Geo Net Communications Limited v Kenya Reinsurance Corporation & another (Environment and Land Appeal 11 of 2022) [2022] KEELC 14466 (KLR) (31 October 2022) (Ruling)

Neutral citation: [2022] KEELC 14466 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND APPEAL 11 OF 2022

MD MWANGI, J

OCTOBER 31, 2022

BETWEEN

GEO NET COMMUNICATIONS LIMITED ..... APPELLANT

AND

KENYA REINSURANCE CORPORATION ..... 1ST RESPONDENT

GALAXY AUCTIONEERS ..... 2ND RESPONDENT

RULING

(In respect of the notice of motion application dated the June 23, 2022 seeking an interim injunction pending appeal)

Background

1. Before me is the appellant/applicant's notice of motion dated June 23, 2022. The appellant/applicant prays for temporary orders of injunction restraining the respondents, their servants or agents from attaching, carting away, selling, levying of distress for rent or in any way dealing with the applicant's goods proclaimed on November 11, 2021 and/or interfering with the applicant's quiet use and possession of the leased office space on the 10th floor at Kenya Re Towers, Upper Hill, Nairobi. The appellant/applicant also prays for costs.

2. The application is premised on the grounds on the face of it. The appellant/applicant states that the honourable court at the Milimani Chief Magistrate's Court (in Milimani CMCC 12276 of 2021) delivered a ruling on May 23, 2022 dismissing its application for a temporary injunction. It accuses the court of misapplying the principles for grant of a temporary injunction and disregarding the fact that the appellant had adduced evidence to the effect that the 1st respondent had failed to render a true account of the rent arrears. Further, parties had agreed to negotiate but the 2nd respondent went ahead to levy distress.

3. The appellant/applicant further argues that the court exercised its discretion capriciously and on wrong principles. The court failed to consider that it would be very unsafe to dismiss the appellant's application before hearing the parties to get a clarity on the rent arrears.

4. The appellant has since filed an appeal against the said ruling which appeal will be rendered nugatory if the order of temporary injunction is not issued as the 1st and 2nd respondents will proceed and proclaim on its goods thereby causing it irreparable loss and damage. The applicant pleads that the application is meritorious and has been brought without unreasonable delay.

5. The application is brought under the provisions of sections 1A ,1B, 3A, 27(1), 79(G) of the *Civil Procedure Act* and order 22 rule 22 & order 51 of the *Civil Procedure Rules 2010*). It is supported by the affidavit of Peter Maina, the director of the appellant/applicant sworn on the June 23, 2022.The deponent majorly reiterates the averments contained in the grounds in support of the application.

6. Despite service being effected upon the respondents, no responses have been filed. There is a return of service on record confirming service. The application is therefore unopposed.

Court's Directions

7. The application was filed under certificate of urgency and the court gave directions on the July 7, 2022 to the effect that the application be dispensed with by way of written submissions. The appellant/ applicant did not file submissions.

Issues for Determination

8. In the court's opinion, the issues for determination in this matter are:

    a. Whether an order of temporary injunction may be granted pending appeal.

    b. Whether the applicant in this matter has satisfied the test for the grant of an order of temporary injunction pending appeal.

Analysis and Determination

A. Whether an order of interim injunction may be granted pending appeal.

9. The Supreme Court of Kenya in the case of *Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others* [2018] eKLR opined that a court of law is obligated whenever an application is presented before it, whether opposed or not, to satisfy itself that the application is meritorious and that it has the necessary jurisdiction to grant it. The court stated that;

> "…. as a court of law, we have a duty in principle to look at what the application is about and what it seeks. It is not automatic that for any unopposed application, the court will as a matter of cause grant the sought orders. It behooves the court to be satisfied that *prima facie*, the application is meritorious and the prayers may be granted. The Court is under a duty to look at the application and without making any inferences on facts point out any points of law, such as any jurisdictional impediment, which might render the application a non-starter."

10. Order 42, rule 6 of the *Civil Procedure Rules* empowers this court in exercising its appellate jurisdiction to grant a temporary injunction. The rule provides that: -

> "(6) Notwithstanding anything contained in sub rule (1) of this rule, the High Court shall have power in 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 a tribunal has been complied with."

11. Section 79G of the *Civil Procedure Act* provides for the time within which appeals from subordinate courts to the High Court can be filed as follows: -

> " Every appeal from a subordinate court to the High Court shall be filed within thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.

12. As stated in rule 6 above, where the procedure for instituting an appeal has been complied with, the court may exercise its discretion to grant a temporary injunction. As this court pronounced in the case of *Kenya Harlequin Football Club vs Quaco Two Hundred and Thirty-Two Ltd & another* (2022) eKLR, under the provisions of order 42 rule (1), appeals to the High Court (and courts of equal status, off course), are in the form of a memorandum of appeal signed in the same manner as a pleading.

13. The appellant/applicant has complied with the procedure for instituting an appeal (from a subordinate court or a tribunal) having filed a memorandum of appeal in accordance with the provisions of order 42 of the *Civil Procedure Rules*. An order of temporary injunction may therefore lawfully be granted, if the application is merited.

