Alios Finance Kenya Limited v Country Farms Limited (Civil Appeal E005 of 2020) [2022] KEHC 11012 (KLR) (27 July 2022) (Judgment)

Neutral citation: [2022] KEHC 11012 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E005 OF 2020

JN KAMAU, J

JULY 27, 2022

BETWEEN

ALIOS FINANCE KENYA LIMITED .... APPELLANT

AND

COUNTRY FARMS LIMITED .... RESPONDENT

(Being an appeal from the Ruling of Hon P. N Gesora (CM) delivered at Kisumu in Chief Magistrate's Court Case No 429 of 2018 on 3rd September 2020)

JUDGMENT

Introduction

1. In his decision of 3rd September 2020, the Learned Trial Magistrate, Hon P. N Gesora (CM), allowed the Respondent's Notice of Motion application dated 29th June 2020 in which the Appellant was restrained from repossessing the Respondent's Motor Vehicles pending the finalisation of negotiations, the execution of the supplemental letter of offer and the valuations of the relevant financed vehicles as was provided under the Mediation Settlement Agreement and Decree.

2. Being aggrieved by the said decision, on 30th June 2021, the Appellant filed a Memorandum of Appeal dated 2nd October 2020. It relied on five (5) grounds of appeal.

3. Its Written Submissions were dated 25th November 2021 and filed on 15th March 2022 while those of the Respondent were dated 12th March 2022 and filed on 14th March 2022.

4. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.

Legal Analysis

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

6. This was aptly stated in the case of *Selle & Another vs Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.

7. Having looked at the Grounds of Appeal and the respective parties' Written Submissions, it appeared to this court that the issues that had been placed before it were:-

    a. Whether or not the Trial Court had jurisdiction to grant an order for injunction after the Mediation Settlement Agreement had been adopted as a judgment of the court;

    b. Whether or not the Respondent had met the threshold of being granted an order of injunction.

8. This court therefore dealt with the said issues under distinct and separate heads.

I. Jurisdiction of the Trial Court

9. Grounds of Appeal Nos (1), (2) and (3) were dealt with under this head because they were related.

10. The Appellant submitted that the Mediation Settlement Agreement which culminated in the Decree of the court dated 28th October 2021 was final and binding upon the parties and that the Trial Court erred in having granted an order of injunction pegged on negotiations and execution of the Supplemental letter of offer. It was emphatic that the Decree resulted from a freely negotiated Mediation Agreement and that each party was to abide by the terms contained therein as there was no provision for further negotiations on the terms to be captured in the Supplemental Letter of Offer.

11. It submitted that the Decree was not varied and/or set aside and was still in force and thus the Respondent could not purport to vary and/or change the terms contained therein. It invoked Order 25 Rule 5 of the *Civil Procedure Rules* and argued that a consent order could only be varied and/or set aside through review once it was demonstrated that the same was entered into through fraud, coercion or undue influence. In this regard, it placed reliance on the case of *Munyiri vs Ndunguya* [1985] KLR 370 where it was held that the only remedy that was available for setting aside a consent order was by way of review.

12. It pointed out that the Respondent had not filed an application to review the consent order and the Decree was therefore still in place. It added that the Respondent's refusal to sign the Letter of Offer was an attempt to avoid settling the decretal sums and by extension, repayment of the borrowed sums. It explained that having defaulted in complying with the terms of the loan agreement, the Respondent ought not be allowed to benefit from its own default.

13. It was its case that the Respondent breached the terms of the Decree when it made changes to the Supplemental Letter of Offer it had the mandate to issue and it was therefore right in having levied execution.

14. It was categorical that the Mediation Settlement Agreement that was adopted by the Trial Court as a judgment had addressed all the issues that were in contention between the parties and a Decree issued.

It averred that the Trial Court was functus officio and it erred when it granted an injunction. It relied on the case of *Raila Odinga & Others vs IEBC & Others* [2013] eKLR, *Jersey Evening Post Limited vs Al Thani* [2002] JLR and *Brian Muchiri Waihenya vs Jubilee Hauliers Ltd & Another* [2018] eKLR where the common thread was that once a decision had been given by a court, it was final and the said decision could not be revoked or varied by the same court.

15. On its part, the Respondent relied on the case of *Telkom Kenya Limited vs John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited)* [2014] eKLR where it was held that functus officio was an enduring principle of law that prevented the re-opening of a matter before a court that rendered the final decision thereon. It invoked Section 99 of the *Civil Procedure Act* and argued that the doctrine of functus officio did not bar a court from entertaining a case it had already decided but prevented it from revisiting the matter on a merit-based re-arrangement once final judgment had been entered and a decree issued.

