Mombasa Trade Centre Ltd v Excellent Transporters Limited (Environment and Land Appeal 70 of 2021) [2023] KEELC 22572 (KLR) (4 October 2023) (Judgment)

Neutral citation: [2023] KEELC 22572 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND APPEAL 70 OF 2021

LL NAIKUNI, J

OCTOBER 4, 2023

BETWEEN

MOMBASA TRADE CENTRE LTD ..... APPELLANT

AND

EXCELLENT TRANSPORTERS LIMITED ..... RESPONDENT

JUDGMENT

I. Preliminaries

1. The Judgment herein pertains to an appeal lodged before this Honorable Court by Mombasa Trade Centre Ltd – the Appellant herein. The appeal was filed through a Memorandum of Appeal dated 22nd October, 2021 and a 176 pages Record of Appeal filed on 16th August, 2022 against the Respondent herein. In a nutshell, the appeal revolves around the interpretation by the lower court of its own orders herein as seen here below.

2. The Appeal emanates from a Ruling delivered and dated 30th September, 2021 by the Chief Magistrate's Court at Mombasa – Hon. Muchoki (RM as he was) in the Civil Case –ELC. Case No. E501 of 2021. Based on the Affidavit of Service on record the Record of Appeal was properly served upon the Respondent.

3. On 22nd January, 2023 the parties having fully complied with court's direction it slated for highlighting the written submissions which the parties discharged effectively.

II. The Appellant's case.

4. From the filed Memorandum of Appeal, the Appellant averred as follows:-

    a. The Learned Trial Magistrate erred in law and fact in failing to apply his mind to the fundamental principle of contract and interpretation of the relevant Letter of Offer for Lease signed between Parties thereby arriving at a wrong decision.

b. The Learned Trial Magistrate erred in Law and in fact in failing to apply the material terms of the Letter of Offer for Lease in the interpretation of what constituted the lettable space under the Lease.

c. The Learned Trial Magistrate erred in law and fact in failing to find that the lettable space in the circumstances is sufficiently and appropriately defined to comprise approximately 1,040 square feet inclusive of the service area which extends beyond the office area and the Respondent's Application for Injunction had no merit.

d. The Learned Trial Magistrate erred in law and fact in failing to find that the Respondent's conduct in failing to execute the Lease contrary to the terms of the Letter of Offer of Lease was designed to assist the Respondent in their quest to breach the terms of the tenancy.

e. The Learned Trial Magistrate erred in law and fact in failing to consider the Appellant's Advocates' submissions and thereby proceeded on an incorrect exposition of the applicable law thereby occasioning a miscarriage of justice.

f. The Learned Trial Magistrate erred in Law and in fact in granting interim orders of Injunction which is an equitable remedy when the Respondent had was in respect of a known amount of rent arrears and there was no proof of irreparable loss and/or damage.

5. The Appellant prayed that:-

a. The Appeal herein be allowed.

b. The Ruling by Honourable Muchoki (RM) delivered on 30th September, 2021 in Mombasa RMCC No. E501 of 2021, Excellent Transporters Limited-vs-Mombasa Trade Centre Ltd be set aside and be substituted with an order dismissing the same.

c. Costs of and/or incidental to this Appeal.

6. From the filed pleadings, the Appellant informed Honorable Court that vide a Letter of Offer for Lease dated 27th May, 2014, the Respondent was let office space within the Appellant's demised premises comprising approximately 582 square feet. Subsequently, at its own instance, the Respondent expressed interest in and requested the Appellant to let it move and occupy other premises comprising approximately 1,040 square feet. The Respondent executed a Letter of Offer for Lease dated 8th May,2017 which has clear and express terms and conditions of the Lease as to the extent of the demised space and the amounts of the rental and service charge payable and the circumstances under which the interest in default of timeous remittance of accruing rentals would be applied.The Respondent breached the terms and conditions of the said Letter of Offer for Lease dated 8th May,2017 by failing to remit rentals as provided under the Letter of Offer of Lease and ran into rent arrears forcing the Appellant to invoke its rights and proceed to recover the rent arrears leading to the institution of the application and suit in the Trial Court seeking injunctive orders against the Appellant.

7. On the 6th April, 2021, the Respondent herein moved the sub-ordinate court vide a Notice of Motion Application dated even date under the Provision of Order 40 Rule 1 of Civil Procedure Rules essentially seeking for temporary injunction orders restraining the Appellant by themselves, their servants and/ or agents or anyone under its authority from demanding, invoicing and/or levying distress for backdated service charges of Kshs. 429,209.88/= and rent for any space other than the 740 sq ft occupied by the Respondent.

8. The Appellant then responded and filed a replying affidavit sworn on 20th April, 2020 appearing at Page 94-96 of the Record Appeal. Parties proceeded by way of written submissions, upon which the Ruling was delivered on 30th September, 2021 allowing the Respondent's Application.

III. The Submissions

9. On 22nd January, 2023, as stated the Record of Appeal was admitted and directions given specifically in the presence of all the parties. The Honorable Court directed that the said appeal be disposed of by way of written submissions with given stringent time lines. Pursuant to that the parties herein fully complied, all the Counsels were granted ample opportunity to highlight their written submissions a duty they effectively and ably executed, with great diligence, devotion dedication and resilience accordingly. The Honorable Court is sincerely grateful to them for undertaking their role professionally.

