Kimanzi v Mutuku (Civil Appeal E238 of 2021)
[2024] KEHC 7045 (KLR) (Civ) (13 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7045 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E238 OF 2021

CW MEOLI, J

JUNE 13, 2024

BETWEEN

EDMOND ISAAC KIMANZI ..... APPELLANT

AND

SAMSON MUTUA MUTUKU ..... RESPONDENT

(Being an appeal from the ruling of E.M Kagoni. (Mrs.) PM. delivered on 22nd April, 2021 in Nairobi Milimani CMCC No. E373 of 2021)

JUDGMENT

1. This appeal emanates from the ruling delivered on 22.04.2021 in Nairobi Milimani CMCC No. E373 of 2021. The proceedings were commenced by way of a plaint filed by Samson Mutua Mutuku, the Plaintiff before the lower Court (hereafter the Respondent) against Edmond Isaac Kimanzi the Defendant before the lower Court (hereafter the Appellant) principally seeking damages for breach of contract.

2. The Respondent's suit was accompanied by a motion under certificate of urgency dated 20.01.2021 seeking inter alia a temporary injunction against the Appellant to restrain him from breach of contract and or selling, disposing off motor vehicle KBD 500N Mistubishi Canter (hereinafter the suit motor vehicle) being the security held by the Respondent pending the pending the hearing and determination of the suit; an order that the Respondent who was in possession of the suit motor vehicle continue holding it as security for payment of the debt owed by the Appellant; and an order that the status quo be maintained so that the Respondent would continue holding the suit motor vehicle as security.

3. The motion was expressed to be brought pursuant to Section 1A, 1B, 3, 3A, 19, 20 and 63(e) of the *Civil Procedure Act* (CPA), Order 39 Rule 2, Order 40 Rule 1, 2, 3 & 10 and Order 51 Rule 1 & 3 of

the Civil Procedure Rules (CPR) inter alia. And on grounds on the face of motion, as amplified in the supporting affidavit sworn by Respondent.

4. The gist of the Respondent's affidavit was that the Appellant was his business manager, and that sometimes in October 2020, the Respondent learnt that the Appellant had embezzled about Kshs. 700,000/- out of proceeds in the said business; that upon being confronted, he owned up and expressed willingness to repay the money to avoid arrest and penal sanctions, as a result of which an agreement on payment modalities was executed; and that under the said agreement the Appellant was to surrender the suit motor vehicle and its logbook and would only be return them upon the Appellant making full payment of the said debt. That although by a subsequent agreement the Appellant confirmed that the Respondent was in actual possession of the suit motor vehicle and its logbook, the Appellant later proceeded to threaten to take possession and sell off the suit motor vehicle, an action that would greatly prejudice the Respondent, occasioning him substantial financial loss.

5. The Appellant opposed the motion through a replying affidavit dated 06.02.2021 whose gist was that the agreement in question was only signed upon his arrest, and while in police custody as condition for being set free. That as a hard-working citizen with good management skills, the Appellant had acquired the suit motor vehicle through a loan. He further deposed that the Respondent had caused the suit motor vehicle to be detained at Shauri Moyo Police Station and was at risk of being vandalized; that there was no Court order allowing the carting away and or detention of the suit motor vehicle; and hence the Respondent had approached the Court with unclean hands. He maintained that the business proceeds from the suit vehicle was servicing a loan and was his sole source of income, and that the Respondent's actions have occasioned him prejudice.

6. The Respondent's motion was thereafter canvassed by way of written submissions. The lower Court's ruling partially allowing the Respondent's motion provoked the instant appeal by the Appellant, which is based on the following grounds: -

> " 1. That the learned trial Magistrate erred in law and fact in allowing the Applicant's application against the weight of evidence on record.
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> 2. That the learned trial Magistrate erred in law and fact in rendering the Appellant's reply to the application incompetent when the same was not.
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> 3. That the learned trial Magistrate erred in law and fact in failing to observe that the Appellant in relying on grounds that he is the legal owner of the motor vehicle KBD 805N Mistubishi Canter and that it's serving a loan.
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> 4. That the learned trial Magistrate erred in law and fact in allowing the Respondent herein to possess a motor vehicle that he illegally took from the Appellant without consent or justifiable reasons.
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> 5. That the learned trial Magistrate erred in law and fact in allowing the Respondent herein to possess the motor vehicle plus the logbook of the vehicle without taking into consideration the risk behind such an order.
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> 6. That the learned trial Magistrate erred in law and fact during oral reading of the ruling by virtual means and allowing prayers (c) and (d), prayers never sought in the application.
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> 7. That the learned trial Magistrate erred in law and fact in failing to provide a typed and substantial ruling that deprived the rightful owner herein, the Appellant, his motor vehicle.

