



Absa Bank Kenya PLC v Rehas Liquor Distributors Limited (Civil Appeal E101 of 2023) [2024] KEHC 4673 (KLR) (18 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4673 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E101 OF 2023
DKN MAGARE, J
APRIL 18, 2024**

BETWEEN

ABSA BANK KENYA PLC PLAINTIFF

AND

REHAS LIQUOR DISTRIBUTORS LIMITED RESPONDENT

JUDGMENT

1. This is Appeal from the Ruling and order given on 6/4/2023 in Mombasa CMCC E1686 of 2022 by Hon. Maureen L. Nabibya – SPM.
2. The appeal is from an interlocutory application, I shall treat, the facts with circumspection to avoid making embarrassing conclusions given that the matter is still ongoing.
3. The appellant filed a Memorandum of appeal on 4/5/2023 and raised 3 grounds of Appeal as follows: -
 - a. The learned magistrate erred in law in failing to consider the jurisdictional challenge in limine or at all.
 - b. The learned magistrate erred in law and fact in granting an injunction after finding that no prima facie case had been established and that no irreparable injury would be suffered.
 - c. The learned magistrate in any event, erred in law and fact in granting an injunction in the circumstances of the case before her.
4. The dispute relates to a claim for 5,000,000/= which according to the Respondent has Kshs. 2,673,538.55 outstanding. The respondent stated that the claim was illegal.
5. The only major prayer is for injunction and supply of bank statement. As usual in this kind of cases a notice of Motion dated 25/11/2022 was filed with the suit.
6. The same was argued and court found as follows: -



- a. The respondent did not have a prima facie case.
 - b. The balance of convenience tilts in favour of the defendant.
 - c. The respondent will not suffer irreparable loss.
7. Parties filed lengthy submission which I shall not regurgitate as the same go to the merit of the matter in the court below. I am however disturbed by the finding of the court. The court must at all-times be guided by the decisions of the superior court.
8. The locus classic case of *Giella = vs = Cassman Brown & Co. Ltd (1973) EA, 358, 360*, sets out principles for grant of injunction. The court, stated as follows, though the wisdom of Spry VP, as then he was, 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.”

12. The first test is the issue of prima facie case. In *Mrao Ltd v First American Bank of Kenya Ltd & 2 others (2003) eKLR*, the Court of Appeal stated:

“The principles which guide the Court in deciding whether or not to grant an interlocutory injunction are well settled. In *Giella v Cassman Brown* to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner he was considering, which was in relation to the pleadings that had been put forward in that case....So what is a prima facie case? I would say that in civil cases it 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 as to call for an explanation or rebuttal from the latter.”

9. It therefore means that a prima facie case is the pre-requisite for grant of an injunction.
10. The principles guiding the grant of interlocutory injunction are now well 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 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."

11. The Court of Appeal in the case of *Nguruman Limited vs. Jan Bonde Nielsen & 2 others* [supra] stated:

"...these are the three pillars on which rest 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... 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 are 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.

12. The court cannot move to the second limb before dealing with the first limb. It is noted that there is no dispute on facts. The finding that there was no prima facie case was not challenged. It remains a finding which this court cannot disturb without committing atrocities to its duty as the first Appellate. In the case of *Mbogo and Another vs. Shah* [1968] EA 93 where the Court stated:

"...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

13. Concomitantly the court cannot proceed to the second limb. The court has no jurisdiction to do so. In *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR, justice Nyarangi JA, as he then was stated as doth;

"With that I return to the issue of jurisdiction and to the words of Section 20 (2) m) of the 1981 Act. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority: "By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take



cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics.

14. The court cannot by craft find a way of giving an injunction. In *S. K Macharia in the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, THE supreme court stated as doth: -

“This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

15. The court will therefore assume jurisdiction where it has and eschew jurisdiction where none exists. The bottom line is that the court was bound to down its tools and dismiss the application upon finding that there is no prima facie case. The court cannot proceed gratuitously to the other limbs upon finding that there was no prima facie case. Injunctions being equitable remedies, cannot be handed to parties willy-nilly. There has to be a strong basis for issuance thereof.

16. On the circumstances the Appeal is merited. It is unnecessary to address the issues of irreparable damages, upon agreeing that the court had found no prima facie case.

17. This does not mean that on evidence the court cannot issue a final injunction. It cannot however, issue one where proof has not been tendered. It is important to remember the words of the Court of Appeal in *Bank of Africa Limited v Juja Coffe Exporters Limited & 4 others* [2018] eKLR, stated as follows: -

“The Court observed in the process, that 'a bank has no money of its own and it is axiomatic that it uses public funds to trade with. The applicant obtained a large amount of those funds and had full benefit of it.' And so it is in this case.”

18. The banks owe the banking public a duty of care to ensure prudent management of resources. Therefore, injunctions are not dished out like manna awaiting nothing. The court should have been alerted of the prima facie nature of the case, when perusing the file and upon finding that there is no prima facie case, it should have followed precedent.

13. There is no other order available save to allow the Appeal. The appeal was meritorious. The Application filed was untenable. In the circumstances, Costs should assuage the Appellant. On costs I am alive to several superior court decisions The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others*, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

“(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth



the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

19. The natural consequence of the dismissal order allowing the application for injunction. In lieu thereof an order for dismissal of the said application with costs will suffice.

Determination

20. The upshot of the foregoing is that I make the following orders: -
- a. The appeal is merited and is accordingly allowed.
 - b. Cost of Kshs. 145,000/= to the Appellant.
 - c. The court declines to strike out the suit in the court below as the court cannot do so at the Appeal level.
 - d. Cost to be paid within 30 days in default execution do issue.
 - e. The matter in the court below do proceed in a court other than Maureen L. Nabibya.
 - f. The file is closed.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 18TH DAY OF APRIL, 2024.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:-

Ms. Cheruiyot for the Appellant

No appearance for the Respondent

Court Assistant- Brian

