



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 116 OF 2014

FRANCIS ODHIAMBO OMONDI T/A

OMONDI & COMPANY ADVOCATES.....APPELLANT

-VERSUS-

NATIONAL BANK OF KENYA LIMITED.....1ST RESPONDENT

SEDCO CONSULTANTS LIMITED.....2ND RESPONDENT

ALFRED BURUCH BARGOTIO ALIAS

ALFRED BARGOTIO.....3RD RESPONDENT

(Being an appeal from the Ruling and Order of the Resident Magistrate in Eldoret

CMCC No. 556 of 2014 delivered on 11 September 2014 by Hon. S.M. Telewa, RM)

JUDGMENT

[1] This is an interlocutory appeal from the Ruling and Orders of the Resident Magistrate in **Eldoret CMCC No. 556 of 2014**. The suit was filed by the Appellant on **12 August 2014** in connection with a letter dated **21 July 2014** which the 2nd Respondent wrote through the 3rd Defendant and which the Appellant considered libelous to him. Hence among the reliefs sought before the lower court were prayers for General and Exemplary Damages as well as an Order of Injunction to restrain the Defendants by themselves, their agents, servants and or employees from hindering the Appellant's access to Parking Lot No. 32.

[2] Contemporaneously, the Appellant filed an application dated **11 August 2014** under Certificate of Urgency seeking for a Temporary Injunction to restrain the Respondents from barring his ingress and egress or hindering his access to the demised premises or Parking Lot No. 32. The application was heard and determined by **Hon. Telewa, RM**. In a Ruling delivered on **11 September 2014**, the Hon. Magistrate was of the conclusion that the application lacked merit. The same was accordingly dismissed with costs to the Respondents.

[3] Being dissatisfied with the decision of the Learned Trial Magistrate, the Appellant lodged this interlocutory appeal on **24 September 2014** on the following grounds:

[a] The Learned Trial Magistrate erred in law and in fact in failing to appraise properly all the evidence on record in support of the application dated **11 August 2014**;

[b] The Learned Trial Magistrate erred in law and in fact in considering extraneous irrelevant issues in determining the application for injunction;

[c] The Learned Trial Magistrate erred in law and in fact in failing to allow the application despite overwhelming evidence pointing to its merits;

[d] The Learned Trial Magistrate erred in law and in fact in reaching a wrong conclusion and against the weight of evidence;

[e] The Learned Trial Magistrate erred in law and in fact in failing to hold that the appellant had established a *prima facie* case for grant of injunction;

[f] The Learned Trial Magistrate erred in law and in fact in disregarding the Appellant's evidence in support of the application dated **11 August 2014**;

[g] The Learned Trial Magistrate erred in law and in fact in failing to find that the Appellant had discharged the burden of proof for the grant of an injunction at an interlocutory stage;

[h] The Learned Trial Magistrate erred in law and in fact in giving undue weight to the Respondent's responses;

[i] The Learned Trial Magistrate erred in law and in fact in failing to find for the Appellant;

[j] The Learned Trial Magistrate erred in law and in fact in failing to find that the Appellant had proved all limbs for the grant of injunction as laid down in the case of **Giella vs. Cassman Brown [1973] EA 358**;

[k] The Learned Trial Magistrate erred in law and in fact in assigning separate corporate status on the business names of **M/s Omondi & Company** and **M/s Wanga & Company Advocates**, despite there being no pleadings to the contrary.

[4] Accordingly, the Appellant prayed that the appeal be allowed and the Ruling in **Eldoret CMCC No. 556 of 2014** be set aside; and that the application be allowed, and orders be granted as prayed and in terms of that application pending the hearing of the main suit.

