



REPUBLIC OF KENYA



KENYA LAW
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**Kenya Commercial Bank Limited v Khan (Civil Appeal E078 of 2022)
[2023] KEHC 22747 (KLR) (26 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22747 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL E078 OF 2022
RPV WENDOH, J
SEPTEMBER 26, 2023**

BETWEEN

KENYA COMMERCIAL BANK LIMITED APPELLANT

AND

MOHAMMED YAMIN KHAN RESPONDENT

*(Being an Appeal from the Ruling and Order of Hon. M. Obiero
(PM) delivered in Migori CMCC No. 79 of 2021 on the 17/12/2021)*

JUDGMENT

1. This judgement is in respect of an appeal against the ruling and order of Hon. M. Obiero dated and delivered on December 17, 2021 in Migori CMCC No. 79 of 2021. Mohammed Yamin Khan (the respondent) filed an application dated September 7, 2021. He sought orders of temporary mandatory injunction against Kenya Commercial Bank (the appellant) restraining the appellant it agents, servants, employees and/or any other person acting under its express/implied authority from selling, disposing of, transferring or dealing in any manner with motor vehicle registration number KCF 400T (the suit motor vehicle) and further attaching, repossessing or otherwise seizing the respondent's movable or immovable property particularly the milling machine or any other property.
2. The respondent contended that he was granted an asset-based facility by the appellant to purchase the suit motor vehicle to the tune of Kshs. 7,585,889/=; that he was granted a further asset-based facility for a milling machine for Kshs. 2,837,810/=; that the aforesaid asset-based facilities were to be paid by monthly instalments; that the respondent dutifully paid the instalments upto the period ending March 2020; that due to COVID, the respondent closed his business and stayed at home; that he wrote to the appellant seeking restructuring or rescheduling of the loans; that the loan arrears due as of September 7, 2021 of the two assets finance, were Kshs. 3,631,794/= and 629,823/= respectively.



3. The respondent further contended that the appellant through auctioneers took possession of the suit motor vehicle for sale by way of auction; that he was willing to repay 10% on both balances on his loan accounts and to continue to repay the instalments once the vehicle was released to him; that he had already paid 70% of the loan on the suit motor vehicle and if it is sold in settlement of the loan arrears, he would suffer loss.
4. The application was opposed. The appellant filed a replying affidavit dated October 18, 2021. The appellant admitted advancing to the respondent an asset-based finance loan of Kshs. 8,085,640/= which was to be repaid in sixty equal instalments of Kshs. 202,388/= until payment in full and a further loan of Kshs. 2, 837, 810/= which was to be repaid in monthly instalments of Kshs. 136,925/=; that the respondent had not been diligently repaying the loan despite being notified of the same and he had been putting off repaying of the loans.
5. It was further deposed that the appellant's request for deferment of repayment was granted and in April 2020, he requested another deferral citing the effects of Covid - 19; that the request was considered and the loan was restructured again; that on the restructure terms, there was a moratorium on the principal of each loan but the appellant would be required to service the interest charged at 13% per annum.
6. The appellant further deposed that it was a term of the restructuring loan letter that in the event of a default, it was at liberty to repossess and sell the suit vehicle to recover the outstanding loan.
7. The trial Magistrate delivered his ruling on December 17, 2021 and found that the respondent's application was partially merited and issued a temporary mandatory injunction compelling the appellant to release the suit motor vehicle upon payment of Kshs. 100,000/= and Kshs. 300,000/= towards settlement of the arrears and a temporary injunction restraining the appellant from attaching the respondent's milling machine or any other movable property based on the loan arrears outstanding unless the respondent defaults in the repayment of the loan.
8. The aforesaid decision triggered the instant appeal in which the appellant preferred ten grounds of appeal which can be summarized as follows:-
 1. That the trial Magistrate erred in law by granting an order of temporary mandatory injunction in favour of the respondent despite acknowledging that the respondent had not satisfied the threshold of the said orders;
 2. That the trial court took into account irrelevant matters to wit - unsupported claims of the adverse effects which COVID - 19 had had on the respondent's business - when in fact that was not an issue for determination and in any event, no proof of such predicaments were demonstrated to court;
 3. That the trial court erred in law by arrogating upon itself jurisdiction to vary and/or review the terms of a legally binding contract between the parties herein by ordering that the respondent to only pay Kshs. 400,000/= out of the admitted loan arrears of Kshs. 3,631,794.40 despite acknowledging that the appellant had restructured the terms of the loan but the respondent still defaulted;
 4. That the trial court erred in law and in fact in allowing the respondent's application dated 7/9/2021 despite holding that the repossession of the respondent's motor vehicle registration number KCF 400T for sale by the appellant was done in accordance with the law;
 5. That the trial court erred in law and in fact by directing that the appellant and the respondent negotiate on how the arrears would be cleared and the loan repaid, notwithstanding that the



