



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 485 OF 2016

AMELI INYANGU & PARTNERS ADVOCATES.....1ST APPELLANT

SWARAN SINGH GHARIAL.....2ND APPELLANT

INTEGRA AUCTIONEERING (K) CO.....3RD APPELLANT

- V E R S U S -

FRANCIS MUTUA t/a KAMBURU SERVICE STATION....RESPONDENT

(Being an appeal from the ruling/order of Hon. Nyaloti Edna CM, Milimani Commercial Courts, delivered on 12th July 2016 in CMCC No. 213 of 2016)

JUDGEMENT

1. Francis M. Mutua t/a Kamburu Service Station the respondent herein, filed a compensatory suit against Ameli Inyangu and Partners Advocates, Swaran Singh Gharial & Integra Auctioneering (K) Co, the 1st, 2nd and 3rd appellants herein respectively. It is alleged by the respondent via the plaint dated 21st January 2016 that he rented office space in KCS house 6th floor which is owned by the 2nd appellant. The 3rd appellant acting on the instructions of the 1st appellant, distressed for rent in arrears alleged to amount to ksh.113,151.30/=. The respondent stated that he was not in any rent arrears. The respondent alleged that he had also deposited with the landlord, the 2nd appellant an extra ksh.129,937/= to hold until the expiry of his lease on 30th November 2018. This was in a bid to stop the nuisance the respondent was facing from the appellants.

2. The respondent via his plaint sought for judgement against the appellants jointly and severally for the recovery of aforesaid sum of ksh.113,115.30 that was distressed for rent. The respondent thereafter filed the notice of motion dated 29th February 2016, where it sought for injunctive orders against the appellants from levying distress and/or attaching its office items/goods. The learned trial magistrate Hon. Edna A. Nyaloti heard the motion and in her ruling she held that the respondent had met the threshold for the grant of interlocutory injunction.

3. Aggrieved by the aforesaid decision, the appellants preferred this appeal and raised the following grounds in their memorandum.

1. That the learned magistrate wholly and completely misapprehended the principles that are applicable in granting the equitable relief of injunction thereby arriving at an unjust decision.

2. That the learned magistrate erred in law and in fact in failing to exercise her discretion judicially particularly by granting an order for interlocutory injunction without giving reasons thereof.

3. That the learned magistrate's order is uncertain and incapable of being executed.

4. That the learned magistrate misdirected herself in ruling against the appellants contrary to the documentary evidence adduced in court; the said ruling is clearly biased against the appellants.

4) When the appeal came up for hearing, learned counsels appearing in this matter recorded a consent order to have the appeal disposed of by written submissions. I have re-evaluated the case that was before the trial court. I have also taken into account the appellants' submissions.

5) The 6 grounds of appeal may be summarised one main ground, which is whether or not the trial magistrate correctly applied the correct principles in granting an interlocutory injunction.

6) The principles to be considered in determining an application for an injunction were laid down in the case of **Giella vs Cassman Brown & Co. Ltd (1973) EA 358** as follows:

i. The applicant must make out a prima facie case with a probability of success; and

ii. The applicant must show that if he is denied the order for injunction he would suffer irreparable loss which cannot be adequately compensated by an award of damages; and

iii. If there is doubt as to either of the above, the court would decide the application on a balance of convenience.

7) I have perused the ruling delivered by the trial magistrate and it is apparent that the learned magistrate stated as it pertains the grant of interlocutory injunctions *inter alia* that;

“I have considered the application, the evidence and the submissions by the parties. I am satisfied that the applicant has met the threshold for grant of interlocutory injunction, pending the hearing and determination of the case.”

8) She did not go into the principles that guide such an application as laid down in the case of **Giella –vs-Cassman Brown & Co. Ltd (1973) EA**.

9) It’s the appellants submission that the learned trial magistrate failed to address her mind to the principles applicable to interlocutory injunction. The trial magistrate therefore did not give any reasons for her decision, for instance whether or not the applicant had established that it had a prima facie case among other factors.

10) It is trite law that an appellate court should not interfere with the exercise of the discretion of a trial court unless it is satisfied that the court in exercising his discretion has misdirected himself and has been clearly wrong and as a result there has been an injustice as were reiterated in the case of Mbogo and another –v- Shah (1968) EA 93.

11) It is clear from the outset that the trial court went off the mark when it failed to consider the principles for granting orders of injunction.

12) The lower court decision is hereby set aside. The motion dated 29th February 2016 to be heard afresh by another magistrate of competent jurisdiction other than Edna A. Nyaloti. Costs of the appeal to abide the outcome of the suit.

Dated, Signed and Delivered in open court this 26th day of January, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent