



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO E 172 OF 2019**

**EGERTON UNIVERSITY.....APPELLANT/APPLICANT**

**VERSUS**

**ADVATECH SUPPLIES LIMITED.....RESPONDENT**

*[An appeal from the Ruling of the Chief Magistrate's Court(Hon. Mmasi) in cause No. 9549 of at Nairobi]*

**ADVATECH SUPPLIES LIMITED.....PLAINTIFF/APPLICANT**

**VERSUS**

**EGERTON UNIVERSITY.....DEFENDANT/RESPONDENT**

**RULING**

The Appellant herein Egerton University being dissatisfied by the decision of the Hon. Mmasi, filed a Memorandum of Appeal dated 13<sup>th</sup> June 2019, on grounds;

- a) That the Learned Magistrate erred in fact and in law and completely ignored trite law that a party is bound by their pleadings in having not sought for the amounts granted to be deposited in court or provision of a guarantee in the alternative.
- b) The Learned Magistrate erred in law and in fact and completely ignored trite law that he who alleges must prove and the Plaintiff had not proved that they had indeed been servicing a loan procured for purposes of supplying the Defendant with merchandise.
- c) The Learned Magistrate erred in fact and in law in granting, the Respondent's orders not sought for and not pleaded.

It was proposed to ask the court for orders that the Ruling of the Chief Magistrate's Court delivered on 16<sup>th</sup> April 2019, and all consequential orders made therein be set aside in their entirety and this Court to issue an injunction pending the hearing and determination of this suit.

**APPELLANT'S WRITTEN SUBMISSIONS TO THE APPEAL**

The Appellant in its submission relied on the decision by the *Court of Appeal in Lucy Wangui Gachara -vs- Minudi Okemba Lore [2015] eKLR*, that at the interlocutory stage, the case has to be unusually strong and clear before a mandatory injunction is granted. If a mandatory injunction is granted, at all on an interlocutory application, it is granted only to restore the *status quo* and not granted to establish a new state of things, differing from the state, which existed at the date when the suit was instituted.

**RESPONDENT'S SUBMISSIONS TO THE APPELLANT'S MEMORANDUM OF APPEAL**

The Respondent submitted that the conditions for the grant of a mandatory injunction were enumerated by Justice P. Nyamweya in the case of *County Assembly of Machakos -vs- Governor, Machakos County & 4 Others[2018]eKLR*, where he held as follows;

***“The principles for the grant of mandatory injunctions are settled. The principles were set out by the Court of Appeal in Kenya Breweries Ltd and another -vs- Wshington Okeyo (2002) 1 E.A 109 wherein it was held that there must be special circumstances shown over and above the establishment of a prima facie case for a mandatory injunction to issue, and even then only in clear cases where the court thinks that the matter ought to be decided at once. The Court held as follows in this regard:***

*‘A mandatory injunction ought to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the Defendant had attempted to steal a march on the Plaintiff.’*

It further relied in the case of Paul Gitonga Wnjau -vs- Gathuthi Tea Factory Company Ltd & 2 Others [2016] eKLR, Justice John M. Mativo quoted in approval the case of Moses C. Muhia Njoroge & 2 Others -vs- Jane W. Lesaloi & 5 Others [High Court ELC case Number 514 of 2013] and held as follows;

*“The court while making a determination on the issue of a prima facie case with a probability of success cited the Court of Appeal decision in the case of Mrao Ltd -vs- First American Bank of Kenya and 2 Others [2003]KLR 125 where the court of Appeal held that:- “a prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.*

That the Respondent herein secured a loan facility from a financial institution which it utilized to supply the goods to the Appellant. The Respondent herein has, however, been unable to repay the said loan facility owed to the financial institution as the Appellant has refused, neglected and/or failed to pay it the sum of Ksh 6,500,000/-, being the sum due for the supply of the goods. The Respondent herein stands an imminent risk of its property being auctioned by the financial institution to recover the outstanding loan facility advanced to it.

It was the Respondent’s submission that following a request in writing from the Appellant’s Deputy Chief Procurement Officer, the Respondent prepared and submitted a sealed tender in respect to tender number EU/RT/68/2015-2016 – supply and delivery of materials for tagging university assets (hereinafter “the tender”). After a successful tendering processing, the Appellant’s Deputy Chief Procurement Officer informed the Respondent, in writing, that its offer for the supply and delivery of the goods as per the tender was accepted. A notification of award of the tender was also sent to the Respondent herein by the Appellant. The Respondent accepted the award of the said tender and it issued a performance bond of Ksh 650,000/- to the Appellant.

