Shivachi v Platinum Credit Limited & another (Civil Appeal E005 of 2022)
[2025] KEHC 2214 (KLR) (Commercial and Tax) (3 February 2025) (Judgment)

Neutral citation: [2025] KEHC 2214 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL APPEAL E005 OF 2022

CJ KENDAGOR, J

FEBRUARY 3, 2025

BETWEEN

DESMOND MMALENJE SHIVACHI ..... APPELLANT

AND

PLATINUM CREDIT LIMITED ..... 1ST RESPONDENT

GILLETTE AUTIONEERS ..... 2ND RESPONDENT

(Being an Appeal from the Ruling of Hon. D.M. Kivuti (Mr.) Principal Magistrate delivered on 25th February, 2022 in Civil Case No. E9300 of 2021)

JUDGMENT

Introduction

1. This Appeal arises from the Ruling of Hon. D.M. Kivuti (Principal Magistrate) delivered on 25th February, 2022. In the said Ruling, the learned Magistrate dismissed the Appellant's Notice of Motion Application dated 25th June, 2021 and which sought to restrain the 1st and 2nd Respondents from dispossessing of the Appellant's motor vehicle registration number KCK 355X Toyota Land Cruiser pending the hearing and determination of Civil Case No. E9300 of 2021 - Desmond Mmalenje Shivachi –Vs- Platinum Credit Limited & Gillette Auctioneers.

2. By way of background, the case before the magistrate's Court was that on or about March, 2020, the Appellant took out a loan of Kshs.1,800,000/= from the 1st Respondent and secured motor vehicle registration number KCX 355X Toyota Land Cruizer. On or about 14th October, 2020, the Appellant sought a further loan advancement from the 1st Respondent after which the 1st Respondent advanced the Appellant a subsequent loan of Kshs 400,000/=.

3. In the pleadings, the Appellant claimed to have serviced the two loans amount of Kshs.3,000,000/=. However, the 1st Respondent disputed this claim and demanded that the Appellant pay Kshs.1,842,527.44/=. The 1st Respondent asserted their right to repossess the security motor vehicle, a Toyota Land Cruiser registration number KCK 355X. The 1st Respondent initiated this process through instructions given to the 2nd Respondent, citing that the Appellant remains indebted to them.

4. The Application dated 25th June, 2021 was dismissed on the ground that it had not established a prima facie case, a fundamental principle that must be satisfied in an Application of such nature.

5. The Appellant was dissatisfied with the ruling and filed the present appeal through a Memorandum of Appeal dated 15th March, 2022. In the Memorandum of Appeal, the Appellant presented the following grounds:

    i. That the Learned Magistrate erred in Law and fact in disregarding the Appellants application to retrain the Respondents from dispossessing him of motor vehicle registration number KCK 355X Toyota Land Cruiser.

    ii. That the Learned Magistrate erred in law and fact in failing to consider that the appellant has substantively and fully repaid the principal loan of Kshs. 2,200,000/- and interest to the tune of Kshs. 3,000,000/=.

    iii. That the Learned Magistrate erred in law and fact in failing to consider that the appellant is being harassed by the Respondents through excessive, exorbitant and oppressive interest rates.

    iv. That the Learned Magistrate erred in law and fact in failing to take into account the Appellant's earning capacity.

    v. That the learned Magistrate erred in law and fact in dismissing the application dated 25th June,2021 and exposing the Appellant to great risk of losing his motor vehicle yet it forms the substratum of the suit which is yet to be heard.

    vi. That the learned Magistrate erred in law and fact in failing to take key consideration into account in arriving at his order dismissing the notice of motion application without any factual basis and determining of what Is owed if anything and what has been paid to the respondent in Court.

    vii. That the Learned Magistrate erred in law and fact in failing to appropriate the totality of the evidence before him and not considering any submissions at all by the appellant or even his financial position and reaching to a conclusion that is contrary to the evidence on record.

    viii. That the learned Magistrate erred in law and fact in failing to evaluate the evidence and record before him and the law before making the order.