A. Written submission by the Appellant

10. On 15th November, 2022, the Learned Counsel for the Appellant, the law firm of Messrs. Sherman Nyongesa & Mutubia Advocates filed their written submissions dated 14th November, 2022. The Learned Counsel commenced his submissions by providing this Honorable court with a brief background of this case. He submitted that the Appellant was dissatisfied with the Order for interlocutory injunction in a dispute the involving payment of rent and preferred the appeal as per the memorandum of Appeal dated 22nd October, 2021 and filed in Court on 25th October, 2021.

11. Vide a Letter of Offer for Lease dated 27th May, 2014, the Respondent was let office space within the Appellant's demised premises comprising approximately 582 square feet. Subsequently, at its own instance, the Respondent expressed interest in and requested the Appellant to let it move and occupy other premises comprising approximately 1,040 square feet. The Respondent executed a Letter of Offer for Lease dated 8th May, 2017 which has clear and express terms and conditions of the Lease as to the extent of the demised space and the amounts of the rental and service charge payable and the circumstances under which the interest in default of timeous remittance of accruing rentals would be applied.

12. The Respondent breached the terms and conditions of the said Letter of Offer for Lease dated 8th May, 2017 by failing to remit rentals as provided under the Letter of Offer of Lease and ran into rent arrears forcing the Appellant to invoke its rights and proceed to recover the rent arrears leading to the institution of the application and suit in the Trial Court seeking injunctive orders against the Appellant. The Appellant in response filed aReplying Affidavit sworn on the 20th April, 2020 appearing at Page 94-96 of the Record Appeal. Parties proceeded by way of written submissions, upon which the Ruling was delivered on 30th September, 2021 allowing the Respondent's Application.

13. The Learned Counsel submitted that being dissatisfied with the whole Ruling and Order of the Honourable Muchoki (R.M) which appears at pages 172-175 of the Record of Appeal and the Appellant filed the instant Appeal seeking that the Ruling and its consequential order be set aside and be substituted with the following orders;

    i. The Appeal herein be allowed.

    ii. The Ruling by Honourable Muchoki (RM) delivered on 30th September, 2021 in Mombasa RMCC No. E501 of 2021, Excellent Transporters Limited-Vs-Mombasa Trade Centre Ltd be set aside and be substituted with an order dismissing the same.

14. The Learned Counsel submitted that its appeal raises arguable issues vis a vis the trial Magistrates Ruling and order dated and delivered on 30th September, 2021 as a consequence of which the same ought to be set aside with costs to the Appellant. The Appeal sets out the following grounds for determination by this Honourable Court;

    i. The Learned Trial Magistrate erred in law and fact in failing to apply his mind to the fundamental principle of contract and interpretation of the relevant Letter of Offer for Lease signed between Parties thereby arriving at a wrong decision.

    ii. The Learned Trial Magistrate erred in Law and in fact in failing to apply the material terms of the Letter of Offer for Lease in the interpretation of what constituted the lettable space under the Lease.

    iii. The Learned Trial Magistrate erred in law and fact in failing to find that the lettable space in the circumstances is sufficiently and appropriately defined to comprise approximately 1,040 square feet inclusive of the service area which extends beyond the office area and the Respondent's Application for Injunction had no merit.

    iv. The Learned Trial Magistrate erred in law and fact in failing to find that the Respondent's conduct in failing to execute the Lease contrary to the terms of the Letter of Offer of Lease was designed to assist the Respondent in their quest to breach the terms of the tenancy.

    v. The Learned Trial Magistrate erred in law and fact in failing to consider the Appellant's Advocates' submissions and thereby proceeded on an incorrect exposition of the applicable law thereby occasioning a miscarriage of justice.

    vi. The Learned Trial Magistrate erred in Law and in fact in granting interim orders of Injunction which is an equitable remedy when the Respondent had not met the test for grant of injunction particularly where the purported dispute was in respect of a known amount of rent arrears and there was no proof of irreparable loss and/or damage.

15. The Learned Counsel submitted that it is settled that an Appellate Court of the first instance has more or less the powers conferred upon the trial Court to consider the evidence tendered before it and the law. Section 78 of the *Civil Procedure Act*, empowers an Appellate Court of the first instance to re-evaluate and consider the evidence and the law to such an extent that the Court of original jurisdiction had and come to its own independent conclusion. (See decision in the case of "Selle & Another – Versus - Associated Motor Boat Co. Ltd & Others [1968] EA 123).

16. It is evident from the Ruling appearing at Page 172-175 of the Record Appeal that the Learned Trial Magistrate Court erred in fact and in law in his failure to consider and appreciate the material issues of facts and law raised in the Defendant's (Appellant's) Replying Affidavit and the Defendant's Written Submissions, appearing at Pages 94-118 and 164-168, respectively of the Record of Appeal.

17. The Appeal sets out six (6) grounds which fall for determination by this Honourable Court which we shall proceed to consider as whole:

18. It was the Learned Counsel's submission that the Learned Magistrate erred in fact and law in failing to apply his mind to the fundamental principle of contract and interpretation of the relevant Letter of Offer for Lease signed between Parties thereby arriving at a wrong decision. He submitted that the Trial Court in arriving at its decision misapprehended the law and the evidence by the Appellant n its Replying Affidavit and documents in support.