In its further submissions the Respondent relied on **section 44(1) and (2) (f)&(g) of the Public Procurement and Assets Disposal Act, No. 33 of 2015**, which states;

*“(1) an accounting officer of a public entity shall be primarily responsible for ensuring that the public entity complies with the Act; (2)(f) approve and sign all contracts of the procuring entity; and (2)(g) ensure the procurement and asset disposal process of the public entity shall comply with the Act”.*

In P. N. Gichoho Ngugi vs- County Government of Laikipai & Another [2017] eKLR, Lady Justice M. Kasango, held that;

*“.....the following cases show that a defaulting party cannot rely on its fault. Alghussein Establishment -vs Elton College (1991) 1 All ER 267, it was held:- “A party who seek to obtain a benefit under a continuing contract on account of his breach is just as much taking advantage of his own wrong as is a party who relies on his breach to avoid a contract and thereby escape his obligation.”*

*The House of Lords in the decision above, relied on a speech by Lord Diplock in Cheall -vs- Association of Professional Executive Clerical and Computer Staff (1983) 1 ALL ER that:- “ This rule of construction, which is paralleled by the rule of law that a contracting party cannot rely upon an event brought about by his own breach of contract as having terminated a contract by frustration is often expressed on broad language as “A man cannot be permitted to take advantage of his own wrong”.*

## **DETERMINATION**

The Court considered pleadings and submissions by Counsel and the matter for determination is whether the Trial Court erred in granting mandatory injunction at the Interlocutory stage.

The Appellate Court’s jurisdiction is outlined by **Section 78 of CPA**

**(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—**

- (a) to determine a case finally;**
- (b) to remand a case**
- (c) to frame issues and refer them for trial;**
- (d) to take additional evidence or to require the evidence to be taken;**
- (e) to order a new trial.**

**(2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.**

Both Counsel made compelling arguments with respect to their divergent positions but were in agreement on the principles of grant of mandatory interlocutory injunction pending hearing and determination of the matter.

The case-law on this point includes;

**Lucy Wangui Gachara vs Minudi Okemba Lore supra County Assembly of Machakos vs Governor Machakos County & 4 Others supra Paul Gitonga Wanjau vs Gathuthi Tea Factory co Ltd vs 2 Others supra Magnate Ventures Ltd vs Eng Kenya Ltd (2009) KLR 538**

To the instant matter, the Trial court considered the following in granting the mandatory injunction at the interim stage;

***“However, there is in my view special circumstances in the case, that the plaintiff’s property maybe attached by the said Bank where he took the loan for the delivery of the 100,000 aluminum serialized asset tags. If the Defendant continues to deny that, they are entitled to pay the Plaintiff the said money for the supply of the tags. This is because the bank’s interest is in the payment of interest accruing therein due to alleged default of loan repayment not being paid timeously, which payments are made from the proceeds of the Plaintiff’s commercial activity”***

The Trial Magistrate addressed the issue of issuance of mandatory interim injunction based on the principles of law. Whereas the Defendant contests the transaction with the Plaintiff as being contrary to Public Procurement Act and hence claims that the same must be subjected to hearing and determination, the Defendant/Appellant did not contest the Plaintiff’s claim. The Plaintiff performed based on the impugned contract by delivery of 100,000 serialized tags to the Defendant. This, the Defendant is silent about the delivery and derived benefit from the goods delivered. The plaintiff incurred costs as told to the Trial Court, he obtained loan facility from the bank and has incurred loss. He suffers from a looming auction of goods for not servicing the loan and at the same time the Appellant derives benefit from delivered goods while he is deprived of benefit from the Purchase Price.

So as to ensure the rights of each party and access to justice, the Trial Court by virtue of **Section 3A CPA** stayed the matter awaiting hearing and determination. At the same time, the Trial Court found the Plaintiff’s special circumstances compelling to provide for security by the Defendant pending trial. So that as the matter awaits determination, the Plaintiff’s rights are safeguarded incase his claim is found to be legitimate, it shall be settled spontaneously.

The Defendant suffers no prejudice as the mandatory injunction entails options of either a deposit of Ksh 3m or bank guarantee and if successful will be refunded.

The parties are also at liberty to expedite hearing and determination of the suit.

I find the Trial Court directed itself properly on the law and evaluated the Plaintiff’s special circumstances and predicament and granted mandatory injunction.

#### **DISPOSITION**

- 1. The Appeal is dismissed with costs**
- 2. The matter is remitted to Trial Court for expedited hearing and determination.**

**DELIVERED DATED & SIGNED IN OPEN COURT ON 29<sup>TH</sup> MAY 2020**

**(VIDEO CONFERENCING**

**M.W.MUIGAI**

**JUDGE**

**IN THE PRESENCE OF;**

**WEKESA & SIMIYU ADVOCATES FOR APPELLANT**

**KARIUKI & KINYA ADVOCATES FOR RESPONDENT**