



REPUBLIC OF KENYA

High Court at Mombasa

Miscellaneous Civil Application 200 of 2012

AL TAJ ALAUDIN ALIBHAI.....APPELLANT/
APPLICANT

V E R S U S

JIWANI IMPEX
LIMITED.....RESPONDENT

RULING

1) Although these proceedings are intituted a Miscellaneous Civil Application they really are appeal proceedings which commenced by way of a Memorandum of Appeal. The Appellant is responsible for this confusion and I trust that the Registry will attend to this misdescription. I choose to refer to the Appellant/Applicant herein by his last name “**Alibhai**” and the Respondent Company by its first name “**Jiwani**”.

2) Alibhai preferred this Appeal against the decision of Hon. T. Ole Tanchu delivered on 18th September 2011 in Mombasa CMCC 3271”A” of 2010 **Al Taj Alaudin Alibhai –Vs- Jiwani Impex Limited** and simultaneously with it filed a Notice of Motion dated 21st September 2012 in which he seeks the following main prayers-

“(a) ...

(b) That the Honourable Court be pleased to restrain the Respondents from executing the order issued by Magistrate T. Ole Tanchu on the 18th September 2012.

(c) That the Honourable Court be pleased to reinstate the Applicant into the suit premises and his goods be returned into the said premises situated at Plot No. 1191/IV/MN.”

3) Some brief background. In Civil Suit No. 3271”A” of 2010 Alibhai sued Jiwani seeking that Jiwani be restrained from stopping his lorries and/or trucks from accessing premises on Plot No. 1191 (hereinafter the “**Suit premises**”) Jiwani defended that action and in an Amended Statement of Defence mounted a counterclaim seeking amongst other prayers an order that-

“(e) ... the Plaintiff vacates the suit premises and removes all his obsolete trucks.”

On 7th May 2012 Alibhai filed a reply to the Defence and Defence to counter-claim. It is not necessary to address the details of the rival claims.

4) By a Motion dated 17th May 2012 and filed on 21st May 2012 and expressed to be brought under

the provisions of Sections 1A and 1B and 3A of The Civil Procedure Act and Order 36 Rule 1 of The Civil Procedure Rules, Jiwani requested the lower court for the following prayers (as relevant to these proceedings)-

“(1) ...

(2) That Summary Judgment be entered against the Plaintiff as prayed in the Defendant’s Counterclaim.

(3) That the Honourable Court grants an eviction order against the Plaintiff and order that the Plaintiff forthwith vacate Plot No. 1191/IV/MN (the suit premises) and give vacant possession to the Defendant who is the rightful owner of the premises.

(4) That the Honourable Court enter summary judgment for rent/mesne profits as against the Plaintiff for unpaid rent at the rate of Kshs. 20,000/- per month from November 2009 upto the date of vacation of the suit premises by the Plaintiff.

(5) That the Plaintiff suit be dismissed with costs to the Defendant.”

One of the grounds for seeking these prayers was that Alibhai’s Defence to counterclaim was nothing but a base denial. This acknowledgement that Alibhai had filed a Defence, as will soon be apparent, is of great significance.

5) The learned Magistrate heard the parties on 26th June 2012 and reserved his decision for 18th September 2012. The decision was delivered on schedule. On that day Counsel representing Jiwani was present in Court. There was no appearance for Alibhai.

6) This is what the learned Magistrate said in the closing part of his decision-

“For the foregoing reasons therefore I do find that the Defendants application has merit and I enter summary judgment in favour of the Defendant in terms of Order No. 3 of the application, prayer No. 5 but with no orders as to costs. I further make an order that the Court Bailiff does supervise the eviction of the Plaintiff/Respondent from the suit premises to prevent any damage to the Plaintiff’s property. I decline to grant prayer No. 4 of application due to the circumstances and nature of this case. Costs of this application.”

7) Counsel for Alibhai has asked me to find that the appeal has overwhelming chances of success as the learned Magistrate erred in entering summary judgment where a Defence had been filed. He also complained about the manner in which the execution was carried out. It was Counsels contention that no warrants were taken out and no notice was given to his client.

8) In answer, Counsel for Jiwani argued that the application before Court was late as execution had already taken place. It was also argued that no case had been made for Alibhai to be reinstated back to the suit premises. That this being a prayer for Mandatory Injunction Alibhai had failed to meet the high threshold required before such an order is granted. In addition there was no irregularity in the summary judgment proceedings and decision.

9) At the close of the arguments, Counsel agreed that the Court calls for the lower Court record for purposes of perusing its contents. That was done.

10) In the exercise of its Appellate jurisdiction the High Court can grant a temporary injunction. Order 42 Rule 6(6) 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.”

In this Jurisdiction the High Court can grant a prohibitory or mandatory order.

11) For an application under Rule 42 6(6) to succeed the Applicant must satisfy the usual principles applicable to grant of injunctions (**Giella –Vs- Cassman Brown & Co. Ltd (1973)EA 358**). If, as here, the relief sought is mandatory in nature then the Applicant must, in addition, show special circumstances calling for this rare relief. This is what the Court of Appeal said of that threshold in **Nrb Civil Appeal No. 332 of 2000 Kenya Breweries Ltd & Another –Vs- Washington O. Okeyo-**

“The test whether to grant a mandatory injunction or not is correctly stated in Vol. 24 Halbury’s Law of England 4th Edition para. 948 which reads:-

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the Court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the Defendant attempts to steal a march on the Plaintiff ... a mandatory injunction will be granted on an interlocutory application.”

Also in **Locabail International Finance Ltd –Vs- Agroexport and Others [1986]1 ALL ER 901 at page 901** it was stated-

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the Defendant had attempted to steal a march on the Plaintiff. Moreover, before granting a mandatory interlocutory injunction the Court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

The principles of law enunciated by these decisions have received full approval by the Courts within our jurisdiction.”