19. There is no doubt that the Respondent is indeed a tenant in the Appellant's demised premises situate in the building comprised in the Plot No. Mombasa/Block XXV/100 2nd Floor North Tower enjoying a fixed term lease for a term of 6 years running from the 1st day of June, 2017 to the 31st day of June, 2023. It was the Appellant's case that the Respondent initially executed a Letter of Offer of Lease dated the 27th May, 2014 appearing at Pages 127-132 of Record of Appeal in respect of premises comprising approximately 582 square feet inclusive of service area subsequent to which the Respondent further expressed interest in and requested the Appellant to allow them to move and occupy a bigger space that was on the same floor as the one they previously occupied.

20. Parties engaged into negotiations in respect of the letting of the bigger space which culminated in the execution of the Letter of Offer of Lease dated 8th May, 2017 appearing at Pages 133-135 of Record of Appeal by the parties which allowed the Respondent to move into the opposite space of the demised premises and it was a clear and express term of the Lease that rent payable was in respect of the premises comprising approximately 1,040 square feet inclusive of common service areas and the amount of rentals payable was set out in the said Letter of Offer for Lease. The Letter of Offer for Lease was voluntarily executed by the parties hence it is binding to the extent of the terms therein.

21. They relied in the case of "Alton Homes Limited & Another – Versus - Davis Nathan Chelogoi & 2 others [2018] eKLR which cited with approval the findings in "Total Kenya Ltd – Versus - Joseph Ojiem, Nairobi HCCC No.1243 of 1999, where the Court held as follows in determining the duties and obligation of parties to a contract :-

> " Parties to a contract that they have entered into voluntarily are bound by its terms and conditions.....The 1t Plaintiff and 1s' Defendant entered into a sale agreement dated 4'"h August 2009, and they are bound by the terms therein..."

22. Having established that the contract between the Appellant and the Respondent is not in dispute, the Learned Counsel to address the issue of what constituted the let able space. The Respondent alleged in its Notice of Motion Application appearing on page 67-92 of the Record of Appeal that the said lettable space consist of 740sq ft and further that the Appellant wrongfully invoiced and demanded payment for a non-existent 300sq ft. The Appellant in response referred to the Letter of Offer dated 8th May, 2017 which clearly defined the lettable area measuring 1,040 square feet is inclusive of the common service area that was at the Respondent's exclusive disposal for use which fact was well known to the Respondent from the time of execution of the initial letter of Offer dated 27th May, 2014. It was also the Appellant's submission that the Respondent had an opportunity prior to executing the Letter of Offer for Lease to inspect the demised space and take any appropriate professional advice as to the lettable space as clearly described in the Letter of Offer for Lease and as such no misrepresentation as to the lettable space was made as alleged by the Respondent. In anycase, the Responded initially discharged its obligation under Letter of Offer of Lease dated the 27th May, 2014. It therefore remains not clear as to why the Respondent would allege that the subsequent Letter of Offer of Lease wrongly captured the lettable space despite them being of similar terms.

23. It was therefore the Learned Counsel's submissions that the Respondent misled the Court by alleging that the lettable area did not include the common service area available to it a fact that cannot be supported or countenanced by the terms and conditions of the Letter of Offer of Lease dated 8th May, 2017. As an afterthought the Respondent did a letter dated 5th December, 2020 purporting that that the let able space was less than the space shown in the contract (see at page 136 of the Record of Appeal). In response the Appellant clarified what constituted let able space via a letter dated 8th December, 2020 appearing at page 137 of the Record of Appeal. Consequently, there was no doubt

that the Respondent voluntarily executed the said Letter of Offer as evidenced at page 135 of Record of Appeal as such parties to a contract are bound by its terms. It is therefore expected that all parties ought to perform their obligations to the latter. In this case, the Respondent entered into a valid contract with the Appellant in respect to the demised premises which terms were not disputed at any time of executing the said Letter of Offer.

24. It therefore follows that on the main issue before Court which was whether there was a binding contract between the Appellant and the Respondent the learned magistrate had no option but to find that the Respondent cannot purport to run away from its obligations pursuant to the Letter of Offer of lease by seeking to deny the Appellant it right to levy distress for rent arrears due and owing to the it. They therefore submitted that the Learned Magistrate misdirected himself by failing to find that the lettable space in the circumstances is sufficiently and appropriately defined to comprise approximately 1,040 square feet inclusive of the service area which extends beyond the office area and the Respondent's Application for Injunction had no merit.

25. On the issue interim orders of Injunction, it is the Appellant's humble submission that the Learned Magistrate's decision ought not to have been granted the said orders as against the Appellant for reasons that the Respondent failed to prove the mandatory requirements for grant of such orders. It is already established in the case of "MRAO Limited – Versus - First American Bank of Kenya Ltd & 20 Others [2003] KLR 125, Giella – Versus - Cassman Brown [1973] EA, Nguruman Ltd – Versus - Jan Bunde N. Elsen & 2 others CA NO. 77 of 2012, that the following conditions were the determinants in exercise of the discretion by the trial court to grant or decline injunctive relieves.

> " In an interlocutory injunction application, the Respondents had a duty to discharge the burden of proof the Applicant has to satisfy the triple requirements as was laid down in the celebrated case of Giella – Versus - Cassman Brown which are to;
>
> (a) establish his case has a prima facie chance of success
>
> (b) demonstrate irreparable injury if a temporary injunction is not granted, and convenience is his favour."

