



**Mungai t/a Subukia Heshima Hardwares v Poly tanks & Containers Kenya Limited  
(Civil Appeal E044 of 2023) [2023] KEHC 3583 (KLR) (26 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3583 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL E044 OF 2023**

**HM NYAGA, J**

**APRIL 26, 2023**

**BETWEEN**

**JOHN MUGAI MUNGAI T/A SUBUKIA HESHIMA  
HARDWARES ..... APPELLANT**

**AND**

**POLYTANKS & CONTAINERS KENYA LIMITED ..... RESPONDENT**

**RULING**

1. It is not in dispute that the small claim's court on November 23, 2022 entered a judgement against the Applicant for a total sum of Kshs 361,633.36/=. It also awarded the Respondent costs of Kshs 55,500/= totalling to Kshs 417,133/=
2. Subsequently, the Applicant filed an Application dated February 7, 2023 seeking a temporary injunction to restrain the Respondent or its agent Hegeons Auctioneers from auctioning/selling and or in any way dealing with its moveable property and to be allowed to pay Kshs 20,000/= towards settling the aforesaid decretal amount.
3. The Application was supremely premised on grounds that the Applicant had been defraying the decretal sum via instalments and had so far paid Kshs 115,000/= yet the respondent had instructed the auctioneers to proclaim his only source of income which is hardware store and that should they be allowed to proceed with execution, the said business shall be completely paralyzed as the Applicant's sole proprietor is a person living with disabilities and currently facing serious economic hardship.
4. The Respondent opposed the Application. The small claims determined same and in its ruling delivered on 6<sup>th</sup> of March, 2023 dismissed it on grounds that the Applicant had not demonstrated bona fides and further failed to establish that its business was struggling by annexing the business accounts. The court also held that the applicant had reasonable time to pay substantial part of the claim noting



the matter was filed in 2022 and it would be unjust to condemn the claimant to recover the decretal sum by unreasonable instalment of Ksh 20,000/=.

5. Undeterred, the Applicant lodged a Memorandum of Appeal against the said ruling and filed a similar application before this court. The said application is dated 9<sup>th</sup> of March 2023 and it's brought pursuant to Order 40 Rules 1 & 6 of the Civil Procedure Rules, 2010. The Applicant seeks for Orders:
  1. Spent
  2. Spent
  3. That a temporary injunction be and is hereby issued restraining the respondent either acting by themselves, servants and or agents Hegeons Auctioneers from auctioning/selling and/or in any way dealing with the respondent's moveable properties pending hearing of the Appeal.
  4. That the court makes any further orders it may deem fit.
  5. That the cost of this Application be provided for.
6. The application is premised on grounds on its face and supported by an affidavit sworn by Johnson Muigai Mungai, the proprietor of the Applicant herein, on the even date.
7. He reiterated that he has been paying the decretal amount in instalment and currently he has paid a total sum of Ksh 115,000/= however the respondent in total disregard of the amounts already paid instructed auctioneers who have moved and proclaimed his only source of income which is a hardware shop.
8. He deponed that he is now exposed to auction of his moveable properties despite being ready to offset the amount in instalments.
9. He averred that his business is currently undergoing financial hardship and he is unable to settle the decretal amount in full. He annexed copies of current sales Records in proof thereof.
10. He averred that he has filed an appeal which he believes has a high chance of success and which will be rendered an academic exercise should the respondent be allowed to proceed with execution.
11. He prayed that the Application be allowed.
12. The respondent opposed the Application through a replying affidavit sworn by Kennedy Mutiso, the credit quality control manager with the Respondent on March 17, 2023.
13. He averred that he is surprised by the Application since the applicant is still indebted to the respondent and had written a cheque for the full amount to its advocate.
14. That the application is therefore frivolous, vexatious and an abuse of the court process and is clear indication of the games and delay tactics employed by the Applicant to deny the respondent its dues.
15. He averred that it is inadmissible to bring additional evidence not raised during the trial and which was in possession of the Applicant at that time. He asked this court not to allow the admission of the same as the Applicant has not proven exceptional circumstances.
16. He averred that the Applicant is trying to strong-arm the respondent through this Application to accept his instalment terms that can only be agreed upon willingly by the parties to the suit.
17. He averred that the applicant has not met the threshold for grant of an injunction as set out in *Giella vs Cassman brown*, has brought the Application in bad faith and the same should be dismissed with costs.



18. The Applicant swore a further Affidavit on March 28, 2023. He averred that the law under Order 21 Rule 12 of the [Civil Procedure Rules](#) allows a judgement debtor to settle decretal sums in instalments.
19. In regards to the averment by the Respondent that he had written a cheque of the decretal sum to its advocate, he deposed that he did recall the same due to insufficient funds in his account and as such the decree remains unsettled. He annexed a letter of recall in proof thereof.
20. On March 22, 2023 parties took directions to canvass the Application via written submissions.
21. Only the Applicant's submissions are on record. The same were filed on March 31, 2023.
22. The Applicant in its submissions reiterated the entire averments contained in his supporting and further Affidavits.