8. That the learned trial Magistrate erred in law and fact by arriving at a biased ruling.

9. That the learned trial Magistrate erred in law and fact in awarding costs to the Applicant." (sic)

7. The appeal herein was canvassed by way of written submissions. Counsel for the Appellant condensed his grounds of appeal into four (4) main issues. Attacking the order of the lower court allowing the Respondent to have possession of a motor vehicle, counsel argued that the Respondent, had illegally, through misrepresentation and duress compelled the Appellant to sign an illegal agreement that allowed him possession of the suit motor vehicle on an alleged and nonexistent debt. That upon obtaining both the logbook and the vehicle, the Respondent rushed to Court with the aim of cementing his actions, by applying to be granted authority to hold the suit vehicle as security.

8. Counsel asserted that the learned magistrate in allowing the Respondent's motion disregarded the Appellant's sworn evidence and that the application represented a classic case of unjust enrichment aimed at disenfranchising the Appellant. The decision in Madhupaper International Ltd & another v Kenya Commercial Bank Ltd & 2 others [2003] eKLR was cited in the foregoing regard. On whether the learned Magistrate issued substantive orders prior to hearing and determination of the suit, counsel argued that the learned Magistrate misdirected himself in allowing the Respondent to have possession of the suit motor vehicle and its logbook despite the obvious risk that it could be disposed of, defeating the suit between the parties.

9. Further, counsel contended that the Respondent's motion comprised prayers numbered 1 to 8 but the lower Court proceeded to grant prayer (c) and (d) which are unclear, bearing no relationship with the motion at hand. That the ambiguity was detrimental to the Appellant who lost his motor vehicle in an unclear circumstance before he could have his day in Court. Counsel thus maintained that the trial Court gravely erred by issuing ambiguous orders to the detriment of the Appellant. He submitted that the learned Magistrate's orders have grossly prejudiced the Appellant who was condemned unheard and consequently lost his tools of trade. In conclusion, the Court was urged to allow the appeal as prayed.

10. Despite being accorded ample opportunity, the Respondent failed to file written submissions on the appeal, as directed by this Court.

11. The Court has considered the record of appeal, the pleadings before the lower Court as well as the submissions by the respective parties. The duty of this Court as a first appellate Court is to re-evaluate the evidence adduced in the lower Court and to draw its own conclusions, but always bearing in mind that it did not have an opportunity to see or hear the witnesses testify. See Kenya Ports Authority v Kusthon (Kenya) Limited (2000) 2EA 212, Peters v Sunday Post Ltd (1958) EA 424; Selle and Anor. v Associated Motor Boat Co. Ltd and Others (1968) EA 123; William Diamonds Ltd v Brown [1970] EA 11 and Ephantus Mwangi and Another v Duncan Mwangi Wambugu (1982) – 88) 1 KAR 278. Abok, James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR.

12. The Respondent's motion before the lower Court was expressed to be brought inter alia pursuant to Section 1A, 1B, 3, 3A, 19, 20 and 63(e) of the *Civil Procedure Act* (CPA), Order 39 Rule 2, Order 40 Rule 1, 2, 3 & 10 and Order 51 Rule 1 & 3. The trial Court in partially allowing the Respondent's motion stated inter alia that;-:

" Has the Applicant established a prima facie case?

.....I have considered the parties' case as laid out in the affidavit on record.....For the Applicant to establish a prima facie case then he needs to show that there is an agreement in place to hold the motor vehicle KBD 805D until the money alleged to have been embezzled is repaid.

