Simple Pay Capital Limited v Gems National Academy Limited & 5 others (Commercial Case E204 of 2024) [2025] KEHC 300 (KLR) (Commercial and Tax) (22 January 2025) (Ruling)

Neutral citation: [2025] KEHC 300 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E204 OF 2024

AA VISRAM, J

JANUARY 22, 2025

BETWEEN

SIMPLE PAY CAPITAL LIMITED ..... PLAINTIFF

AND

GEMS NATIONAL ACADEMY LIMITED ..... 1ST DEFENDANT

ERNEST MUREITHI WAITHAKA ..... 2ND DEFENDANT

TERENCE NDANYI ..... 3RD DEFENDANT

DANIEL KARANI GUNGU ..... 4TH DEFENDANT

REGIS RUNDA ACADEMY LIMITED ..... 5TH DEFENDANT

RUNDA GARDENS DEVELOPMENT LIMITED ..... 6TH DEFENDANT

RULING

1. I have considered the Notice of Motion Application dated 22nd April, 2024; the grounds of opposition dated 3rd June, 2024; the replying affidavit sworn on 3rd June, 2024; the supplementary affidavit sworn on 25th July, 2024; the submission of the parties; and the applicable law.

2. The Applicant seeks the following order:-

> That pending the hearing and determination of the suit, the Honourable Court be and is hereby pleased to issue a temporary injunction restraining the sixth Defendant Respondent whether by itself or as agents, servants employees representatives, or anyone claiming under it from marketing, offering for sale, selling, transferring, alienating, charging, disposing or further dealing in whatsoever manner with the suit property being all that property known

L. R. 111681/10 (original No. 11681 (formerly LR No. 200091) situated in Runda, within Nairobi County).

3. In support of the Application, the Applicant outlined the background to the dispute. Counsel submitted that the 6th Defendant and 1st Defendant entered into an agreement which provided for construction of a school on the suit property, and for the grant of a long-term lease to carry out the business of a school on the said property.

4. She contended that after construction, the 6th Defendant granted the 1st Defendant a lease to carry on a school. Registration of the lease did not however materialize, what happened thereafter, was that the 6th Defendant terminated the lease, after the school had already commenced its business.

5. The terms of the lease between the parties permitted the said business, and payment was to be made quarterly. Payment was not however made in time, and the 6th Defendant re-possessed the school property in December, 2022.

6. The Plaintiff contended that it issued two loans to the 1st Defendant for the amount of Kshs. 60 Million initially, and later, a second loan for USD 80,000. After the grant of the lease, the 1st Defendant approached the Plaintiff for financial assistance. The purpose of this assistance was specifically for expansion of a school. This school in Counsel's view, was Regis School.

7. Counsel contended that the parties entered into a Master License Agreement with the real purpose and intention to continue the school despite the debt of the 1st Defendant. The 5th Defendant carried out this work and sought various licenses and approvals, and was granted the certificates to run the school at various levels, on the same suit property.

8. In Counsel's view, the 5th and 6th Defendants took over the school from the 1st Defendant and continued to run the same business that was owned by the 1st Defendant. She contended that the school run by the 5th Defendant bears the same name as the school owned by the 1st Defendant.

9. Counsel contended that the 5th and 6th Defendant have not vacated the property at the end of the Master License Agreement and to date, remain on the same property.

10. Counsel submitted that when a business is transferred, the transferee, in this case the 5th and 6th Defendant's, are liable for the debts of transferor, 1st Defendant. Further, that no notice was provided to the public of the said transfer contrary to the law.

11. In opposition to the Application, Counsel for the Respondent pointed out that the notices in relation to the transfer were in fact issued, and that evidence of the same are annexed to its Exhibits, and form part of the court record.

12. Counsel submitted in summary, that there is no relationship between the Plaintiff and the 5th and 6th Defendant.

13. Having considered the oral and written submissions of the parties, I note from the outset that the orders the Applicant is seeking are essentially orders to restrain or prevent the sale or disposal of the property.

14. On the face of it, the Application is made under the provisions of Order 40 rule 10 (1)(a), however, the orders the Applicant is seeking in its prayers relate to only Order 40 rule 1 and 2 of the Civil Procedure Rules.

15. Despite the above, the Applicant has submitted at great length in relation to orders seeking preservation and or inspection of property, which have not been prayed for, and in any event, are subject to the

conditions set out in Order 40 rule 10(1)(a). The submissions are however based on the law applicable to Order 40 rule 1, and the criteria for grant of such an order, namely, the principles set down in the case of Giella vs Cassman Brown & Co. Ltd. [1973] EA 358.

