VISRAM, J
SEPTEMBER 25, 2024**

BETWEEN

ANDREW MWANGI NGANGA 1ST APPLICANT

LEAH WANGUI MAINA T/A MAGEGANIA ENTERPRISES 2ND APPLICANT

AND

STANDARD GROUP PLC 1ST RESPONDENT

SUMTRIC SOLUTIONS 2ND RESPONDENT

EAST AFRICAN PAGES LIMITED 3RD RESPONDENT

RULING

1. I have considered the grounds on the face of the Notice of Motion Application dated 27th September, 2023, together with the supporting affidavit sworn on even date; the replying affidavit sworn in opposition to the same on 17th July, 2024; together with the rival submissions; and the applicable law.
2. The Application seeks orders restraining the Respondent from executing and implementing a tender award, namely Tender No. SGL/OC/SCR [P003-004/2023](#) pending hearing and determination of the suit, and pending the hearing and determination of its Amended Plaintiff.
3. The Applicant submitted that it was awarded a tender pursuant to a contract to supply waste product and scrap material. Counsel submitted that when the said products are available, the Applicant is invited to collect the material and the cost of the same is adjusted on a basis of a reduction of money already been paid in advance to the Respondent by the Applicant.
4. He contended that the sum of approximately Kshs 40 Million had been paid in advance. A similar tender was thereafter awarded to the Respondents, however with a price difference. Newspaper



material, for example, was sold at a different price to the Respondents from the Applicant. The Applicant was of the view that this tender, with a price difference should be stopped, and is the basis of the application.

5. Counsel submitted, that originally, the Plaintiff was paying Kshs. 30/= for a newspaper, but that the price of the product changed, and the Respondents began paying Kshs. 103/= for the same product. He argued that accordingly, the Respondent cut the supply to the Applicant because it preferred to sell the products at the higher price.
6. Additionally, he argued that the sum paid up in advance was supposed to be utilized as an advance payment for the supply of the product, and thereafter adjusted. The alteration of price accordingly made the products more expensive to purchase.
7. In opposition to the application, in summary, the Respondent submitted that the parties were never bound to deal exclusively with one another. Counsel contended that the Applicant has not attempted to take up the supply at the original price offered, and has not been denied the supply at the original price, subject to availability.
8. He submitted that the Applicant has also never been asked to match the higher price, and there is no evidence to that effect. The adjustment of the paid up sum continues to be made based on the original contract of agreement between the parties.
9. Finally, he contended that the Respondent has a right to deal and tender as part of its ongoing business with any and all parties.
10. Having considered the above, to my mind, the primary issue before this court is one relating to breach of contract between the parties, arising from the issuance of the said tender, which the Applicant submits, ought not to be implemented.
11. The crux of the Respondents' response is that the parties do not have an exclusive relationship with one another, and as such, the 1st Defendant is free to trade with other parties, in addition to the Applicant on its own terms.
12. The Respondent argued that tendering with numerous parties is a process of continuous prequalification of suppliers, service providers, and buyers of its products. It is therefore a continuous and ongoing part of its business.
13. On the other hand, the Applicant contended that the Respondent's actions of offering similar tenders to other parties, was in fact, breach of its contract and legitimate expectation. Further, that the offer to sell the products at a different cost amounted to a variation of the terms of its contract. In particular, he argued that the new price of the products had been unilaterally varied from Kshs. 30/= to Kshs. 103/= per KG to its detriment.
14. Having outlined the history of the dispute, I turn to the principles guiding the grant of interlocutory injunction, which are now well settled. Those principles were set out in *East African Industries vs. Trufoods* [1972] EA 420 and *Giella vs. Cassman Brown & Co. Ltd* [1973] EA 358. In *Nguruman Limited vs. Jan Bonde Nielsen & 2 Others* [2014] eKLR, the Court restated the law as follows:-

“In an interlocutory injunction application, the Applicant has to satisfy the triple requirements to;

- a. establish his case only at a prima facie level,
- b. demonstrate irreparable injury if a temporary injunction is not granted, and



c. ally any doubts as to (b) by showing that the balance of convenience is in his favour.

i. These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the Applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Ltd V. Afraha Education Society* [2001] Vol. 1 EA 86. If the Applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the Respondent 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. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. 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. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the Applicant if interlocutory injunction is refused would be balanced and compared with that of the Respondent, if it is granted."

15. Further to the above, Ringera, J (as he then was) in *Airland Tours & Travel Limited vs. National Industrial Credit Bank Nairobi (Milimani) HCCC No. 1234 of 2002*, stated that in an interlocutory application, the Court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence, or disputed propositions of law.

16. Guided by the above, I address my mind to the first limb of the test; what then constitutes a prima facie case? In the case of *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125, the Court of Appeal held as follows:-

"In civil cases a prima facie case 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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the Applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."

17. Further guided by the above, I caution myself not to make any definitive findings of fact at the present and interlocutory stage, and based on contradictory affidavit evidence. As such, I do not intend to make a final determination as to whether or not the parties were contractually bound to deal exclusively with one another at this stage. It is also not possible to determine, at this stage, whether or not the supplies to the Applicant were "cut" owing to the price difference on the open market. I therefore address my



mind to what is probable, based on a limited review of the facts, and based on the record for the purpose of the present application.

18. The question remains as to whether or not the Applicant has established a prima facie case? I have considered the record before me, and I am cognizant that the same does not yet bear all the necessary information. However, based on the record before this court, I am not persuaded that the parties were bound to deal exclusively with one another. In the circumstances, I do not think that the Respondent ought to be barred from issuing similar tenders as part of its ongoing business. Neither is it evident, at this point, if the terms of the tender awarded to the Applicant were unilaterally varied by the Respondent, as alleged, in a manner to warrant the grant of an injunction.
19. Based on the reasons set out above, I am not persuaded that the Applicant has made out a prima facie case in the terms required by Nguruman (supra) in so far as it has not demonstrated a clear and unmistakable right to be protected, which is directly threatened by an act sought to be restrained, or that its right is material and substantive, and there is an urgent necessity to prevent the irreparable damage that may result from the invasion.
20. However, in the event I am mistaken, I am willing to consider the second condition, or limb of the test, namely, whether the Plaintiff stands to suffer irreparable loss if the injunction is not granted?
21. It was held in Nguruman Limited case (supra), where the court expressed itself as hereunder:-

“On the second factor, that the Applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately 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.”
22. Guided by the above, I am satisfied that the test has not been met. I do not think that the Plaintiff has surmounted the second limb because in the present matter the damages are capable of being measured with a fair degree of accuracy. Further, the Applicant has admitted that it will suffer financial loss arising from the unilateral variation in price, which is the basis upon which it seeks damages. Those damages may be calculated based on the contract between the parties, and eventually proved at trial.
23. Having satisfied myself that the Applicant has failed to surmount the second limb, there is no need to move to the third limb of the test set out above. I therefore will not address the issue of balance of convenience.
24. My conclusion in relation to the first and second limb accordingly, brings the matter to an end and based on the reasons set out above, I find and hold that the application is without merit. The same is dismissed with costs.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 25TH DAY OF SEPTEMBER 2024.

ALEEM VISRAM, FCI Arb

JUDGE



In the presence of;

..... For the 1st Applicant

..... For the 2nd Applicant

..... For the 1st Respondent

..... For the 2nd Respondent

..... For the 3rd Respondent