The Respondent's affidavit before this court is wanting. It is not the work of elegant drafting and consummate skill that is required of practitioners at this stage. A replying affidavit is supposed to address the issues raised in a supporting affidavit. This means that each paragraph of the supporting affidavit must be responded to separately in the matter and form that a defence addresses a plaint. This approach will clearly demarcate what is in issue and what is not....

The Court was confused by the...deposition. At first the Respondent is denying the existence of binding contract. However, the Court further observes a rider which to its mind contradicts the earlier statement that there is legally existing contract. .....All contracts are agreements but not all agreements are contracts. Therefore, the Respondent should have known better and refrained from using the word contract again. If he had used the word agreement the said deposition would have rid itself of all the issues that this Court has highlighted.

Since the deposition is a paradox this means the same cannot be seen to rebut the supporting affidavit. No other paragraph in the replying affidavit has attempted to address the issues raised in the supporting affidavit. On the strength of these findings the Court finds the Applicant to have established a prima facie case.

Has the Applicant established irreparable damages?

The Applicant's contended that the application should be allowed since the motor vehicle is acting as security for payment of his debt and he has no intentions of disposing it.....I have noted that what the Applicant claims before this Court is Kshs. 700,000 a sum of which is quantifiable and thus easily paid by an award of damages. However, this court notes that the value of the said motor vehicle has not been clearly established by either party. If the value is below the amount in issue then disposing it will not answer the claim and if its value is well beyond the amount in issue then the Applicant may be prejudiced with its disposal for it is most likely that the motor vehicle maybe be disposed off at a forced sale value to his detriment. For this reason, I find that the Applicant is likely to suffer irreparable harm if the motor vehicle, whose value has not been ascertained is disposed off at this stage.

Having found that both prima facie case and irreparable damage has been established the court need not delve into where the balance of convenience lies." [Emphasis added] (sic)

13. The salient provisions invoked in Respondent's motion include Order 40 Rule 1, 2, 3 & 10 of the CPR. Order 40 Rule 2 of the CPR provides that:

> "(1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.

(2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit."

14. It is settled the grant or refusal of an interlocutory injunction involves the exercise of a discretion. See Nguruman Limited vs Jan Bonde Nielsen & 2 Others [2014] eKLR. However, such discretion must be exercised judicially and upon reason, and not arbitrarily or capriciously. The Court of Appeal in Mashreq Bank P.S.C v Kuguru Food Complex Limited [2018] eKLR stated:-

> " This Court ought not to interfere with the exercise of a Judges' discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of discretion and occasioned injustice. Conversely, a court exercising judicial discretion must be guided by law and facts and not ulterior considerations. This much was stated by the Court of Appeal in the case of Shah v Mbogo (supra)
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> > "A court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising this discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and as a result there has been injustice". [Emphasis added]

15. This appeal turns on the key issue whether the Respondent was entitled to the injunctive relief sought by his motion in the lower court. In answering the question, the Court will attempt to contemporaneously address Appellant's grounds of appeal. The now settled principles governing the grant of interlocutory injunctions spelt out Giella v Cassman Brown & Co. Limited [1973] EA 358 were reiterated in Nguruman Limited (supra). The latter decision is particularly illuminating. The Court described the role of the court in such application to be merely to consider whether the principles for the grant of the interlocutory injunction were met.

16. The Court further observing that:

> " ...Since the fundamentals about the implications of the interlocutory orders of injunctions are settled, at least over four decades since Giella's case, they could neither be questioned nor be elaborated in detailed research. Since those principles are already ..... by authoritative pronouncements in the precedents, they may be conveniently noted in brief as follows:
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> In an interlocutory injunction application, the Appellants has to satisfy the triple requirements to:
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> a) establish his case only at a prima facie level
>
> b) demonstrate irreparable injury if a temporary injunction is not granted.
>
> c) allay any doubts as to (b) by showing that the balance of convenience is in his favor."

