Sidian Bank Limited & another v Muuru (Civil Appeal E056 of 2024)
[2025] KEHC 447 (KLR) (23 January 2025) (Judgment)

Neutral citation: [2025] KEHC 447 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E056 OF 2024

DKN MAGARE, J

JANUARY 23, 2025

BETWEEN

SIDIAN BANK LIMITED ..... 1ST APPELLANT

STARTRUCK AUCTIONEERS ..... 2ND APPELLANT

AND

KENNEDY GITONGA MUURU ..... RESPONDENT

(Being an appeal against the Ruling and orders of the Hon. Ismael Stanley Imoleit – (RM) delivered on 29.08.2024 in Nyeri MCCC NO. E040 of 2024)

JUDGMENT

1. This is an appeal against the Ruling and orders of the Hon. Ismael Stanley Imoleit –Resident Magistrate at Nyeri delivered on 29.08.2024 in Nyeri MCCC No. E040 of 2024. The Appellants were the Respondents in the lower court. The matter is still pending in court. This is thus an interlocutory appeal.

2. The Respondent filed suit vide a Plaint dated 7.3.2024 claiming the following: -

    a. That an order of permanent injunction be issued restraining the Defendants whether by themselves, employees, servants and/or agents or otherwise assigns and/or any person whatsoever acting on their behalf and/or under its mandate and/or instructions from advertising for sale, offering for sale, selling, transferring, or otherwise dealing in any manner with the plaintiff's vehicle being motor vehicle Registration Number KDN 269G.

    b. That this Court be pleased to order the immediate release by the Defendants of repossessed motor vehicle Registration Number KDN 269G to the Plaintiff.

c. Grant a permanent injunction restraining the Defendants from any further interference with the Plaintiff's lawful possession and use of the vehicle without just cause.

d. A declaration that the Defendants acts of repossession of the car and intended sale is unprocedural and allow the Plaintiff offset his loan.

e. General damages encountered as from 8th February, 2024.

f. Award damages to the Plaintiff for the Defendants' breach of good faith and fair dealing.

g. That the Court be pleased to issue any other order or further orders.

3. Simultaneous with the Plaint the Respondent filed an application dated 7.3.2024, under sections IA, IB, 3& 3A of the *Civil Procedure Act*, Order 51 Rule 15, of the Civil Procedure Rules, 2010, Articles 40, 47, 159 of the *Constitution* of Kenya and Section 13 of the Hire Purchase Act, seeking the following orders:

a. Pending the hearing and determination of the application herein inter-parte, an order of injunction be issued restraining the respondents whether by themselves, employees, servants and/or agents or otherwise assign and/or any person whatsoever acting on their behalf and/or under its mandate and/or instructions from advertising for sale, offering for sale, selling, transferring, or otherwise dealing in any manner with the applicant's vehicle being motor vehicle Registration Number KDN 269G, IsuzuLorry/Truck.

b. Pending the hearing and determination of this application inter-partes, this Court be pleased to order the immediate release by the Respondents of reposed motor vehicle Registration Number KDN 269G, Isuzu Lorry/Truck into the Applicant's possession.

4. The Respondent pleaded that he was to pay between Ksh.70,000/= and Ksh.100,000/ per month. He stated further that he was given a loan on 19.10.2023 and the vehicle was purchased on 21.10.2023. He continued that the loan was advanced only 4 months earlier and he had paid Kshs. 430,000/= and had not defaulted by 8.2.2024 when repossession took place.

5. He stated that the vehicle was taken on a pretext of fixing tracker issues and subsequently repossessed. Several particulars of negligence, breach of contract, fraud and breach of fiduciary duty was pleaded. The only addition to the application was that the Respondent was not aware that there was no grace period but was only notified on 16.11.2023 by a credit manager who sent a schedule of payments. He stated that on the date of filing the truck was parked at the 2nd Appellant's premises and was intended to be sold on 8.3.2024.

6. Annexed to the application was a motor vehicle copy of records showing registration was on 6.10.2023, meaning it was a new vehicle. Evidence of payment on 5.1.2024, together with a request that payment was being made. There was another payment vide a cheque dated 20.11.2023.

7. The Appellants entered appearance and denied the claim stating that the vehicle was security acquired through asset finance for 6,939,000/=. Together with insurance premium of Kshs. 388,279/= as per the premium financing form dated 11.10.2023. According to the Respondent, the monthly repayment was to be 206,380.03/=. They stated that a notice was served on 6.1.2024 affording the Respondent 7 days to comply. This was buttressed by the Replying Affidavit of Jackline Ndung'u, a Senior Legal Officer with the 1st Appellant.

