



REPUBLIC OF KENYA



KENYA LAW
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**Kuria & another v Ongoi (Civil Appeal E042 of 2023)
[2023] KEHC 27175 (KLR) (28 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 27175 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E042 OF 2023
FN MUCHEMI, J
DECEMBER 28, 2023**

BETWEEN

PATRICK NJIRU KURIA 1ST APPELLANT

PALEAH STORES LIMITED 2ND APPELLANT

AND

CLEMENT ONDIBA ONGOI RESPONDENT

RULING

Brief facts

1. The application for determination dated 30th November 2023 brought under Sections 3A, 75, 78 and 79G of the *Civil Procedure Act* and Order 40 Rule 1, 2, 3, 7 and 10 and Order 41 Rule 4 of the *Civil Procedure Rules* seeks for orders of an injunction restraining the respondent from selling or disposing off the attached motor vehicle KCX 089G and or attaching any other or further moveable properties of the appellants. The applicants further seek for the orders of an unconditional release of the attached motor vehicle KCX 089G pending the hearing and determination of the appeal.
2. In opposition to the application, the respondent filed a Repeating Affidavit dated 14th December 2023.

The Applicants' case

3. The applicants state that they filed an application dated 23rd October in Thika CMCC No. 221 of 2021 seeking a temporary injunction against the execution of a decree from judgment delivered on 28/3/2023. The application came up for directions on 31st October 2023 and the trial magistrate granted the application for stay on condition that the applicants deposit Kshs. 1,000,000/- pending the hearing and determination of the said application. The applicants challenge the execution of the decree on the ground that the same arises from an irregular judgment and ought to have been set aside *ex debito justitiae* instead of granting conditional stay on stringent grounds.



4. The applicants further state that they were unable to come up with the funds due to the harsh economic times which led to the respondent attaching their motor vehicle registration number KCX 089G which is their source of income. The applicants further contend that they are apprehensive that the respondent will proceed to sell the said motor vehicle which will prejudice them and further render their appeal nugatory unless the court grants the orders sought herein.
5. Moreover, the applicants argue that the trial court did not have jurisdiction to hear and determine the matter as the claim is a work injury claim which ought to have been lodged at the Directorate of Occupational Safety and Health Services pursuant to Section 16 of the *Work Injury Benefit Act*.
6. The applicants contend that the application and appeal have been brought without delay and the appeal has high chances of success as the judgement was obtained irregularly and the conditions for stay of execution as directed by the trial court are unfair as the applicants have been condemned unheard.

The Respondent's Case

7. The respondent states that the application is frivolous, vexatious, devoid of any merit, brought with undue delay and ought to be dismissed with costs. The respondent further states that the trial magistrate exercised his discretion in allowing the application for setting aside the ex parte judgment on condition that the applicants deposit security in the sum of Kshs. 100,000/-. As such, this court can only interfere with the exercise of discretion by the trial magistrate if he misdirected himself in some matter and resultantly arrived at a wrong decision, which the respondent argues is not the case herein.
8. The respondent states that the applicants were served with summons to enter appearance dated 6/5/2021 and plaint at their former offices in Wang'uru on 21/5/2021 and the 1st applicant received the documents but deliberately failed to enter appearance. The respondent further states that although the applicants claim that they employed him and therefore he was precluded from claiming from them, the applicants did not produce any form of evidence to show that they employed him. Moreover, the respondent states that on the material day of the accident, he was a pedestrian at BAT stage along Thika Garrissa road. Furthermore, the respondent contends that the applicants did not dispute that on 13/9/2020 he was involved in a road traffic accident with motor vehicle registration number KCX 089G registered in the name of the 2nd applicant. Consequently, interlocutory judgment was entered against the applicants for failure to file their memorandum of appearance and defence as stipulated by law.
9. The respondent further contends that the applicants have not challenged the contents of the Affidavit of Service in the request for judgment. Further, the trial court was willing to have the application allowed on condition that the applicants pay throw away costs of Kshs. 100,000/- and the auctioneer fees as they were served with summons and the plaint but failed to act as required by law. As such, the respondent prays that the application be dismissed as the applicants have not adduced any sufficient grounds to review or set aside the judgment as the same is regularly on record and the trial court was satisfied with the service.



The Law

Whether the applicants have met the requisite conditions to warrant the granting of a temporary injunction.

10. Order 42 Rule 6(6) of the *Civil Procedure Rules* 2010 empowers this court to grant a temporary injunction on terms it deems fit so long as the procedure for filing an appeal from the subordinate court has been complied with. It provides thus:-

Notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from subordinate court or tribunal has been complied with.

11. In the instant case, the ruling of the trial court was delivered on 31st October 2023 whilst the Memorandum of Appeal was filed on 30th November 2023. To that end, the applicants duly complied with the procedure for instituting an appeal before this court and thus the court has jurisdiction to entertain the present application.
12. The principles for granting of a temporary injunction pending appeal are now well settled. Those principles were set out by Visram J (as he then was) in *Patricia Njeri & 3 Others vs National Museum of Kenya* [2004] eKLR where the learned Judge stated:-

The appellants did however, pray (in the alternative) for an order of injunction pending appeal. There was no dispute that the court can, in a proper case grant an injunction pending appeal. What are the principles that guide the court in dealing with such an application.

