Crown Bus Services Limited v Scania Credit Solutions Proprietary Limited & another (Civil Appeal E419 of 2024) [2025] KEHC 12182 (KLR) (Civ) (22 May 2025) (Ruling)

Neutral citation: [2025] KEHC 12182 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E419 OF 2024

TW CHERERE, J

MAY 22, 2025

BETWEEN

CROWN BUS SERVICES LIMITED ..... APPELLANT

AND

SCANIA CREDIT SOLUTIONS PROPRIETARY LIMITED ... 1ST RESPONDENT

GG KAMIRI T/A WESTMISTER AUCTIONEERS ..... 2ND RESPONDENT

RULING

" Interim reliefs are a shield for the deserving, not a refuge for the defiant."

1. The matter before the Court is the Notice of Motion dated 26th March 2024 brought by the Appellant pursuant to the provisions of Sections 1A, 1B, 3A and 63(c) & (e) of the *Civil Procedure Act* and Order 22 Rule 22(2), Order 40 Rules 1(a), 2, 4(1), and 10(1)(b) of the Civil Procedure Rules, 2010.

2. The Appellant seeks, inter alia, an order of temporary injunction restraining the Respondents from interfering with, repossessing, or disposing of certain motor vehicles, being registration numbers KCX 074G, KCX 075G, KCX 076G, KCX 077G, KCM 098L, KCM 091L and KCM 413L, pending the hearing and determination of the appeal.

3. The application is supported by the affidavit of Mohamud Jumale Awale, the Appellant's Managing Director, sworn on 15th December 2024 and is based on the following grounds among others that:

    1. That the Appellant has various financial facilities with the 1st Respondent over the listed motor vehicles.

2. That default arose due to the impact of COVID-19 travel restrictions and what the Appellant contends are secretly imposed, inflated interest and unwarranted charges by the 1st Respondent.

3. That the 1st Respondent intends to seize and dispose of the said vehicles to the detriment of the Appellant.

4. That an injunction had previously been granted on 4th April 2023 by the trial court in MCCC E451 of 2022.

5. That the 1st Respondent successfully moved to discharge the injunction and instructed the 2nd Respondent to attach the vehicles.

6. That the Appellant is aggrieved by the order issued on 15th March 2024 discharging the injunction.

7. That the Appellant has suffered great loss due to the grounding of its vehicles.

4. The application is opposed through a replying affidavit sworn on 24th October 2024 by Mr. Paul Wanyonyi, the Credit Controller of the 1st Respondent. In opposition, the 1st Respondent avers inter alia:

1. That the Appellant breached the lease agreements by defaulting in payment.

2. That the 1st Respondent instructed the 2nd Respondent (auctioneers) on 22nd January 2022, who issued a proclamation.

3. That after the lapse of the stay order on 10th June 2024, the 1st Respondent repossessed four of the vehicles.

4. That all the vehicles were later released to the Appellant following the ruling of 25th July 2024 and are in its custody.

5. That the Appellant previously sought an injunction on 03rd February 2022.

6. That an injunction was granted on 29th March 2022 for 90 days with directions for reconciliation of accounts and continued payments.

7. That the Appellant declined to comply and orders were extended on 02nd December 2022, but the Appellant persisted in default.

8. That the 1st Respondent's application dated 28th November 2023 led to the trial court discharging the injunction on 15th March 2024.

9. That the matters raised in the present application are res judicata.

10. That the application is an abuse of the court process.

5. In its submissions dated 23rd April 2025, the Appellant reiterated the grounds set out in the application and the supporting affidavit. It is contended that the impact of COVID-19 constituted a force majeure event and argued that the trial court erred in failing to apply the binding precedent on this issue in Jomo Kenyatta University of Agriculture and Technology v Kwanza Estate Ltd [2022] KECA 700 (KLR).

6. The Appellant further relied on Transouth Conveyors Ltd v Kenya Revenue Authority [2007] eKLR to submit that the arguability of even a single issue is sufficient to warrant consideration by an appellate court. Additionally, reference was made to Retreat Villas Ltd v Equitorial Bank [2007] eKLR in

support of the proposition that, at the interlocutory stage, it is not necessary for the Appellant to demonstrate the likelihood of success of the appeal.

7. In its submissions dated 14th May 2025, the 1st Respondent argued that this application was brought in bad faith and that the Appellant had approached the Court with unclean hands. Reference was made to the ruling delivered on 04th April 2022, as well as the subsequent orders issued on 02nd December 2022, particularly on continued period payments, asserting that the Appellant had failed to comply with the said orders. The Respondent maintained that obedience to court orders is fundamental and that the Appellant's non-compliance disentitles it to an equitable relief.

