



Alwy & another v Engroup (K) International Limited (Civil Appeal E59 of 2021) [2023] KEELC 16340 (KLR) (8 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16340 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CIVIL APPEAL E59 OF 2021**

**LL NAIKUNI, J
MARCH 8, 2023**

BETWEEN

MOHAMED ALWY 1ST APPELLANT

DAVID NGURE KIENJEKU 2ND APPELLANT

AND

ENGROUP (K) INTERNATIONAL LIMITED RESPONDENT

RULING

I. Introduction

1. The 2nd Appellant/Applicant, David Ngure Kienjeku, moved this Honorable Court for the hearing and determination of a Notice of Motion application dated May 5, 2022 under Sections 1A, 1B, 3A, 12, 13, 15 and 18 of the *Civil Procedure Act*, Cap 21, Order 40 Rules 1, 2 & 3 and Order 51 Rule 1 of the *Civil Procedure Rules*. He sought the following orders.
 - a. Spent.
 - b. Spent.
 - c. That this Honorable Court do issue temporary injunction restraining the Respondent and/or its agent, servant and/or representatives to with Moran Auctioneers from carrying away the tenant's proclaimed tools of trade and/or in any other manner whatsoever interfering with the tenant's peaceful occupation of the demised premises pending the hearing and hearing of this Appeal already pending in Court.
 - d. That the OCS central police station to ensure compliance with the order.
2. The application is based on the facts on the face of the application and an 11 Paragraphed Supplementary Supported Affidavit of David Ngure Kienjeku the 2nd Appellant/Appellant and three



- (3) annexures Marked as “DN – 1 to 3”). The Appellant averred that the Court ruled on February 9, 2022 and directed the Appellants to continue paying the old/current rent pending the determination of the appeal. The Court directed the Appellants to provide security for costs by depositing the decretal sum which was the rental sum as ordered by the Business Premises Rental Tribunal on September 10, 2021, which was rent from March 1, 2021 to September 24, 2021. The decretal sum was to be deposited within 60 days from the date of the ruling, in an interest earning joint account in the names of Counsel on record for the parties herein.
3. The Appellant averred that on April 8, 2022, he caused a cheque numbers 000969 to issue in favour of Michael Ngure & Co Advocates & Abdulrahman, Saad & Associates for a sum of Kenya Shillings Three Eighteen Thousand Five Hundred (Kshs 318,500/=) (marked as “DN -3”) the decretal sum as advised by his advocate on record, Michael Ngure & Co Advocates, vide a letter dated March 8, 2022 (marked “DN – 2”). On April 8, 2022, the two Counsels on record resolved to open an account with the financial NCBA Bank of Africa - Moi Avenue branch in the joint names of the two Law firms Messrs. Michael Ngure & Co Advocates and Abdulrahman, Saad & Associates (marked as “DN – 4”). In order to take action with regard to opening the bank account, the Counsel for the Appellant, Michael Ngure & Co. Advocates wrote to the Law firm of Messrs. Abdulrahman, Saad & Associates on April 8, 2022, to supply documents such as the 2022 practicing certificate, a copy of national identification card, the Kenya Revenue Authority (KRA) PIN Certificate and the Passport photos (marked as “DN -5”). Upon the joint bank account being opened, the said cheque was banked on April 27, 2022 as evidenced by the e - statement of account from the bank for the period of April 1, 2022 to April 30, 2022 (Marked as “DN – 6”).
 4. The Appellant stated that despite complying with the orders of the Court, the Respondent instructed Moran Auctioneers on April 13, 2022 to proclaim his goods of trade vide a proclamation notice dated April 25, 2022 (Marked as “DN -1”). The 2nd Appellant had reason to believe that the 1st Appellant had since pulled out of the Appeal after having an informal meeting with the Respondent and his Counsel on record at the exclusion of the Applicant and his Counsel. The Applicant urged Court to grant the orders prayed least his appeal is rendered nugatory, an appeal which he believes is merited and has probability of success.

