Stephen v Safaricom Investment Co-op Society Limited (Miscellaneous Application E038 of 2022) [2024] KEHC 5463 (KLR) (6 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5463 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAJIADO

MISCELLANEOUS APPLICATION E038 OF 2022

SN MUTUKU, J

MAY 6, 2024

BETWEEN

JOHN OMOLLO STEPHEN ..... APPLICANT

AND

SAFARICOM INVESTMENT CO-OP SOCIETY LIMITED ..... RESPONDENT

RULING

The Application

1. John Omollo Stephen, the Applicant, has moved this court through a Notice of Motion dated 1st September, 2022 anchored under Section 7 of the *Arbitration Act*, Order 51 Rule 1 of the *Civil Procedure Rules* and Sections 1. 1A, 3 and 3A of the *Civil Procedure Act*, seeking the following orders:

    a. Spent.

    b. That Pending the hearing of this Application inter-partes, this Honourable Court be pleased to issue a temporary injunction restraining the Respondent by itself, servants and/or agents from evicting the Applicant from and or transferring or selling the property known as Villa Number 4 Rongai Royal Villas which is constructed on Land title number Ngong/Ngong/43204.

    c. That pending the hearing and determination of the intended arbitration process, this Honourable court be pleased to issue a temporary injunction restraining the Respondent by itself, servants and/or agents from evicting the Applicant from and/or selling the property known as Villa Number 4 Rongai Royal Villas which is constructed on Land Title number Ngong/Ngong/43204.

    d. That at the inter-partes hearing, this Honourable Court be pleased to allow the Applicant to pay off the arrears in renewed monthly installments.

    e. The costs of this application be provided for.

2. The application is premised on the grounds listed on the face of the application and the annexed affidavit of the Applicant dated 1st September, 2022, which grounds I have read and understood.

3. The Applicant and the Respondent entered into a Tenant Purchase Agreement in 2017 for purchase of a villa number 4 at Rongai Royal Villas constructed on Land Title Number Ngong/Ngong/43204 at a purchase price of Kshs. 13,500,000/-. Deposit of Kshs 140,000 was paid in two instalments of Kshs 70,000 on 28th July 2017 and 1st August 2017. The balance was to be paid in equal monthly instalments made up of Kshs 111,333 plus monthly rent of Kshs 67,357 making a total of Kshs 178,690 over a period of 120 months.

4. The Applicant claims to have been paying the instalments faithfully until 2020 when the Covid 19 pandemic struck affecting his business resulting in default in repayments and fell in arrears. The Respondent issued him with notice and proceeded to forfeit the deposit he had paid towards purchase of the suit property.

5. The Applicant stated that he is apprehensive that he will lose out on the suit property which he struggled to acquire and even made several efforts to pay the purchase price thus suffering irreparable loss and damage if the same is repossessed. It was his prayer that this court should allow the orders sought and be allowed to pay off the purchase price in renewable monthly installments and stay legal proceedings and refer parties to arbitration.

Replying Affidavit

6. The application is opposed by the Respondent through a Replying Affidavit dated 15th September, 2022. The Respondent agrees with the Applicant that parties entered into a tenant purchase agreement dated 28th July, 2017 for purchase of the suit property at Kshs. 13,500,000; that Kshs. 140,000 was to be paid before signing the agreement in 2 equal installments of Kshs. 70,000; that the Applicant was required to pay monthly instalments of Kshs. 178,690 for 120 months but he defaulted on this.

7. It is deposed that by 31st August, 2022 the Applicant was expected to have paid Kshs. 10,721,400 being equal monthly installments for a period of 60 months but he had only paid Kshs 2,514,000 and was in arrears of Kshs 8,386,090 exclusive of interest. That vide an email dated 23rd May, 2022 the applicant was notified that the arrears stood at Kshs. 7,748,350. The Respondent proposed a payment plan of repayment in three instalments which the applicant rejected and instead requested for the arrears to be paid in 8 monthly installments. The Respondent did not accept the Applicant's request. It is the Respondent's case that the issue of default is not disputed and therefore the Applicant cannot raise the issue of arbitration and that this court has no jurisdiction to refer a matter to arbitration where no dispute exists.

Applicant's Submissions

8. This application was argued through written submissions as directed by the court. The Applicant's submissions are dated 21st July, 2023. The Applicant has raised one issue for determination: Whether the Applicant's Notice of Motion dated 1st September 2022 merit issuing of a temporary injunction?