appellant had restructured the loan terms which the respondent failed to honour and therefore any negotiation would be an exercise in futility.

9. The appellant asked this court to set aside the ruling and orders issued on 17/12/2021 and replacing them with orders:-
 - a. Dismissing the respondent's notice of motion application dated 17/12/2021 in its entirety and all consequential orders issued thereto.
 - b. Costs of this appeal and the lower court costs to the appellant.
10. The appeal was canvassed by way of written submissions. It is only the appellant who filed its submissions.
11. It was submitted that the principles to be considered when granting an order of interim injunction are well settled in the case of *Giella v Cassman Brown* (1973) EA 358; that it was held in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* (2014) eKLR the three limbs ought to be surmounted sequentially and if it is observed that a *prima facie* case has not been established, the other limbs need not be delved into and the equitable remedies should be denied. It was argued that in the trial court's ruling, it was observed that the respondent admitted to defaulting the loan repayments; that in the case of *New Age Developers & Construction Co Ltd v Jamii Bora Bank Ltd*, it was stated that where there is an admission of indebtedness an injunction cannot issue. The appellant submitted that having made such an observation, the trial Magistrate erred in considering the other limbs.
12. On whether the trial magistrate took into account relevant matters when granting the said orders, it was submitted that section 107 of the *Evidence Act* places the burden of proof on the person who alleges; that the respondent did not demonstrate how the effects of COVID - 19 affected his business by producing books of accounts; that the trial Magistrate erred by making presumptions of facts not proved. The appellant further stated that the trial Magistrate suo moto reviewed the terms of the substantive contract by preventing it from exercising its statutory power of sale but instead adhere to the new terms of the contract.
13. The appellant further submitted that there were no special circumstances presented in the case before the trial Magistrate to warrant issuance of a mandatory injunction. The appellant referred to the case of *Joseph Kaloki T/A Royal Family Assembly v Nancy Atieno Ouma* (2020) eKLR and *Sharrif Abdi Hassan v Nadhif Jama Adan* (2006) eKLR.
15. In conclusion, the appellant urged this court to find that it has sufficiently demonstrated that the orders were not deserved; that this being an appellate court, it should re-evaluate the evidence and arrive at its own decision; that this court should find this appeal meritorious and issue the orders as prayed.
16. This being the first appellate court, this court has a duty to re-evaluate and analyse all the evidence tendered in the lower court and arrive at its own conclusions. It has to establish whether the decision of the lower court was well founded. See the decision in *Selle & another v Associated Motorboat Co Ltd* (1968) EA 123.
17. It is also settled that an appellate court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or on a misapprehension of it or on demonstrably wrong principles not supported by evidence or on wrong principles of the law. This was the finding of the Court of Appeal in *Mbogua Kiruga v Mugecha Kiruga & another* (1988) eKLR.
18. I have carefully considered the grounds of appeal and the parties' submissions. The issues for determination is: -