II. Respondent’s responses

5. On May 20, 2022, the Respondent being opposed to the application vide a Replying Affidavit dated even date. It was sworn by Faud Abdallah, its director. He deponed that the Applicant had defied the Court orders issued on February 9, 2022, by paying Kenya Shillings Three Eight Eighteen Thousand Five Hundred (Kshs 318,500/=) instead of Kenya Shillings Three Fifty Thousand (Kshs 350,000/=) which was the decretal sum. He argued that the Applicant issued unbanked cheques between the months of March 2021 and September 2021, which were still unbanked till date. Hence, the Appellant was not in any way entitled to deduct the said sum of Kenya Shillings Thirty One Thousand Five (Kshs 31,500/=) from the decretal sum.
6. The deponent maintained that the Applicant ought to have opened the said bank account within 60 days. That is to say, the Appellant ought to have deposited a sum of Kenya Shillings Three Fifty Thousand (Kshs 350,000/=) between February 9, 2022 to April 8, 2022. It was said that the Applicant waited until the last day when his orders were to vacate, April 8, 2022 to communicate with the Respondent’s Counsel with an aim of opening the account at the last minute. Further, the Applicant was accused of drawing a cheque on April 8, 2022, for a non - existing bank account which was eventually banked on April 27, 2022 which was 17 days after the deadline for depositing the decretal sum had passed. The Respondent sustained that the Applicant owed him Kenya Shillings Seventy



Thousand (Kshs 750,000/=) in rent arrears from the unbanked cheques and the said ruling from the tribunal.

7. The deponent stated that the 1st Appellant approached him to pay the rental arrears and vacate the premises, which he agreed. He maintained that the stay orders granted by Court on February 9, 2022 had been vacated on April 11, 2022 on the account on non - payment of the decretal sum as ordered by Court. He urged Court to dismiss the application and to strike out the appeal since he had suffered great prejudice and serious financial loss from the non - payment of rent by the Applicant.

III. The Supplementary Affidavit by the 2nd Appellant/Applicant

8. The 2nd Appellant/Applicant responded to the Replying Affidavit vide a Supplementary Affidavit dated May 27, 2022, sworn by the applicant. He deponed that Fuad Abdallah, the deponent of the Replying affidavit dated May 20, 2022 was an imposter since he was not one of the Respondent's director, as seen from the CR – 12 Form accessed from the Registrar of Companies as at May 23, 2022 (Marked as “DN – 1”). Further the 2nd Appellant/Applicant stated that the tribunal ordered him to pay rent to Faiza Abdalla Brek Said vide a bankers cheque, which he had been compiling with (Marked as “DN – 2”). He argued that he has ever been in arrears, if anything his Advocate wrote to the Respondent's Advocate on May 5, 2022 in response to the Respondent's Counsel letter dated April 6, 2022, requesting them to furnish them with instructions on whom to remit the rent to, but the same has not been responded to.
9. Further, the applicant argued that his advocate on record was not aware of the negotiations happening between the 1st Appellant and the Respondent, and contended that the 60 days were wasted with the back and forth between the advocates to avail the documents for the opening of the joint account. The Deponent maintained that his appeal has a high chance of success and urged court to address itself on substantive justice and not mere technicalities since the intended purpose has been achieved.

IV. The Respondent's Response to the Supplementary Affidavit

10. The Respondent replied to the Appellant's Supplementary Affidavit vide a further affidavit dated August 4, 2022 sworn by Fuad Abdallah. However, the same was expunged from the Court's record on September 29, 2022 for being filed without leave of Court and furthermore, for being out of the scope of law as provided by the provision of Order 51 Rule 14 of the [Civil Procedure Rules, 2010](#). This right was not available to the Respondent.

V. Submissions

11. On September 29, 2022 while all the parties were present in Court, they were directed to have the application canvassed by way of written submissions with stringent timelines. Pursuant to that, by the time the Court was penning down the ruling, apparently only the Respondent had complied. Thereafter, the Court reserved a date to deliver the ruling on notice accordingly.

