Exon Investment Limited v Consolidated Bank Limited & another (Civil Case 109 of 2018) [2024] KEHC 16899 (KLR) (28 November 2024) (Ruling)

Neutral citation: [2024] KEHC 16899 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL CASE 109 OF 2018

F WANGARI, J

NOVEMBER 28, 2024

BETWEEN

EXON INVESTMENT LIMITED ..... PLAINTIFF

AND

CONSOLIDATED BANK LIMITED ..... 1ST DEFENDANT

MAKURI AUCTIONEERS ..... 2ND DEFENDANT

RULING

1. This is a ruling in respect of two (2) applications dated 20th February, 2024 and 26th February, 2024. On 29th February, 2024, court directed that the two applications be dealt with simultaneously. The first application dated 20th February, 2024 sought for a raft of orders among them interim injunction restraining the 1st Defendant or anyone claiming through it from executing and/or further attaching the Applicant's motor vehicles, assets or properties emanating from the consent dated 29th September, 2023 and adopted on 9th October, 2023.

2. It also sought for the release of the Applicant's motor vehicle registration number KCB 893G proclaimed and arrested on 19th February, 2024. There is equally a prayer seeking to expand and/or extend time within which parties shall comply with the consent order dated 29th September, 2023 and adopted on 9th October, 2023 by a further six (6) months.

3. The grounds in support of the prayers are as enumerated on the face of the application among them that the Applicant has made concerted steps and/or efforts towards complying with the consent order including sale of certain motor vehicles and depositing the proceeds in the respective loan accounts. The application is further supported by the affidavit sworn by one Ateet Jetha, the Applicant's director.

4. The second application dated 26th February, 2024 seeks almost similar prayers as the first one save that the second one is precipitated by the attachment and/or arrest of another motor vehicle registration

number KBX 640A. The grounds in support of the application as well as the supporting affidavit contain similar averments as the first application and I therefore do not see the need to rehash the same.

5. The applications are strenuously opposed. Through a replying affidavit dated 20th March, 2024 and sworn by one Geoffrey Kisaka, the 1st Respondent's Mombasa Nkrumah Road Branch Manager, the financial facilities extended to the Applicant and various variations are enumerated in detail.

6. In a nutshell, it is averred that on 14th August, 2013, the Applicant took from the 1st Respondent a Letter of Credit Facility/ Asset Finance facility amounting to USD 1,000,000 repayable within forty-eight (48) months and attract a default interest of twelve percent (12%). The facility was secured through various motor vehicles and trailers. The Applicant sought and obtained a second Letter of Credit convertible to Asset Finance line of Kshs. 100,000,000/= vide a Letter of Offer dated 11th August, 2014. The second facility was to be charged at a flat rate of eight and a half percent (8.5%).

7. It is averred that on 6th April, 2021, parties entered into a fresh contract being the Letter of Offer of even date. On the basis of this new Letter of Offer, on 20th May, 2021, parties entered into a consent that sought to conclude the dispute between them upon compliance with the terms of the said consent. The Applicant still defaulted and rushed to court seeking injunctive orders preventing the 1st Respondent from seizing/repossessing the Applicant's motor vehicles pursuant to the aforementioned consent.

8. Before the application could be determined, parties entered into a new consent dated 29th September, 2023 and filed on 30th September, 2023. It is the 1st Respondent's contention that the Applicant has made it a habit to rush to court to defeat consent orders willingly agreed by parties and adopted by the court. The 1st Respondent states that the court has no jurisdiction since upon the adoption of the consent settling a suit, the court becomes functus officio.

9. It is the Respondents' position that the Applicant has failed to meet the conditions that would allow the court to vary the terms of the consent being new and important matter or evidence which after the exercise of due diligence was not within the Applicant's knowledge or could not be produced by him at the time of passing the decree or making the order and some mistake or error apparent on the face of the record.

10. The Respondents contend that it is now well settled law that a consent judgement or order can only be reviewed, varied or set aside on the same grounds as would justify the setting aside of the contract being fraud, mistake or misrepresentation. The urge the court to dismiss the two applications with costs.

11. The Applicant filed a further affidavit dated 26th September, 2024 wherein it reiterated that it was not seeking to vary the terms of the consent but simply variation of terms in respect of timelines. The Applicant avers that it has made efforts to repay the amount as evidence by payment of Kshs. 1,000,000/= as legal fees and Kshs. 5,000,000/= towards reducing the amount from Kshs. 28,000,000/ =.

