Platinum Credit Limited v Nyaundi (Civil Appeal 137 of 2021)
[2024] KEHC 17035 (KLR) (9 May 2024) (Judgment)

Neutral citation: [2024] KEHC 17035 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL 137 OF 2021

TA ODERA, J

MAY 9, 2024

BETWEEN

PLATINUM CREDIT LIMITED ..... APPELLANT

AND

NANCY KERUBO NYAUNDI ..... RESPONDENT

(Being an appeal from the Ruling delivered by Hon. ONJORO (PM) on 22nd October, 2021 in KISII CMCC NO. 535 of 2021)

JUDGMENT

Introduction

1. This Appeal arises from the Ruling delivered on 22nd October, 2021 in Kisii CMCC NO 535 of 2021 granting the Respondent herein an order of injunction against the Appellant deducting money from the Respondent's Account pending the hearing and determination of the main suit filed by the Respondent.

   Aggrieved by the decision of the trial court filed this appeal based on the grounds that;

   a. The Learned Trial Magistrate erred in law and in fact granting an injunction against the Appellant from deducting money from the Respondent's account.

   b. The Learned Trial Magistrate failed to consider and/ignore the submissions of the Applicant and consequently arrived at an erroneous decision.

   c. The Learned Trial -Magistrate erred failed to consider and determine the Appellant's objection against the Respondent.

   d. The Learned Trial Magistrate erred in law and in fact by failing to take into account the pertinent issues raised in the appellants., submissions;

e. The Learned Trial Magistrate erred in law and in fact by failing to dismiss the Respondents application dated 19th May 2021.

Based on the grounds of Appeal the Appellants sought for the following orders;

a. The Ruling and/or order of the Learned Magistrate dated 22nd October, 2021 be set aside and/or quashed

b. This Honorable court be pleased to substitute an order dismissing the Respondent's Application dated 19th May, 2021 in the subordinate court vide the original Kisii CMCC NO. 535 OF 2021. and enter a just judgement in light of the evidence on record;

c. That the costs of this Appeal and those incurred at the subordinate court be borne by the Respondent

d. Any such order that this court shall deem just and expedient in the circumstance to grant.

The background of the matter is that the Respondent filed a suit against the Appellant vide a plaint dated 19th May, 2021 seeking;

a. A permanent injunction restraining the Defendant (the Appellant herein) and its agents, servant's workers or employees from deducting any amount from the plaintiff's salary any further.

b. A refund of the sum unlawfully deducted from the Plaintiff's account

c. An account of all sums the defendant has deducted since the loan was issued to the plaintiff

d. Costs of the suit

e. Interest on (b) and (d)

f. Any other relief the court may deem fair and just in the circumstance.

2. To support her claim the Respondent alleged that on or about 18th October, 2018, she applied for a loan facility amounting to Kshs. 650,000/=. The Respondent was to pay a sum of Kshs. 33,480 monthly until payment in full. The Respondent agreed to have her monthly salary as security wherein the Appellant was to draw the monthly deduction from the same. The Appellant accepted and advanced the said amount of money to her and had religiously been drawing money from her salary account to recover the monthly installments.

3. However, the Respondent claimed that according to the Appellant's interim statement of the Respondent's account dated 3rd May, 2021, the plaintiff allegedly still owed the Appellant a sum of Kshs. 641,800. She insisted that at the time she filed the suit he did not owe any outstanding monies from the loan as the same had been paid in full by 18th May, 2020 or thereabout given that the Appellant had religiously been deducting monies from her salaries account. The Respondent equally claimed that the Appellant had equally deducted interest to the loan to a tune of 546, 198.91.

4. He claimed that despite having cleared the loan in May 2020, the Appellant was still making deduction from her salary account and thus she filed seeking a declaration that she had paid up all the loan amount an order stopping the Appellant from making any further deduction. She also sorts a refund of the sum the defendant had deducted after she had cleared paying the loan.

5. Together with the Plaint, the Respondent equally filed an Application under certificate of urgency seeking orders of temporary injunction pending the hearing and determination of the suit among other orders. In support of the Application, the Respondent reiterated her averments in the Plaint. In addition, she decried that if the respondent was not restrained from proceeding to make further deduction from his account, then stood to suffer irreparable damage given that the continued deduction of money from her account without any basis was likely to affect her financially as well as her investment. She equally claimed that the Respondent stood to suffer no prejudice should the Application be applied as prayed.

6. The Appellant entered appearance on 31st May, 2021 and filed a replying affidavit sworn by Richard Simbala Assistant legal officer with the Appellant on 10th June, 2021 and filed in court on 16th June, 2021 in response to the Application for injunction. Mr. Simbala averred that the Application was defective an affront to the mandatory provisions of the civil procedure rules. He narrated that the plaintiff applied for a loan facility of Kshs. 400,000 at a monthly interest of 6% plus other applicable bank charges and penalties from the Appellant for a period of 60 months; on 18th September, 2020, the Respondent applied for another loan facility and was granted another loan Kshs. 650,000 that was payable within 60 months. The loan facility was considered, approved and disbursed to the Respondent upon her signing an agreement detailing the terms and conditions of the loan. As security to the loan the Respondent secured an amount directly payable directly from her pay slip guaranteeing the full payment of the loan amount advanced as well as the interest and costs of recovery in case of one month's default, it was agreed that the Plaintiff was to repay through a monthly deduction of Kshs. 33,480 from his salary until the payment in full.

7. Mr. Simbala averred that it was not true that the plaintiff had completed paying the loan by 18th September, 2020 and the amount that as she was yet to pay an outstanding amount of loan that stood at 641,800 as at the date of filing the suit. He contended that the Respondent was to not to be made to suffer unmitigated loses whilst the loan agreement continued to depreciate while at the same time the loan amount continued to balloon with arrears and other bank charges accruing exponentially. He contended that it was only just if the respondent was allowed to continue with the deduction given that the Respondent had not completed paying the loan. He thus urged the court not to allow the injunctive orders and allow the bank to proceed with the deductions. He claimed that the respondent had not demonstrated any irreparable damages she stood to suffer incapable of being compensated by way of costs especially considering that the respondent is a respectable commercial credit facility capable of compensating him by way of costs. He contended that the balance of convenience was in the defendant's favor and consequently the Applicant has terribly failed to demonstrate the conditions precedent to grant of injunctive orders and reliefs sought in his Application. He thus urged the court to dismiss the Application.

8. The learned trial Magistrate directed the Application to be disposed of by way of written submission. Upon considering the Application, the response thereto and the written submissions by the parties the court delivered it on 22nd October, 2021 wherein it allowed the application for injunction. In his Ruling the learned Magistrate set out the 3 requirement for grant of an order of injunction that were elucidated in the Giella vs Casman Brown which included (a) prima facie case with chances of success, irreparable injury and balance of convenience.

9. On prove prima facie case, the learned trial magistrate held that the plaintiff had proved that she had a prima facie case given that it had not been shown how the loan balance was calculated and thus it was important for the accounts to be furnished by the Respondent during the hearing of the suit to determine how exactly the loan balance that was being contested by both parties was arrived at.

10. On irreparable damage, the learned trial magistrate observed that the Appellant had tendered evidence to show that he was a civil servant and continued deduction of money from her salary account will affect her ability invest to realize her life goals and provide for her dependents. He contended that the Appellant's claim that it was a rebuttable financial institution capable of paying the low was not sufficient to shift the balance of convenience towards as being a reputable financial institution was not enough.

11. It is against this decision that the Appellant filed this Appeal. This court with the consent of all the parties directed that the Appeal to be disposed of by way of written submissions. The Appellants filed the written submission through the learned counsel on 5th February, 2023, while the Respondent's submissions were filed on 12th December, 2023.

Issues Of Determination

12. Having analyzed the grounds of Appeal, reviewed the written submissions filed by the parties in respect to this appeal and re-evaluated the evidence presented at the trial and also considered the Ruling of the trial, I find that the issue for determination; is Whether the trial court erred granting the Respondent orders of injunction restraining the Appellant from proceeding to deduct monies from the Respondents Account pending the hearing and determination

Analysis And Determination

13. In Nguruman Limited v Jan Bonde Nielsen & 2 others, *CA No. 77 of 2012*; [2014] eKLR, the Court of Appeal reiterated the conditions to be met by a litigant who seeks injunctive relief 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. 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."

14. The trial court found in its decision which I have highlighted herein above found that all the above elements had been established. The Appellant has a different position and that is why he has approached this court seeking to have the decision of the lower court set aside.

15. This court being a first appellate court is duty bound to analyze the evidence afresh, re-evaluate it and arrive at our own independent conclusion but must bear in mind that the trial court had the advantage of hearing the witnesses testify and seeing their demeanour and should make allowance for the same. (see John Teleyio Ole Sawoyo v David Omwenga Maobe [2013] eKLR). In this case witnesses had not testified in the lower court and so the duty of the court is to re-evaluate the application and the decision of the lower court and arrive at its own conclusion.

The principles for granting injunctions in Kenya were laid down in the celebrated case of Giella vs Casman Brown 1973 EA. Where it was held that the applicant must establish:

i. A prima facie case with high chances of success

ii. Irreparable loss or

iii. Balance of convenience

Whether the Respondent established a prima facie case.

16. The law requires the applicant to show that it has a prima facie case with a probability of success in order to persuade the court to grant an interlocutory injunction in its favour., the Court of Appeal in the case of Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR defined a prima facie case as 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.

A Prima facie case was equally defined in Nguruman Limited v Jan Bonde Nielsen & 2 Others (supra) where the court stated as follows;

> " 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. In this instant case it not in dispute that cause of action in the suit filed by the Respondent at the lower court was one where the Respondent sought to question the lawfulness of the Appellant's continued drawing of monies from her account despite the completion of her loan on 18th September 2020 wherein the Appellant had remotely been deducting monies from her salary account. In the Application that is now the subject of this Appeal, the Applicant requested the trial court to issue orders of injunction against the appellant continuing to withdraw money from her account. It was not in dispute that there existed an agreement between the Appellant and the respondent wherein the appellant was to disburse loan facility to the appellant for a definite period and that the appellant was to recover the loaned amount by deducting money from a salaried account monthly for the entire period. However, the point of departure is where the Respondent claims that she signed agreement for a loan facility for Kshs. 650,000 which she was to pay by the Respondent deducting monies for her salary account up to 18th September 2020 while the Appellant argues that the parties restructured the loan vide an agreement dated 18th September 2020 and thus the deduction ought to proceed beyond 18th September 2020. I took my time to review the Replying Affidavit sworn by Mr. Simbala especially paragraph *4* the same. Mr. Simbala claims that the Respondent took a loan facility of Kshs. 400,000 which was to run 60 months on 18th October, 2018. He claimed further that on 18th September, 2020 the plaintiff restructured the loan and took a further loan of Kshs. 650,000 running from the date thereof. He contended that the ongoing deduction were on the basis of the new loan agreement executed on 18th September, 2020. However, it has emerged that the two loan agreements attached to support the averment were executed on 31st May, 2018 and 16th October, 2018 and there is no loan agreement shared that relates to the purported agreement dated 18th September, 2020 that would draw

some impression to this court that in deed the continued deduction was based on a restructured loan agreement entered into on 18th September, 2020 and thus the deduction beyond 2020 had some legal basis.

18. Since from the forgoing it is not clear evidentiary whether there existed a loan agreement between the parties on 18th September, 2020 that was to extend the deduction beyond that date as alleged by the Appellant, it is outright that the Respondent presented to the trial court a prima facie case.

Whether the Respondent established that she would suffer irreparable damage if the orders of injunction were not granted.

19. The Court of Appeal in case Nguruman Limited v Jan Bonde Nielsen & 2 Others (supra) observed as follows regarding the issue of irreparable damage or injury.

> "If the applicant establishes a prima facie case that alone is not sufficient to grant an interlocutory injunction, the Court must further be satisfied that the injury the applicant 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 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."

That the Court of Appeal further held that:

> "On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prim facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of 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 adequate remedy.

20. As correctly observed by the trial court, the Appellant was able to demonstrate the deduction was being made from her salary of account which was her source of livelihood and that of her dependents. She was equally able to demonstrate that if the deduction was going to proceed while the matter was pending determination her investments were likely to be affected irreparably and her suit rendered a nugatory or just a mere academic exercise. I thus find no reason to fault the learned trial magistrate for making such an observation.

Whether the balance of convenience favored the Respondent.

21. In the case of Pius Kipchirchir Kogo Vs Frank Kimeli Tenai (2018) EKLR which defined the concept of balance of convenience as:

> 'The meaning of balance of convenience will favour of the Plaintiff' is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff 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 Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.

In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting".

22. In the case of Paul Gitonga Wanjau Vs Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR, the court dealing with the issue of balance of convenience expressed itself thus: -

> " Where any doubt exists as to the Applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies."

23. The trial court found that the balance of convenience tilted favor of the Respondent. in the case Amir Suleiman Vs Amboseli Resort Limited [2004] eKLR the court observed that:

> " The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice."

24. It is clear from the circumstances of this case that the respondent established that the balance of convenience tilted on her side.

25. I am convinced that the respondent established the conditions for granting temporary injunction and thus there is no reason to fault the trial court's finding on that front.

Conclusion

26. From the forgoing therefore I do not find any merit in the appeal and I proceed to dismiss the same with costs to the Respondent.

It is so ordered.

T**.A. ODERA**

JUDGE

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DELIVERED VIRTUALLY VIA TEAMS PLATFORM

In the Presence of: -

Oigo - Court Assistant

Miss Kebaya for Appellant

Miss Nyaata for Respondent