A. Written Submissions by the Respondents

12. On August 18, 2022, the firm of Messrs. Abdulrahman Saad & Associates Advocates filed their written submissions. Mr. Makori Advocate submitted that the 2nd Appellant/Applicant failed to comply with the orders of February 9, 2022. This led the Respondent serving him with a demand letter on April 6, 2022 demanding a sum of Kenya Shillings Seventy Two (Kshs 72,000/=). Further it was submitted that the 2nd Appellant/Applicant was supposed to pay Kenya Shillings Three Hundred and Fifty Thousand (Kshs 350, 000/=) as the decretal sum but he only deposited Kenya Shillings Three Eighty (Kshs. 318,000/=). The decretal sum was deposited on April 8 2022 which was 17 days after the deadline of



depositing the decretal sum as ordered by Court from 9th February 2022. The Counsel urged Court to dismiss the appeal for failure to comply with orders on security for costs as per the provision of Order 42 Rule 14 (3) of the [Civil Procedure Rules, 2010](#). The Counsel submitted that non-compliance of the 2nd Appellant/Applicant with the orders of Court led to the stay orders being vacated on April 11, 2022. Since the orders were vacated, it was within the rights of the Respondent to instruct auctioneers to proclaim the 2nd Appellant/Applicant's properties to recover the rental amount. The Counsel submitted that the proclamation notice issued was lawful since the 2nd Appellant/Applicant failed to deposit the security for costs within the timeframe provided by Court.

13. The Counsel submitted that the 2nd Appellant/Applicant's application for injunctive orders pending the hearing and determination of the suit as laid down in the case of:- "*Giella v Cassman Brown & Co. Limited* [1973] EA 358, which set out the three requirements that has to be satisfied in an interlocutory injunction application. The applicant has to establish his case only at a prima facie level, demonstrate irreparable injury if a temporary injunction is not granted, and where the Court has any doubts, it would be decided on a balance of convenience. The Counsel submitted that the 2nd Appellant had failed to establish a prima facie case since he had not complied with the conditions set by Court on the stay orders. On the second limb of irreparable loss, the Counsel submitted that the Respondent was the one incurring costs and losing business over the 2nd Appellant/Applicant's action of remaining on the suit property and failing to remit rent.
14. Further the 2nd Appellant/Applicant was said not be worthy of an equitable remedy of injunction while having unclean hands of noncompliance. It was said that the 2nd Appellant/Applicant had not demonstrated to Court how he would suffer irreparable loss if the orders was not granted. The Counsel urged Court to find that the balance of convenience tilted in favour of the Respondent who stood to suffer loss and find the application lacked merit and dismiss the same with costs to the Respondent.

VI. Analysis and Determination

15. I have carefully assessed the Notice of Application dated May 5, 2022 and the filed Submissions herein by the parties. The Court has underscored three (3) issues for its consideration. These are:-
 - a. Whether the Notice of Motion application dated May 5, 2022 by the 2nd Appellant/Applicant herein meets the threshold required to be considered for granting of temporary injunction orders sought under the provision of Order 40 Rules 1, 2 and 3 of the [Civil Procedure Rules, 2010](#).
 - b. Whether the parties herein are entitled to the orders sought.
 - c. Who will bear the costs of the application?

ISSUE No. a). Whether the Notice of Motion application dated 5th May, 2022 by the 2nd Appellant/Applicant herein meets the threshold required to be considered for granting of temporary injunction orders sought under the provision of Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules, 2010.

16. Under this Sub heading, it is instructive to note that the power of Court in an application for interlocutory injunction is unfettered and free discretionary. The discretion should not only be exercised judiciously but also on the basis of law and evidence. It is now well established that the principles which guide the Court in deciding whether or not to grant an interlocutory injunction are set out in "the Locus Classicus" case of: "*Giella – Versus - Cassman Brown & Co. Limited* [1973] EA 358, From this decision, the three (3) pre – conditions to be satisfied to grant an interlocutory



injunction application were laid down. These are, firstly, the applicant has to establish having “a *prima facie*” case; Secondly, then the Applicant has to demonstrate not being granted the order would suffer irreparable injury without being able to be compensated by an award of damage and thirdly, where the Court has any doubts, whatsoever, it would be decided on a balance of convenience.

17. The Court of Appeal in the case:- “*Mrao Limited v First American Bank of Kenya Limited & 2 others* [2003] KLR 125 defined “a *prima facie* case” to mean:-

“So what is a *prima facie* case? I would say that in civil cases it is a case in 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.” The court went further to hold 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 case upon trial. That is clearly a standard which is higher than an arguable case.”