26. An interlocutory injunction being an equitable remedy would then require that both parties act in a fair manner. It is a well-established principle of law that whoever comes to seek an equitable remedy in Court must come with clean hands. In the Appeal herein, it is clear that the Honourable Magistrate erred in Law and in fact in granting interim orders of Injunction which is an equitable remedy when the Respondent had not met the test for grant of injunction particularly where the purported dispute was in respect of rent arrears arising from the contractual obligations clearly defined under letter of Offer of lease in respect of the demised premises. They relied on the case of "United India Insurance Co. Ltd – Versus - East African Underwriters (Kenyan) Ltd [1985] EA 898 which provides that the Court of Appel is only entitled to interfere if one or more of the following matters are established:

> " First, that the Judge misdirected himself to the law, secondly, that he misapprehended the facts, thirdly, that he took account of consideration 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."

27. It was the Learned Counsel's submissions that the gist of the decision by the Learned Trial Magistrate was the error occasioned and misdirection of granting the orders of conditional interlocutory injunction contrary to the clear terms of the contract between the Appellant and the Respondent. The

appellant further contends that in declining to enforce the contract, the decision would have an adverse effect on the legally binding contract in which one of the parties is in default.

28. It was clear from the Appellant evidence and submissions that the Respondent breached the terms and conditions of the said Letter of Offer for Lease dated 8th May, 2017 by failing to remit rentals as provided under the Letter of Offer of Lease and has since ran into rent arrears. In the circumstance, it is clear that the injunction granted by the Honourable Learned Magistrate violates the contract as created under the valid letter of Offer for Lease. The question which arises is whether the Learned Trial Magistrate erred in fact and in law in granting orders of injunction to restrain the Appellant from exercising its rights, as a landlord, to levy distress for the rent arrears due on account of a commercial Lease executed by both parties. The answer is to the negative. It is clear that parties are bound by the terms of the Letter of Offer of Lease and it is not available to the Respondent to purport to urge this Court to rewrite the terms and conditions of the operational contract.

29. The Learned counsel submitted in conclusion that from the totality of evidence on record, the submissions of parties and the law, the Learned Trial Magistrate considered extraneous facts and failed to consider the Appellant's Advocates' submissions and thereby proceeded on an incorrect exposition of the applicable law thereby occasioning a miscarriage of justice. The Ruling by the said Honourable Magistrate was based on wrong principles of both law and fact and ought to be set aside and the Appeal herein allowed.

30. They reiterated that the respondent failed to establish that there was any irreparable loss or damage to be suffered if the injunction was not granted since the dispute involving a specific amount of money in the nature of understanding and disputed balance of rent arrears. The Learned trial Magistrate erred in granting orders that had the effect of stripping the landlord from recovery even the undisputed rent thereby greatly prejudicing the Appellant.

31. It is trite and Courts have repeatedly held that interlocutory injunction would not issue in matters involving disputed over rent disputes and the have occasions where it has happened injunctions are granted on condition that the disputed rent is deposited either in Court or in an agreed joint account to protect vulnerable Landlord from tenants who used Courts as an avenue to evade from paying agreed rent.

32. The Learned Counsel urged the court to allow the Appeal and discharge the orders of injunction granted by the Learned Trial Magistrate.

A. Written submissions of the Respondent

33. On 13th December, 2022, the Respondent through the law firm of Messrs. Ndegwa & Sitonik Advocates filed their written submissions dated 21st November, 2022, the Learned Counsel submitted that the appeal is one against the exercise of discretionary power of the learned trial magistrate to grant an interim order of injunction. The Appellant has filed to satisfy this court to interfere with the decision, because the learned trial magistrate correctly exercised his discretion by:

    a. Properly directing himself to the law on grant of interim orders of injunction, as settled in "the Giella – Versus - Cassman Brown & Co Ltd [1973] EA 358.

    b. Properly apprehending the facts before him as set out in the respective pleadings of the parties, and correctly applying the settled law on injunctions to the facts of the case.

    c. Properly taking into account all relevant factors and disregarding all the irrelevant factors.

34. The Learned Counsel submitted that the impugned Ruling of 30/9/2021 subject of this appeal was limited to the issue of whether the Respondent satisfied the conditions for grant of an interim order of injunction. The issues of interpretation of the letter of offer, the lettable space under the lease, and alleged breach of the terms of the lease as raised in the Memorandum of Appeal dated 20/10/2021 are all issues whose determination are reserved for the main suit. The Court should therefore reject the Appellant's invitation to adjudicate on those issues in an interim application.

35. In the trial court, the Respondent satisfied al the three conditions for grant of interim injunction orders as settled in "Giella v Cassman Brown. The learned trial magistrate therefore correctly granted the order of injunction. We therefore urge the Court to uphold the decision of the learned trial magistrate in the ruling dated 30/9/2021 and dismiss this appeal with costs.

36. On the issued of the limitations of the Appellate Jurisdiction of the Court, the Learned Counsel submitted that the Court of Appeal in MRAO Limited – Versus - First American Bank of Kenya Ltd & 2 others [2003] eKLR held that the power of a court in an application for an interlocutory injunction is discretionary.

37. In "the locus classicus' case of "Mbogo & Another – Versus - Shah [1968] as cited with approval in the case of: "Ramadhan Kamora Dhadho – Versus - John Kariuki & another [2017]eKLR, the Court held that an appellate court may only interfere with the exercise of a judicial discretion if it satisfied that:-

> " I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that,
>
> a. its decision is clearly wrong, because it has misdirected itself or
>
> b. because it had acted on matters on which it should not have acted or
>
> c. because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

38. The Learned Counsel urged the Honourable Court to refuse to disturb the exercise of discretion of the trial Magistrate Court in granting an injunction to the Respondent herein as the same was based on concrete documentary evidence produced as exhibit.