8. The Respondent is said to have defaulted the obligation necessitating instructions to the 2nd Appellant. The Appellant beseeched the court below, not to re-write the contract between the parties. The

allegations relating to the repossession under pretext to fix tractor were not answered at all. The default as at 8.3.2024 was said to be Ksh. 508, 309.75/- for asset financing and Ksh 86,309.46/- for premium financing. They stated that the amount of Ksh 430,000/= claimed to be paid are not sufficient to clear the indebtedness, even on the day the first installment was due.

9. The court below heard the matter and allowed the application. The Appellant filed this appeal and set the following grounds: -

    a. The Honourable trial court erred in law and fact by failing to find that the Plaintiff's application dated 7th March 2024 did not seek any reliefs pending the hearing and determination of the suit.

    b. The Honourable trial court erred in fact in failing to find that the Plaintiff in his application and submission did admit to having breached the security between the 1st Appellant and the Respondent.

    c. The Honourable trial Court erred in law and facts in failing to find that the 1st Appellant had complied with provisions of the Moveable Property Security Rights Act 2017.

    d. The Honourable trial court erred in law and fact by stripping the 1st Appellant of its security rights over motor vehicle KDN 269G.

    e. The Honourable trial court erred in law and fact in failing to find that parties are bound by their contract and a court of law cannot rewrite a contract.

    f. The Honourable trial court erred in law by failing to appreciate that the Respondent had not met the threshold for an interlocutory prohibitory injunction.

Submissions

10. The Appellant filed submissions dated 4.8.2024. It was submitted that none of the reliefs granted by the lower court were sought in the application dated 7.3.2024 and parties were bound by pleadings.

11. It was also submitted that the court failed to examine whether the procedure in the Moveable Property Security Rights Act had been followed in relation to the right for secured creditors to exercise remedies under Section 73(2) of the Act. On this, it was also submitted that the Respondent was patently in breach and the lower court erred in issuing the injunctive orders.

12. The Appellant also submitted that the balance of convenience was not in favour of the Respondent. Reliance was placed on the case of Man (South Africa) Property Limited v Afkon Limited & 6 Others (2020) eKLR.

13. On their part, the Respondent filed submissions dated 8.10.2024. It was submitted that the appeal was frivolous and an abuse of the court process and should be dismissed in limine. The Respondent also submitted that the Appellant advanced fundamentally unjust practices that informed on fairness and equity.

14. On the grounds of appeal, it was submitted that the reliefs sought were prayed for and were in the discretion of the trial court. Reliance was placed on Aikman v Muchoki (1984) eKLR to submit that courts are not confined by specific reliefs requested in the pleadings provided that broader reliefs are warranted by facts and circumstances.

15. The Respondent further submitted that the grant of an injunction was satisfied. Reliance was placed on Giella v Cassman Brown. The Respondent cited a plethora of authorities to support a prima facie case which I have considered.

Analysis

16. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. The appeal is an interlocutory Appeal and not a final Appeal. The court will consider the exercise of discretion of the court. The court cannot differ with the court below on exercise of discretion. There having been no witnesses the discretion of this court is wide. In the case of Sugut v Jemutai & 3 others (Civil Appeal 110 of 2018) [2023] KECA 202 (KLR) (17 February 2023) (Judgment) Neutral citation: [2023] KECA 202 (KLR Kiage JA, stated as doth: -

> "I have carefully considered those rival submissions by counsel in light of the record and the bundles of authorities placed before us. I have done so mindful of our role as a first appellate court to proceed by way of re-hearing and to subject the entire evidence to a fresh and exhaustive re-evaluation so as to arrive at our own independent conclusions. See Rule 29(1) of the Court of Appeal Rules 2010; Selle Vs Associated Motor Boat Co [1968] EA 123). I do accord due respect to the factual findings of the trial court out of an appreciation that it had the advantage, which we do not, of having seen and heard the witnesses as they testified. I am, however, not bound to accept any such findings if it appears that the judge failed to take any particular circumstance into account or they were based on no evidence or were otherwise plainly wrong. I note from the record before us that the learned Judge may not have been in a fully advantageous position in that regard having taken up the case when it was already half-way heard. Her conclusions on the evidence and findings of fact were therefore from a reading of what was recorded by the previous judge."