18. Having stated out the basic principles of law, the Court now wishes to apply them to the instant case. To begin with, there is need to establish whether the 2nd Appellant/Applicant herein has demonstrated having a “*prima facie* case” based on the surrounding facts and inferences of the matter. It is critical for at this stage for the 2nd Appellant/Applicant herein to demonstrate that he has complied with the conditions issued by Court on February 9, 2022. Further, he has to show Court that the stay orders granted were never vacated but are still alive as the Respondent purports to issue him with a proclamation notice.

19. On February 9, 2022 the Court allowed the application dated September 23, 2021 filed by the Appellants seeking stay of execution of the orders issued and the ruling of Business Premises Tribunal delivered on September 10, 2021 in BPRT 308 of 2020. The Court granted a stay of execution on the following conditions:-

- a. That until the filed appeal is heard and determined the 1st and 2nd Appellant/Appellants to continue paying the old and/or current tenancy rent to the Respondent as stated in the duly executed tenancy agreement terms and conditions stipulated thereof.
- b. That the 1st and 2nd Appellants/Applicants to provide security for costs by depositing the decretal sum, which is the rental sum as ordered by the Business Premises Rent Tribunal on September 1, 2021, from March 1, 2021 to September 24, 2021 when the application was filed in court.
- c. That the decretal sum hereby be and shall be deposited in an interest earning escrow joint holding bank account in the names of Messrs. Michael Ngure & Company Advocates and Abdulrahman Saad & Associates the Counsel on record for both the 1st and 2nd Appellants/Applicants herein and Respondent, Within The Next 60 Days from the date of this ruling, failure to adhere these orders stay vacated.
 1. From the above order, the Court never specified the actual rental amount the 2nd Appellant/Applicant was directed to deposit as Security for Costs. The Court felt better to avoid micro – managing the parties by letting them agree on the actual computation of the outstanding sum. Secondly, it appears some slight confusion may have emerged from the orders obtained. The 2nd Appellant/Applicant in his supplementary affidavit maintained that the orders of the tribunal dated December 4, 2009 emanated from the “Tribunal Case No. 98 of 2009 - David Ngure T/A David



General Stores – Versus - Faiza Abdalla Brek Said” whereupon he was directed to pay rent to Faiza Abdalla Brek Said. However, in the application dated September 23, 2021 (that was allowed in the ruling dated February 9, 2022), the orders which was stayed by court were in “Tribunal Case No. 309 of 2020 David Ngure Kienjeku – Versus - Engroup (K) International Limited and Sure Auctioneers and Tribunal Case No. 308 of 2020 Mohamed Alwy – Versus - Engroup (K) International Limited. The old rent that the Court directed the Appellant/Applicant to continue paying ought to have been paid to in the name of Engroup (K) International Limited as directed by Court.

2. The Respondent is a limited company, with a legal identity separate from its directors, with the ability to hold a bank account. The 2nd Appellant/Applicant in his Supplementary Affidavit dated May 27, 2022 demonstrated through attaching a CR1 - 2 Form dated February 7 2001 that the Respondent’s directors are Abdalla Brek Said and Stella Katuku Muendo. This led the Respondent serving him with a demand letter on April 6, 2022 demanding a sum of Kenya Shillings Seventy Two (Kshs 72,000/=). Further it was submitted that the 2nd Appellant/Applicant was supposed to pay Kenya Shillings Three Hundred and Fifty Thousand (Kshs 350, 000/=) as the decretal sum but he only deposited Kenya Shillings Three Eighty (Kshs 318,000/=). The decretal sum was deposited on April 8, 2022 which was 17 days after the deadline of depositing the decretal sum as ordered by Court from February 9, 2022. As a result of all these mix ups, the 2nd Appellant/Applicant should get a benefit of doubt.
3. The second condition imposed on the Applicant/Appellant was to deposit the decretal sum, which is the rental sum as ordered by the tribunal on September 10, 2021 in an interest earning escrow joint holding bank account in the names of both advocates on record within 60 days from February 9, 2022.
4. Basically the court directed the applicant to adhere to the notice dated November 20, 2020 and deposit a rental sum of Kenya Shillings Fifty Thousand (Kshs 50,000/=) from March 1, 2021 to September 24, 2021. The applicant claimed that he received a letter dated March 8, 2022 from Michael Ngure Advocates, his advocates advising him to pay Kenya Shillings Three Eighteen Thousand (Kshs 318,000/=) which would have been Kshs 45,500 (less the Kshs 4,500) as opposed to Kshs 50,000/= as ordered by the tribunal. In my view the applicant was directed by court to deposit Kshs 350,000/= which would have been the rent for 7 months. On April 8, 2022, the applicant went ahead to deposit the said amount into NCBA Moi Avenue branch, Account No 7936720014, Account Name Michael Ngure & Co Advocates and Abdulrahman, Saad & Associates.
5. In my view it was misleading for counsel for the applicant to advise his client to pay Kshs 45,500/= as opposed to Kshs 50,000/= as directed by the tribunal. Therefore, to me this are all issues of arithmetics and which parties should be allowed some leverage to resolve among themselves without having to drag Court into it. Thus, all said and one, the 2nd Appellant/Applicant fully complied with the orders of this Court of depositing the decretal sum.
6. From the given circumstances, the Respondent had no right to distress for rent as it did vide the Proclamation of attachment of moveable property dated April 25, 2022. In a nutshell, having satisfied Court that he fully complied with the conditions set out by this Honorable Court from the stay orders issued on February 9, 2022 and hence has proved bearing “a *prima facie* case” with a probability of success at the hearing.