16. It contended that the Trial Court had not yet heard the matter on its merits at the time of delivering its Ruling for the reason that it heard its application dated 4th September 2018, which it had filed together with Plaint, and referred the matter to Court Annexed Mediation (CAM), which resulted into a settlement agreement.

17. The process of CAM is governed by the Judiciary of Kenya Practice Directions on Court Annexed Mediation issued by the Chief Justice under Article 159 of *the Constitution* and Section 59B (1) (a), (b) and (c) of the *Civil Procedure Act*.

18. Paragraph 12 of The Judiciary of Kenya Directions of Court Annexed Mediation (as amended in 2018) provides as follows:-

> "Any agreement filed with the Deputy Registrar or Magistrate or Kadhi as the case may be shall be adopted by the Court and shall be enforceable as a Judgment or order of Court." (emphasis court).

19. Notably, once a mediation agreement is signed, it becomes final and binding on the parties. Mediation agreements were in the nature of consents. It is for that reason that this court considered the consequences and implications of entering a consent.

20. In the cases of *Flora N. Wasike vs Destimo Wamboko* [1988] eKLR and in *Board of Trustees National Social Security Fund vs Michael Mwalo* [2015] eKLR, the common thread was that a consent could not be set aside or varied unless it was proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general or for reason which would enable the court to set aside an agreement.

21. This court noted that the Mediation Settlement Agreement dated 4th October 2019 and signed by both parties together with their Advocates and the Mediator was adopted as order and judgment of the court on 9th October 2019. There was nothing to indicate that the Respondent applied for it to be set aside or that there were vitiating factors such as misrepresentation, mistake, coercion, undue influence and/or duress that would have enabled it avoid the Mediation Settlement Agreement. Its terms therefore remained in force.

22. Further, a perusal of the Mediation Settlement Agreement showed that none of the terms and clauses therein were dependent in each other. Clauses (7) and (8) of the Mediation Settlement Agreement that the Respondent had argued had not been complied with provided as follows:

7. The assets of County Farms Ltd, forming security shall be valued and information shared by all parties.

8. Any default of the payments shall attract consequences of default to be defined in supplemental hire purchase offer letter.

23. This court looked at the Supplemental Hire Purchase Offer Letter dated 14th November 2019 and noted that the same contained the following pertinent clauses:-

5. The monthly instalment of USD 10,000.00 per month will be

reviewed upwards in February 2020 after the first three (3) instalments have been paid in November 2019, December 2019 and January 2020 by Alios Finance Kenya Limited in consultation with County Farm Limited.

6. All the assets of Country Farms Limited forming the collateral for the financed amount by AFKE to be valued and the valuations reports forwarded to Alios Finance Kenya Limited.

7. In the event of default i.e. if any one (1) instalment remains unpaid for a period of 30 days, the following consequences shall take effect:-

a. Immediate repossession of all assets financed by Alios Finance Kenya Limited.

b. Country Farms Limited and Directors to be listed on Credit Reference Bureau (CRB) under NPL category.

24. The condition of restructure was indicated as follows:-

1. The loan will be repaid by RTGS by 30th monthly with effect from 30th November 2019.

25. The said Supplemental Hire Purchase Offer Letter was duly executed by both the Appellant and the Respondent herein. However, there were alterations by hand to Clause 8 and the Clause for the Condition indicating the periods as 90 days and 30th January 2020.

26. It was evident that the Respondent did not have any input to the terms therein and was only called upon to execute the Supplemental Hire Purchase Offer Letter. The only time the Respondent was to be consulted was in the case of the review of the monthly instalments in February 2020 as per Clause 5 of the Supplemental Hire Purchase Offer Letter. If the Respondent intended to negotiate the time lines in the said Supplemental Hire Purchase Offer Letter, it ought not to have executed the same and engaged the Appellant in negotiating the terms therein.

27. It followed that once the said Mediation Settlement Agreement was adopted as a judgment of the court and the Supplemental Hire Purchase Offer Letter was issued by the Appellant and executed by the Respondent herein, the Learned Trial Magistrate had no jurisdiction to interrogate the terms of the Mediation Settlement Agreement for the reason that the terms were consensual as between the Appellant and the Respondent herein.

28. The Trial Court was also functus officio and could not re-open the negotiations of the Supplemental Hire Purchase Offer Letter. Any revision of the terms of the Mediation Settlement Agreement such as negotiations of the terms of Supplemental Hire Purchase Offer Letter as had been prayed by the Respondent in its Notice of Motion application dated and filed on 29th June 2020 could only have been with the consent of the parties and not imposed on the Appellant through the intervention of the court.

29. Having opted to mediate the dispute between itself and the Appellant herein, the Respondent could not move to litigation to resolve a dispute that was resolved by the parties themselves with the facilitation of a third party neutral. Any negotiation on any terms that had already been agreed upon could only have been re-opened through another mediation process, the Mediation Settlement Agreement having been adopted as an order of the court.