B. Whether the applicant in this case has satisfied the test for the grant of an order of temporary injunction.

14. Justice Visram J (as he then was), while considering a similar application in the case of *Patricia Njeri & 3 others vs National Museum of Kenya* (2004) eKLR, spelt out the principles to be followed in considering an application for a temporary injunction pending appeal. He stated that the power of the court to grant any order of temporary injunction is discretionary. Discretion must however be exercised judicially and not in a whimsical or arbitrary fashion.

15. The exercise of that discretion should be guided by certain principles as follows: -

    a. The discretion will be exercised against an applicant whose appeal is frivolous.

    c. The discretion should be refused where it would inflict greater hardship than it would avoid.

    d. The applicant must show that to refuse the injunction would render his appeal nugatory.

    e. The court should be guided by the principles in Giella vs Cassman Brown & Company Ltd (1973) EA 358.

16. It is important to note that the Magistrate's Court is yet to pronounce itself on the merits of the appellant/applicant's case as the main suit is yet to be heard. This court is equally yet to hear and determine the appeal lodged before it. The court will therefore be "mean" with its words so as not to prejudice the outcome of the said matters and/or embarrass the respective trial courts.

17. From the grounds in support of the application as well as the supporting affidavit, the appellant/ applicant seeks to stay the levying of distress against it by the Landlord pending the determination of its appeal herein. The appellant/applicant has leased office space from the 1st respondent. The lease is for a term of six years effective November 1, 2019.

18. The principles to be considered in determining an application for an order of temporary injunction were pronounced in the famous case of *Giella vs Cassman Brown* [1973] EA 358, where it was held that in order to qualify for an injunction: -

> " First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable harm which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience."

19. The question which now arises is whether the applicant has made a case for the grant of orders of temporary injunction to restrain the 1st respondent from exercising its right as a landlord to levy distress for the rent arrears duly owed to it.

20. Has the applicant established a *prima facie* case against the respondent?

21. In the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR the Court of Appeal elaborated the meaning of a *prima facie* case and stated as follows:

> " 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."

22. The appellant/applicant in this case does not dispute that it is in arrears of rent. It actually acknowledges being in arrears of rent. The 1st respondent has since instructed the 2nd respondent to proclaim the appellant's assets in exercise of its right to levy distress for rent. The appellant/applicant complaint against the 1st respondent is that it has failed to render an account of the amount due and in arrears. It does not however state the amount it owes the 1st respondent according to its own calculations.

23. I need to categorically state that a landlord under the law has a right to levy distress for rent arrears. The applicant has not demonstrated why the 1st respondent/landlord should be barred from exercising its right to levy distress for rent. The court would only interfere with a landlord's exercise of that right if it is demonstrated to be illegal. The Court of Appeal in the case of *CYO Owayo – vs- Gorge Hannington Zephania Aduda t/a Aduda Auctioneers & another* (2007) eKLR cited various instances in which distress for rent may be illegal warranting the court's intervention. The court stated that: -

> " We must not only consider our laws, but must also consider what in England would be considered an illegality in the levy of distress. In Halsbury's Laws of England, 4th edition volume 13 paragraph 368 it is stated:
>
> "368. Circumstance in which distress is illegal
>
> An illegal distress is one which is wrongful at the very outset, that is to say either where there was no right to distrain or where a wrongful act was committed at the beginning of the levy invalidating all subsequent proceedings.

> The following are instances of illegal distress; a distress by a landlord after he has parted with his reversion; a distress by a person in whom the reversion is not vested; a distress when no rent is in arrear; or for a claim or debt which is not rent; as a payment for the hire of chartels; a distress made after a valid tender of rent has been made; a second distress for the same rent; a distress off the premises or on the highway; a distress in the night that is between sunset and sunrise ..... a distress levied or proceeded with contrary to the law of distress.....”

24. In the instant case, the applicant has not stated how and or demonstrated why the proposed levying of distress against it by the 1st respondent is illegal. Rent has been acknowledged to be due and owing. My finding is that since the applicant has acknowledged being in arrears of rent, it means that he is in breach of one of the fundamental conditions of a tenancy agreement; that is the obligation of a tenant to pay rent for the leased premises. Accordingly, the applicant has not established a *prima facie* case as defined in the *Mrao Ltd* case (*supra*).

25. The Court of Appeal in *Nguruman Ltd vs Jan Bonde Nielsen & 2 others* (2014), while upholding the 3 conditions pronounced in the *Giella* case stated that, ‘the 3 conditions and stages are to be applied as separate distinct and logical hurdles which an applicant is expected to surmount sequentially.’

26. Guided by the decision in the *Nguruman Ltd* case (*supra*), this court in the case of *Nicholas Njeru Muturi -vs- Thome Dynamics Limited & another* [2022] eKLR stated that the essence of the holding in the *Nguruman* case is that ‘...if a *prima facie* case is not established, the court need not go farther to consider if the applicant has established the irreparable injury that he would suffer, if an order of temporary injunction is not granted.’

27. The appellant/applicant having failed to establish a *prima facie* case against the 1st respondent, the court needs not go any farther. The application must fail at this point. The appellant/applicant has therefore not met the test for the grant of an order of a temporary injunction pending the hearing and determination of the appeal.

28. Accordingly, I hereby dismiss the notice of motion application dated June 23, 2022 with no orders as to costs.

    It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF OCTOBER 2022

M.D. MWANGI

JUDGE

In the virtual presence of:

No appearance by the parties.

Court Assistant – Hilda.

M.D. MWANGI

JUDGE