- a. Whether the trial magistrate's ruling dated 17/12/2021 considered the proper legal principles before arriving at the said decision.
19. The case for the respondent in the trial court was for grant of a temporary injunction against the appellant restraining it from selling and/or interfering with the suit motor vehicle and the milling planting machine. The principles set out in the case of *Giella v Cassman Brown (supra)* before an order of injunction are granted are: whether the applicant has shown *prima facie* case with a probability of success; whether the applicant shall suffer irreparable injury which cannot be compensated by damages; and if the court is in doubt, then it can decide the application on a balance of convenience. In the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* CA No 39 of 2002 a *prima facie* case was described as one which on the material placed before the court there exists a right which has been infringed by the opposite party.
20. Similarly, in the case of *Nguraman Limited v Jan Bonde Nielsen & 2 others* (2014) eKLR the Court of Appeal held that:-
- “In an interlocutory injunction application, the Applicant has to satisfy the triple requirements; to establish his case only at a *prima facie* level, 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. 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.”
21. In considering an application for grant of an injunction, the court is forbidden from delving into the relevant facts of the case and determining it to its finality. All the court is supposed to do, is interrogate the conduct of the parties before it. That is, the applicant of the injunctive reliefs whether s/he is guilty of misconduct which does not approve the court of equity and the conduct of the respondent whether it acted out of impunity. The Court of Appeal in *Esso Kenya Ltd v Mark Makwata Okiya* (1992) eKLR held:-
- “The principles underlining the granting or refusal of injunction are well settled in several decisions of the court. Where an injunction is granted, it will preserve or maintain the status quo of the subject matter pending the determination of the main issue before the court. The merits or demerits of granting injunction orders deserve greater consideration. The court should avoid granting orders which have not been asked for in the application before it or determine issues in the suit before the actual hearing. In cases where an award of damages could be adequate compensation, an injunction should not be granted. On an application for an injunction in aid of a plaintiff's alleged right, the court will usually wish to consider whether the case is so clear and free from objection on equitable grounds that it ought to interfere to preserve property without waiting for the right to be finally established. This depends upon a variety of circumstances, and it is impossible to lay down any general rule on the subject by which the court ought in all cases to be regulated, but in no case will the court grant an interlocutory injunction as of course...The court ought to look at the allegations in the affidavits by the plaintiff and the defendant and weigh them whether there is a possibility of the plaintiff succeeding or whether there is a possibility of quantifying damages. Only in cases of doubt court will proceed on the basis of the balance of convenience while being aware that formal evidence will be adduced at the hearing...The principle underlying injunctions is that the status quo should be maintained so that if at the hearing the applicant obtains judgement in his favour the respondent will have been



prevented in the meantime from dealing with the property in such a way as to make the judgement nugatory...As it is settled law that where the remedy sought can be compensated by an award of damages then the equitable relief of injunction is not available.”

22. Ringera, J (as he then was) in *Dr Simon Waitbaro Chege v Paramount Bank of Kenya Ltd* Nairobi (Milimani) HCCC No 360 of 2001 held:-

“The remedy of injunction is one of the greatest equitable relief. It will issue in appropriate cases to protect the legal and equitable rights of a party to litigation which have been or are being or are likely to be violated by the adversary...As the relief is equitable in origin, it is discretionary in application and will not issue to a party whose conduct as appertains to the subject matter of the suit does not meet the approval of the eye of equity.”

