



**Oketch v Mburu (Civil Appeal 34 of 2022)
[2023] KEHC 27569 (KLR) (27 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 27569 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 34 OF 2022
F WANGARI, J
OCTOBER 27, 2023**

BETWEEN

RAY RALPH OBURA OKETCH APPELLANT

AND

MOSES NGUGI MBURU RESPONDENT

(Being an Appeal arising out of the decision of Honourable M. Nabibya (PM) on the whole Ruling delivered on 17th February, 2022 in MCCC No. E1749 of 2021 Mombasa; Moses Ngugi Mburu v Ralph Obura Oketch)

JUDGMENT

1. This is an Appeal against the ruling delivered by Hon. M. Nabibya, Principal Magistrate in Mombasa MCCC No. E1749 of 2021 on 17th February, 2022. The Respondent had filed a suit against the Appellant seeking several orders among them an order of injunction to compel the Appellant from removing any office documents, spare parts, containers and any other item of trade within the said premises. Contemporaneously with the suit, the Respondent filed an application seeking temporary injunction in line with his prayers in the plaint.
2. The application was heard and the Lower Court through a ruling delivered on 17th February, 2022 allowed the application on the following terms:

“...Having perused the documents attached to the application and response thereto, I agree with the respondent that the claimant is claiming against a co-director in a company. Although there is clear evidence of non-joinder of parties in the company, that does not take away the right of a director to complain.

I am therefore satisfied that on a balance of convenience, if the application is not allowed and probably the plaintiff proves his case, he shall stand to suffer more. It is on this basis that



I allow the same. Just to note that I have not seen evidence of likelihood of successful case or evidence of irreparable loss and damage...”

3. It is this ruling that has precipitated the present appeal. The Appellant preferred a total of thirteen (13) grounds in seeking to overturn the Lower Court ruling and in its place, have an order striking out the entire suit. Directions were taken that the appeal be canvassed by way of written submissions. All parties duly complied with the court’s directions by filing submissions and cited various authorities in support of their rival positions. The Appellant condensed the grounds to five (5) which he has extensively submitted on.
4. I have duly considered the said submissions as well as the authorities cited by the parties. For the Appellant it was submitted that the Respondent lacked locus standi to institute the suit and that the Trial Court lacked jurisdiction to deal with derivative actions thus the Trial Court was in error to allow the application for injunction. The Respondent submitted in favour of upholding the Trial Court’s ruling.

Analysis and determination

5. This being the first appeal, it is my duty under Section 78 of the Civil Procedure Act to re-evaluate the affidavit evidence adduced before the trial court and come to my own independent conclusion. This principle of law was well settled in the case of *Selle v Associated Motor Boat Co. Ltd* (1968) EA 123; *Makube v. Nyamiro* [1983] KLR 403 and *Kiruga v Kiruga & Another* [1988] KLR 348.
6. Based on the pleadings and the submissions filed, the issues for determination are;
 - a. Whether the Notice of Motion dated 2/11/2021 whose ruling is the subject to this appeal met the threshold for granting an injunction.
 - b. Whether the trial court has jurisdiction over the matter.
7. The principles guiding the court whether to grant injunction orders or not are well 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) 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. 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)

8. From the above, a party must show that prima facie case has been established, irreparable damage shall be suffered and the balance of convenience is in his favour. The Respondent did not satisfy the above principles, which must all be proved. I therefore agree with the Appellant that the application did not meet the threshold in *Giella v Cassman Brown & Co. Ltd* [1973] EA 358.
9. On whether the court had jurisdiction over the matter, the Appellant submitted that the Respondent ought to have filed a derivative suit. The trial court did not make a determination on whether a director of a company can bring a suit against another director of the company. It is only after such determination has been made that an appeal can be filed against the finding. I find the ground of appeal on jurisdiction of the court to be premature.
10. 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. In this case, each party to bear the costs of the appeal.
11. Following the foregone discourse, the upshot is that the following orders do hereby issue: -
 - a. The appeal has merits and is hereby allowed on the following terms;
 - i. The trial court’s ruling delivered on 17th February is hereby set aside.
 - ii. Matter be referred back to the trial court for full hearing and final disposition.
 - iii. Mention before trial court on 13/11/2023 for directions.
 - b. Each party to bear its own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 27TH DAY OF OCTOBER, 2023.

.....

F. WANGARI

JUDGE

In the presence of:-

Gitonga Advocate for the Appellant

N/A by the Respondent

Barile, Court Assistant

