Mwananchi Credit Limited v Onyango & another (Civil Appeal E037 of 2023) [2023] KEHC 21253 (KLR) (26 July 2023) (Ruling)

Neutral citation: [2023] KEHC 21253 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E037 OF 2023

DKN MAGARE, J

JULY 26, 2023

BETWEEN

MWANANCHI CREDIT LIMITED ..... APPELLANT

AND

JOHN OGWANG ONYANGO ..... 1ST RESPONDENT

FORESIGHT AUCTIONEERS ..... 2ND RESPONDENT

(An appeal from the ruling and Order of Honourable David W Mburu delivered on January 19, 2023 in Mombasa CMCC No 1006 2022.)

RULING

1. This is a ruling over an application dated 22/2/2023 filed on behalf of the Appellant/Applicant. The Appellant had filed an Appeal from the ruling and Order of Honourable David W Mburu which was given on January 19, 2023 in Mombasa CMCC No 1006 2022. The Appellant filed 11 grounds of Appeal. Simultaneous with the filing of a notice of motion application dated February 22, 2023. In that case, the Applicant sought the following orders: -

    a. Spent

    b. Spent

    c. This Honourable court be pleased to stay execution of the Ruling and order dated January 19, 2023 pending hearing and determination of this appeal.

    d. Costs of this application for.

2. The same is premised on the grounds that the orders were mandatory in nature and they were given in the interlocutory stage and when the first respondent has no formal proof of ownership whatsoever. Further that the orders were given contrary to sound legal principle that courts must exercise discretion

judiciously in granting injunctive orders. They have an appeal which is arguable and has high chances of success. It is their contention that they will suffer irreparable loss and injury.

3. The application was supported by an affidavit of Sylvia Njoroge on behalf of the applicant. She stated that the applicant took a loan in 2020 and defaulted in March 2022. They filed submissions and a myriad of authorities which were all disregarded by the learned 'judge'. I presume this was a copy paste from another application. They wondered why the court gave unconditional release despite the loan outstanding being Kshs 843 814.81.

4. The Applicant also denied that the 1st Respondent had formal ownership. I don't know what this means in view of the fact that the 1st Respondent is the duly registered owner of the suit motor vehicle. It is important to get orders on the basis of material disclosure. I issued interim orders on 20/3/23 and heard the Application.

5. To my utter surprise, I noted that the first orders in this court were obtained through material non-disclosure. The Applicant did not disclose how much the loan is and that the log book is registered in the joint names of the Applicant and the 1st Respondent.

6. The Applicant argues that it stands to suffer irreparable harm which loss cannot be compensated by way of damages. They annexed an application that was filed in the lower courts. In that court the 1st Respondent had sought the following orders: -

    a. A temporary mandatory injunction be issued against the respondent to release Motor Vehicle Registration Number KCK 263 R if the same was repossessed by the time of issuance of this order

    b. The first defendant to provide updated statement of account regarding the loan taken by John Ogwang Onyango

    c. Costs be provided for.

7. In the supporting affidavit in the lower Court, the 1st Respondent was of the view that he is the registered owner Motor Vehicle Registration Number KCK 263 R. he stated that he received demand for a huge amount of money when he had paid Kshs 764 794, which was where Kshs 333 140 in excess of the principal sum the maths should lead to Kshs 733,140/=

8. The Applicant herein field grounds of opposition and replying affidavit and true to their word, they filed a myriad of other authorities.

9. The Applicant herein admitted that default occurred in March 2022 and repossession was in that month. If there was no repossession prior there to, then ipso facto, there is an admission that out of the possible 762,768, a sum of Kshs 540,294 had been paid by February 2022. The balance at most, was Kshs 222,474.

10. There was no explanation on how the amount claimed arose, if their word was to be believed. There was no single statement of account attached Sections 176 and 177 of the *Evidence Act* provides ss doth: -

> " Mode of proof of entries in bankers' books Subject to the provisions of this Chapter of this Act, a copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of such entry, and of the matters, transaction and accounts therein recorded.
>
> 177. Proof and verification of copy (1) A copy of an entry in a banker's book shall not be received in evidence under section 176 of this Act unless it be first proved that—

(a) the book was, at the time of making the entry, one of the ordinary books of the bank; and

(b) the book is in the custody and control of the bank; and

(c) the entry was made in the usual and ordinary course of banking business; and (d) the copy has been examined with the original entry, and is correct.