17. The court is tasked to find whether the court was correct in issuing an injunction as prayed. The principles guiding the grant of interlocutory injunction are now well settled. Those principles were set out in East African Industries vs. Trufoods [1972] EA 420 and Giella vs. Cassman Brown & Co. Ltd [1973] EA 358. In Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR the Court restated the law as follows:

> In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;
>
> (a) establish his case only at a prima facie level,
>
> (b) demonstrate irreparable injury if a temporary injunction is not granted, and
>
> (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

18. These are the three pillars on which rests the foundation of any order of injunction, interlocutory or mandatory. The court below established that all the above three conditions were met. It must be remembered that the three pillars are to be applied as separate, distinct and logical hurdles which the Respondent was expected to surmount, sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86.

19. When an Applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction. The court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the Respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the Applicant's claim may appear at that stage.

20. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted. The Court of Appeal in the case of Nguruman Limited vs. Jan Bonde Nielsen & 2 others [2014] eKLR further opined that:

> "...these are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially... if the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted will be irreparable. In other words, if damages recoverable in law are an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration."

21. The injunction sought by the Respondent was in the nature of a mandatory injunction against the Appellants. For a mandatory injunction to issue, there must be compelling reasons, in particular serious irregularities and illegalities. In the locus classicus case of Kamau Mucuha vs. The Ripples Ltd Civil Application No. Nai. 186 of 1992 [1990-1994] EA 388; [1993] KLR 35 the Court of Appeal expressed itself as hereunder:

> ...A court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case the Court must, inter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted and that is a higher standard than is required for prohibitory injunction."

22. The operative date is January 2024. Before addressing this, it is crucial to address the animus of the Appellants. It communicated via WhatsApp messaging service on 16.11.2023 on the schedule of payment. The agreement itself provided on repayment. It stated that the sum of 206,380.03/= was indicative, the same provided as follows:

> The loan shall be repaid together with interest by 48 consecutive monthly instalments of Kshs. 206,380.03 from the date if drawdown by debit to the borrower's account. This is an indicative figure. Upon drawdown, the bank shall provide a loan repayment schedule with actual monthly installments payable. Where the loan is drawn on or before 15th day of the month, the first such installment shall be payable the last day of the month following the drawdown whereas if drawn after the 15th day of the month, the first such instalment shall be paid on the last day of the month following drawdown. Subsequent installments shall be payable on monthly intervals thereafter effected on the anniversary of the first installment. Where the repayment date falls on a nonworking day, the installment shall be paid on the next working day.

23. In such matters concerning an interlocutory appeal, I understand this court must be careful to guard against dispositions that would put the pending suit to jeopardy. The court must thus proceed with

alertness to keep off findings that would venture into or signpost the path to determination of the impending meritorious hearing; or otherwise pre-empty the potential findings of the ultimate judicial disposition of the lower court suit.

24. It follows that the default in supplying the repayment schedule fell squarely on the Appellant, who provided the same 3 months later. The Appellant rightly requested the court not to rewrite the contract. What do you do with a contract that appears to postpone dates and then create surprises? The uncertainties created were from the Appellant. There is absolutely no formal communication on the draw down date and installments.

25. The court notes that a 7-day notice is stated to have been given. It is not the duty of this court to belabour as it will be the trial court's duty to find whether this was notice required under the contract.

26. Reading the issues before the trial court, I cannot but resist the temptation to agree with the lower court that there was a prima facie case. I cannot on my side find any default in January. There was no notice to that effect. To make matters worse, the vehicle was retained under false pretenses. Any default in February and March is irrelevant to actions carried out in January up to 8th February.

27. I note the Appellant to have detailed that the lower court granted orders that were not prayed for. However, the application subject of the appeal was filed together with the plaint and clearly sought interim orders. The interim orders were not for any other purpose than the protection of the subject matter of the suit. The leaned magistrate had unfettered discretion in granting interim reliefs pending the determination of the suit and was thus well in order and cannot be faulted without evidence of fettering such discretion.

28. Therefore, based on the above findings, I find no material based on which to fault the lower court's finding that the Respondent had satisfied the condition based on which an injunction could issue and issuing the injunctive orders as he did. The injunctive order was necessary to preserve the substratum of the suit and I uphold it.

Determination

29. In the upshot, I make the following orders:

    a. The Appeal lacks merit and is accordingly dismissed.

    b. The Appellants shall bear the Respondent's costs of the Appeal of Kshs. 55,000/=, which shall be paid within 45 days, in default execution do issue.

    c. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 23RD DAY OF JANUARY, 2025.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:

Mr. Mwangi for the Appellant

Mr. Maingi for the Respondent

Court Assistant – Jedidah