



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 201 OF 2015

EXCEL GLOBAL LIMITED.....APPELLANT

VERSUS

NORTHPOLE COLLEGE LIMITED.....RESPONDENT

(Being an appeal from the Ruling and order of Hon Mr C. Obulutsa, Senior Principal Magistrate (SPM) at the Chief Magistrate's Court at Milimani in Civil Case No 6498 of 2015 delivered 30th April 2015)

JUDGMENT

INTRODUCTION

1. In his Ruling that was delivered on 30th April 2015, the Learned Magistrate, Hon Mr C. Obulutsa, Senior Principal Magistrate (SPM) allowed the Respondent's Notice of Motion application dated and filed on 30th October 2014 which had sought that the Appellant be restrained from using and/or doing any activities which may be construed as infringing on the Respondent's proprietary right to their registered trademark pending the determination of the suit. He also ordered the Appellant to provide access to the Respondent to inspect and audit the inventory of equipment and books of accounts pending the hearing and determination of the suit.
2. Being dissatisfied with the said decision, the Appellant filed its Memorandum of Appeal dated 5th May 2015. It relied on nine (9) grounds of appeal.
3. Its Written Submissions and Bundle of Authorities and Supplementary Written Submissions were dated 6th August 2019 and 2nd September 2019 respectively while those of the Respondent were dated 19th August 2019.
4. The Judgment herein is based on the said Written Submissions, which the parties herein relied upon in their entirety.

LEGAL ANALYSIS

5. The Appeal herein was on an interlocutory decision. There was therefore no evidence to re-evaluate and assess.
6. Having looked at the grounds of appeal and the respective parties' submissions, it appeared to this court that the issue that had been placed before it for determination was whether or not the Learned Magistrate exercised his discretion judiciously when he allowed the Respondent's application.
7. The Appellant argued that an appellate court could interfere with a decision if the court had misdirected itself in law, if it had misapprehended the facts and if it had taken considerations which ought not to have been considered as was held by the Court of Appeal in the case of **Said Ahmed vs Manasseh Denga & Another [2019] eKLR**.
8. It submitted that the Learned Magistrate did not consider the principles of injunction before considering that its actions would cause the Respondent irreparable loss. It stated that these principles were to be satisfied that the applicant had demonstrated that:-

a. He had established a *prima facie* case;

b. There would be irreparable injury if a temporary injunction was not granted;

c. That if the court was in doubt, then it would grant an interlocutory injunction on a balance of convenience.

9. It submitted that if the Learned Magistrate had considered the principles sequentially without leapfrogging as was held in the case of **Said Ahmed vs Manasseh Denga & Another** (Supra), then he would have come to a different conclusion. It argued that in leapfrogging the principle, the Learned Magistrate acted in violation of the principles set out in the case of **Nguruman Limited vs Jan Bonde Nielsen & 2 Others [2014] eKLR**.

10. It was also emphatic that the lower court had no jurisdiction to handle the matter as it centred on Trademarks, which was within the jurisdiction of the High Court.

11. It added that the Learned Magistrate's order was ambiguous as it could be interpreted that the Learned Magistrate allowed the whole application. In this regard, it placed reliance on the case of **Republic & 2 Others vs Muhidin Omar Mohamed [2014] eKLR** where it was held that courts should not make vague and ambiguous orders.

12. On its part, the Respondent submitted that it had demonstrated that it was entitled to be granted an interlocutory injunction pending the hearing and determination of the main suit. It placed reliance on the cases of **Aikman vs Muchoki [1984] KLR 353**, **Paul Tirimba Machogu vs Rachel Moraa Mochama [2015] eKLR**, **Mbogo & Another vs Shah [1968] EA 93** and the **Nguruman case**.

13. In his Ruling, the Learned Magistrate rendered himself as follows:-

“The court has considered the authorities and principle of injunction and finds the conduct of the defendant is going to cause the Plaintiff irreparable loss. The court finds that the Plaintiff's application dated 30th October 2014 has merit and will be allowed with costs.”

14. It did appear that the Learned Magistrate also granted the Respondent an Anton piller order when he stated that:-

“... the court will also order the defendant to provide access to the plaintiff to inspect and audit the inventory of equipment and books of accounts pending the hearing and determination of the suit.”

15. In the case of **Anton Piller KG vs. Manufacturing Processes Ltd and Others [1976] 1 All ER**, Lord Denning MR stated thus:

“...the order sought in this case is not a search warrant. It does not authorize the plaintiffs' solicitors or anyone else to enter the defendants' premises against their will. It does not authorize the breaking down of any doors, nor the slipping in by a back door, nor getting in by an open door or window. It only authorizes entry and inspection by the permission of the defendants. The plaintiffs must get the defendants' permission. But it does do this: it brings pressure on the defendants to give permission. It does more. It actually orders them to give permission - with, I suppose, the result that if they do not give permission, they are guilty of contempt of court...”

16. It therefore follows that a court has to carefully consider the circumstances of any particular case before an Anton Piller order could be granted as it is a drastic interlocutory relief. A perusal of the Ruling of the Learned Magistrate showed that he did not appear to have addressed his mind to the circumstances under which such an order could be granted. As was also pointed out by the Appellant, he did not also analyse the principles of granting of an interlocutory injunction to enable this court consider whether or not he exercised his discretion to grant the aforesaid orders judiciously.

17. This court took the view that the Learned Magistrate would have gone further to explain how the irreparable loss he found the Respondent was to suffer was one which could not be compensated by way of damages. Indeed, irreparable loss alone is not a ground for granting an interlocutory injunction. It must be accompanied by the fact that such irreparable loss would be one that would and could not be compensated by way of damages.

18. The question of which court had jurisdiction to hear the dispute between the Appellant and the Respondent herein was not one that was before this court on appeal and consequently, it did not address itself to the same.

19. Notably, Section 78 of the Civil Procedure Act Cap 21 (Laws of Kenya) stipulates as follows:-

“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.”**

20. To give the Appellant an opportunity to have its arguments relating to the Respondent's Notice of Motion application dated 30th October 2014 analysed so as to give the court a chance to consider if discretion was or was not exercised judiciously, it was best that the said application be heard afresh.

DISPOSITION

21. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was dated 5th May 2015 was successful. The effect of this decision was that the decision of the Learned Magistrate, Hon Mr C. Obulutsa, Senior Principal Magistrate (SPM) that was delivered on 30th April 2015 be and is hereby set aside.

22. It is hereby directed that the lower court file be placed before the Chief Magistrate Milimani Commercial Courts on 16th November 2020 for the allocation of the hearing and determination the Respondent's Notice of Motion application dated and filed on 30th October 2014 to any other magistrate other than to the Learned Magistrate, Hon Mr C. Obulutsa, Senior Principal Magistrate (SPM).

23. As this court found the failure to consider the principles of interlocutory injunction was on the part of the Learned Magistrate, this court will not make an order as to costs of the Appeal herein. Each party will bear its own costs.

24. It is so ordered.

DATED and DELIVERED at NAIROBI this 27th day of October 2020

J. KAMAU

JUDGE