Autocat International Ltd v Kadara (Civil Case E058 of 2023)
[2024] KEHC 7078 (KLR) (11 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7078 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL CASE E058 OF 2023

DKN MAGARE, J

JUNE 11, 2024

BETWEEN

AUTOCAT INTERNATIONAL LTD ..... APPLICANT

AND

JAMES NYAMWATA KADARA ..... RESPONDENT

RULING

1. In a supplementary affidavit by Lorna Makena she stated that cash receipts dated 22/3/2024 were forgeries. They stated unless stopped the IP is likely to sell the vehicle. I do not understand why the vehicle is being sought if already the IP had handed it over. The receipts annexed relate to 30/9/20234 report.

2. The motor vehicle Registration No. KCM XXXX was handed over to the plaintiff. The stamp in the alleged receipt is conspicuously present.

3. In the replying affidavit Lorna Makena indicated that the receipt annexed are forgeries. Motor vehicle registration Number was supposed to be taken to the nearest police station. This was in response to an earlier application.

4. The Respondent filed a replying affidavit. The Respondent stated that he filed Civil Suit No. 78 of 2021 after the vehicles were repossessed. The respondent stated that he paid the entire purchase price. He denied interest of 10,000/=.

5. They said this claim is ambiguous and exaggerated. They stated that it was illegal to repossess KCM XXXX without an order yet he paid in full. He annexed to it receipt for payment. These are the receipts the Applicants are saying are forgeries. The plaint indicates that the sale was on 19/9/2017 and 7/10/2017 for KCM XXXX and KCN XXXX. The suit herein was filed 6 years later.

6. The purchase price for KCM XXXX was Kshs. 1,800, 000/= on 19/9/2017.

7. The Respondent is said to have paid Ksh. 700,000/= out of 1,800,000 leaving 1,100,000/=.

8. On 7/10/2017 an agreement for the second vehicle was reached. the said vehicle was agreed on at Kshs. 1,100,000/=. Kshs 400,0000/= was paid leaving Kshs. 400,000/=. Payment was to be in equal monthly instalments, that is by Defendant 2018.

9. The respondent is said to have defaulted and even sold motor vehicle registration No KCX XXXX.

10. The prayers in the plaint are:-

    a. A sum of Kshs. 1,050,000/=

    b. Interest of Kshs. 10,000,000/= per month.

    c. A declaration that the plaintiff is the owner of motor vehicle registration No. KCM XXXX and KCN XXXX.

11. These are the pleadings is situ requiring this courts intervention.

Analysis

12. The orders sought are in the nature of a mandatory injunction. For the court to issue the same, the following conditions must be present: -

    a. There must be an order sought in the plaint in relation to that interim prayer.

    b. The plaintiff has title to the goods.

    c. The Respondent has no claim over the goods.

13. The principles guiding the grant of interlocutory injunction are now well settled. Those principles were set out in *East African Industries v. Trufoods* [1972] EA 420 and *Giella v. Cassman Brown & Co. Ltd* [1973] EA 358. In *Nguruman Limited v. 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;
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> (a) establish his case only at a prima facie level,
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> (b) demonstrate irreparable injury if a temporary injunction is not granted, and
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> (c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.
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> 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."

14. The Court of Appeal in the case of *Nguruman Limited v. Jan Bonde Nielsen & 2 others* [2014] eKLR further opined that:

> "...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."

15. In the locus classicus case of *Kamau Mucuha v. The Ripples Ltd*. Civil Application No. Nai. 186 of 1992 [1990-1994] EA 388; [1993] KLR 35 the Court of Appeal expressed itself as hereunder:

> ...A court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case the Court must, inter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted and that is a higher standard than is required for prohibitory injunction."

16. Even for temporary injunction there must be a pleading for breach of contract or other breach. Order 2 Rule 4 posits as doth: - .....copy.....

17. In this case, the claim is a monetary one. There is no injunction sought in the plaint. The court cannot issue any. It is a misnomer to claim ofr money and at the same time claim for a vehicle in the interim without seeking a final order.

28. Even for grant of interim orders for injunction, there must be a *prima facie* case. The *locus classic* case of *Giella = v = 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."

18. The first test is prima facie case. I do not see a case being made leave alone a prima facie case. The vehicle is not a subject matter of the suit or prayers thereof. Praying for an interlocutory mandatory

injunction is thus an obnoxious rendition of barbaric tendencies. It is anathema to good conscious and the pleadings.

19. Parties must understand that before they are given orders, they must seek them. -Therefore, parties are bound to plead their cases fully. In the case of *Daniel Otieno Migore v South Nyanza Sugar Co. Ltd* [2018] eKLR, Justice A C Mrima stated as doth: -

> " 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of *Independent Electoral and Boundaries Commission & Ano. v. Stephen Mutinda Mule & 3 others* (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) v. Nigeria Breweries PLC* SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -
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> > ".....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....
> >
> > ...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

20. In the case of *Malawi Railways Ltd v Nyasulu* [1998] MWSC 3, Malawi Supreme Court of Appeal stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled "The Present Importance of Pleadings" published in [1960] Current Legal Problems at p 174 whereof the learned author posited that: -

> As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings .....for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

> In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

21. In respect to the essence of pleadings, the Supreme Court of Kenya in its ruling on *inter alia* scrutiny in the case of *Raila Amolo Odinga & Another v. IEBC & 2 others* (2017) eKLR found and held as follows in an election petition: -

> "In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings....."

22. In the case of *Mrao Ltd v First American Bank of Kenya Ltd& 2 others*[2003] eKLR, the court of Appeal noted the following regarding prima facie case: -

> "A *prima facie* case in a civil application includes but is 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 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.

23. The Court of Appeal in the case of *Nguruman Limited v. 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.

24. The court cannot move to the second limb before dealing with the first limb. There is no *prima facie* case related to injunction on the vehicles. Further, a prayer for a declaration is a final order. It cannot be issued at interlocutory state. There is no provisions for interim declaration.

25. Secondly there is a vicious dispute as to the debt due. There is no pleading on breach of contract. Even the amount of Kshs. 1,050,000/= prayed for is not shown how it arose. This is important in a case where the suit is borderline on limitation of Actions. I do not find there being a prima facie case in absence of pleadings. The court cannot issue an injunction not prayed for. The prayer for a sum of Kshs. 1,050,000/= is a claim for money. There is no judgment on the same. The court's hands are therefore tied till there are pleadings and the suit is heard.

26. It is unnecessary to go with the issue of irreparable loss if the application has not laid basis.

27. An application cannot be based on interim orders. The orders are interim.

28. Consequently, I find no merit in the application dated 27/7/2023. The same is accordingly dismissed. Given delay in prosecution of this matter. I direct that parties must comply with Order 11 by 10/7/2024. The suit, if not prosecuted shall stand dismissed on 15/6/2025, with costs.

Determination

29. In the circumstances, I find as follows: -

    a. The application dated 27/7/2023 lacks merit and is accordingly dismissed.

    b. Costs of Ksh. 25,000/= to the respondent.

    c. The matter is hereby transferred to the Chief to be heard by a resident Magistrate, being the lowest cadre in the Magistracy. The matter shall be mentioned on 2nd July 2024 before the Chief Magistrate to assign a resident magistrate to hear the matter.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 11TH DAY OF JUNE, 2024.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:

No appearance for parties

Court Assistant – Jedidah