8. Further, it was contended that the Appellant had not established a case for an injunctive relief as it had failed to demonstrate the likelihood of suffering irreparable harm. The Respondent also submitted that the balance of convenience favoured dismissing the application which would preserve the Respondent's interests.

9. Additionally, the Respondent raised serious concerns regarding the Appellant's alleged involvement in money laundering and suspected links to proscribed groups, as flagged by the Office of Foreign Assets Control (OFAC). The court was to reject the application, noting that similar circumstances had previously led to denial of injunctive relief.

10. The 1st Respondent equally cited numerous cases in support of its proposition which I will come to later in this ruling.

Issues for Determination

11. From the affidavits on record, submissions and cited cases, the issues arising for determination are:

    1. Whether the Appellant has met the threshold for grant of an interlocutory injunction pending appeal

    2. Whether the Appellant can rely on the ground of force majeure arising from the Covid-19 pandemic in the present proceedings.

Analysis and Determination

1. Whether the Appellant has met the threshold for grant of an interlocutory injunction pending appeal

12. The principles governing the grant of interlocutory injunctions were first articulated in Giella v Cassman Brown [1973] EA 358, where the Court held that an applicant must establish a prima facie case, demonstrate irreparable harm that cannot be compensated by damages, and show that the balance of convenience favours the grant of an injunction. These principles were applied in Patricia Njeri & 3 Others v National Museum of Kenya [2004] eKLR, particularly in the context of injunctions pending appeal, where the Court added that the appeal must not be frivolous and that refusal of the injunction would render the appeal nugatory. The Court of Appeal in Nguruman Ltd v Jan Bonde Nielsen [2014] eKLR reaffirmed the Giella test and emphasized its sequential application, that each limb must be satisfied before moving to the next.

i. A primafacie case

13. The Appellant relied on Transouth Conveyors Ltd v Kenya Revenue Authority [2007] eKLR to submit that even a single arguable ground suffices to establish a prima facie case. It also cited Retreat Villas Ltd v Equitorial Bank [2007] eKLR, arguing that the Appellant need not prove the likely success

of the appeal at this stage. While these are valid propositions, their applicability turns on the facts. In this case, the appeal arises not from a contested legal issue, but from a ruling discharging injunctive relief due to the Appellant's default.

14. The Court in Mrao Ltd v First American Bank of Kenya Ltd [2003] eKLR defined a prima facie case as one which shows not only an arguable issue but a probability of success and infringement of a right. The Appellant has not demonstrated any such infringement. It is, in essence, seeking protection from the consequences of non-performance.

15. The record reveals that injunctive orders were initially issued by the trial court on 04th April 2022 and extended on 02nd December 2022, on the express conditions that the parties would reconcile accounts and Appellant would continue making periodic payments under the lease agreements.

16. The 1st Respondent, through the affidavit of Mr. Paul Wanyonyi sworn on 24th October 2024, has demonstrated that the Appellant persistently failed to comply with these conditions. The trial court, upon being moved through the 1st Respondent's application dated 28th November 2023, discharged the injunctive relief by its ruling of 15th March 2024 due to the 1st Respondent's continued default.

17. The dispute herein arises from the Appellant's failure to comply with clear and express court conditions, rather than from the assertion of any arguable legal right requiring interim protection. The Appellant has not demonstrated any breach of a legally enforceable right or shown a probability of success. It is, in essence, seeking to avoid the consequences of its non-compliance. Accordingly, the Appellant has failed to establish a prima facie case, which is the first and essential limb of the Giella test.

ii. Irreparable harm

18. As to irreparable harm, the Court in Nguruman Ltd clarified that the equitable remedy of injunction is issued solely to prevent grave and irreparable injury, that is, injury that cannot be adequately compensated by damages.

19. The Appellant has not proved such injury. On the contrary, the 1st Respondent has demonstrated that the vehicles in question were repossessed only after lawful orders were discharged, and that they were subsequently released to the Appellant following the ruling of 25th July 2024. Moreover, there is no evidence before the Court that the vehicles are at imminent risk of sale or permanent loss. Moreover, there is no evidence that the 1st Respondent, is incapable of compensating the Appellant should the appeal succeed.

20. Accordingly, I find that the Appellant has not demonstrated any irreparable harm. The subject matter of the appeal which are commercial vehicles, are not unique or incapable of valuation. Rather, they are readily quantifiable and can be adequately compensated by an award of damages should the appeal succeed. Therefore, the second limb of the Giella test is not satisfied.

iii. Balance of convenience

21. This Court is called upon to consider whether equity may lend its aid to a party who has persistently defied lawful court orders and now seeks protection from the natural consequences of its default.