30. The court could, however, have intervened in post-judgment applications relating to the execution of the terms of the said Mediation Settlement Agreement. The Learned Trial Magistrate thus erred in having granted the impugned injunction orders pending finalisation and execution of the Supplemental Hire Purchase Offer Letter as firstly, there was no room for negotiations and secondly, the Supplemental Hire Purchase Offer Letter had been duly executed by both the Appellant and the Respondent herein.

31. Ground of Appeal Nos (1), (2) and (3) were not merited and the same be and are hereby dismissed.

II. Injunction

32. Ground of Appeal No (4) was dealt with under this head.

33. The question of whether or not there was merit in granting the injunctive orders had really been rendered moot having found that the Learned Trial Magistrate had no jurisdiction to re-open the negotiations in respect of the Supplemental Hire Purchase Offer Letter.

34. In arguing that the Respondent ought not to have been granted an order of injunction, the Appellant placed reliance on the cases of Giella vs Cassman Brown (citation not given)and *Nguruman Limited vs Jan Bonde Nielsen & 2 Others* CA No 77 of 2012 (eKLR citation not given) amongst other cases where it was held that for an applicant to be granted an order of injunction, it had to demonstrate that it had established a prima facie case with high chances of success, that it would suffer irreparable loss if the interlocutory injunction was not granted and that if the court was in doubt, then the interlocutory injunction was to be allowed on a balance of convenience.

35. It was emphatic that the Respondent did not establish any of the three (3) conditions as it had admitted owing it monies and they agreed how the same was to be paid. It averred that the purported negotiations of the Supplemental Letter of Offer in the Decree was based on non-existent terms.

36. It further argued that the value of the financed motor vehicles was ascertainable and the Respondent could therefore be adequately compensated in the unlikely event it was found that its repossession and subsequent sale of the said Motor Vehicles was wrongful. It averred that as the sum of USD 542,827.06 was outstanding and it was likely that the debt would continue to accrue and outstrip the value of the motor vehicles that were financed leaving it exposed to serious financial losses as there was likelihood of it being unable to fully recover its monies from the Respondent, the balance of convenience tilted in its favour in the order of injunction not being granted.

37. It relied on the case of *Quantum Petroleum Limited vs Diamond Trust Bank Kenya Ltd* [2017] eKLR where it was held that a debt was only resolved by payment and that where it was acknowledged, it would be unlawful and unjust to stop the creditor from collecting his debt unless the creditor was shown to have acted unlawfully.

38. On its part, the Respondent argued that the Trial Court's jurisdiction was proper in entertaining the application for injunction since it exercised its inherent powers as provided in Section 3A of the *Civil Procedure Act*. It submitted that under that provision, the court had powers to issue injunctive orders so as to extend time to attain the overriding objective of doing justice to both parties. It further contended

that it needed to get interim remedial measures from the court noting that referral of cases to mediation did not act as automatic stay.

39. It was emphatic that it had met the conditions for the granting of an order for injunction as set out in the case of Giella vs Casman Brown (Supra). It also placed reliance on the case of *Francis Jumba Enziano & Others vs Bishop Philip Okeyo & Others* Nairobi High Court Civil Case No 1128 of 2001 (unreported) that was quoted in *Kipkoech Lagat t/s Kaptarakwa Enterprises & 23 Others vs William Bayas & 3 Others* [2013] eKLR where it was held that an interlocutory injunction would not normally be granted unless the applicant could show that it would suffer an irreparable injury which could not be adequately compensated by damages if the interlocutory injunction was not granted.

40. It argued that in this case, damages would not be adequate remedy in the event the Appellant repossessed and sold its motor vehicles. It relied on the case of *Manasseh Denga vs Ecobank Kenya Limited* [2015] eKLR where this very court held that a person's property was not a matter that could be taken casually because it deprived a party of his or her right to own property, a right that was enshrined in Article 40 of *the Constitution*.

41. It pointed out that it had established a prima facie case because the Appellant acted in breach of the terms of the Mediation Settlement Agreement by instructing General Riftvalley Auctioneers to proclaim its motor vehicles which exposed its operations to extreme detriments resulting in it failing to meet its contractual commitments.

42. It placed reliance on the case of *Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others* [2003] eKLR where it was held that a prima facie case was a case in which on the material presented to the court, a tribunal properly directing itself would conclude that there existed a right which had apparently been infringed by the opposite party so as to call for an explanation or rebuttal from the latter.

