Kaminara Agencies Limited v Mturi & 2 others (Civil Suit E030 of 2022) [2023] KEHC 27562 (KLR) (28 July 2023) (Ruling)

Neutral citation: [2023] KEHC 27562 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT E030 OF 2022

F WANGARI, J

JULY 28, 2023

BETWEEN

KAMINARA AGENCIES LIMITED ..... PLAINTIFF

AND

JONATHAN DANIEL MTURI ..... 1ST DEFENDANT

PATIENCE SIKUKU MTURI ..... 2ND DEFENDANT

DIAMOND TRUST KENYA LIMITED ..... 3RD DEFENDANT

RULING

1. This ruling relates to a notice of motion application dated 9th May, 2022 which sought for the following orders: -

    a. Spent;

    b. Spent;

    c. That the Honourable Court do issue a temporary injunction restraining the Defendants, their servants, agents and/or any other person acting on their behalf from alienating, selling, auctioning, transferring or disposing off Plot No. L.R. No. Mainland North Section I/1202 Old Nyali Estate, Mombasa, County, Mombasa pending the hearing and final determination of this suit;

    d. That the costs of this application be provided for.

2. The application was opposed. The 3rd Respondent filed a detailed replying affidavit dated 17th June, 2022 and filed on 4th July, 2022. It was sworn by the 3rd Respondent's Legal Manager. I note that the 1st and 2nd Respondents filed an application dated 19th September, 2022 but the same was withdrawn.

Having withdrawn their application, the 1st and 2nd Respondents filed their joint response dated 10th July, 2023 on 14th July, 2023.

3. The application was disposed of by way of written submissions wherein all parties complied by filing submissions together with various authorities in support of the parties' rival positions. I am grateful to Counsel on their compliance as the submissions filed will aid the court in arriving at a just decision either way.

Analysis and Determination

4. I have considered the application, responses, submissions together with the authorities relied upon by the parties as well as the law and in my view, the following are the issues for determination

    a. Whether the Applicant has made out a case for grant of orders of injunction;

    b. If the answer to (a) above is in the affirmative, what orders should issue?

    c. Who bears the costs of the application?

5. Turning to the substance of the application, the facts are not greatly in dispute. The Plaintiff entered into a lease agreement with the 1st and 2nd Defendants for the subject property. Unknown to the Plaintiff, the 1st and 2nd Defendants had guaranteed a loan to a third party from the 3rd Defendant using the subject property as security. The third party having defaulted in its obligation towards repaying its loan, the 3rd Defendant sought to realise the security and in compliance with the law, it issued the requisite notices to the 1st and 2nd Defendants. It is at this juncture that the Plaintiff got to know of the subject property's impediment and thus moved the court to safeguard its interests. The 1st and 2nd Defendants do not dispute the facility but only challenges the manner in which the 3rd Defendant sought to exercise it more so on the issue of notices.

6. This being an application for orders of temporary injunction, the principles guiding the court whether to grant the orders sought or not are 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 of Appeal 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 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..." (Underlying for emphasis)

7. While considering the above principles, I take caution 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. (See the decision of Ringera, J (as he then was) in *Airland Tours & Travel Limited vs. National Industrial Credit Bank Nairobi (Milimani)* HCCC No. 1234 of 2002). However, the Court is not excluded from expressing a prima facie view of the matter and the Court is entitled to consider what else the deponent to the supporting affidavit has stated on oath which is not true. Being an equitable relief, a party seeking this remedy ought to act equitably.

8. Therefore, though at an interlocutory stage the Court is not required and indeed forbidden to purport to decide with finality the various relevant "facts" urged by the parties, the remedy being an equitable one, the Court will decline to exercise its discretion if the Applicant to relief is shown to be guilty of conduct which does not meet the approval of the Court of equity. Injunction being an equitable remedy, the court is enjoined to look at the conduct of the Applicant for the injunctive orders, the surrounding circumstances whether the orders sought are likely to affect the interests of non-parties to the suit, the issue whether an undertaking as to damages has been given as well as the conduct of the Respondent whether or not he has acted with impunity.

9. The Court is also, by virtue of section 1A (2) of the *Civil Procedure Act*, enjoined to give effect to the overriding objective as provided under section 1A (1) of the said *Act* in exercising the powers conferred upon it under the *Civil Procedure Act* or in the interpretation of any of its provisions. One of the aims of the said objective as interpreted by the Court of Appeal is the need to ensure equality of arms, the principle of proportionality and the need to treat all the parties coming to court on equal footing.[1]

10. So has the Applicant established prima facie case? In *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125, prima facie case was defined 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..."