9. The Applicant has relied on *Giella -vs Cassman Brown and Company Limited* (1973) EA 358 and *Peter Kairu Gitu -vs- KCB Bank Kenya Limited & Another* [2021] eKLR and submitted that for a temporary injunction to issue, the following must be met:

    a) There must be a serious/fair issue to be tried

    b) Damages are not adequate remedy.

c) The balance of convenience lies in favour of granting or refusing the application.

10. The Applicant relied on *Moses C. Muhia Njoroge & 2 others -vs – Jane W Lesaloi and 5 others* (2014) eKLR, where the court stated that:

> " A *prima facie case* in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later."

11. He has argued that he was unable to meet the obligations of the agreement as a result of Covid 19 pandemic which affected his business. He pleaded force majeure and invoked clause "O" of their agreement on the issue. He also invoked clause "N" of the agreement on the issue of having the matter referred to arbitration. It was submitted that the issue of the pandemic negatively affected his business and hence he unable to perform his end of the agreement and therefore, this issue should be determined in arbitration.

12. He relied on *Jomo Kenyatta University of Agriculture and Technology -vs- Kwanza Estate Limited* (Civil Appeal 64 of 2022) [2023] KECA 700 (KLR) (16 June, 2023) (Judgment), where it was stated that:

> " Consequently, it is our view that the pandemic was a force majeure event that caused the appellant undue difficulty in continuing with the lease agreement in accordance with its purpose and making the payments thereupon agreed. The appellant, in good faith, continued to make payments as required up to January 2021 long after seeking to be released from the lease agreement vide a letter dated 10th July 2020. Through the respondent's own actions of restricting the appellant's exit it curtailed its own chances of entering into business arrangements with other entities. The pandemic was no secret, and the respondents were aware of the government directive to close schools and universities. Therefore, to require performance in the face of such unforeseen and unavoidable circumstances, not caused by any acts and/or omission on the part of the appellant is absurd, unfair, and unjust."

13. The Applicant relied on *Kenya Commercial Finance Co. Ltd -vs- Afraha Education Society* [2001] Vol. 1 EA on the issue whether damages are an adequate remedy, where the court held that:

> " 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."

14. He submitted that the suit property is his home where he and his family reside and are at a threat of being rendered homeless should they be evicted. It is his case that no amount of money would adequately compensate him for the loss of his home. On this they relied on the case of *JM -vs- SMK & 4 others* [2022] eKLR.

15. On balance of convenience he relied on the case of *Pius Kipchirchir Kogo -vs- Frank Kimeli Tenai* [2018] eKLR, where it was stated that:

> " 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 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 would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer. In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it."

16. He argued that he is at risk of losing his home which could mean that the family would be forced to find alternative place to live in which would in turn disrupt his life and that of his children. He stated that he has satisfied the 3 ingredients required for temporary injunction to issue and urged this court to allow his application.

Respondent's Submissions

17. The Respondent's submissions are dated 17th October, 2023. The Respondent also cited *Giella -vs- Cassman Brown Co. Ltd* (1973) EA 358 and submitted that that the applicant defaulted in the repayments and therefore is not deserving of any equitable remedy.

18. On whether the Applicant has established a *prima facie case*, it was submitted that the Applicant is not deserving of the equitable remedy of injunction because he has defaulted in repayments since 2017; that he did not communicate to the Respondent that he had defaulted as result of the Covid 19 pandemic and that the default begun way before the onset of the Covid 19 in 2020. The Respondent relied on *Peter Aswa & 42 others -vs- National Housing Corporation* [2014] eKLR, where it was held that:

> "In view of the admission (implied in the applicant's pleadings and submissions) that the applicants have not been meeting their contractual obligations to the respondent, it is submitted that the applicants have failed to establish a *prima facie case* with a probability of success against the respondent. It is also submitted that an interlocutory injunction, being an equitable remedy and the evidence on record having demonstrated that the applicants are persistent defaulters in their obligations, they do not deserve an equitable remedy."