43. It also referred this court to the case of *Pius Kipchirchir Kogo vs Frank Kimeli Tenai* [2018] eKLR where it was held that for an applicant to be granted an injunction on a balance of convenience, it had to show that the inconvenience caused to it would be greater than that which would be caused to the defendant if an order for injunction was not granted. It argued that the balance of convenience tilted in its favour because it had demonstrated that the motor vehicles were being used to facilitate the repayment of the loan outstanding to the Appellant. It added that it had also demonstrated that some of the motor vehicles that were to be auctioned were not among those financed by the Appellant causing it to suffer double loss.

44. It was emphatic that Clause 8 of the Mediation Settlement Agreement had not been adhered to since the motor vehicles had not been valued and that until parties had finalised negotiations and both executed the Supplemental Letter of Offer, the injunctive orders were valid and ought to be upheld. Be that as it may, this court deemed it prudent to establish if the Respondent had demonstrated that it was entitled to an injunction.

45. It was evident from the Mediation Settlement Agreement and the Supplemental Hire Purchase Letter Offer that the recovery of the debt from the Respondent herein was not dependent on valuation of the Respondent's motor vehicles or negotiations on the Supplemental Hire Purchase Offer Letter as has been shown hereinabove. Such recovery by the Appellant was upon the Respondent defaulting in making its payments.

46. In its Supporting Affidavit of 27th June 2020 by Prithpal Singh Pandhal, the Respondent admitted to having issued the Appellant twelve (12) postdated cheques in the sum of USD 10,000. Contrary to its assertion, it was not at liberty to issue cheques when it was crystal clear that the remittance would

be by way of RTGS for the reason that this was contrary to the terms of the Mediation Settlement Agreement and Supplemental Hire Purchase Offer Letter.

47. Further, it was clear that the Respondent did not effect payments as had been agreed upon. It blamed the inability to effect payments to the cessation of movement to and from Nairobi that was declared on 6th April 2020 and restricted access to Uganda. That may very well have been so. However, Clause 8 of the Supplemental Hire Purchase Offer Letter clearly provided that in the event of default of payment of any one (1) instalment remaining unpaid for a period of 30 days, the Appellant was at liberty to repossess the assets it had financed and have the Respondent and its Directors listed at CRB.

48. Having defaulted to effect payments of the instalments as was provided in the Supplemental Hire Purchase Offer Letter, a position that was set out in the Demand letter dated 15th January 2020 by M/S Gumbo & Associates advocate for the Appellant, this court was not persuaded that the Respondent had demonstrated a prima facie case as it was clearly indebted to the Appellant herein. The case of Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others (Supra) could not come to the assistance of the Respondent.

49. Whereas sanctity of owning property must be protected as this very court found and held in the case of Manasseh Denga vs Ecobank Kenya Limited (Supra), financial institutions must also be given a conducive environment to conduct their economic activities in line with the agreements between them and their customers. Courts must be slow to interfere with self-regulating dispute resolution mechanisms and/or terms of contract and only intervene if actions are unlawful or have no legal basis. The default clauses must be allowed to freely take effect in line with the contracts between parties.

50. From the facts that were placed before this court, it was evidence that the balance of convenience titled in favour of an injunction not been granted. The loan was accruing interest and there was likelihood that the outstanding loan could outstrip the value of the assets it had had financed thus prejudicing its interests as a financier.

51. Notably, valuation of the Respondent's motor vehicles was to be done under the Supplemental Hire Purchase Offer Letter. It was not clear to this court whether the same was done. Be as it may, the value of the assets was ascertainable and hence damages would be adequate compensation in the event interlocutory injunction was not granted and the Respondent succeeded on appeal.

52. Accordingly, this court came to the firm conclusion that the Respondent had not demonstrated the three (3) conditions for being granted an order for interlocutory injunction as was held in the case of *Giella vs Cassman Brown Company* [1973] EA 358 at pg 360 which were that for an applicant to be granted an interlocutory injunction, he had to demonstrate that it had established a prima facie case, that damages would not be an adequate remedy if the interlocutory injunction was not granted and that if the court was in doubt, it would grant an interlocutory injunction on a balance of convenience.

53. The fact that the Appellant had repossessed motor vehicles it had not financed would not have been a good reason to grant an interlocutory injunction. That was best handled in a separate suit so as failure to do so had the potential of re-opening an already concluded matter.

Disposition

54. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 2nd October 2020 was merited and the same be and is hereby allowed. The effect of this Judgment is that the Ruling and consequential orders thereto that were issued by Hon P. N. Gesora delivered on 3rd September 2020 in Kisumu CMCC No 429 of 2018 Country Farms Limited vs Alios Finance Kenya Limited, be and are hereby set aside and/or vacated.

55. The Respondent will bear the costs of this Appeal.

56. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 27TH DAY OF JULY 2022

J. KAMAU

JUDGE