



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO 739 OF 2019

VENTURE MOTORS LIMITED.....APPELLANT

VERSUS

EQUITY BANK LIMITED.....RESPONDENT

RULING

INTRODUCTION

1. In its Notice of Motion application dated and filed on 17th December 2019, the Appellant sought orders to restrain the Respondent, its servants, authorised agents and whomsoever acting on its behalf from seizing, attaching, repossessing and/or interfering with its user and possession of Motor Vehicle Registration Number KCE 197S including initiating, commencing and or pursuing criminal proceedings against its directors pending the hearing and determination of the suit (**sic**). The said application was supported by the Affidavit of its Director, Kennedy Kimende that was also sworn on 17th December 2019.

2. The Applicant contended that by a Letter of Offer dated 21st July 2015, the Respondent offered it and it accepted a credit facility of Kshs 7,463,000/= for the purchase of Motor Vehicle Registration Number KCE 197S Isuzu FVZ Truck (“hereinafter referred to as the subject Motor Vehicle”) which facility was secured by a joint registration and Hire Purchase Agreement. It stated that it paid a sum of Kshs 8,655,807.03 leaving a balance of Kshs 2,152,288.32.

3. It averred that the Respondent instructed its agents to repossess it as a result of which the subject Motor Vehicle’s ignition system, clutch and pressure boosters were interfered with and one pressure control booster vandalised while it was at the auction yard. It pointed out that the Respondent’s said conduct had denied it the ability to obtain any income to service the facility and that further, it had shut the door and was not willing to enter into any compromise on the repair of the said damage and/or set off the repair costs.

4. It pointed out that it was aggrieved by the decision of the lower court which dismissed its application for injunction to restrain the Respondent from seizing and/or repossessing the said subject Motor Vehicle. It stated that it had paid more than 2/3 of the loan facility and that the Respondent stood to unfairly obtain an advantage over it and call for the entire amount despite causing the grounding of the said subject Motor Vehicle.

5. It averred that it filed its application without undue delay and that it was willing to furnish security as may be determined by the court and was emphatic that it had disclosed prima facie grounds for the granting of injunctive relief. It thus urged this court to allow its application as prayed.

6. In opposition to the said application, on 23rd December 2019, the Respondent filed Grounds of Opposition dated 21st December 2019. It termed the present application incurably defective, incompetent and devoid of merit with no legs to stand on. It added that the Appellant had not come to court with clean hands and that as an equitable joint owner, it had the legitimacy to realise the security as the Appellant defaulted in servicing the facility.

7. It contended that it stood to suffer irreparable harm and suffer more hardship if the orders were granted. It was its further averment that the Appellant would not suffer any prejudice or any harm as its claim was quantifiable and could be compensated by way of damages.

8. Further, it averred that the court could not re-write the terms of their contract and also added that it would be against public policy for it to be restrained from instituting criminal proceedings against the Appellant herein and/or its directors.

9. On 16th June 2020, its Manager , Legal Services, Kariuki King’ori also swore a Replying Affidavit on its behalf. While reiterating the averments in the said Grounds of Opposition, it stated that the Appellant’s assertions that its agents tampered with the subject Motor Vehicle were uncorroborated and unsubstantiated and that the Appellant could not blame it for its own misfortunes. It therefore urged this court to dismiss the present application .

10. In his Supplementary Affidavit that he swore on 23rd September 2019, Kennedy Kimende stated that the Applicant had been making payments and that its outstanding balance was Kshs 1,492,090/= after it made several payments in 2020. He added that the Respondent did not also furnish the court with any proclamation and attachment notices as per the Auctioneers Act and Rules.

11. The Appellant relied on the cases of **Vivo Energy Kenya Ltd vs Maloba Petrol Station Ltd & 3 Others [2015] eKLR**, **Olympic Sports House Ltd vs School Equipment Centre Ltd [2012] eKLR**, **Amir Suleiman vs Amboseli Resort Ltd [2004] 2 KLR 589**, the **Giella** case amongst several other cases to support its argument that it had established that it had a *prima facie* case, that it would suffer damage that could not be compensated by way of damages and that the court could grant the injunctive relief on a balance of convenience. It therefore urged this court to grant it an injunction on condition that it continued to service the loan.

12. On the other hand, the Respondent relied on the cases of **Amicabre Travel Services Ltd vs Alios Kenya Finance Ltd [2014] eKLR** where this very court held that the plaintiff therein could not fail to meet its obligations and yet hope to retain the vehicles and that of **Kihara vs Barclays Bank Ltd [2001] 2 E.A. 420** where it was held that once a person offers his property as security for borrowing, he does so knowing very well that it will be sold if he defaults.

13. On 25th February 2020, this court granted an order of status quo; the status on that day being that the Appellant was still in possession of the subject Motor Vehicle herein. No condition was attached to the said order as the court needed to consider the parties' respective submissions before making a determination as to whether or not the Appellant could be granted the orders it had sought.

14. A perusal of the Grounds of Appeal shows that the Appellant was aggrieved by the Learned Magistrate's decision dismissing its application for injunctive relief. The mandate of the appellate court will be to determine whether or not the said Learned Magistrate exercised her discretion judiciously when she dismissed the said application. The question of whether or not a court could re-write the contract for parties was also a matter that the appellate court could consider in the Appeal.