19. On whether damages are an adequate remedy and whether the balance of convenience tilts in favour of temporary injunction being granted, the Respondent cited Clause B of the Agreement and submitted that the Contract provided for conditional refund to the Applicant; that the Applicant is in clear breach of his contractual obligations and that the deposit paid is ascertainable as indicated in the Replying Affidavit. The Respondent relied on *Peter Aswa & 42 others -vs- National Housing Corporation* [2014] eKLR, where it was stated that:

> "Ordinarily the applicants being in occupation of the suit properties, would suffer greater prejudice if removed from the houses they occupy. However, in view of the special circumstances of this case firstly, the contracts provided for refund of deposit if the applicants breached their obligations necessitating the repossession of the suit properties. Secondly, the deposit paid by each applicant in this suit is ascertainable, thirdly there is no evidence that the respondent might not be able to meet its contractual obligation under the respective agreements, finally an injunction being an equitable remedy, it can only issue if the court is satisfied that, it will not be encouraging illegal or unlawful conduct. In the instant case, there is no doubt that the applicants are in breach of their contractual obligations. Instead of engaging the respondent with a view to meeting their contractual obligations, the

applicants have moved to court to restrain the respondent from enforcing its contractual rights. Surely, no court of law or equity can issue the orders sought as doing so would be tantamount to encouraging impunity."

20. The Respondent submitted that the Applicant is a persistent defaulter given that he started defaulting in 2017 and up until 2023 is yet to make any substantial payments. It is their case that the balance of convenience is in their favour as they did not breach their contractual obligations and that the instant suit is not founded on any pending (substantive) suit that is before this court and therefore this application should be dismissed with costs.

Analysis and Determination

21. I will determine a singular issue, whether the application before this court has merit. The applicable principles for granting injunctions are well settled in various authorities including *Giella vs Cassman Brown & Co Ltd* [1973] E.A 358. It is the duty of this court therefore to satisfy itself whether the threshold set in the above case has been reached.

22. The Court of Appeal in *Charter House Investments Ltd vs. Simon K. Sang and others*, Civil Appeal No. 315 of 2004 had this to say on injunctions:

> " Injunction is an equitable and discretionary remedy, given when the subject matter of the case before the court requires protection and maintenance of the status quo. The award of a temporary injunction by courts of equity has never been regarded as a matter of right, even where irreparable injury is likely to result to the applicant. It is a matter of sound judicial discretion, in the exercise of which the court balances the conveniences of the parties and possible injuries to them and to third parties. In the Giella case (supra) the predecessor of this Court laid down the principle that for one to succeed in such an application, one must demonstrate a *prima facie case* with reasonable prospect of success; that he stands to suffer irreparable damage which cannot be compensated for by an award of damages; and that the balance of convenience tilts in his favour."

23. I have considered the decision in *Mrao Ltd-vs- First American Bank of Kenya Ltd & 2 others* (2003) KLR 125, to determine whether the Applicant has demonstrated *prima facie case* as defined in that case. The Court of Appeal in the above case held as follows:

> " .....in civil cases a *prima facie case* as one which on the material presented in court, a tribunal property 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 but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial."

24. The Applicant admits he is in default and attributes his failure to make repayments to Covid 19 pandemic which affected his business negatively. The Respondent has argued that the Applicant has not demonstrated a *prima facie case* because the Applicant fell in default even before Covid 19 struck that he did not communicate to the Respondent that the Covid 19 pandemic had affected his business. I have considered this matter. I have noted that it is not disputed that the Applicant fell into arrears and has continued to default. He has not provided any evidence to controvert the evidence by the Respondent that he fell into default way before Covid 19 came into being in 2020. He has failed to discharge the evidentiary burden on that issue.

25. My considered view, after analyzing the evidence on each side, the law and the cited authorities, is that the Applicant has not established a *prima facie case* with a likelihood of success. An injunction is an equitable remedy issued discretionary. Where a party is in breach of a contract and admits the same, as is the case before me, such party cannot expect to get this remedy.

26. This court need not proceed to determine the other applicable principles for issuance of an injunction after the applicant has failed to establish *prima facie case*. However, even if I were to proceed to determine whether an award of damages would be an adequate remedy, I would find that given the admitted default and the terms of the contract, especially Clause B, then the Applicant has failed to establish that he will suffer irreparable harm that cannot be adequately compensated by an award of damages. I proceed to state that the balance of convenience tilts in not granting the orders sought.

27. In conclusion, it is my finding, and I so hold, that the Applicant has failed to demonstrate to this court that he deserves the orders he is seeking. The Notice of Motion dated 1st September 2022 lacks merit and is hereby dismissed with costs to the Respondent.

28. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 6TH MAY, 2024

S. N. MUTUKU

JUDGE

In presence of:

Mr. Ngira for the Applicant.

Mr. Mugo for the Respondent.