39. The Learned Counsel submitted that on Ground No. 6 of the of the Memorandum of Appeal. Grounds No. 1, 2 3 and 4 together as they are kindred grounds. On ground 6, the Learned trial magistrate was correct in finding that the Respondent satisfied the test for the granting of an interim order of injunction.At page7 of the Ruling, the learned magistrate appreciated the decision of the Court of Appeal in "the locus classicus" case of "Giella – Versus - Cassman Brown Co. Ltd [1973] E.A.358, settled the conditions for the grant of an interlocutory injunction. (See page 174 line 8 of the Record of Appeal). The settled conditions are as follows

    i. First, an applicant must show a prima facie case with a probability of success.

    ii. Secondly, an interlocutory injunction will not normally be granted unless the Respondent might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages.

    iii. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."

40. Flowing from the settled conditions, the issue underground 6 of the Memorandum of Appeal is whether the Respondent satisfied the three conditions. The Learned Counsel submitted that they

will discuss the issues separately. On whether the Respondent established a prima facie case with a probability of success, the Court of Appeal in the case of "MRAO Limited – Versus - First American Bank of Kenya Ltd & 2 others [2003] eKLR defined a "prima facie case" as follows:-

> " 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."

41. The case of the Court of Appeal of:- Nguruman Limited – Versus - Jan Bonde Nielsen & 2 Others [2014]eKLR went on to define a prima facie case as follows:-

> " All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case."

42. In the Application before the trial court, the Respondent established a prima facie case with a probability of success at trial of the main suit as demonstrated below:

a. It was not in contention that the Respondent is the tenant of the Appellant in the suit property, pursuant to the letter of offer dated 8/5/2017. This uncontested fact was deponed at paragraph 3 of the Respondent's Supporting Affidavit filed on 6/4/2021 (at page 072 of the Record of Appeal), and at paragraph 2 of the Appellant's Replying Affidavit filed on 23/4/2021 (at page 094 of the Record of Appeal).

b. The Respondent paid the rent due for the undisputed space of 740 sq ft. which the Respondent occupied for the period of January to June 2021. The Respondent was not in any rent arrears whatsoever which is also in line with the orders issued on 7/4/2021. {The evidence of the payment of rent was the RGTS transfer produced as annexure OMA-9 at page 088 of the Record of Appeal}.

c. At paragraphs 4 and 5 of the Plaint dated 6/4/2021, the Respondent claimed that the Appellant fraudulently misrepresented and induced the Respondent to believe that the office space to be occupied vide in the lease would be 1,040 sq. ft. whereas it was in fact 740 sq. ft. (See paragraphs 4 and 5 of the Plaint at page 2 of the Record).

d. d. At paragraph 6 of the Plaint, the Respondent pleaded that it relied and acted upon the fraudulent statements of the Appellant, believing them to be true and executed the letter of offer dated 8/5/2017 which purported that the office space is 1,040 sq. ft.(See paragraph 6 of the Plaint at page 2 of the Record).

e. The Respondent further pleaded that despite establishing through a joint survey that the space comprised in the lease is 740 sq. f. and not the purported 1,040 sq. ft., the Appellant continued to infringe the Respondent's unmistakable right of quiet possession by demanding and invoicing the for payment of rent for the non-existent and/or disputed space of 300 sq. ft. in addition to rent for the 740 sq. ft. The Respondent produced a copy of the layout showing that the premises is 740 sq. ft as annexure OMA-3. (The layout is at page 88 of the Record of Appeal}.

f. The Respondent has the unmistakable right to property as guaranteed by Article 40 of *the Constitution*. This right was under threat of violation by the acts of the Defendant because the Appellant through letters dated 2/12/2020, 17/12/2021, 29/12/2020 11/2/2021, threatened

to distress for payment of rent for the non-existent 300 sq. ft., yet the Respondent has no rent arrears.{The letters are at pages 81, 82 83, of the record of appeal}.

43. Additionally, it was not in contention that the Respondent was in possession of the suit property. This is in itself is enough to establish a prima facie case. This position was settled in "Bryan Chebii Kipkoech – Versus - Barnavas Tuitoek Bargoria & Another [2019] eKLR was held that,

> " I have considered the application and do find that the Respondent is in possession of the suit propertied, being in possession alone to establish a prima facie case... I do find that the Respondent has established a prima facie case with probability of success....The Plaintiff had demonstrated that he is in possession of the land."

44. The Learned Counsel further relied on the Court of Appeal decision in the case of "Haveer Investment Limited - Versus - Equitorial Commercial Bank & 3 others [2009] eKLR, where the Court issued an injunction against exercising statutory power of sale on the basis of there being an element of fraud on the part of the as is the case herein. The Plaintiff had alleged that the execution of the charge was obtained through misrepresentation.

45. Accordingly, the Learned Trial magistrate correctly held that "the Plaintiff has therefore established a prima facie case warranting the grant of injunction as sought in the application."(See lines 1-4 at page 175 of the Record of Appeal).

46. On whether the Respondent established irreparable injury, the Learned Counsel submitted that the Court of Appeal in Nguruman Limited (supra) described an irreparable injury thus,

> " An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."