12) I make a few remarks about the strength of Alibhai’s Appeal. Unlike the previous edition of The Civil Procedure Rules the grant of Summary Judgment is not available under The Civil Procedure Rules 2010 where a Defence to a claim has been filed. This is explicit from a comparison of the two editions. Order XXXV Rule 1(1) of The Previous Civil Procedure Rules read-

“In all suits where a Plaintiff seeks judgment for:-

- (a) ...
- (b) ...

where the Defendant has appeared the Plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.”

While Order 36 Rule 1(1) of The Civil Procedure Rules 2010 reads-

“In all suits where a Plaintiff seeks judgment for-

- (a) ...
- (b) ...

where the Defendant has appeared but not filed a Defence the Plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.” (emphasis mine)

The inclusion of the words but not filed a Defence in the new Rules makes all the difference. The intention is that Order 36 is not available where a Defence has been filed. A party wishing to mount a summary challenge on a Defence can do so under the provisions of Order 2 Rule 15 (striking out) or Order 13 Rule 2 (Judgment on admissions).

13) If I need support for this view, then I find it in the decision of Mabeya J in Nrb Civil Case No. 339 of 2011 James Juma Muchemi & Partners Ltd –Vs- Barclays Bank of Kenya Ltd & Another where he said-

“This means that the Drafters of The Civil Procedure Rules 2010 intended to completely bar Applications under Order 36 being brought after the Defence had been filed.”

14) It is common ground that Alibhai had set up and filed a Defence to Jiwani’s Counterclaim. Notwithstanding the clear provisions of Order 36 Rule 1, the learned Magistrate entered summary judgment against Alibhai and this was done in the face of submissions by Counsel for Alibhai that summary judgment was not grantable in the circumstances. My view is that the appeal has strong prospects of success. The application meets the first test in Giella –Vs- Cassman Brown & Co. Ltd (1973) EA 358.

15) What loss would Alibhai suffer if the order is not granted? His trucks and other property will be kept out of the suit premises. This undoubtedly is an injury that can be compensated in damages. An injunction would ordinarily then not be deserved. But there are aspects of these proceedings that sway me towards granting a mandatory injunction.

16) The learned Magistrate read his decision on 18th September 2012. That decision, admittedly, was read in the absence of Alibhai’s Advocate. The Order was fairly drastic. It required that Alibhai be evicted forthwith from the suit premises under the supervision of a Court Bailiff. The Order was extracted on the very same day (18th September 2012) of the Ruling and duly signed by the learned Magistrate. Although this Court was not told when exactly the eviction was carried out, it must have happened by 21st September 2012 when Alibhai filed the present application. This would be three (3) days after the decision was rendered. There is no evidence that Alibhai was given prior notice of the Order before his eviction.

17) That Order, in my view, was prepared contrary to the provisions of Order 21 Rule 8 of The Civil Procedure Rules which provides-

“8. (1) A decree shall bear the date of the day on which the judgment was delivered.

(2) Any party in a suit in the High Court may prepare a draft decree and submit it for the approval of the other parties to the suit, who shall approve it with or without amendment, or reject it, without undue delay; and if the draft is approved by the parties, it shall be submitted to the registrar who, if satisfied that it is drawn up in accordance with the judgment, shall sign and seal the decree accordingly.

(3) If no approval of or disagreement with the draft decree is received within seven days after delivery thereof to the other parties, the registrar, on receipt of notice in writing to that effect, if satisfied that the draft decree is drawn up in accordance with the judgment, shall sign and seal the decree accordingly.

(4) On any disagreement with the draft decree any party may file the draft decree marked as “for settlement” and the registrar shall thereupon list the same in chambers before the judge who heard the case or, if he is not available, before any other judge, and shall give notice thereof to the parties.

(5) The provisions of sub-rules 2, 3 and 4 shall apply to a subordinate court and reference to the registrar and judge in the subrules shall refer to magistrate.

(6) Any order, whether in the High Court or in a subordinate court, which is required to be drawn up, shall be prepared and signed in like manner as a decree.

(7) Nothing in this rule shall limit the power of the court to approve a draft decree at the time of pronouncing judgment in the suit, or the power of the court to approve a draft order at the time of making the order.” (my emphasis)

The emphasis is to show that by virtue of Rules 5 and 6, orders in Subordinate Courts must also be prepared in compliance with Rules 1, 2, 3 and 4 above. This was not done in the instant case. Jiwani's Counsel did not seek the approval of the order by his counterpart. This contravened Rule 2 above. Further, this Court has perused the lower Court file and does not see any record to suggest that the learned Magistrate approved a draft Order at the time of giving his decision (See Rule 7 above). This Court is not saying that the Order was not drawn in accordance with the decision. But the circumvention of the Rules appears to have been driven by bad faith.

18) The haste in which the eviction was carried, without prior notice to Alibhai, is a demonstration that there was an intention to steal a march. This Court will not countenance the breach committed by Jiwani's Counsel in preparation of the Order. It is precisely in circumstances of this nature that a Court of law should grant a mandatory injunction to reverse an advantage unlawfully obtained. For this reason I allow the application dated 21st September 2012 with costs. Jiwani shall within 7 days of this decision allow Alibhai back into the premises and to remain thereon until this Appeal is heard and determined.

Dated and signed at Mombasa this 23rd day of November, 2012.

**F. TUIYOTT
JUDGE**

Dated and delivered in open court in the presence of:-

Kiume Kioko for Applicant

No appearance for Respondent

Court clerk - Moriasi

**F. TUIYOTT
JUDGE**