Weru v Kawira & 2 others (Appeal E117 of 2022) [2024] KEHC 1570 (KLR) (Commercial and Tax) (16 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1570 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

APPEAL E117 OF 2022

FG MUGAMBI, J

FEBRUARY 16, 2024

BETWEEN

EPHRAIM WAMBUGU WERU .... APPELLANT

AND

IMMACULATE KAWIRA .... 1ST RESPONDENT

NEWTON'S PREMIUM AUTOS .... 2ND RESPONDENT

NEWTON KIMATHI KIRIMI .... 3RD RESPONDENT

JUDGMENT

1. This appeal originates from an interlocutory ruling of the subordinate court (Hon A. N. Oganda) delivered on 5th August 2022 in Nairobi Milimani MCCOMMSU No. E393 of 2022. By that ruling, the Learned Magistrate granted an injunction to restrain the appellant, 2nd and 3rd respondents from transferring ownership of motor vehicles registration number KDA 844H Mazda CX-5 and KCW 943T Toyota Auris. She also issued an order restraining the said respondents from disturbing or interrupting the ownership and quiet enjoyment of motor vehicle KDA 844H Mazda CX-5 by the 1st respondent and directed that the Motor Vehicle Toyota Auris KCE 943T be delivered to Karen Police Station.

2. Dissatisfied with the ruling, the appellant filed this appeal vide a Memorandum of Appeal dated 25th August 2022. The appeal is premised on the grounds that:

    i. The learned magistrate erred in law and in fact in failing to find that the 1st respondent could not on the facts establish a *prima facie* case with a probability of success against the appellant

    ii. The learned magistrate erred in law and in fact in failing to find that the 1st respondent's loss, if any was capable of monetary compensation

iii. The learned magistrate failed to properly appreciate and properly apply the principles in *Giella v Cassman Brown* to the application.

3. The appeal was canvassed by way of written submissions. The appellant's submissions are dated 10th May, 2023 while the 1st respondent's submissions are dated 28th July 2023. The 2nd and 3rd respondents did not participate in the appeal.

4. The submissions by the appellant buttressed the grounds in the Memorandum of Appeal, which I need not reiterate. The 1st respondent opposed the appeal and in turn submitted that the trial court had correctly exercised its discretion in granting the interim orders. As far as she was concerned, it was necessary to preserve the subject matter of the suit which is yet to be determined. The 1st respondent submitted that the appellant had failed to demonstrate in which manner the trial court misdirected itself in arriving at a wrong conclusion.

Analysis

5. I have carefully considered the record of appeal and submissions made by the rival parties. The issue for determination is whether the trial court erred in granting the orders of injunction as issued.

6. In determining the issues raised in the appeal this court is cognizant of its duty on a first appeal as set out in the case of *Selle & Another v Associated Motor Boat Co Ltd & Others,* [1968] EA 123. The Court of Appeal restated the guidelines that apply when evaluating an appeal against a decision taken in the exercise of discretion in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others*, [2014] eKLR:

> " Reverting to the main appeal, we emphasize by reiterating that this Court will not interfere with the exercise of discretion by the Judge in the court below unless satisfied that the decision of the Judge is clearly wrong because of some misdirection, or because of failure to take into consideration relevant matter or because the Judge considered irrelevant matters and as a result arrived at a wrong conclusion, or where there is a clear abuse by the Judge of his discretion. Whenever a court exercises a discretion, there is always a presumption of correctness of decision which is reversible only upon showing of a clear abuse of discretion."

7. As a result, this court will not interfere with the Learned Magistrate's exercise of discretion unless it is satisfied that the Magistrate erred in some area and came to the incorrect conclusion, or that it is evident from the case as a whole that the decision was manifestly incorrect in the exercise of discretion and caused injustice. (See *Mbogo v Shah*, [1968] EA 93).

8. The 1st respondent submitted that the trial court was justified in issuing the orders of temporary injunction having established the existence of a *prima facie* case and in the spirit of protecting the subject of the suit. The appellant on the other hand, argues that the 1st respondent failed to establish a *prima facie* case as the Motor Vehicle registration number KDA 844H Mazda CX-5 was registered in his name and he was not a party to the contract for sale dated 12th November 2020 entered between the 1st respondent and the 2nd respondent.

9. I have perused the ruling by the trial magistrate and it is evident that she considered and applied her mind to the settled principles for grant of an injunction as enunciated in *Giella v Cassman Brown* before rendering her decision. The assertion by the appellant that the trial court did not consider the principles for granting an injunction cannot therefore hold water.