In *Venture Capital & Credit Ltd vs Consolidated Bank of Kenya Ltd* Civil Application No. Nairobi 349 of 2003 (UR) the Court of Appeal said that an order for injunction pending appeal is a discretionary matter. The discretion must, however, be exercised judicially and not in a whimsical or arbitrary fashion. This discretion is guided by certain principles some of which are cited herein:-

- a. The discretion will be exercised against an applicant whose appeal is frivolous. (*Madhuaper International Limited vs Kerr* [1985] KLR 840 which cited *Venture Capital*). The applicant must state that a reasonable argument can be put forward in support of his appeal.
 - b. The discretion should be refused where it would inflict greater hardship that it would avoid. (*Madhupaper supra*).
 - c. The applicant must show that to refuse the injunction would render his appeal nugatory (*Butt vs Rent Restriction Tribunal* [1982] 417).
13. The court should also be guided by the principles in the case of *Giella vs Cassman Brown & Co. Ltd* [1973] EA 358 which were restated by Ringera J, (as he then was) in *Airland Tours & Travel Limited vs National Industrial Credit Bank Nairobi* (Milimani) HCCC No. 1234 of 2002 as follows:-
- a. *A prima facie* case with a probability of success at trial;
 - b. The applicant is likely to suffer an injury, which cannot be adequately compensated in damages;



- c. If the court is in doubt about the existence or otherwise of a prima facie case it should decide the application on a balance of convenience;
- d. The conduct of the applicant meets the approval of the court of equity.

A prima facie case with a probability of success at trial

14. What then constitutes a prima facie case? In the case of *Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125,

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 being infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly, a standard, which is higher than an arguable case.

15. Similarly in *Nguruman Limited vs Jan Bonde Nielsen & 2 Others* [2014] eKLR the court stated:-

The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion....The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the appellant's case is more likely than not to ultimately succeed.

16. The determination of whether the applicants have a prima facie case with chances of success in the instant application calls for a consideration of whether the applicants have an arguable appeal. The Court of Appeal stated in *Stanley Kang'ethe Kinyanjui vs Tony Keter & 5 Others* [2013] eKLR that:-

The first issue for our consideration is whether the intended appeal is arguable. This court has often stated that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous, a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable.

In the case of *Dennis Mogambi Mong'are vs Attorney General & 3 Others* Civil Appeal No. Nairobi 265 of 2011 (UR 175/2011) where the same court stated that:-

An arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court's consideration.

17. I have perused the Memorandum of Appeal and noted that the applicants have challenged the judgment of the trial court on the premise that it is irregular and ought to be set aside *ex debito justitiae* and further that the trial court did not have jurisdiction to determine the matter as the claim was a work injury claim. The applicants have only attached the application dated 23rd October 2023 and failed to attach the proceedings and ruling of the court which is the subject of this appeal. Therefore this court is unable to verify the nature of evidence presented before the trial court upon which the court's decision was premised. In the circumstances, the applicants have failed to demonstrate that they have an arguable appeal or a prima facie case with probability of success.



Irreparable Injury

18. In *Paul Gitonga Wanjau vs Gathuthi Tea Factory Company Ltd & 2 Others* [2016]eKLR the court considered Halsbury's Laws of England on what irreparable loss is and stated that:-

“First, that the injury is irreparable and second, that it is continuous. The term “irreparable injury” refers to an injury which is substantial and could never be adequately remedied or atoned for by way of damages; not an injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages.”

19. The issue is whether the applicants have demonstrated that they will suffer irreparable loss unless the injunction is granted, which loss would not adequately be compensated by an award of damages? The applicants have argued that the respondent attached motor vehicle registration number KCX 089G and they are apprehensive that he will sell the same which will effectively prejudice them and render their appeal nugatory. It is trite law that execution is a lawful exercise and it is not sufficient for the applicants to state that they will suffer irreparable damage based on the fact that the respondent will lawfully execute his decree. Moreover, the motor vehicle has an ascertainable value and can be compensated by way of damages. As such, it is my considered view that the applicants have not demonstrated that they will suffer irreparable damage or how the appeal would be rendered nugatory if a temporary injunction is denied.

Balance of Convenience Test

20. In the case of *Pius Kipchirchir Kogo vs Frank Kimeli Tenai* [2018] eKLR, the court in dealing with the issue on balance of convenience held as follows:-

The meaning of balance of convenience in favour of the plaintiff is that if the injunction is not granted and the suit is ultimately decided in favour of the plaintiffs, the inconvenience to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer? In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it.

21. Considering the facts of this application, it is my considered opinion that the balance of convenience tilts in favour of the respondent in that the inconvenience that will be caused to him is much greater than that caused to the applicants should the orders sought be granted. The trial court granted stay on condition that the applicants deposit Kshs. 1,000,000/- in court. The applicants failed to comply with the said condition which led to the orders for stay being vacated. As such, the applicants are not entitled to the orders sought at this stage. However, the applicants still have a chance of ventilating their case during the hearing of this appeal even though they have failed to convince this court that they are deserving of the orders sought herein.
22. In regard to the Judgment that the applicant alleges was irregular and that it ought to have been set aside, it is my view that this is a matter to be determined after considering the record of appeal and the



submissions the parties may present before this court. At this interlocutory stage, this court cannot give final orders as the applicant has sought in this application.

Conclusion

23. Consequently, I find that the application dated 30th November 2023 lacks merit and is hereby dismissed.
24. The costs of this application shall abide in the appeal.
25. It is hereby so ordered.

F. N. MUCHEMI

JUDGE

RULING DELIVERED AND DATED AT THIKA THIS 28TH DAY OF DECEMBER 2023.

