



**Kei Industries Limited v Young & 10 others (Civil Suit
E084 of 2023) [2024] KEHC 16985 (KLR) (8 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 16985 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT E084 OF 2023
F WANGARI, J
JANUARY 8, 2024**

BETWEEN

KEI INDUSTRIES LIMITED PLAINTIFF

AND

LARRY YOUNG 1ST DEFENDANT

EDISON INTERNATIONAL GROUP 2ND DEFENDANT

ETHAN KATO 3RD DEFENDANT

KENYA PORTS AUTHORITY 4TH DEFENDANT

KENYA REVENUE AUTHORITY 5TH DEFENDANT

AF BLACKMORE AND SONS LIMITED 6TH DEFENDANT

MARK JONES 7TH DEFENDANT

LUBURWA MOSES 8TH DEFENDANT

INTERNATIONAL FISH CANNERS (SCOTLAND LIMITED) AFRICAN

BRANCH 9TH DEFENDANT

MICHAEL WILLIAM GORDON 10TH DEFENDANT

CMA-CGM 11TH DEFENDANT

RULING

1. This ruling relates to a Notice of Motion dated 6th October, 2023 which sought for the following orders: -

a. Prayers 1-6 Spent;



- b. Pending the final disposal of this suit, the plaintiff/applicant be granted a temporary prohibitory injunction barring the 1st, 2nd and 3rd defendants, their employees, their agents, officers, assigns or anyone howsoever claiming through them or under them from collecting accessing and or otherwise interfering and/or dealing with the plaintiff's goods under the Bills of Lading No. AMC2113963 and AMC2100104 consigned to the 2nd defendant.
 - c. Pending the final disposal of this suit, the plaintiff/applicant be granted a temporary injunction barring the 4th and 5th defendants restraining them from auctioning, selling, alienating, wasting and/or otherwise disposing of the plaintiff's goods under the Bill of Lading No. AMC2113963 and AMC2100104 consigned to the 2nd defendant and restraining the 4th and 5th defendants from releasing the said goods to the 1st, 2nd and 3rd defendants.
 - d. Pending the final disposal of this suit, the plaintiff/ applicant be granted a temporary mandatory injunction against the 1st and 3rd, 2nd and 3rd defendants ordering them to return to the plaintiff the goods under the Bill of Lading No. AMC2098736.
 - e. That costs for of this application be provided for.
2. The application, orders and the directions issued by this court on 7/11/2023 were served upon the Defendants as per the Affidavit of service dated 28/11/2023. When the matter came up for directions on 28/11/2023, the none of the Defendants had filed their responses nor submissions as directed.
 3. The Applicant was directed to file the submissions within 21 days from the date thereof and a ruling date fixed for 1/2/2024. The Applicant thereafter filed a Certificate of Urgency dated 5/12/2023 seeking to have the ruling date rescheduled to an earlier date as the application was not opposed and the Applicant continued to suffer irreparable harm as the containers held at the Port of Mombasa continued to attract daily charges.
 4. The ruling date was rescheduled to 27/12/2023 but due to unforeseen and unavoidable circumstances, the trial Judge was not in a position to deliver the ruling on the said date as stated. The ruling was then fixed to be delivered on 8/1/2024 during the High Court's vacation. I have perused the e-filing platform and as 27/12/2023, there was no response from any of the Defendants.
 5. However, the 4th Defendant filed the Memorandum of Appearance dated 5/1/2024 and Grounds of Opposition dated 8/1/2024. This was done after the time of responding was long gone. There is ample evidence that the 4th Defendant was duly served on time but chose not to respond in requisite time. Further, there was no leave that was sought by the 4th Defendant to file its pleadings out of time.
 6. In *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, the Supreme Court had this to say about filing of documents without leave of the court;

“What we hear the applicant telling the Court is that he is acknowledging having filed a ‘document’ he calls ‘an appeal’ out of time without leave of the Court. Pursuant to rule 33(1) of the Court’s Rules, it is mandatory that an appeal can only be filed within 30 days of filing the notice of appeal. Under rule 53 of the Court’s Rules, this Court can indeed extend time. However, it cannot be gainsaid that where the law provides for the time within which something ought to be done, if that time lapses, one need to first seek extension of that time before he can proceed to do that which the law requires.



By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such ‘an appeal’, is tantamount to moving the Court to remedy an illegality. This, the Court cannot do.”

7. Under the circumstances, the 4th Defendant having filed the pleadings without leave of the court, this court shall proceed to disregard the Grounds of Opposition filed, and deem the Applicant’s application to be unopposed.
8. The application was disposed of by way of written submissions. Only the Applicant complied by filing detailed submissions together with various authorities in support of its positions. Despite the fact that the application is unopposed, this court has a duty to determine the same on merits.