22. Whereas the COVID-19 pandemic presented unprecedented disruption, it did not suspend contractual obligations indefinitely nor excuse willful non-compliance with binding judicial directives. Equity, after all, aids the vigilant, not the delinquent.

23. The Appellant has not demonstrated that it has since purged the default or taken any meaningful steps to comply with the terms previously set by the trial court. In J.M.A. v R.G.O [2015] eKLR, the Court

made it clear that a party who comes to equity must do so with clean hands, and that disregard for court orders disentitles such a party from equitable relief.

24. Similarly, in Hadkinson v Hadkinson [1952] All ER 567, the English court stated that a party in contempt cannot be heard until it has purged its contempt. The same principle applies here. The Appellant's continued breach of subsisting court orders militates against the grant of any discretionary relief.

25. The principle of balance of convenience was aptly summarized in Pius Kipchirchir Kogo v Frank Kimeli Tena [2018] eKLR which requires an applicant to demonstrate that the comparative mischief from withholding the injunction will be greater than granting it.

26. The 1st Respondent's averments demonstrate that the continued use of the subject vehicles by the Appellant, despite persistent default in payment and breach of contractual obligations, undermines its proprietary and commercial interests. Additionally, the Appellant 's alleged links to proscribed entities and the resulting risk of regulatory action or asset seizure by the Office of Foreign Assets Control (OFAC), although directed at the Appellant, poses a significant reputational and operational risk to the 1st Respondent, whose assets remain exposed by continued association. These factors cumulatively point to the likelihood of irreparable harm to the 1st Respondent.

27. From the foregoing, the Court is not persuaded that the balance of convenience lies with the Appellant.

28. Granting an injunctive relief in such circumstances would amount to shielding the Appellant, a defaulting party, from the natural consequences of its own conduct, while unfairly prejudicing the 1st Respondent and undermining judicial authority.

2. Whether the Appellant can rely on the ground of force majeure

29. The Appellant contends that the COVID-19 pandemic constituted a force majeure circumstance justifying its non-performance. In support, it relied on Jomo Kenyatta University of Agriculture and Technology v Kwanza Estate Ltd [2022] KECA 700 (KLR). It is worth noting that this issue was not raised in the application dated 28th November 2023 before the trial court and cannot now be raised for the first time at appellate stage. As observed by the Court in West Kenya Sugar Co. Ltd v Okendo [2024] KEHC 2844 (KLR):

> " The appellate court is restricted to consideration of the issues that were canvassed before and decided by the trial court."

30. Even if the force majeure argument were to be considered on merit, the defence is unconvincing for the reason that the trial court, in its ruling dated 29th March 2022 expressly took judicial notice of the economic disruption caused by the COVID-19 pandemic but nonetheless imposed clear conditions, including reconciliation of accounts and continued periodic payments, anticipating the eventual resumption of contractual obligations.

31. The Appellant cannot therefore rely on the COVID-19 pandemic as a continuing justification for non-performance, particularly where it has failed to demonstrate any effort to comply even after the easing of restrictions and resumption of business activities.

32. The Appellant's failure to comply long after business normalized cannot be excused under the guise of COVID-19 disruptions. Indeed, the trial court observed:

> "Even evangelists... closed their places of worship and had to resort to other means of survival."

33. The Court was clearly alive to the pandemic but still expected parties to honour their obligations post-disruption.

Disposition

34. From the foregoing analysis, the Court finds that:

1. The Appellant has persistently breached subsisting court orders and has not approached this Court with clean hands;
2. The Appellant has failed to meet the established threshold for the grant of an interlocutory injunction pending appeal, as set out in Giella v Cassman Brown, Patricia Njeri & Others v National Museum of Kenya and Nguruman Ltd v Jan Bonde Nielsen
3. The plea of force majeure arising from the COVID-19 pandemic is procedurally improper and, in any event, substantively lacking in merit.
4. The Notice of Motion dated 26th March 2024 is therefore without merit and is hereby dismissed with costs to the 1st Respondent.
5. Mention before the Deputy Registrar on 04th July 2025 to confirm filing and service of the record of appeal

DELIVERED AT NAIROBI THIS 22nd DAY OF May 2025

WAMAE.T. W. CHERERE

JUDGE

Appearances

Court Assistant - Ruth

For Appellant - Mr. Kinyanjui for J. Harrison Kinyanjui & Co. Advocates

For 1st Respondent - Ms. Oseko for G.N.Nyakundi Advocates

For 2nd Respondent - N/A