47. The Respondent satisfied tis second condition by providing evidence that it would suffer irreparable loss unless the trial Court restrained the Appellant the by an order of injunction. The Respondent demonstrated that the Appellant would distress for rent to recover rent for the non-existent space of 300 sq. ft. and the back dated service charges amounting to Kshs. 429,209.88/=, unless the trial court stopped it by an order of injunction. To support this apprehension, the Respondent produced the Appellant's letters dated 2/12/2020, 17/12/2021,29/12/2020 and 11/2/2021, through which the Appellant continually threatened the Respondent that it will distress against the Respondent. {See the letters at pages 81, 82, 87, and90 of the Record of Appeal).

48. The Respondent further adduced evidence that it is a clearing and forwarding firm and that removing its properties, which are also its tools of trade, would disrupt its business, and affect the rights, documents and properties of innocent third parties who are not parties to the dispute. {See paragraph 18 of the Respondent's Supporting Affidavit filed on 6/4/2021 at page 74 of the Record of Appeal}. Additionally, the Respondent proved that in the event the Appellant is allowed to proceed with the threatened purported distress for rent, the Appellant would instruct auctioneers to remove the Respondent's office furniture, cupboard, files and machines, which would drive the Respondent out of business. A loss for which no amount of damages would be sufficient.

49. The Learned Counsel submitted that such a turn of events would obviously cause an irreparable injury because, no amount of compensation op order of the Court would be sufficient to revive the disrupted business of the Respondent, or to compensate the third parties for breach of contracts. There is no standard to measure, with reasonable accuracy or at all, the injury that the Respondent would suffer, because the damage could not be liquidated to a definite amount. Consequently, damages

would not recoverable/ adequate to compensate the Respondent because the value of the injury is unascertainable.Consequently, the learned trial magistrate correctly found that the Respondent demonstrated that it would suffer irreparable damages and unless the trial court granted the injunction orders.

50. On the issue of whether the balance of convenience lied with the Respondent, the Learned Counsel submitted that in any event, the balance of convenience tiled in favour of the Respondent because,

51. In the case of:- "Bryan Chebii Kipkoech – Versus - Barnabas Tuitoek Bargoria & another (supra) theEnvironment and Land Court defined "balance of convenience" to mean that:-

> " ... if an injunction is not granted and the suit is ultimately decided in favor of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants ifan injunction is granted but the suit is ultimately dismissed."

52. The prejudice the Respondent would suffer if the trial court denied to grant the injunction and the suit eventually succeeds, outweighs the prejudice, if any, that the Appellant woThe Respondent has been paying all the rent due for the undisputed office space of 740 sq. ft. and the service charge since 1/6/2017 when the lease commenced. The Respondent has not been in any arrears and has always been ready and willing to continue paying rent and service charge for the undisputed space of 740 sq. ft. as per the agreement would suffer if an injunction is granted.

53. Additionally, the fact that it is the Respondent who was at all material times in occupation of the suit property tilts the balance of convenience in its favour. This is line with the case of "Bryan Chebii Kipkoech (supra), where the ELC Court held that, "In this case, the balance of convenience favors the grant of injunction as the Plaintiff is in possession. He will be highly inconvenienced if injunction is not granted."

54. Grounds 1,2,3 and 4 are in regards to,

    a. The interpretation of the Letter of Offer of Lease signed between the two parties.

    b. What constitutes lettable space under the Letter of Offer of Lease between the two parties.

55. The Learned Counsel submitted that these are disputed facts that are central to the dispute between the parties and are thus for determination in the main suit. The main dispute between the parties in this suit is with respect to the lettable space of the demised premises as per the letter of offer of lease dated 27/5/2014, as shown by the pleadings of the parties, thus:

    a. At paragraphs 4-7 of the Plaint dated 6/4/2021, the Respondent avers that the Appellant made fraudulent misrepresentation relating to the grant of the lease and induced the Respondent to believe that the lettable space comprised in the grant of lease is 1,040 sq ft.

    b. On the other hand, at paragraph 4(c) of the Defence dated 4/5/2021,the Appellant alleges that that the lettable space comprised of approximately 1,040 sq. ft. inclusive of the service area.

56. These disputed facts can only be determined and resolved after full hearing of the suit as the issues cannot be determined at an interlocutory stage. The issue of the lettable space was not before the learned trial magistrate in the application for injunction. The only issue at that stage was whether the Respondent satisfied the principles for injunction.

57. In the case of: "Robert Mugo Wa Karanja – Versus - Ecobank (Kenya) Limited & another [2019] eKLR, the High Court held that, "...in view of the rival positions taken by both sides, the same can

only be determined and resolved after full hearing of the suit as the issues cannot be determined at the interlocutory stage."

58. Ground 1,2,3 and 4 of the Memorandum of Appeal are inviting the Court to hold a mini trial and to examine the merits of the case closely, which is outside the jurisdiction of the Court in an application for an injunction.The Court of Appeal in Nguruman Limited v Jan Bonde Nielsen & 2 Others [supra], held that when considering whether or not a prima facie case has been established, the Court "should not hold a mini trial and must not examine the merits of the case closely."The learned trial magistrate correctly appreciated this position by holding that since the Plaintiff is disputing the size of the suit property, it will not be proper to hold a mini trial on the Affidavits by the Parties.Accordingly, determining the issues raised in Ground 1, 2, 3 and 4 at this stage would amount to determining the main/ whole dispute in this suit at an interlocutory stage, without a full hearing of the case with witnesses and evidence. The four grounds therefore lack merit.

