



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. APPLICATION NO. 516 OF 2019 (O.S)

J. K. BOSEK & CO. ADVOCATES.....APPLICANT

-VERSUS-

WILLMAC CATTLE FARM LIMITED.....1ST RESPONDENT

NIC BANK LIMITED.....2ND RESPONDENT

RULING

1. The applicant has at this instance filed the Notice of Motion dated 18th July, 2019 and which Motion is supported by the grounds set out on its body and the facts deponed to in the affidavit of *Joel Kimutai Bosek*. The applicant is fundamentally seeking an order for an interlocutory/interim injunction against the 2nd respondent herein, barring or otherwise restraining it from releasing the funds in Account Number 1004972208 under the joint names of Patrick Law Associates and Kariuki Runo & Co. Advocates pending the hearing and determination of the Originating Summons.
2. The deponent, being the proprietor of the applicant, stated that he was at all material times acting for the 1st respondent in respect to the property known as L.R. No. 20902 (I.R. No. 66639) in Nyeri ELC NO. 261 OF 2013.
3. It was also asserted by the deponent that sometime in 2016 the 1st respondent through its directors appointed his firm to undertake the sale of the subject property on the agreement that his firm would receive 5% of the value of the said property in legal fees.
4. He equally stated that he undertook the various transactions in regards to the suit property on behalf of the 1st respondent at his own costs and in the hopes that the 1st respondent would ultimately pay the applicant's legal fees but that the intended sale was frustrated by non-commitment on the part of the said respondent.
5. The deponent went ahead to aver that the 1st respondent has since sold the subject property without his knowledge through the firm of Patrick Law Associates and deposited the proceeds thereof in an interest earning account in the joint names of Patrick Law Associates and Kariuki Runo & Co. Advocates, and which account is being held by the 2nd respondent.
6. The deponent stated that the 1st respondent is currently in the process of being dissolved and that the nature and extent of its assets remain unknown.
7. The deponent clarified that the 1st respondent was sued in the abovementioned Nyeri ELC NO. 261 OF 2013 in relation to the subject property and which suit is still pending in court, though the applicant has since ceased acting for the 1st respondent in the matter.
8. Ultimately, the deponent has urged this court to grant the injunctive orders in the interim until full payment of his legal fees is effected.
9. Going by the record, it is well established that both respondents were served with copies of the Motion but did not offer any replies. That being the case, the Motion proceeded *ex parte*.
10. In his oral arguments, *Mr. Bosek* counsel for the applicant while reiterating the averments made in his affidavit maintained his apprehension that once the proceeds of the sale are paid out to the 1st respondent's shareholders and other relevant persons, it may be dissolved, thus rendering the applicant's originating summons nugatory. The advocate in turn urged this court to order the 2nd respondent not to release the funds until the applicant's intended Bill of Costs is filed and taxed.

11. I have duly considered the grounds in the Motion and the facts deponed to in the supporting affidavit, as well as the oral submissions made on behalf of the applicant.

12. It is clear that this is a matter concerning the granting of an interlocutory injunction. In that case, the relevant principles as encapsulated in the prominent case of *Giella v Cassman Brown (1973) EA 358* are:

a. Whether there is a prima facie case.

b. Whether damages would be an adequate remedy in the event that an injunction is not granted and if not, whether the applicant would be able to give an undertaking in damages to the defendant(s).

c. Where the balance of convenience tilts.

13. As concerns the first principle, the Court of Appeal in *Mrao Ltd v First American Bank of Kenya and 2 others [2003] eKLR* sought to define a prima facie case in the following manner:

“A prima facie case in a civil application includes but is 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 that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

14. The Court further opined that:

“...a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.”

15. Drawing from the above, the applicant would be expected to demonstrate that its case is not only of an arguable nature but that there has been a genuine and evident infringement of its rights.

16. Having studied the facts presented before me, it is evident that the applicant is fundamentally claiming unpaid legal fees arising from its representation and work done in respect to the subject property. I have similarly perused the purported instruction letter dated 8th August, 2016 annexed to the Motion as “*JKB 1*” and observed that the same neither bears the 1st respondent’s company logo/letter head nor the applicant’s stamp evidencing receipt of the same, hence there is no way of ascertaining whether the said letter is authentic or not.

17. It is also my observation that the abovementioned letter bears signatures of persons purported to be the directors of the 1st respondent. Nonetheless, no other concrete evidence by way of documentation has been availed to confirm the true number and names of the directors of the 1st respondent. As it stands therefore, I have no way of telling whether or not the persons set out in the letter are indeed directors as claimed.

18. On the subject of sale of the subject property, I have likewise taken the time to peruse the annexures to the Motion and noted that the purported agreement for sale dated 1st August, 2017 between the 1st respondent and Grayston Construction Company Limited does not bear the respective companies’ seals.

19. In my considered opinion, the applicant would have done well to at least avail some form of explicit documentation to confirm that it represented the 1st respondent in Nyeri ELC NO. 261 OF 2013 and/or undertook work on its behalf; this was not done, unfortunately. Further to this, there is nothing to indicate that the 1st respondent is in the process of being dissolved or that the purported proceeds of the sale were placed under the care of the 2nd respondent in the referenced account or at all, as is alleged.

20. Put another way, the averments made by the applicant are not supported by evidence that is clear-cut, thereby placing this court in an extremely difficult position of having to grope in the dark. In the premises, I am doubtful that the applicant has established a prima facie case within the definition offered in the *Giella* case; I say this notwithstanding the reality that there has been no response from either of the respondents herein.

21. The second principle by and large touches on the adequacy of damages and whether the applicant stands to suffer irreparable loss that cannot be compensated through damages. In contemplation thereof, I make reference to the analysis portrayed in *Nguruman Limited v Jan Bonde Nielsen & 2 Others, CA NO. 77 OF 2012* as cited by the Court of Appeal in *Lucy Wangui Gachara v Minudi Okemba Lore [2015] eKLR* as hereunder:

“...If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage.”

22. As earlier indicated, I am aware that the applicant is claiming its legal fees from the 1st respondent. Nevertheless, I have already found that the said applicant has not met the first principle which is the establishment of a prima facie case.

23. Needless to say that I make reference to the applicant's arguments regarding the unknown assets and dissolution of the 1st respondent. In consideration thereof, I am of the view that in ordinary circumstances, the 1st respondent's inability to pay the damages would in itself be a valid cause for concern; however, the circumstances in this instance are unique in the sense that the applicant has not brought forth any proof of an advocate-client relationship between itself and the 1st respondent.

24. Even if the circumstances were different, the applicant would still be required to show that any loss that will be suffered cannot adequately be compensated through damages; this has not been done. In any event, the applicant's argument that the 1st respondent is in the process of being dissolved holds no water as the same stands unsupported. In the premises, I would be quite hesitant to come to the conclusion that the applicant has met the required threshold on this principle.

25. In addressing the third principle, I would say that the same is largely dependent on the first two. Going by my reasoning above, I am persuaded that the balance of convenience does not favour the applicant.

26. In the end, I do not find this to be a proper case to enable me exercise my discretion in favour of the applicant. Consequently, the Motion is dismissed for lacking merit. Costs to abide the outcome of the Originating Summons.

Dated, signed and delivered at NAIROBI this 30th day of July, 2019.

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L. NJUGUNA

JUDG

In the presence of:

..... for the Applicant

..... for the 1st Respondent

..... for the 2nd Respondent