Momentum Credit Limited v Ndolo & another (Civil Appeal E108 of 2021) [2022] KEHC 12169 (KLR) (Commercial and Tax) (30 June 2022) (Judgment)

Neutral citation: [2022] KEHC 12169 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL APPEAL E108 OF 2021

DAS MAJANJA, J

JUNE 30, 2022

BETWEEN

MOMENTUM CREDIT LIMITED ..... APPELLANT

AND

FELIX MUIA NDOLO ..... 1ST RESPONDENT

ROBERT W MAINA T/A ANTIQUE AUCTIONS AGENCIES .... 2ND RESPONDENT

(Being an appeal from the Ruling and Order of Hon. A. Ogonda, SRM dated 22nd October 2021 at the Magistrates Court at Nairobi, Milimani in Civil Case No. E1057 of 2021)

JUDGMENT

1. The appellant appeals against the ruling of the subordinate court allowing the 1st respondent's application for an interlocutory injunction restraining the appellant from repossessing, selling or otherwise dealing with the 1st respondents motor vehicle registration number KBW 679N pending the hearing and determination of the suit.

2. The facts leading to the suit are not in dispute and can be gathered from the depositions filed by the parties and are as follows. On July 17, 2019, the 1st respondent applied for and was granted a term loan credit facility for KES 290,000.00 inclusive of a capitalization amount of KES 10,400.00 which was secured by motor vehicle registration number KBW 679N ("the motor vehicle") which was jointly-registered in the name of the appellant and the 1st respondent subject to the terms and conditions contained therein. The 1st respondent requested for a top-up of an additional KES 49,714.00 to the already existing loan facility through a deed of variation of the security agreement dated November 8, 2019 wherein it was agreed that an additional interest rate of 10% would apply for late payments.

3. Once the funds were disbursed, the 1st respondent failed to keep up with the repayments. He therefore requested for a restructure of the loan facility. This was accepted by the appellant was evidenced by the email dated April 29, 2021 on the following terms; the outstanding loan amount was agreed to be KES 314,330.87, the monthly installment was reduced to KES 27,671.00 and the restructured loan amount would be repaid in 21 months beginning June 5, 2020 until February 5, 2022 on the 5th of each succeeding month.

4. According to the appellant, the 1st respondent failed to keep up with payment, the last payment being made on June 23, 2021 despite the fact that his last repayment was for February 5, 2022. After the 1st respondent failed to heed demands to repay the outstanding debt, it commenced the process of realization process of its security. This is what precipitated the suit and the interlocutory application before the subordinate court.

5. In its plaint dated August 3, 2021, the 1st respondent alleged that he had fully repaid the loan and that the appellant unjustly issued instructions to the 2nd respondent to attach and sell the motor vehicle to recover nonexistent loan arrears which amounted to a breach of the agreement. It is on this ground that the 1st respondent pressed its application made, *inter alia*, under order 40 rules 1, 2, 3 and 10 of the *Civil Procedure Rules*.

6. The issue which the trial magistrate considered was whether the 1st respondent had defaulted in its loan. The trial magistrate accepted the 1st respondent's position that he had been servicing the loan before the pandemic, she found that after the pandemic he continued paying the loan although not as consistently and had actually paid 13 instalments some of which exceeded the agreed installment of KES 27,671.00. The learned magistrate further stated that before the pandemic, the 1st respondent had paid KES 264,565.00 and that he had paid a total of KES 645,314.00. After citing the decision in *Danson Muriuki Kihara v Johnson Kabugo* KRG HCCC No 28 of 2013 [2017] eKLR as authority for the proposition that the court may interfere with the terms of an agreement if the terms are on its face illegal, unconscionable, oppressive or fraudulent, the trial magistrate concluded:

> The plaintiff in the present case has complained about the interest rate, and it is clear that he has already paid almost double the amount borrowed. I see no evidence of the plaintiff intentionally refusing to honour (h)is obligations under the contract; save for the pandemic and its effect on his finances, he had faithfully discharged his contractual obligations. The plaintiff has asserted that the loan has been paid in full and in light of the above noted authority, and those cited in the plaintiff's submissions., I find that the plaintiff has established a *prima facie* case with chances of success.

7. It is this decision that has precipitated this appeal. The appellant has filed the memorandum of appeal dated November 11, 2021 in which it assails that decision of the trial court. The thrust of the appellant's case is that the trial magistrate misdirected itself in application of the principles for the grant of injunction settled in *Giella v Cassman Brown & Co Ltd* [1973] EA 358.

8. This is an appeal against the exercise of discretion by the trial court hence the court's approach to the exercise of its appellate jurisdiction is guided by known principles. In *Mbogo v Shah* [1968] EA 93, Newbold P, expressed the nature and extent of the appellate court's jurisdiction to interfere with the discretion of the lower court as follows;

> A court of appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole

> that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.