59. The Learned Counsel submitted that ground 5 is misconceived because the learned trial Magistrate evaluated all the submissions and authorities of the parties, including those of the Appellant's Advocate. The learned trial magistrate considered all the arguments of the parties and arrived at the correct conclusion that the Respondent had satisfied the conditions for grant of an interim order of injunction.

60. The Learned Counsel concluded that it is trite law that an appellate court should be slow to interfere with the exercise of judicial discretion by the trial court. The learned trial magistrate judiciously exercised his discretion to grant the interim orders of injunction. They therefore urged the Court to find that the Appellant's appeal lacks merit and dismiss it with costs to the respondent.

IV. The Issues for Determination.

61. I have had a chance to critically assess all the pleadings filed in this Appeal being the Record of Appeal and its contents, the Memorandum of Appeal by the Appellant, the written submissions, the Plethora of cited authorities by the parties, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.

62. For the Honorable Court to be in a proper position to arrive at an informed, plausible, just, fair and reasonable decision from the filed Appeal by the Appellant herein, the Honorable Court has condensed the subject matter into the following three (3) salient issues for its determination. These are:-

    a. Whether the filed appeal by the Appellant being aggrieved by the decision/Ruling delivered by the Lower Court on 30th September, 2021 has any merit whatsoever.

    b. Whether the parties are entitled to the relief sought from the filed Appeal.

    c. Who will bear the costs of the Appeal?

V. Analysis and Determination

ISSUE No. (a) Whether the filed appeal by the Appellant being aggrieved by the decision/Ruling delivered by the lower court on 30th September, 2021 has any merit whatsoever.

63. Before embarking on the issues for analysis under this sub-heading as indicated earlier in the Judgement the Honorable Court in a preamble form the court makes two assertions. First on the re-evaluation of the evidence from trial court and secondly the brief facts of this case. To begin with, while dealing with all appeals emanating from the decision by the trial Courts, as a first appellate Court it is guided

and informed by the principles summarized in the decisions of; - Selle & Another – Versus- Associated Motor Boat Co. Limited & Others (1968) E.A. 2123 at Page 126 as:-

> " Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make allowance in that respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence of if the impression on the demeanor of a witness is inconsistent with the evidence in the case generally."

64. Similarly, in the case of "Peter –Versus - Sunday Post Limited 1958 E.A. 424" Sir Kenneth O'Connor P. rendered the applicable principles as follows:-

> " It is a strong thig for an appellate court to differ from the finding on a question of facts, of the judge who tried the case and who had the advantage of seeing and hearing the witnesses. An appellate court has indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a Jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion...."

Brief Facts:

65. Vide a Letter of Offer for Lease dated 27th May, 2014, the Respondent was let office space within the Appellant's demised premises comprising approximately 582 square feet. Subsequently, at its own instance, the Respondent expressed interest in and requested the Appellant to let it move and occupy other premises comprising approximately 1,040 square feet.

66. The Respondent executed a Letter of Offer for Lease dated 8th May, 2017 and the allegations that the lettable space was less than 1,040 sq ft was an afterthought and intended to mislead the Court.

67. .On 30th September, 2021 having heard the parties on this application the trial Court rendered its ruling as follows:-

> " .....The Plaintiff is disputing the size of the Leased property and it would not proper for the Court to dismiss without a mini trial on thy merits by the Parties. The Plaintiff has therefore established prima facie case warranty the grant of the injunction as sought in the application.
>
> Accordingly the Court will proceed to find that the Plaintiff/ Applicant's Notice of Motion dated 6th April, 2021 has merit and the same is hereby allowed as prayed."

68. It's from the foregoing Ruling that the Appellant being aggrieved by the said decision by the trial Court that decided to prefer the Appeal before this Honorable Court. The Court has deliberately re – produce the excerpt of the ruling as it shall be referring to it extensively at a later of this Judgement.

69. Now turning to the issues for the analysis of this sub heading. From the materials and records of appeal, it is my view that clearly the main borne of contention herein are two prongs: -

    a. Whether the Learned trial court and/or Magistrate erred in law and fact in granting the Respondent an interlocutory injunction; and.

b. Whether the Learned Magistrate/trial court erred in Law and Facts in finding that despite of the Respondent being in rent arrear deserved the granting of the interlocutory temporary injunction against the Appellant.

70. Be that as it may, this being a first appeal, the duty of a first appellate court was captured by the Court of Appeal in John Teleyio Ole Sawoyo – Versus - David Omwenga Maobe [2013] eKLR thus:

> " This being a first appeal we have the duty to reconsider both matters of fact and of law. On facts, we are duty bound to analyse the evidence afresh, re-evaluate it and arrive at our own independent conclusion but must bear in mind that the trial court had the advantage of hearing the witnesses testify and seeing their demeanour and should make allowance for the same."

71. Still on the duty of the first appellate Court, Hancox JA (as he then was), stated in the case of:- "Ephantus Mwangi & another -Versus - Duncan Mwangi Wambugu [1982-88] 1KAR 278 at page 292, as follows:

> " A Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the finding he did."

72. The Court went ahead and stated that:

> " The Court of Appeal would hesitate before reversing the decision of a trial Judge on his findings of fact and would only do so if (a) it appeared that he failed to take account of particular circumstances or probabilities material to an estimate of the evidence or (b) that the impression based on demeanour of material witnesses was inconsistent with evidence in the case generally."

