



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 149 OF 2018

DAVID GIUGU THEURI T/A IMAGE PRESS SOLUTIONS.....APPELLANT

VERSUS

ELITE DIGITAL SOLUTIONS LTD.....1ST RESPONDENT

KENYA COPYRIGHT BOARD.....2ND RESPONDENT

RULING

INTRODUCTION

1. The Appellant's Notice of Motion application dated 20th March 2018 and filed on 21st March 2018 was brought pursuant to the provisions of Section 79G and 3A of Civil Procedure Act, Order 42 rule 6 (3) and (6) of the Civil Procedure Rules 2010, and all other enabling provisions of the law. Prayers No (1) was spent. It sought the following remaining orders:-

1. Spent

2. THAT this Honourable court be pleased to issue conservatory order of injunction do issue (sic) restraining the 1st and 2nd Respondents by themselves or through their agents servants or assignees or representatives from entering, trespassing the Appellant's premises or in any way interfering with the Appellant's two Second hand Printers HP Indigo 3500 and HP Indigo 5000 in a purported attempt to inspect/run the software legalization program on the Appellant's two Second hand Printers HP Indigo 3500 and HP Indigo 5000.

3. THAT the costs of this Application do abide by the outcome of the Appeal.

2. The Appellant's Written Submissions were dated 17th May 2018 and filed on 7th June 2018 while those of the 1st Respondent's were dated and filed on 18th June 2018. The 2nd Respondent did not file any response to the Appellant's application but it filed Written Submissions dated and filed on 18th June 2018.

3. When the matter came up on 17th October 2018, the Respondents requested the court to deliver its decision based on their Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

THE RESPONDENTS' CASE

4. On 20th March 2018, the Appellant swore an Affidavit in support of his application.

5. He had sought similar orders to the orders he had prayed for in his application in the lower court but his application was dismissed. He faulted the Learned Trial Magistrates for having declined to grant him an injunction because there had been no complaint of infringement and hence the inspection/running the software legalisation programme by the 1st Respondent amounted to unnecessary and illegal harassment.

6. He was apprehensive that if the orders that he sought in his application herein were not granted, the Respondents' action would not cripple his business and machinery completely rendering him destitute and but also render his appeal nugatory.

7. He therefore urges this court to grant him the orders he has sought in his present application.

THE 1ST RESPONDENT'S CASE

8. In response to the said application, Riyaz Kurji swore a Replying Affidavit on behalf of the 1st Respondent on 3rd May 2018. The same was filed on 4th May 2018.

9. The 1st Respondent stated that it was the sole authorised channel partner in Kenya of all HP Indigo Products, to supply consumables for use with the HP Indigo Presses and to provide after sales services for all HP Indigo Products in Kenya. It said that it had to approve and register any HP machine sold in Kenya so that it could give permission for use of the software.

10. It further averred that it did not approve or sell the printers to the Appellant or grant him the licenses for use, sale, distribution or importation of the two (2) Printers. It was its contention that it had the right and contractual obligation to inspect all its equipments that run on the HP Software as protected under the Copyright law.

11. It was its averment that the Appellant's application had not met the threshold of being granted an injunction and thus urged this court to dismiss the same.

LEGAL ANALYSIS

12. The Appellant's application had been brought under the provisions of Order 42 Rule 6 (6) of the Civil Procedure Rules. The same provides 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.”

13. He therefore submitted that this court had power to grant preservatory orders pending appeal. He placed reliance on several cases amongst them **Safaricom Ltd vs Ocean View Beach Hotel Ltd & 2 Others [2010] eKLR**, **Reuben & 9 Others vs Nderitu & Another [1989] KLR 459**, **Samiyan Kaur Davinder Signh vs Speedway Investments Ltd & Another [2014] eKLR** wherein the Court of Appeal held that under Rule 5 (2) (6) of the Court of Appeal Rules, the court has power to grant an injunction or to order stay of execution or stay of proceedings.

14. He also averred that he had an arguable appeal and that in fact, the 2nd Respondent had not filed any response in opposition to his application.