7. Having proved that the 2nd Applicant/Appellant has “a *prima facie* case”, the court need now to consider the other limbs of irreparable damages. From the facts of this suit, on April 13, 2022 the Respondent instructed Moran Auctioneers to proclaim his goods of trade vide a proclamation notice dated April 25, 2022 (Marked as “DN -1”). Indeed, it is held that the 2nd Appellant/Applicant had been under the illusion that perhaps the 1st Appellant had since pulled out of the Appeal after having an informal meeting with the Respondent and his Counsel on record at the exclusion of the 1st Appellant/Applicant and his Counsel. Arising from happenings, in order to protect its trade and the Auctioneers from carrying away the tenant’s proclaimed tools of trade and/or in any other manner whatsoever interfering with the tenant’s peaceful occupation of the demised premises he moved Court through this application. Clearly, if denied the orders sought yet he has already complied with this Court’s orders afore stated it will be travesty of Justice and he will be exposed to suffer irreparable damages not able to be compensated by way of damages.
8. The Court need not say any more on the third limb on the conditions to grant injunction orders. It follows that the balance of convenience tilts in favour of the 2nd Appellant/Applicant.

ISSUE No. Who will meet the Costs of the application?

28. The issue of Costs is the discretion of the Court. Costs means the award granted to a party at the conclusion of a legal action, proceedings and process of any litigation. The proviso of the provision of Section 27 (1) of the [Civil Procedure Act](#), Cap. 21 holds that costs follow the event. By event it meant the result of the legal action, proceedings and process.
29. In the instant case, the Applicant/Appellant has succeeded in prosecuting its application. Thus, they are entitled to the Costs of the application.

IV. Conclusion & Disposition

30. Consequently, the 2nd Appellant/Applicant has demonstrated to Court he has “a *prima facie* case” with a probability of success. On preponderance of probability, the Court is satisfied that the application is successful. Thus, I proceed to order as follows: -
 - a. That the Notice of Motion Application dated May 5, 2022 be and is hereby allowed as it has merit.
 - b. That for expediency sake the Appeal should be heard and determined within the next one hundred and Eighty (180) days from this date of the delivery of this Ruling on July 25, 2023 and be mention of May 9, 2023 for taking directions under Sections 79 B & G of the [Civil Procedure Act](#), 2010 and Order 42 Rules 11, 13 and 16 of the [Civil Procedure Rules, 2010](#).
 - c. That costs for the application to be in the Cause.

31 **IT IS SO ORDERED ACCORDINGLY.**

RULING DELIEVERED THOROUGH MICROSOFT VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS.....8TH DAY OFMARCH...2023.

HON JUSTICE L L NAIKUNI, (JUDGE),

ENVIRONMENT & LAND COURT AT,



MOMBASA

In the presence of:-

a. M/s Yumnah, Court Assistant.

b. Mr Ngure Advocate for the 2nd Appellant/Applicant.

c. No appearance for the Respondent.