23. The uncontroverted evidence is that the appellant advanced two separate asset-based loan facilities to the respondent. The loans advanced were for Kshs. 8,085,640/= and Kshs. 2,837,810/= for purchase of the suit motor vehicle and a milling machine respectively. The asset-based loan for the suit motor vehicle was to be paid in sixty equal monthly instalments of Kshs. 202,388/= and the asset-based loan for the milling machine was to be paid in monthly equal instalments of Kshs. 136, 925/= until payment in full.
24. There is a history of communication between the appellant and the respondent through letters, on deferral and restructuring of the two asset-based loan facilities. The respondent wrote to the appellant letters dated 9/5/2017 and 17/9/2018 asking for deferral of payment of the loan facility advanced for the suit motor vehicle. Following a meeting between the appellant and the respondent, the appellant wrote to the respondent a letter dated 24/7/2019, agreeing to release the repossessed suit motor vehicle on condition that the respondent clears the arrears on both the asset-based loan facilities. The appellant wrote to the respondent another letter dated 1/8/2019 reminding him of the outstanding arrears and when they were due. The appellant agreed to restructure the loan facilities advanced to the appellant, through new terms in the letters dated 19/11/2019 and 23/6/2020.
25. The respondent blamed the effects of COVID - 19 as one of the reasons he did not repay the loan on time. However, the evidence on record is that the respondent began to ask for deferral of payments as early as the year 2017 and 2018. In addition, the appellant had repossessed the suit motor vehicle, but released it to the respondent on condition that he re-pays the outstanding arrears. Whereas it is true that COVID affected all the businesses the world over, when the appellant sought to repossess the suit motor vehicle in 2/9/2021, the country's economy had substantially opened up and it is not proper to blame the adverse effects of COVID - 19. The respondent did not provide any financial records to justify the allegations that the business was affected by COVID, and therefore, he could not be in a position to repay the loan facilities. Besides, the respondent was granted a moratorium for 6 months on the repayment of the principal amount in the letter dated 23/6/2020. He did not present evidence to prove that he at least adhered to the terms of the restructured loan agreement.
26. The respondent signed a letter of offer dated 9/10/2015 for the loan facility of the suit motor vehicle and a further letter of offer dated 27/9/2016 for the loan facility of the milling plant. The parties through letters dated 11/12/2017, 19/11/2019 and 23/6/2020 agreed on the restructuring terms. Hence, the parties were bound by the terms of the contract and the subsequent addendums. The trial court erred and there was no basis in ordering the respondent to pay Kshs. 100,000/= and 300,000/= towards settlement of the pending arrears. This was akin to re-writing the terms of the contract between the parties.



27. This court in Migori Civil Suit No E002 of 2022 *Isaiab Juma & another v Co - operative Bank (K) Limited* (Unreported) held:-

“The respondent, just like all other banking institutions are in commercial business. They lend out money for profit but not on humanitarian, gratuity or love for humankind basis. Borrowers do understand this fact and that is why they sign a loan facility agreement which sets out the terms and conditions of repaying the loan; and in addition, offer a security to guarantee that should they not fulfil their obligations, the security stops being their personal property and becomes a commercial commodity to be sold in the market to realize the outstanding debt. It would not make sense for a court which is a third party to the agreement to re-write the terms of loan facility agreement in order to protect a party who is acting in bad faith.”

28. From the conduct of the respondent, he has not established that he has a prima facie case deserving of grant of interlocutory reliefs. He who comes to equity must come with clean hands. The respondent approached the court with unclean hands. Since it has been established that the respondent admitted that he was indebted to the appellant, he was not entitled to the mandatory injunction orders issued by the trial Magistrate. The trial Magistrate observed as much and therefore, he had no justification to granting the temporary mandatory injunction. There was no justification in granting the temporary mandatory injunction.

29. In the end, the finding of this court is that the appeal is merited and the following orders do issue:-

1. The ruling and Order of hon M Obiero dated and delivered on 17/12/2021 and its consequential orders are hereby set aside.
2. The appellant to issue to the respondent an updated loan statement indicating the current outstanding loan amount.
3. In default of further repayment, the appellant is at liberty to exercise its statutory power of sale.
4. Costs of the appeal awarded to the appellant.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 26TH DAY OF SEPTEMBER, 2023

R. WENDOH

JUDGE

Judgement delivered in the presence of;

Mr. Oduor for the Appellant.

Mr. Odero holding brief Mr. S. Onyango for the Respondent.

Emma & Phelix Court Assistants.