6. The appeal was canvassed by way of written submissions.

Appellant's Submissions

7. The Appellant submitted that the grant of temporary injunction is an exercise of judicial discretion and its purpose is to preserve matters in status quo until the question to be investigated in the suit can finally be disposed of. The Appellant further submitted that whereas the Respondents denied that the Appellant had settled the outstanding loan and maintained that the Appellant still owed the Respondent Kshs.1,842,527.44/=, this was an issue to be canvassed at the hearing of the main suit and not at the interim stage.

8. In submitting that he had met the test of prima facie case, the Appellant relied on the cases of Mrao Limited –vs- First American Bank of Kenya Limited & 2 Others and Kiyimba Kaggwa –vs- Katended [1985] KLR and submitted that the moment the Appellant took out the loan facility and paid in full, the Court was supposed to issue an injunction for purposes of preserving the subject matter pending the hearing and determination of the main suit on merits. The Appellant further submitted that he would suffer irreparable injury that cannot be compensated by way of damages if the motor vehicle is sold.

Respondents submissions

9. The Respondents submitted that the Appellant's quest for an interlocutory injunction should not be granted. The Respondent submitted that being an appeal stemming from an application for the grant of an interlocutory application at the lower Court, the Appellant must satisfy the conditions laid down in Giella –vs- Cassman Brown & Company Limited (1973) E.A. 358.

10. The Respondents submitted that the Appellant breached his contractual duties under the loan agreements and that even though he claimed to have paid a total of Kshs.3,000,000/=, the Appellant failed to produce any evidence of such payment. They asserted that the Appellant did not act in good faith by knowingly and willfully failing to pay the loan amount which is key consideration in granting interlocutory orders postulated in Mrao Limited –vs- First American Bank of Kenya Limited & 2 Others and Kiyimba Kaggwa –vs- Katended [1985] KLR and that as such, the Appellant failed to establish a prima facie case with the probability of success.

11. The Respondents further submitted that the Appellant did not demonstrate that should the aforementioned motor vehicle be sold, the Appellant would suffer injury not capable of being compensated through damages, as the 1st Respondent is a money-lending institution with the ability to remedy the Appellant if the court finds in favour of the Appellant. The Respondents further argued that the balance of convenience favours them, as the only form of security held by the 1st Respondent is the motor vehicle registration number KCX 355X Toyota Land Cruiser and further that they would suffer greater harm from the outcome of the injunctive order sought in this Appeal.

Issues for Determination

12. This being a first appeal, I am duty bound to review the evidence adduced before the trial Court and satisfy myself that the trial Court's finding was premised on well-known principles and foundation of law. This enduring duty was espoused in Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated thus:

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

Analysis and Determination

13. I have carefully considered the grounds of appeal, along with the submissions and supporting authorities submitted by the parties. The issue for determination is whether the appellant met the threshold for issuance of the interlocutory orders that was the basis of the Application determined by the trial Court.

14. The test for temporary injunction was settled in the locus classicus decision of Giella vs Cassman Brown & Co. Ltd (1973) EA, 358, 360, which set out principles for grant of injunction. The former Court of Appeal for East Africa stated as follows:-

> " The conditions for the grant of an interlocutory injunction are now, I think, well settled in east Africa. 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."

15. The Court of Appeal in the case of Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] Eklr held that the three limbs were sequential. The Court stated as follows:-

> " In an interlocutory injunction application, the applicant has to s atisfy 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) ally any doubts as to (b) by showing that the balance of convenience is in his favour.
>
> 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."

16. In the case of Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014], the Court of Appeal held as follows on what constitutes a prima facie case: -

> " We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. 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. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."

17. The trial Court noted the following in concluding that the appellant had not established a prima facie case;

> " The threshold of injunctive relief as appreciated in the authority in Cassan Brown I find the applicant fails the prima facie threshold, the loan amount is in default and the injunctive relief sought would indeed affect the debt collection endeavors. I find no merit in the application."