### **Issues for Determination**

23. Having carefully considered the Application, the Affidavit in support and in rebut of the issues herein, and the Submissions on record. The only issue that arises for determination is Whether the Applicant has met the threshold for granting interlocutory injunction.

### **Analysis**

24. The law and principles on granting temporary injunctions is set out under order 40(1) (a) and (b) of the [Civil Procedure Rules, 2010](#) as follows:

“Cases in which temporary injunction may be granted [Order 40, rule 1.]

Where in any suit it is proved by affidavit or otherwise—

- (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- (b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

25. The conditions for granting an injunction are well settled in the case of *Giella vs Cassman Brown & Company Limited* [1973] EA 358, where the court expressed itself thus: -

“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.”



26. In *Kenleb Cons Ltd vs New Gatitu Service Station Ltd & another*, (1990) eKLR the court held as follows on what a party seeking an injunction must demonstrate:

“To succeed in an application for injunction, an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must also show he has a right legal or equitable, which requires protection by injunction.”

27. On what amounts a prima facie case was defined by the Court of Appeal in *Moses C Mubia Njoroge & 2 others vs Jane W Lesaloi and 5 others*, (2014) eKLR citing with approval the case of *Mrao Ltd vs First American Bank of Kenya and 2 others* [2014] eKLR where it was defined as follows:

“A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.

28. In the instant case, what the applicant is actually seeking is a stay of execution of the decree in the lower court, but has couched it so as to come as an application for injunction.

29. An injunction is applied for to prevent a wrong being committed or when a wrong is about to be committed. The respondent cannot be said to be committing a wrong in executing a lawful decree obtained in the lower court. I am therefore doubtful if the applicant has set out a prima facie case with a probability of success.

30. In the circumstances I do find that an injunction cannot issue against a party executing a lawful decree of the lower court. The applicant has failed to surmount the first hurdle as set out in *Giella vs Cassman Brown (supra)*.

31. In the instant case, it is not in dispute that the decretal sum is Kshs 417,133/= and to date the Applicant has only paid Kshs 115,000/=.

32. It is also uncontroverted that the Respondent has already proceeded to proclaim the Applicants goods and or property and has made an inventory of the property within the Applicant’s hardware shop as evidenced by the annexure marked “JMM 2”.

33. The Applicant contends that he is unable to defray the decretal sum at once due to financial constraints. A copy of the current daily sales records showing the Applicant’s business has been facing financial difficulties has been annexed as “JMM 5”. The Applicant had filed an application before the lower court seeking to pay the decretal amount in instalments but the same was dismissed.

34. It is correct, and as argued by the respondent, to state that the annexures now shown to this court were not adduced before the trial court. In essence the applicant is now adducing new evidence and without leave of the court.

35. Order 42, rule 27 of the *Civil Procedure Rules* deals with production of additional evidence in appellate court. It provides that;

“(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the court to which the appeal is preferred; but if—

(a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or



(b) the court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the court to which the appeal is preferred may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by the court to which the appeal is preferred the court shall record the reason for its admission.”

36. The applicant has appealed against the said decision before this court. As an appellate court, this court can only look at the evidence adduced before the trial court and make a decision, and only then can it determine that the trial magistrate/adjudicator reached a wrong decision.
37. Having looked at the application made in the lower court, I note that the applicant failed to adduce the evidence he is now adducing before me. I find no valid reason to set aside the decision by the trial magistrate. With the material before that court I would have come to the same conclusion as the trial court.
38. I am therefore unable to find that the proposed appeal has high chances of success, which is a key consideration of an application for stay pending an appeal.
39. I also note that the applicant has not shown the court if leave to appeal against the said decision was granted by the lower court. An order made pursuant to an application under Order 21 Rule 12 of the *Civil Procedure Rules* does not confer a right of appeal as of right as set out under Order 43 Rule 1 (1) of the *Civil Procedure Rules*. The applicant needed to apply for leave to appeal. That also works against the applicant.
40. Given the reasons set out above, there is every reason to dismiss the application. I am also of the view that the appeal ought to be struck out for want of leave.
41. I therefore proceed to dismiss the application with costs.
42. The memorandum of appeal herein is also struck out. Since the appeal has not been canvassed, there shall be no orders as to costs.
43. The applicant shall also bear the auctioneer costs to be agreed or taxed as provided under the Auctioneer’s Act and Rules.

**DATED AT NAKURU THIS 26<sup>TH</sup> DAY OF APRIL, 2023.**

**H. M. NYAGA**

**JUDGE**

**In the presence of;**

**C/A Jeniffer**

Ms Akinyi for Mbaabu for Respondent

Ndichu for appellant