15. Enquiring if the Appellant had established a *prima facie* case as was defined in the case of **Mrao vs First American Bank of Kenya Ltd & 2 Others [2003] KLR 125** or whether or not the Appellant would suffer irreparable loss that cannot be compensated by way of damages in the event he was not granted an interlocutory injunction would be premature as what was before this court was not an appeal from the main suit in the lower court but rather it was an appeal from the decision of the Learned Trial Magistrate who declined to grant the Appellant an interlocutory injunction pending the hearing and determination of the main suit.

16. It must be appreciated that at an interlocutory stage, there is real danger of a court delving into the merits or otherwise of the decision that is intended to be appealed from if it analysed the facts of the case. It must therefore exercise great caution and restraint when an application is seeking an interlocutory injunction.

17. The singular question of whether or not the Learned Magistrate exercised her discretion in dismissing the Appellant's application seeking injunctive reliefs was an arguable point of appeal. This demonstrated that there was a *prima facie* arguable case. Whether the ground would eventually succeed, was immaterial.

18. In the event the appeal was successful and the court would not have granted the Appellant herein an injunction pending appeal, there was a possibility of it suffering damage that might not be compensated by way of damages. This is because it appeared that the Appellant had repaid the loan facility of Kshs 7,463,000/= leaving a balance of Kshs 2,062,307.97 as per the Respondent's Replying Affidavit.

19. Indeed, this court wholly associated itself with the holding of Mabeya J in the case of **Olympic Sports House Ltd vs School Equipment Centre Ltd** (Supra) where he held as follows:-

“... there may be circumstances where although damages may be adequate but nevertheless an injunction would issue.”

20. Further, where the court is in doubt, then it would serve the interests of justice that it grants an interlocutory injunction. This court determined that it was best that the appellate court determine whether really the Appellant had made out a good case on appeal.

21. This court was satisfied that the Appellant herein had satisfied the court that it had met the threshold of being granted an interlocutory injunction as set out in the case of **Giella vs Cassman Brown & Co Ltd [1973] EA 358** while it ventilated its Appeal herein.

22. Having said so, an appellate court should not freely grant an injunctive order without attaching a condition to it. Indeed, it must keep at the back of its mind that while one party may benefit from such an order, the opposing party will also suffer hardship. The creditor will be forced to wait a while longer to have its dispute determined. The court is therefore called upon to cut a balance so as to try as possible to put the opposing parties on a scale that is not tilted in favour of one of them especially where the applicant seeking injunctive orders on appeal has complied with the procedure of instituting the appeal.

23. In Order 46 Rule 6 of the Civil Procedure Rules, 2010, it is stipulated as follows:-**“Notwithstanding anything contained in subrule (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 a subordinate court or tribunal has been complied with.”**

24. The court found and held that the Respondent could not be restrained from instituting criminal proceedings against the Appellant and/or its Directors as it was its constitutional right under Article 50 (1) of the Constitution of Kenya to seek a fair trial in any court of competent jurisdiction or tribunal. In any event, if the Appellant was apprehensive that its rights and those of its Directors would be infringed, it was at liberty to seek the appropriate orders to safeguard its interests.

DISPOSITION

25. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Notice of Motion application dated and filed on 17th December 2019 was merited. It is hereby directed that an interlocutory injunction be and is hereby granted to the Appellant restraining the Respondent, its servants, authorised agents and whomsoever acting on its behalf from seizing, attaching, repossessing and /or interfering with its user and possession of Motor Vehicle Registration Number KCE 197S Isuzu FVZ Truck pending the hearing and determination of the Appeal herein the following conditions:-

- 1. THAT the Appellant shall pay to the Respondent the sum of Kshs 1,000,000/= within sixty (60) days from the date of this Ruling.**
- 2. THAT the Appellant shall continue to remit to the Respondent without fail, the monthly payments of Kshs 214,562/= in respect of the balance of the loan facility pending the hearing and determination of the Appeal herein.**
- 3. In the event that the Appellant shall default on Paragraph 25(1) and Paragraph 25 (2) hereinabove, the conditional interlocutory injunction will automatically lapse.**
- 4. The Appellant be and is hereby directed to file and serve its Record of Appeal within forty five (45) days from the date of this Ruling.**
- 5. The Deputy Registrar High Court of Kenya Milimani Law Courts Civil Division be and is hereby directed to facilitate the expeditious typing of the proceedings in the lower court to enable the Appellant comply with the timelines within which to file its Record of Appeal as aforesaid.**
- 6. In the event the certified copies of the proceedings and Ruling to be appealed from will have been ready and the Appellant will have failed to file and serve its record of Appeal within forty five (45) days from the date of the Ruling herein, the Appeal herein will stand as automatically dismissed.**
- 7. Either party is at liberty to apply.**
- 8. Costs of the application will be in the cause.**

26. It is so ordered

DATED and DELIVERED at NAIROBI this 23rd day of November 2020

J. KAMAU

JUDGE