Berlin Equipment Limited v Mascor Kenya Limited (Civil Suit E051 of 2022) [2023] KEHC 17533 (KLR) (28 April 2023) (Ruling)

Neutral citation: [2023] KEHC 17533 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT E051 OF 2022

DKN MAGARE, J

APRIL 28, 2023

BETWEEN

BERLIN EQUIPMENT LIMITED ..... PLAINTIFF

AND

MASCOR KENYA LIMITED ..... DEFENDANT

RULING

1. The plaintiff has filed suit to compel the plaintiff, not to commence liquidation. The nature of this claim is supposed to fit within the 3 limbs of *Giella v Cassman Brown*, where the court held that: -

> " The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

2. The first issue was whether, the plaintiff has a prima facie case. In the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR the Court of Appeal was of the view that these tests are sequential. The court stated: -

> " In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;
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> (a) establish his case only at a *prima facie* level,
>
> (b) demonstrate irreparable injury if a temporary injunction is not granted, and allay any doubts as to

(b) by showing that the balance of convenience is in his favour.

3. 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.

4. 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."

5. In the respondents submissions, they stated that they are owed Kshs 36,397,897.95. In *Mrao Ltd v First American Bank of Kenya Ltd & 2 ors* civil appeal No 39 of 2002, the court described prima facie case as:

> " in civil case, it 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 been infringed by the opposite party as to call for an explanation or rebuttal from the latter"

6. They also rely on *East African Cables Ltd v SMB Bank (K) Ltd* [2020] eKLR. The plaintiff on their part stated that there is an issue of 34, 9821,664. They rely on the case of *Blue Line Properties Ltd v Mayfair Insurance Co Ltd* 2019] eKLR and *Odongo Nairasha Estate (Nairobi) Ltd v OCB Kenya Ltd* [2021] eKLR I note that the dispute is whether the demand is proper or not.

Analysis

7. My view is that the suit itself is much ado about nothing. Whether or not a demand should be signed is outside of this court's jurisdiction. The court has no business advising parties whether to file a claim or not. There is no *prima facie* case disclosed.

8. There is absolutely nothing to go on trial, the court cannot issue an injunction to bar a party from going to court. Article 159 allows parties to have access to justice. The article provides as follows: -

2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles.

a. justice shall be done to all, irrespective of status;

b. justice shall not be delayed;

c. alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

d. justice shall be administered without undue regard to procedural technicalities; and

e. the purpose and principles of this Constitution shall be protected and promoted."

9. The consequence is that both the suit and the application are unconstitutional in so far as they seek to permanently bar a party from approaching the court. The right to access justice has been stated as follows by the Court of Appeal: -

10. In S. *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, Supreme Court stated –

> "68) A court's jurisdiction flows from either the *Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the *constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings. This court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission* (applicant), constitutional application number 2 of 2011. Where the *Constitution* exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the *Constitution*. Where the *Constitution* confers power upon Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

11. The jurisdiction of the court is said to be flowing from the power of the court to decide in *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR

> "With that I return to the issue of jurisdiction and to the words of section 20 (2) (m) of the 1981 Act. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority:
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> "By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the

court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given"

12. Ipso facto, a court cannot decline jurisdiction it has or assume jurisdiction it does not have. It amounts to suspending an act of parliament a restraining the invocation of the *Insolvency Act*. In this matter, the court has no jurisdiction to bar a party from going to court.

13. Further issues of the statutory demand can only be dealt with in the course of a resolving a dispute in the insolvency petition. There is no such petition. This there is nothing to argue.

14. The application has no merit.

Determination

15. The suit was filed and the application are unconstitutional they seek to bar a party from access to justice. Consequently, both the application and the suit are bereft of merit. The application dated August 3, 2022 is dismissed as it lacks merit.

16. Having found that the application has no merit and it is unconstitutional the only prayer in the suit being the same, that being the same, that is, injunction against the statutory notice. There is no other prayer.

17. Courts ought to be slow in striking out pleadings unless they are unsalvageable. This one cannot be salvaged. In the case of *Francis Waithaka Ngokonyo & 2 others v Kenya Posts & Telecommunication Corporation* [1992] eKLR, the court, S.E.O Bosire, held as doth: -

> " Before me are three applications seeking precisely the same orders, viz that the defences filed in all of the three cases be struck out for being scandalous, frivolous or vexatious, or are otherwise an abuse of the court. The applications, like the suits in which they were brought, were consolidated. They are all expressed to be brought under order VI rule 13(1)(b), and (d), and rule 16 of the Civil Procedure Rules.
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> Striking out of a pleading is a draconian measure. The court is therefore, obliged to act with caution and should be slow in deciding to order the striking out of any pleading.
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> In the case of DT Dobie & Co (K) Ltd v Joseph Mbaria Muchina & another civil appeal No 37 of 1978, Madan JA (as he then was) said as follows:-
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> "No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and it is so weak as to be beyond redemption and incurable by amendment."

18. There is nothing to go to try on the suit. I strike out the suit with costs of Kshs 550,000/= for the suit and Kshs 30,000/= for the application dated August 3, 2022 to the defendant/respondent.

19. The matter be listed in the next 60 days for hearing of the counter-claim.

20. The costs be paid within 30 days in default execution do issue.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 28TH DAY OF APRIL, 2023. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

Angela Cheruiyot for plaintiff

Miss Nzamsa for Miss Mulago for Defendant

Court Assistant - Brian