12. The Applicant states that though consent judgement is akin to a contract, it invites the court to take into account that in commercial transactions such as banking transactions, parties are allowed to restructure even loan facilities where the repayment of such facilities does not materialize on the projected and anticipated terms. It thus urges that the application be allowed by allowing the restructure of the consent terms and extend the timelines for the repayment of the consent sum.

13. I note that on 7th February, 2024, the 1st Respondent filed an application for execution of decree and warrant of attachment of immovable property in execution of decree for money and warrant of sale of property in execution of decree for money were signed on 22nd February, 2024. I believe this what precipitated the two applications.

14. Directions were taken to have the applications canvassed by way of written submissions. Both parties duly complied. The Applicant's submissions are dated 26th September, 2024 while those by the Respondents are dated 14th October, 2024. I have given due consideration to the parties' submissions and the court shall make reference to them in determination of the issue (s) by the disputants.

Analysis

15. This Court has carefully considered the applications, response, parties' rival submissions, the authorities cited and the law and the issues that fall for this Court's determination are as follows: -

    a. Whether the orders of injunction sought can issue;

    b. If the answer to (a) above is in the affirmative, whether this court can extend and/or enlarge time within which the Applicant ought to comply with the consent order dated 29th September, 2023; and

    c. What is the order as to costs?

16. The principles guiding the grant of interlocutory injunction are now well settled. Those principles were set out in East African Industries v Trufoods [1972] EA 420 and Giella v Cassman Brown & Co. Ltd [1973] EA 358. In Nguruman Limited v 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.
>
> These are the three pillars on which rest 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... 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 are 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..."

17. Having set out the principles, has the Applicant establish a prima facie case in respect to the first application? A prima facie case was defined in the case of Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] KLR 125 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..."

18. It is not in dispute that the parties entered into a contract where the Applicant was granted various financial facilities by the 1st Respondent and the facilities were secured by Applicant's motor vehicles and trailers. It is equally not in contest that the facilities went into arrears and the 1st Respondent sought to repossess the securities.

19. This threat prompted the Applicant to move to court seeking injunctive orders which were granted. With a view of resolving the matter, parties entered into consents which consents were to fully settle the case and the first consent was entered in May, 2021. It appears there was non-compliance with the terms and the 1st Respondent once again sought to repossess the security offered. The Applicant once again moved the court through an application dated 17th May, 2022.

20. The record shows that parties once again compromised the suit through a consent dated 29th September, 2023 and adopted as an order of the court on 9th October, 2023. Relying on the terms of the consent, the 1st Respondent sought to execute the same and this led to repossession of two motor vehicles being motor vehicles registration numbers KCB 893G and KBX 640A.

21. The Applicant avers that being a transport company, the repossession directly affects its income and thereby hampering its ability to service the facility. It further avers that it has made considerable efforts to repay and/or comply with the consent order by paying the legal fees of Kshs. 1,000,000/= and reducing the amount due of Kshs. 28,000,000/= by Kshs. 5,000,000/=. The 1st Respondent has not refuted these averments and I thus find that a prima facie case has been established.

22. What of irreparable injury or loss? In Nguruman (supra), irreparable injury was defined as follows: -

> " ...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..."

23. It has not been denied that the Applicant is in the transport business and thus it is not far-fetched that the repossession by the 1st Respondent directly hampers this business. The repossessed trucks are what I consider as the tools of trade. Though the trucks have or can be assigned a value, that alone cannot be a factor to deny a party orders of injunction. In Joseph Siro Mosioma v Housing Finance Company of Kenya Limited & 3 Others [2008] eKLR, Warsame, J (as he then was) held as follows: -

> " ...damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be substituted for the loss which is occasioned by a clear breach of the law, in any case, the financial strength of a party is not always a factor to refuse an injunction. More so a party cannot be condemned to take damages in lieu of his crystalized right which can be protected by an order of injunction..."

24. I am thus persuaded that the Applicant stands to suffer irreparable loss or injury if the equitable remedy sought herein is not granted.

25. Lastly, on balance of convenience, the court in Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR observed as follows: -

> " ...The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show

that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer? In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it..."

26. Applying the above rationale to the present case, the continued detention of the subject motor vehicles has a direct negative impact on the Applicant and even if it succeeds in the main suit, whatever award or costs made in its favour might not be of any help to it because the motor vehicles are subject to wear and tear which directly leads to depreciation of their value and might even completely dissipate.