11. In its submissions, the Plaintiff submitted that it entered into a lease agreement with the 1st and 2nd Defendants for a term of two (2) years. The lease commenced on 14th November, 2020 and was to terminate on 15th November, 2022. The 3rd Defendant submitted that the lease agreement entered into between the Plaintiff and the 1st and 2nd Defendants was null and void as it contravened the provisions of section 88 (1) (g) of the *Land Act*, 2012. It provides as follows: -

> Implied covenant by the chargor.
>
> 88. (1) There shall be implied in every charge covenants by the chargor with the chargee binding the chargor—

[1] SeeJM v SMK & 4 Others [2022] eKLR

a. ....

b. ...

c. ....

d. ....

e. ....

f. ....

g. not to transfer or assign the land or lease or part of it without the previous consent in writing of the chargee which consent shall not be unreasonably withheld;

12. This provision would apply if the present dispute was between the 1st and 2nd Defendants and the 3rd Defendant. However, the situation currently obtaining is one where the Plaintiff entered into a lease agreement with the 1st and 2nd Defendants without knowledge of the existing impediments. Though I agree with the 3rd Defendant that no consent was sought and obtained from it in express disregard to the provisions of section 88 (1) (g) of the *Land Act*, this cannot be visited against the Plaintiff. The purpose of an order of injunction is to preserve the substratum of the suit. The party who stands to be prejudiced if the order sought is not granted is the Plaintiff. To this end, I am satisfied that a prima facie case has been established.

13. As held in *Nguruman* (*supra*), having found that a prima facie case has been established, I am duty bound to consider the second facet, that is, irreparable injury. The Court of Appeal in the above case expressed itself thus: -

> "...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." (Emphasis added)

14. The Plaintiff stated that it is using the subject property for its business. In the 3rd Defendant's submissions, it was contended that damages would be an adequate remedy. Section 99 (4) of the *Land Act* among other authorities was cited in support. Though I agree that the rent the Plaintiff was paying to the 1st and 2nd Defendants could be determined, the gains on the use of the subject property by the Plaintiff cannot be quantified. In *Joseph Siro Mosioma vs. 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..."

15. I thus note that though the 3rd Defendant states that damages can be computed, the benefits derived from the business cannot be ascertained and as such, I am satisfied that irreparable injury would occur if the order sought is not granted.

16. On the third limb, that is, balance of convenience, I note that the Plaintiff is currently in occupation of the subject property where it is running its business. In *Chebii Kipkoech vs. Barnabas Tuitoek Bargoria & Another* [2019] eKLR, balance of convenience was defined 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 them would be greater than that caused to the defendants if an injunction is granted and suit is ultimately dismissed..."

17. Putting all the facts into perspective, I note that if the 3rd Defendant is allowed to proceed with realization of the subject property, the Plaintiff would lose that which it holds dear in its operations. On the contrary, the 3rd Defendant still has the right to go ahead and realize the security in the event the suit is dismissed. All that is happening is simply a pause on the 3rd Defendant's pursuit. I cannot say the same for the Plaintiff and thus I am persuaded to maintain the status obtaining pending the hearing of the suit.

18. On the issue of costs, it is settled that the same follows the event. That is the import of section 27 of the *Civil Procedure Act*. The court reserves its discretion on whether to award costs to either party. This was well enunciated by the Supreme Court in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others* [2013] eKLR. Having considered the fact that this is an interlocutory application, it would be onerous to award costs to any party at this stage. Therefore, I direct that costs shall await the outcome of the suit.

19. In order to safeguard the 3rd Defendant's interests, I order that the matter be fast tracked. Notice is hereby issued to all parties that once the matter is fixed for hearing; no adjournments shall be allowed.

20. Based on the above discourse, I make the following orders: -

    a. The application dated 9th May, 2022 is merited and the same is allowed in terms of prayer (3) thereof, that is, there be a temporary order of injunction pending the hearing and determination of the main suit.

    b. Costs to abide the outcome of the suit.

    Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28TH DAY OF JULY, 2023.

.....

F. WANGARI

JUDGE

In the presence of;

Mr. Bunde Advocate for the Plaintiff/Applicant

Kisinga Advocate for the 3rd Defendants

N/A for the 1st and 2 Defendant

Abdullahi, Court Assistant