73. The conditions for the granting of an interlocutory injunction are now, we think, well settled. In the case of "Giella – Versus - Cassman Brown & Co Ltd (1973) EA 358 at page 360, it was stated as follows;

> " 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 injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

74. In the case of "MRAO Limited – Versus - First American Bank of Kenya Ltd (2003) eKLR, the Court of Appeal held that:

> " Counsel for the Defendant urged that the shape of the Law governing the grant of injunctive relief was long ago, in Giella – Versus - Cassman Brown, in 1973 cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel in that point, for the law has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of Films Rover International made this point regarding the grant of injunctive relief (1986) 3 ALL ER 772 at 780 – 781: - A fundamental principle of ... that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong'... Traditionally, on the basis of the well accepted principles set out by the Court

of Appeal in Giella –v- Cassman Brown, the court has to consider the following questions before granting injunctive relief:

i) Is there a prima facie case.....

ii) Does the applicant stand to suffer irreparable harm....

iii) On which side does the balance of convenience lie.....

Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The court in responding to prayers for interlocutory injunctive relief should always opt the lower rather than the higher risk of injustice... if granting the applicant's prayers will support the motion towards full hearing, then should grant those prayers. I am unable to say at this point in time that the Applicant has a prima facie case with a probability of success, and this matter will depend on the progress of the main suit. Lastly there would be a much larger risk of injustice if I found in favour of the Defendant than if I determined this application in favour of the applicant."

75. It is not in dispute that the Respondent was a tenant vide a letter of offer of lease dated 27th May, 2014 by the Appellant and was in arrears of rent which promoted the Appellant. The Respondent executed a Letter of Offer for Lease dated 8th May,2017 which has clear and express terms and conditions of the Lease as to the extent of the demised space and the amounts of the rental and service charge payable and the circumstances under which the interest in default of timeous remittance of accruing rentals would be applied. The Respondent breached the terms and conditions of the said Letter of Offer for Lease dated 8th May,2017 by failing to remit rentals as provided under the Letter of Offer of Lease and ran into rent arrears forcing the Appellant to invoke its rights and proceed to recover the rent arrears leading to the institution of the application and suit in the Trial Court seeking injunctive orders against the Appellant.

76. I find that the Respondent did not establish a prima facie case as it was the one in arrears of the rent payable to the Appellant and was in breach on the lease agreement. In granting the interim interlocutory judgment against the Appellant the Trial Court purported to have rewritten the contract that was between the Parties to the lease.

77. I find that the balance of convenience lies with the Appellant as the said premises belongs to it and they are expected to suffer more loss if the Respondent is granted an injunction stopping the Appellant from recovering the rent in arrears. In this instant case I find that the rights of the Appellant need to be safeguarded as the damages he is likely to suffer may not be compensable by way of damages.

ISSUE No. (b) Whether the parties are entitled to the relief sought from the filed Appeal.

78. Under this sub-heading the court has already noted and concluded that the lower court delivered order on 30th September, 2021. All the parties were fully aware of these orders as they were informed by their Advocates who were present in court all along during the proceedings and the Respondent was aware that they were in arrear of the rent and it is a unprocedural to want to hide behind the law when you had unclean hands.

79. The guiding principle of the overriding objective is that the Court should do justice to the parties before it and their interests must be put on scales. I find that, it is only fair to make orders with the Appellant in mind as they are still incurring losses as the Respondent stops them from rent recovery yet there was a valid lease which the Respondent has breached.

ISSUE No (c) Who will bear the costs of the Appeal?

80. The issue of Costs is at the discretion of Courts. Costs mean the award that a party is granted at the conclusion of any process, legal action or proceeding in any litigation. The Proviso of the provision of Section 27 (1) of the *Civil procedure Act*, Cap. 21 provides that Costs follow the event whereby by events it means the result of the said process, legal action or proceedings.

81. In the instant case, taking that the matter is still to proceed hearing and final determination before the trial Court, the appeal has merit with costs to the Appellant.

V. Conclusion and Disposition.

82. The upshot of the foregoing, and having conducted an in depth analysis of the framed issues herein, the Honorable Court finds that the Appeal by the Appellant has merit to a certain extent. Accordingly, and for avoidance of any doubts, the Honorable Court makes the following orders for disposal thereof:-

    a. That the appeal herein be and is hereby allowed by setting aside the Ruling and order delivered by Trial Court by Hon Muchoki (RM as he was then) on 30th September, 2021.

    b. That an order be and is hereby made that the matter to be set down for re – trail before the lower Court before any other Presiding Trial Magistrate apart from the one who heard it before as He/She may not be based at the station at the moment.

    c. That the matter to be mentioned before the Chief Magistrate Court (Civil Division) on 24th October, 2023 for compliance of these orders and/or further direction.

    d. That the Appellant shall have the costs.

It Is So Ordered Accordingly

JUDGEMENT DELIEVERD THOUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 4TH DAY OF OCTOBER 2023.

…….

HON. JUSTICE (MR.) L.L. NAIKUNI

ENVIRONMENT AND LAND COURT AT MOMBASA

Judgement delivered in the presence of:-

a. M/s Yumnah, the Court Assistant.

b. M/s. Juma Advocate holding brief for M/s. Takah Advocate for the Appellant.

c. No appearance for the Respondent.