9. Under the principles established in *Giella v Cassman Brown* (*supra*), in order to succeed in an application for injunction, an applicant must demonstrate that it has a *prima facie* case with a probability of success, demonstrate irreparable injury which cannot be compensated by an award of damages if a temporary injunction is not granted, and if the court is in doubt, show that the balance of convenience is in its favour. In *Nguruman Limited v Jane Bonde Nielsen and 2 others* NRB CA Civil Appeal No 77 of 2012 [2014] eKLR, the Court of Appeal reiterated the three conditions to be fulfilled before an interim injunction and further clarified that they are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. This means that if an applicant does not establish a *prima facie* case then irreparable injury and balance of convenience do not require consideration. On the other hand, if a *prima facie* case is established, then the court will consider the other conditions. The court further stated that in deciding whether there is a *prima facie* case, the court need not conduct a mini-trial but need only be satisfied on a *prima facie* basis that the applicant rights will be violated if an injunction is not issue. In *Mrao Ltd v First American Bank of Kenya Limited and 2 others* MSA CA Civil Appeal No 39 of 2002 [2003] eKLR, the Court of Appeal explained that 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."

10. The question in this appeal is whether the 1st respondent established a *prima facie* case with a probability of success. Only the appellant filed written submissions. I have considered the entire record together with the submissions made by the parties before the trial court.

11. The appellant submits that it tendered uncontroverted evidence that despite taking up a restructured loan, the 1st respondent constantly breached his contractual loan obligations by failing to remit the agreed monthly instalment of KES 27,671.00 from June 5, 2020 until its payment in full February 5, 2022. It points out that the 1st respondent's last payment was on June 23, 2021 and that following the default, the account accrued substantial arrears and penalties. The appellant contends that by agreeing to the restructure and to up, he admitted the debt, agreed to terms of the facility including those on payment of interest hence the court fell into error by granting the injunction.

12. The appellant submits that the 1st respondent's case was that the appellant does not have a right to realise the security on the basis of the interest charged and the amount he paid. The appellant submits that the fact that there was a dispute on the interest charges and the amount due, the court should not issue an injunction. It cites the decision in *Francis JK Ichatha v Housing Finance Company of Kenya Ltd* [2005] eKLR where the court observed that the existence of such a dispute is not a valid ground for restraining the respondent from exercising its statutory power of sale.

13. I have considered the material before the court and I agree with the appellant that the trial magistrate erred in granting the injunction. The evidence is clear that the 1st respondent had defaulted. His admission is clear when he applied for the top–up. Further, the trial magistrate found as a fact that the 1st respondent had defaulted in making payments but went on to excuse the default by citing the COVID 19 pandemic and went on to excuse the default based on the 1st respondent's intention to make payments. Having found as a fact that there was breach of the agreement by failing to pay the loan as the installment's fell due, there was no basis to grant the injunction.

14. Finally, the trial magistrate expressed the view that there was *prima facie* case based on the issue of interest rate and the fact that the 1st respondent had paid almost double what he paid. The trial magistrate did not point to any part of the agreement which did not permit the appellant to charge interest and in this case default interest. The court cannot re-write the bargain between the parties (see *National Bank of Kenya Ltd v Pipleplastic Samkolit (K) Ltd & another* [2002] EA 503). This was clearly a misdirection.

15. I have looked at the decision of *Danson Muriuki Kihara v Johnson Kabugo* (*supra*) relied on by 1st respondent and cited by the trial magistrate to support the grant of the injunction. The appellant in that case succeeded before the trial court wherein he was awarded KES 40,000.00 in accordance with the agreement between the parties. The trial magistrate however found the interest rate of 50% per month unconscionable. That case is distinguishable as it was a judgment following a full trial. Further, there is no evidence or even basis for concluding that rate of interest agreed to by the 1st respondent is unconscionable at all. It was not shown, for example, that the interest rate is way out of proportion to interest charged in similar agreements.

16. From the totality of the evidence, the 1st respondent had defaulted on his obligations and the appellant was entitled to exercise its contractual remedy to repossess the motor vehicle and sell it, if the 1st respondent did not tender the outstanding amount. The trial magistrate did not take into account these undisputed facts when granting the injunction.

17. For the reasons I stated above, I allow the appellant's appeal and order as follows:

    a. The application dated August 3, 2021 filed in the subordinate court be and is hereby dismissed and the order granted on October 22, 2022 be and is hereby set aside.

    b. The 1st respondent shall pay the costs of the application and this appeal assessed at KES 40,000.00.

SIGNED AT NAIROBI

DS MAJANJA

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JUNE 2022.

A MSHILA

JUDGE

Court Assistant: Mr M Onyango.

Mr Nyanchoga instructed by MMW Advocates LLP for the appellant.

Mr Muteti instructed by FM Muteti and Company Advocates for the 1st respondent.