(2) Such proof may be given by an officer of the bank, or, in the case of the proof required under paragraph (d) of subsection (1), by the person who has performed the examination, and may be given either orally or by an affidavit sworn before a commissioner for oaths or a person authorized to take affidavits.

11. Without going into the merits of the case, there was no evidence annexed to the application to show a prima facie case. Each instalment was for Ksh 31 872 and as noted even if default is therein, it is an amount that cannot cause irreparable loss to the Applicant. On the other hand the 1st Respondent posits that the loan was fully paid and there were even excess payments. The Applicant had a duty to explain in terms of bankers books, how the amount arose and how much was paid. The balance being demanded is Kshs 843,184.81 as due.

Analysis

12. If as at March 2022, a sum of Kshs 532, 696 or at worst, Kshs 540,294 had been paid, how did these other arrears arise? There is no explanation on why this is the case. If one is to be believed an amount of Kshs 843 184, is due and owing, then there should be an accompanying account statement.

13. If default was in march 2022, only one instalment of Kshs 31,782 ought to have been due. Even up to June 2023, then only three months' instalments, at the tail end of the contract could have been due. This works as three months instalments. That should be around the three months as Kshs 95, 346/=.

14. I have perused the Application in this Court and the applications in the lower Court. I do not see where to fault the lower court. This however may be pointed out to me during the main hearing.

15. If they did repossession on the same month of default, then it is clear they may never have issued even demand.

16. I am restraining myself from making concrete steps, since the matter in the lower Court is still active. The only question at this point is who between the two protagonists to believe. In answering that question, it is a question whether there is an arguable Appeal.

17. The Appellant had not annexed anything showing that 1st Respondent owes. At least they confirm that at the very least there was payment made up to March 2022, when default allegedly occurred.

18. Only the Appellant will know where the records are. They should produce records on indebtedness. The Appellant is stated to have refused to reconcile the accounts to the chagrin of the 1st Respondent and the court below.

19. The question that is in my mind is whether it is safe to send auctioneers to reprocess for an amount that cannot be known. Or that which is contrary to protection offered to consumers.

20. It is apparent that when the appellant lost the Application for injunction in suit number 1006 of 2022, they filed this Appeal and a supporting application. The up-and-up in this court settled 11 grounds of appeal most of which are repetitive.

21. They don't make the best matters when preparing for determination that there is an arguable Appeal. The court of Appeal had this to say in regard to rule 86 (which is pari mateira with order 42 Rule 1) in the case of *Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat* [2020] eKLR:-

> " We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others [2013] eKLR) and Nasri Ibrahim v. IEBC & 2 Others [2018] eKLR. In the latter case, this Court lamented:
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> "We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs." The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated September 19, 2018 raise only two issues..."

22. Further in *Kenya Ports Authority v Threeways Shipping Services (K) Limited* [2019] eKLR, the court of appeal observed that: -

> " Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the *Kenya Ports Authority Act* ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In William Koross V. Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No 223 of 2013, this Court stated:
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> "The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better."

23. The rest of the issues are ancillary, repetitive, prolixious and a waste of judicial time. This will be the question I will deal with in the main Appeal.

24. The Application was opposed and submissions filed in similar terms as was done in the court below. I will not get into the details of the submissions in view of the fact that the matter in the lower Court is still pending. I may not make firm decisions that one way or another bind the lower court on issues awaiting trial. Further, the main appeal herein is the very same injunction once I make detailed determination, the same may embarrass the hearing of the Appeal itself.

25. The question for stay pending appeal revolves around the issues whether:

    a. There is an arguable appeal.

    b. Weather the appeal will rendered nugatory

c. Whether there is security.

d. Public policy

26. In the case of *Nicholas Stephen Okaka & another v Alfred Waga Wesonga* [2022] eKLR, justice R.E. Aburili, was of the view that: -

> " The court, in RWW v EKW [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words:
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> > "The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.
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> Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent."