27. The same cannot be said of the Respondents and in particular the 1st Respondent. If the suit is finally dismissed, it can proceed and execute the terms of the consent and the sum continue attracting interest as per the Letters of Offer. It equally has a right to costs.

28. In light of my findings above, I am satisfied that the Applicant has satisfied the conditions necessary for the grant of the injunctory orders and I shall pronounce the specific orders at the end of this discourse.

29. Having found as above, I proceed to consider the second issue which is basically the prayer for enlargement and/or extension of time to comply with the terms of the consent. Both parties are in agreement that consent judgements or orders can only be reviewed, varied and/or set aside only on conditions that would justify the setting aside of a contract being fraud, mistake and/or misrepresentation.

30. According to the 1st Respondent, the Applicant is seeking to review or vary the consent dated 29th September, 2023. However, the Applicant is of a different view. It is not seeking to vary or review the consent but rather seeks to vary the timelines within which to comply in terms of payment by six (6) months. It compares its request with an application for restructure of a loan facility.

31. Importantly, the Applicant does not seek to vary the amount agreed by the parties but only that the repayment period be extended by a specific time. Can the court extend time where parties have specifically agreed on the timelines within which an act ought to have been done? It has been in a long line of authorities of this court and other superior courts that extension of time is not a right of a party and can only be granted upon a deserving party (See Nicholas Kiptoo Salat's case).

32. From the Applicant's averments, the failure to make the agreed payments within the time fixed by parties was occasioned by challenges in the transport industry. It is the Applicant's further contention that despite the challenges, it has made efforts to make payments and this is evidenced by the payment of Kshs. 1,000,000/= as legal fees and a further Kshs. 5,000,000/= towards reducing the initial amount of Kshs. 28,000,000/=. This has not been controverted.

33. I also take judicial notice that indeed since the advent of Covid-19 pandemic in early 2020 and the government policy to have containers transported through Standard Gauge Railway (SGR), one of the industries hard hit is the transport industry. The Applicant has demonstrated that it has been making efforts and this court is thus inclined to exercise its discretion in favour of the Applicant by extending time.

34. I find succor in the provisions of Order 50 Rule 5 of the Civil Procedure Rules which provide as follows: -

> "Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such

enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed..."

35. I thus find favour in the Applicant's prayer for extension of time to make the payments as per the consent dated 29th September, 2023. Considering the delay that the applications have taken, I direct that the period sought for shall run from the date of this ruling.

36. On costs, the same follows the event. Though the proviso to Order 50 Rule 5 of the Civil Procedure Rules mandates that costs of any application to extend time shall be borne by the parties making such application, the court retains its discretion to order otherwise. The Applicant has demonstrated that it has paid legal fees prior and I thus find it onerous to condemn it to pay costs once again. In the circumstances, I direct that each party shall bear own costs.

37. The upshot of the foregoing is that the court renders itself as hereunder: -

    a. The Notice of Motion Applications dated 20th February, 2024 and 26th February, 2024 are merited and the same are allowed on the following terms: -

        i. An order of injunction is hereby issued restraining the Respondents whether by themselves, agents, employees, servants and/or anyone claiming through them from in any manner interfering with the Applicant's motor vehicles, assets and/or properties and in particular motor vehicle registration numbers KCB 893G and KBX 940A pending full compliance with the consent order dated 29th September, 2023 and adopted as an order of court on 9th October, 2024;

        ii. An order is hereby issued directing the Respondents whether by themselves, agents, employees, servants and/or anyone claiming through them to release to the Applicant immediately forthwith motor vehicle registration numbers KCB 893G and KBX 940A;

        iii. Parties are at liberty to agree on storage charges if any;

    b. The Applicant's compliance with the consent order dated 29th September, 2023 and adopted on 9th October, 2023 in terms of payment is hereby extended for a further period of six (6) months from the date of this ruling;

    c. In default of (b) above, the Respondents and in particular the 1st Respondent is at liberty to proceed and realize its securities; and

    d. Each party to bear own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28TH DAY OF NOVEMBER, 2024.

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F. WANGARI

JUDGE

In the presence of;

Gathu Advocate for the Plaintiff/Applicant;

M/S Gitau Advocate h/b for Kibara Advocate for the 1st Defendants/Respondents;

Brian, Court Assistant