18. The Appellant contended that he had settled the loan in full and that, thus, the 1st and 2nd Respondent's intended attachment of his motor vehicle registration Number KCX 355X Toyota Land Cruiser was uncalled for. In my opinion, the question of whether the Appellant has paid loan amounts or whether the Respondent's claim that the Appellant is still indebted is a fundamental question in dispute for determination.

19. I am guided by the decision of Nguruman Limited v Jan Bonde Nielsen and 2 others (2014) eKLR, where the Court of Appeal held that: -

> " the party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion."

20. The Appellant's assertion that he had paid a total of Kshs.3,000,000/= to the satisfaction of the loan amounts and interest, it is imperative that the Appellant has a clear and unmistakable right over the motor vehicle registration number KCX 355X Toyota Land Cruiser. The trial Court erred by concluding an interlocutory stage that the appellant was in default when, in fact, this was an issue that required examination at trial. The trial Court proceeded to conduct a mini-trial, yet the ruling does not clarify how she determined that the loan amounts were still due over the other assertion. Considering the evidence about whether the appellant paid the loan amount in full or not at an interlocutory stage would involve examining the substance of the case, which should be reserved for the hearing of the main suit.

21. I am further persuaded that failure to grant the interlocutory orders pending the hearing and determination of the main suit would see the Respondent sell the said motor vehicle. The Appellant explained that he would suffer irreparable harm if the Respondents dispossessed him of the motor vehicle and sold it, particularly if the Court later ruled in favour of the Appellant. While the Respondent has asserted its ability to compensate the Appellant should the claim succeed, the Appellant contends that the value of the motor vehicle far exceeds the amounts claimed to be outstanding, that its sale will not be reversed, and that there is a higher risk of injustice.

22. In the case of Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR , the Court examined the test of balance of convenience and held as follows: -

> " The meaning of balance of convenience in favor of the Applicant is that if an injunction is not granted and the suit is ultimately decided in favor of the Applicants, the inconvenience caused to the Applicant would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Applicants to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the Applicants who suffer. In other words, the Applicants have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it."

23. I believe the assessment of the balance of convenience also favours the Appellant, considering the nature of the claim and the potential challenges that may arise if the vehicle is disposed of before the lower court hears and determines the case. In making my assessment, I have taken into account the practical realities of the case before me. I have weighed the harm the injunction would cause if granted against the harm resulting from its refusal. The Appellant would suffer greater injustice if the injunctive relief is denied. He has shown that he can financially fulfil the undertaking in damages through the deposited security.

24. In the circumstances, it is my finding that this Appeal succeeds. I set aside the Ruling and orders issued on 25th February, 2022.

25. To ensure that the motor vehicle used as security is well preserved and that the interests of each party are taken into account pending the hearing and determination of the suit, the application dated 25th June, 2021 is allowed in the following terms:

    I. Temporary injunction is issued restraining the Respondents by themselves, their agents, servants and or employees from repossessing, offering for sale, selling, transferring or dispossessing the Appellant of Motor vehicle KCK 355X Toyota Land Cruiser pending the hearing and determination of CM Milimani Commercial Civil Suit No. E9300 of 2021.

    II. The Appellant shall neither sell nor offer the vehicle for sale pending the hearing and determination of the matter.

    III. The security of Kshs.500,000/- which was deposited with the Respondent as security for this appeal, shall be deposited in court within 14 days and retained by the court, pending further directions from the trial court upon the conclusion of the matter.

    IV. The parties are to schedule the suit promptly for hearing.

26. Each party shall bear their costs of the appeal.

It is so ordered.

DELIVERED, DATED, AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 3RD DAY OF FEBRUARY 2025.

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C. KENDAGOR

JUDGE

In the presence of:

Court Assistant – Beryl

Advocate for the Appellants – Oringe Waswa Advocate

Advocates for the Respondent – Kogai Advocate