Arguable Appeal

27. The court has to decide whether the Appeal is arguable. I must warn myself that the decision on the arguability of the appeal is made at an interlocutory stage. There may be laws not considered or facts that turn out in evidence. Indeed the bar for arguable appeal has been set very low. In the case of *Kiu & another v Khaemba & 3 others* (Civil Appeal (Application) E270 of 2021) [2021] KECA 318 (KLR) (17 December 2021) (Ruling) the court of appeal sitting in Kisumu stated as doth: -

> " In law, an arguable appeal/intended appeal is one that need not succeed but one that warrants the court's interrogation on the one hand and the courts invitation to the opposite party to respond thereto."

28. The question in this court is whether the court below granted an injunction without following the tenets set out in law.

29. The locus classic case of *Giella = vs = Cassman Brown & Co. Ltd* (1973) EA, 358, 360, sets out principles for grant of injunction. The court, stated through the wisdom of Spry VP, as then he was, as follows: -

> " 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."

30. 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,
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> b. demonstrate irreparable injury if a temporary injunction is not granted, and
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> c. ally any doubts as to (b) by showing that the balance of convenience is in his favour.
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> 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."

31. I have perused the decision by the Court below. In not so many words the court was asking, can we know if the notice is proper. There was no dispute as to the amount due. The respondent had positively asserted that he cleared the loan. In the case of *Stek Cosmetics Limited v Family Bank Limited & another* [2020] eKL the court, E. C. Mwita, stated as doth: -

> The law requires the applicant to show that it has a prima facie case with a probability of success in order to persuade the court to grant an interlocutory injunction in its favour.

32. In *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* (*supra*), the Court of Appeal stated:

> "The principles which guide the Court in deciding whether or not to grant an interlocutory injunction are well settled. In Giella v Cassman Brown to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner he was considering, which was in relation to the pleadings that had been put forward in that case....So what is a prima facie case? I would say that in civil cases 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 apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

33. The tragedy in this matter can only be resolved in the hearing of the suit on merit. There is no dispute on the amount due. The 1st respondent stated that they have fully paid the amount due. The appellant posits that they demanded Ksh 843,184.81. They have been either unable or unwilling to draw a nexus

between the said amount and the amount due. It is therefore doubtful that there is a debt owing to the Appellant.

34. This is informed by the question that has not been rebutted in all affidavits in court that the amount taken was Kshs 400,000/=. It took less than 2 years, actually 17 months, to be in areas of 843,184.81. This is after paying 733, 140. Adding the payment and arrears we get a total sum of Kshs 1,576, 324/=. In other words, there is a possibility that the Kshs 400,000/= in a span of 17 months, grew to be Kshs 1,576 324.81/= that is Kshs733 140 Plus Kshs 843,184.81.

35. Just musing that the possibility that the sum of Kshs 400,000/= attracted interest on Ksh 1, 176 324.81 in less than 17 months tends toward the impossible. Bankers books could assuage the court on this. We will never know.

36. I therefore agree that these questions are not idle. I am satisfied that the 1st Respondent must have established a prima facie case as set out in the court below. In any event it will be substituting one discretion for another.

37. In the case of *Mbogo and Another vs. Shah* [1968] EA 93 where the Court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

38. I will not interfere with the discretion of the court below at this stage. I therefore dismiss the application dated 22/2/2023 in limine for lack of merit with costs of Kshs 20,000/=.

Disposition

39. In the circumstances I make the following orders: -

    a. I dismiss the application dated February 22, 2023 *in limine* for lack of merit with costs of Kshs 20,000/=

    b. In order to return parties to the position they were I vacate my orders of March 20, 2023 and revert the *status quo ante*, the said motor vehicle be placed in the custody of the 1st respondent, without any other extra charges.

    c. The matter shall be listed for directions forthwith.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 26TH DAY OF JULY 2023. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

Mr Maithya 1st Respondent

N/A for the Appellant

No aapearance for the 2nd Respondent

Court Assistant - Brian