10. On the first principle, in order to meet the threshold for a *prima facie* case with a probability of success, the 1st respondent was required to lay out sufficient material to call for an explanation by the appellant

and the 2nd and 3rd respondents at a full trial. The *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others*, [2003] KLR 125 decision is often cited in establishing the threshold for a *prima facie* case. The learned judges established that:

> " ...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 as 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. The evidence must show an infringement of a right, and the probability of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case."

11. The evidence on record shows that the 1st respondent entered into a motor vehicle sale agreement with the 2nd respondent for sale of motor vehicle registration number KDA 844H Mazda CX-5. The sale agreement is dated 12th November 2020. According to the agreement, the total purchase price was Kshs. 1,900,000/=. The agreement acknowledges that the 1st respondent had traded in a motor vehicle KCW 943T Toyota Auris and there is prove that the 1st respondent further paid an amount of Kshs.723,700/= on 12th November 2020 to the 2nd respondent.

12. The evidence on record further confirms that the motor vehicle registration KDA 844H Mazda CX-5 was registered in the name of the appellant. The 1st respondent avers that despite having performed her part of the agreement, the appellant, the 2nd and 3rd respondents had failed to transfer the vehicle to her and the appellant had made it impossible for her to enjoy quiet possession of the vehicle. This is what is at the centre of this dispute.

13. I note that the appellant denies any knowledge of the respondents herein. He further denies that he had authorized the 2nd and 3rd respondents to sell the motor vehicle on his behalf. The Learned Magistrate considered this fact and questioned how the 1st respondent would have obtained possession of the vehicle KDA 844H Mazda CX-5. The Learned Magistrate further concluded that the appellant would have to explain the circumstances if he still insisted that the 2nd and 3rd respondents were not his agents.

14. I might add here that there is also a hand-written agreement dated 7th April 2022 signed by the appellant, the 1st and the 3rd respondent in which the 3rd respondent undertakes to pay Kshs. 1,800,000/ = to the appellant in respect of the said vehicle where the 1st respondent is described as the buyer. The circumstances of this agreement will require to be interrogated as will the assertion by the appellant that he is a 'stranger' to the transaction.

15. I am alive to the limitations of enquiry that are permitted of this court at this point in time, guided by the decision in *Nguruman Ltd v Jan Bonde Nielsen 8 2 Others*, [2014] eKLR where the court observed 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."

16. Considering the evidence presented before this court, I concur with the Learned Magistrate that the case presented by the 1st respondent raises pertinent issues that demand an explanation or rebuttal by the appellant, 2nd and 3rd respondents. This can only be determined upon further interrogation at a full trial hence the need to preserve the subject matter of the trial.

17. Secondly, on adequate compensation, I refer to the case of *Kenya Commercial Finance Co. Ltd v Afraha Education Society*, [2001] Vol. 1 EA 86 where the court held that:

> "The equitable remedy of a temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be an adequate remedy."

18. I find it crucial to further point to the decision in *Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 Others*, [2016] eKLR. In this matter the Court cited with approval from the *Halsbury's Laws of England* on the definition of irreparable loss as:

> "Injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages."

19. This view was well captured in the reasoning of Warsame, JA in *Joseph Siro Mosioma v Housing Finance Company of Kenya & 3 Others*, [2008] eKLR to the extent that:

> "Damages is not and cannot be a substitute for the loss, which is occasioned by a clear breach of the law...a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction."

20. From reading the ruling, it is clear that the Learned Magistrate was convinced by the submissions made by the 1st respondent that she had suffered the inconvenience of losing both vehicles and her money and would suffer irreparable loss if an injunction was not granted. On this basis, the trial court, and rightly so in my view, considered that this ground had been justified.

21. Finally, it is clear that the trial court evaluated the balance of convenience and opined that the 1st respondent was more likely to suffer prejudice in the event the injunction is not issued as there was a higher probability she would not recover the amount paid for the purchase of the motor vehicle as well as recover the motor vehicle KCW 943T.

22. I am convinced that the trial magistrate exercised her discretion on sound reason by interrogating all the conditions necessary for granting temporary injunctions.

Determination

23. Accordingly, the appeal is bereft of merit and it is dismissed with costs to the 1st respondent.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 16TH DAY OF FEBRUARY 2024.

F. MUGAMBI

JUDGE