Analysis and Determination

9. I have considered the application, submissions together with the authorities relied upon by the Applicant as well as the law and in my view, the following are the issues for determination
 - a. Whether the Applicant has made out a case for grant of orders of injunction;
 - b. If the answer to (a) above is in the affirmative, what orders should issue?
 - c. Who bears the costs of the application?
10. On the second issue, this being an application for orders of temporary injunction, the principles guiding the court whether to grant the orders sought or not are 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 of Appeal 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.

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...” (Underlying for emphasis)

11. While considering the above principles, I take caution 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. (See the decision of Ringera, J (as he then was) in *Airland Tours & Travel Limited vs. National Industrial Credit Bank Nairobi (Milimani)* HCCC No. 1234 of 2002) However, the Court is not excluded from expressing a prima facie view of the matter and the Court is entitled to consider what else the deponent to the supporting affidavit has stated on oath which is not true. Being an equitable relief, a party seeking this remedy ought to act equitably.
12. Therefore, though at an interlocutory stage the Court is not required and indeed forbidden to purport to decide with finality the various relevant “facts” urged by the parties, the remedy being an equitable one, the Court will decline to exercise its discretion if the Applicant to relief is shown to be guilty of conduct which does not meet the approval of the Court of equity.
13. Injunction being an equitable remedy, the court is enjoined to look at the conduct of the Applicant for the injunctive orders, the surrounding circumstances whether the orders sought are likely to affect the interests of non-parties to the suit, the issue whether an undertaking as to damages has been given as well as the conduct of the Respondent whether or not he has acted with impunity.
14. The Court is also, by virtue of section 1A (2) of the *Civil Procedure Act*, enjoined to give effect to the overriding objective as provided under section 1A (1) of the said Act in exercising the powers conferred upon it under the *Civil Procedure Act* or in the interpretation of any of its provisions.
15. On whether the Applicant has established prima facie case, in *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125, prima facie case was defined as follows: -

“...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...”
16. The Applicant is the owner of the cargo in question. That has not been disputed despite the Defendants having been served with the application. It has been well stated and documented how the cargo ended up in the Port of Mombasa. There is therefore infringement of the Applicant’s right to the cargo. I am satisfied that a prima facie case has been established.
17. On whether the Applicant shall suffer irreparable damage which cannot be compensated by an award of damages, the Applicant has established that the 1st, 2nd and 3rd Defendants fraudulently acquired one consignment without paying for it and seeks to further acquire more cargo from the Applicant. The fact that they have not even appeared nor filed their responses makes one doubt if the address given is even genuine. If the orders being sought for are not granted, and the cargo is released to the said Defendants, the matter being cross-border in nature, the Applicant as stated in its submissions is likely unable to execute the judgement in the event there is success in the suit.
18. On the balance of convenience, I note that the cargo is still incurring demure charges are still being incurred, yet the Applicant is suffering due the acts of the Defendants save for the 4th and 5th



Defendants. The Defendants are not suffering any damages. In *Chebii Kipkoech vs. Barnabas Tuitoek Bargarioria & Another* [2019] eKLR, balance of convenience was defined as follows: -

“...the meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to them would be greater than that caused to the defendants if an injunction is granted and suit is ultimately dismissed...”

19. Putting all the facts into perspective, I note that if the orders for injunction are not granted at this stage, the Applicant continues to suffer irreparable harm. On the contrary, the Defendants in the event they are successful in the suit, they can be awarded damages and costs of the suit.
20. On whether the matter should be determined by case stated, it cannot be ignored that the 4th Defendant has already entered appearance. This shall be cured by fast tracking the hearing of the suit and which shall be done on priority basis.
21. On the issue of costs, Section 27 of the *Civil Procedure Act* decrees that the same follows the event. However, the court retains its discretion to either award or not to award costs. The matter is still at the preliminary stages. Costs shall follow the outcome of the suit.
22. From the above, the court orders as follows;
 - a. The application dated 6/10/2023 is allowed in terms of prayer no. 7, 8 and 9.
 - b. That the Applicant do pay the statutory charges due and owing to the 4th Defendant, and the cargo be released immediately upon the said payment to avoid further unnecessary charges.
 - c. That due to the urgency in the matter, the suit shall be fast tracked, and matter be fixed for pre-trial within the next 14 days from the date hereof.
 - d. That costs to follow the outcome of the suit.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA EMAIL AT MOMBASA THIS 8TH DAY OF JANUARY, 2024.

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F. WANGARI

JUDGE