[5] The appeal was canvassed by way of written submissions in terms of the directions issued herein on **11 October 2017**. In the Appellant's written submissions, filed herein on **29 January 2018**, Counsel opted to argue the 13 Grounds of Appeal under the following broad heads:

[a] The status of the Appellant. (Grounds 12 and 13)

[b] Whether the Appellant established a prima facie case for the grant of injunction. (Grounds 3, 5, 6, 9 and 10)

[c] Whether the Magistrate relied on extraneous matters and ignored relevant evidence. (Grounds 1, 2, 4, 7, 8 and 11)

[6] It was the submission of the Appellant that at all material times and from the pleadings, it was clear that the Appellant carried on business as an Advocate in the name and style of **Omondi & Company Advocates** and **Wanga & Company Advocates**; and therefore that it was contrary to the weight of evidence for the Trial Magistrate to find and hold that there was no evidence that the Plaintiff changed from **Wanga & Company Advocates**. It was further the submission of the Appellant that it had proved all the limbs for grant of an interlocutory injunction as laid down in **Giella vs. Cassman Brown [1973] EA 358**, by availing sufficient documentation to demonstrate payment of rent. Counsel relied on **Naftali Ruthi Kinyua vs. Patrick Thuita Gachure & Another [2015] eKLR**; **Mbogo & Another vs. Shah [1968] EA 93** and **Nguruman Limited vs. Jan Bonde Nelsen & 2 Others Civil Appeal No. 77 of 2012**, to support his arguments.

[7] It was consequently the submission of Counsel for the Appellant that the lower court misdirected itself in declining to grant the injunction sought and thereby reached a wrong conclusion that the Appellant had not established a *prima facie* case. That, had the Learned Magistrate considered the dispute in the light of the competing interests, she would have come to the conclusion, based on the Appellant's documentation before the court, that temporary injunction was warranted.

[8] This being an interlocutory appeal, I am conscious of the need to refrain from making any conclusions on matters in dispute before the lower court as the trial is yet to take off. (See **David Kamau Gakuru vs. National Industrial Credit Bank [2002] eKLR**)

[9] It is manifest from the written submissions filed herein that the issues for determination in connection with the Notice of Motion dated **11 August 2014** were well set out by the Learned Trial Magistrate in her ruling, namely whether the Appellant had made out a case for the issuance of temporary injunction following the principles in **Giella vs. Cassman Brown**. She was of the view that no *prima facie* case had been made out by the Appellant for the reason that no lease agreement had been exhibited from which she could determine whether or not the Respondent was under obligation to provide the Appellant with parking space. The evidence availed to her indicated that the Appellant had been operating as a sub-tenant of **M/s Wanga & Co. Advocates** in breach of the terms of the lease as no consent had been obtained for the sub-lease. Secondly, she was of the view that in any event the Appellant could be compensated by way of damages if he succeeded at the hearing of the main suit. For those reasons the Learned Trial Magistrate dismissed the application.

[10] Needless to say that in refusing to grant an injunction, the trial court was exercising judicial discretion; and the well-beaten path is that an appellate court ought to be slow in interfering with the exercise of such discretion. This was well explicated by the Court of Appeal in **Lucy Wangui Gachara vs. Minudi Okemba Lore [2015] eKLR** thus:

"... As a rule an appellate court will not interfere with the exercise of discretion by the trial court, even if, in the shoes of the trial court, it would have come to a different conclusion. This principle is based on the fact that the discretion involved is the discretion of the trial court, not of the appellate court. The circumstances under which this Court will therefore interfere with the exercise of discretion by the trial court are limited and were well articulated by Madan, JA (as he then was) in UNITED INDIA INSURANCE CO. LTD V. EAST AFRICAN UNDERWRITERS (KENYA) LTD [1985] E.A 898, as follows:

"The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

[11] Having found that the lower court properly directed itself as to the principles for the grant of a temporary injunction, the only issue for me to consider is whether the Learned Trial Magistrate misapprehended the fact, or took into account considerations of which she ought not to have taken into account or failed to take into account consideration of which she should have taken into account. In this respect, Counsel for the Appellant contended that the Learned Magistrate failed to take into account evidence by way of receipts which would have shown that he had made out a *prima facie* case. However, as indicated herein above, the Magistrate hinged her decision on the failure by the Appellant to exhibit a tenancy agreement from which she could decipher the terms of engagement. I am therefore far from convinced that the decision of the Trial Magistrate was plainly wrong given the material that was placed before her.

[12] Accordingly, I find no merit in this appeal and would accordingly dismiss it with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 28TH DAY OF NOVEMBER 2018

OLGA SEWE

JUDGE