16. The conflict as stated above, goes to the root of the Application because the conditions for grant of a Mareva injunction under Order 40 rule 10(1)(a) of the Rules are entirely different from the considerations in relation to the prayer sought under Order 40 rule 1.

17. Given the above conflict, I am of the view that this court ought to consider only the order that has been specifically prayed for. Accordingly, to my mind, the only prayer before this court seeks to restrain the sale and or disposal of the subject property. I have therefore disregarded the submissions in relation to Order 40 rule 10, which seek preservation and inspection of property because there is no prayer seeking orders in relation to the same.

18. Addressing my mind to the relevant prayer, I am of the view that there is an insufficient nexus tying the 6th Defendant Company to the loan agreements made between the Plaintiff and the 1st Defendant at this stage of the proceedings, which are interlocutory.

19. The Plaintiff has not produced evidence of a debenture over the 6th Defendant's property, nor is it pursuing a statutory power of sale over the property pursuant to a legal charge, or other statutory instrument.

20. In the absence of a cause of action to enforce a statutory power of sale under a loan contract, mortgage, charge, debenture, guarantee or other such contract between the Plaintiff and the 6th Defendant, I do not think there is a sufficient basis for this court to interfere with the 6th Defendant's property rights at this stage.

21. Further, I do not think it is appropriate for this court, at this stage of proceedings, to determine the question of whether or not the 5th and 6th Defendant are liable to settle the loans of the 1st Defendant. That is a question for the trial court and is to be determined based on evidence to be adduced before the court. This position is in line with the decision of the court in *Airland Tours & Travel Limited vs. National Industrial Credit Bank Nairobi (Milimani) HCCC No. 1234 of 2002*, where Ringera, J. stated that in an interlocutory Application, the Court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence, or disputed propositions of law.

22. I am persuaded that in the absence of any privity of contract between the Plaintiff on the one hand and the 5th and 6th Defendants on the other hand, relating to the loan contracts dated 13th June, 2022 and 25th December, 2022, respectively, which the Plaintiff seeks to enforce in this suit, there is insufficient basis for the grant of the injunction sought against the 5th and 6th Defendants.

23. Finally, based on the record before me, there is no evidence to show that after lapse of the one year of the Master License Agreement, on 31st December, 2023, the 5th and 6th Defendants acquired the 1st Defendant's business in contravention of the law. Again, I am of the view that this issue ought to be determined by the trial court, and this court ought not make definitive findings of fact in relation to the same.

24. Given the facts above, I do not think the threshold for a grant of an injunction has been met, namely the principles set out in Giella vs. Cassman Brown & Co. Ltd [1973] EA 358. In Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR, where the Court restated the law as follows:-

> "In an interlocutory injunction Application, the Applicant has to satisfy the triple requirements to;
>
> i. establish his case only at a prima facie level,
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> ii. demonstrate irreparable injury if a temporary injunction is not granted, and
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> iii. ally any doubts as to (b) by showing that the balance of convenience is in his favour.
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> i. These are the three pillars on which rests 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. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. 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 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. 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." (Emphasis mine)

25. In particular, I do not think that a prima facie case has been made out at this stage. In the case of Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125, the Court of Appeal held as follows in relation to prima facie case:-

> "In civil cases a prima facie case 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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the Applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."

26. Based on the reasons set out above, I am not persuaded that the Applicant has made out a prima facie case in the terms required by Nguruman (supra). In short, I do not think that the Applicant has demonstrated a clear and unmistakable right to be protected, which is directly threatened by an act sought to be restrained, or that its right is material and substantive, and there is an urgent necessity to prevent the irreparable damage that may result from the invasion.

27. Having satisfied myself that the Applicant has failed to surmount the first limb, there is no need to move to the second limb of the test set out above. I therefore will not address the second or third limb.

28. My conclusion in relation to the first limb accordingly, brings the matter to an end. Accordingly, I find and hold that the Application is without merit. The same is dismissed with costs.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 22ND DAY OF JANUARY, 2025

ALEEM VISRAM, FCIArb

JUDGE

In the presence of;

.....Court Assistant

..... For the Plaintiff /Applicant

..... For the 1st Defendant/Respondent

..... For the 2nd Defendant/Respondent

..... For the 3rd Defendant/Respondent

..... For the 4th Defendant/Respondent

..... For the 5th Defendant/Respondent

..... For the 6th Defendant/Respondent