15. He pointed out that since the 1st Respondent had denied having lodged a complaint with the 2nd Respondent in its Replying Affidavit that was filed in the lower court, then the 2nd Respondent had no complaint to act on. It was his contention that the 1st Respondent's assertions that it was the sole authorised channel partner of the HP Incorporations Indigo Division to sell HP Indigo Printers was thus a change of tune.

16. He was emphatic that the issues he had raised were weighty and worthy of consideration in the Appeal herein.

17. On its part, the 1st Respondent argued that the Appellant had not demonstrated that he had satisfied the principles that have been set out in the case of **Giella vs Cassman Brown & Co Ltd [1973] EA 358**.

18. It also relied on several other cases to demonstrate that a party applying for an injunction must demonstrate a *prima facie* case and that injunction being an equitable relief, that he is deserving of the said relief.

19. It urged this court not to grant the injunction because the Appellant would continue to infringe on its copyright and thus cause it to suffer greater injustice.

20. It was also its argument that the balance of convenience lay in its favour because it had a valid contractual and statutory obligation that was enforceable under the law against the Appellant.

21. It placed reliance on the case of **Showind Industries vs Guardian Bank Ltd & Another [2002] 1 EA 284** where it was held that a mandatory injunction should be granted sparingly and only in exception circumstances.

22. The 2nd Respondent submitted that it acted on receiving a complaint from the 1st Respondent and when it asked the Appellant to furnish it with pertinent documentation, he “**ran**” to court and sought injunction orders. It stated that it was mandated by the Copyright Act to administer all matters of copy right and related rights in Kenya.

23. It argued that its intended inspection would only be illegal if it was not supported by express provisions of the law. In this regard, it relied on the case of **Real Deals Ltd vs 3 Others vs Kenya National Highway Authority & Another [2015] eKLR** and urged this court to

uphold the Ruling that was delivered on 16th March 2018 dismissing the Appellant's application for conservatory orders in the lower court.

24. It was apparent to this court that the parties' respective submissions have delved in great detail on the merits or otherwise of their cases. This was more so in the case of the 2nd Respondent. At this point, the court's duty is to establish if the Appellant has demonstrated that he has met the criteria in the case of **Giella vs Cassman Brown & Co Ltd** (Supra). The criteria that has been set in this case is **THAT:-**

a) The applicant must demonstrate that he has established a *prima facie* case with a probability of success;

b) The applicant must demonstrate that he will suffer irreparable loss that cannot be compensated by way of damages if the interlocutory injunction is not granted;

c) If the court is in doubt, then it should grant an interlocutory injunction on a balance of convenience.

25. Notably, the cases the Appellant relied upon related to the grant of injunctive relief by the Court of Appeal. The criteria for granting the said order is that Court of Appeal is different from that of the High Court. In the Court of Appeal, all an applying party only has to demonstrate that he has an arguable appeal and that if the injunction is not granted then his appeal will be rendered nugatory. The said cases were thus distinguishable from the facts of the case herein.

26. In view of the fact that the Appellant had attached documents showing copies of Re-Export Verification Conformity (hereinafter referred to as "PVO") dated 10th May 2016 and 25th August 2016 and Import Declaration Forms Nos E1605306565 and E1608385184 from Germany and United States respectively, the balance of convenience titled in favour of this court granting a conservatory order pending the hearing and determination of the Appeal herein.

27. 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.

DISPOSITION

28. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Notice of Motion application dated 20th March 2018 and filed on 21st March 2018 was merited and the same is hereby allowed in terms of Prayer No (1) pending the hearing and determination of the Appeal herein. Costs shall be in the cause.

29. The Appellant is hereby directed to take all necessary action to prosecute his Appeal forthwith. The Deputy Registrar High Court Milimani Law Courts Civil Division is hereby directed to facilitate the typing of the proceedings and placing of the lower court file in the file herein to enable the Appellant prosecute his Appeal.

30. It is so ordered

DATED and DELIVERED at NAIROBI this 24th day of January 2019

J. KAMAU

JUDGE