17. The Court explained that the three (3) conditions above apply separately as distinct and logical hurdles to be surmounted sequentially by an applicant. Such that, it was not enough for the applicant to establish a prima facie case, they must further successfully establish irreparable injury, that is, injury for which damages recoverable at law could not be an adequate remedy. And where there is doubt as to the

adequacy of damages, the Court will consider the balance of convenience. Conversely, where no prima facie case is established, the court need not consider irreparable injury or the balance of convenience. The Court of Appeal emphasized that the standard of proof is to prima facie standard.

18. As to what constitutes a "prima facie case" the Court of Appeal expressed itself as follows: -

> " Recently, this court in Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others [2003] KLR 125 fashioned a definition for "prima facie case" in civil cases in the following words:
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> > "In civil cases, a prima facie case 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 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 appellant's case upon trial. That is clearly a standard, which is higher than an arguable case.
> >
> > We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. 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 Appellants 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 appellant's case is more likely than not to ultimately succeed."

19. Here, it was the Respondent's case before the trial Court that the respective parties had executed an agreement on 25.12.2020 in respect to the suit motor vehicle, pursuant to which the vehicle was to be treated as a form of security towards payment of a debt purportedly owed by the Appellant to the Respondent in respect of monies allegedly embezzled by the former. The Appellant in his response despite acknowledging the said contract assailed it on grounds that it was executed under duress and as such was not binding on the parties.

20. The trial Court viewed the Appellant's response as contradictory. Neither the original record nor the record of appeal contains the two agreements asserted in the Respondent's affidavit to have been signed on two separate occasions, latterly before an advocate. It is not clear whether these were ever attached to the supporting affidavit, as they are equally missing from the Respondent's documents apparently filed subsequently in the original record.

21. The court has perused the entire replying affidavit of the Appellant. As this court understood paragraph 4 of the replying affidavit, the Appellant was therein essentially admitting that he had signed a contract "in the form of a letter" regarding the alleged debt and security for payment in favour of

the Respondent. However, that this was under duress while the Appellant was in police custody, and hence no binding contract existed between the parties. Moreover, he asserted that his vehicle was lying at the police station at the material time. The foregoing depositions were not controverted by way of a supplementary affidavit by the Respondent. Moreover, it was significant that the genesis of the matter was an allegation by the Respondent of embezzlement by the Appellant of some Shs. 700,000/- from the Respondent's business, in respect of which not a single piece of evidence was placed before the lower court.

22. It is not clear why the trial court considered the deposition at paragraph 4 of the replying affidavit as contradictory and seemed more concerned with the evidently poor drafting of the replying affidavit, than drawing out its true purport. See the highlighted portion of the trial court's ruling reproduced herein at paragraph *12*. Although the question whether the admitted so-called contract was a matter fit for full determination at the trial as part of the Appellant's defence to the Respondent's claim, the Appellant's assertions aimed at impeaching the legality and enforceability of the said agreement ought to have received attention, at the interim stage as the said agreement was inter alia the basis of the Respondent's claim. It is a cardinal principle of law that a contract obtained through duress, fraud misrepresentation, inter alia is liable to be set aside. Similarly, contracts found to be unconscionable, for instance because they are tainted with illegality cannot be enforced. The trial court's dismissive handling of the key deposition in the replying affidavit was unjustified and resulted in error.

23. The obtaining circumstances relating to the execution of the agreement, not just the asserted terms of the agreement, had some bearing on whether a legal right had been established and demonstrated to have been infringed. Hence pertinent to any finding as to existence of prima facie case. The court reviewing the material before the trial court is of the view that the finding that the replying affidavit did not present a response to the motion was erroneous and borne out of mere reliance on the alleged terms of the asserted agreement and placing the form of the replying affidavit above substance.

24. The asserted agreement or contract that was the basis of the Respondent's claim could not in the face of the matters raised by the Appellant, properly be taken at face value, as happened here. Moreover, and more importantly, no evidence at all was tendered concerning the alleged threats or attempts by the Appellant to take back and dispose of the vehicle, which the Respondent claimed to be in his possession, while the Appellant asserted that it was held at the police station at all material times. It appears doubtful from a review of the material placed before the trial court that a clear prima facie case had been established in this instance.

25. The foregoing conclusion should determine the matter but for completeness, the court will proceed to consider whether the irreparable damage had been demonstrated. In this regard, the learned Magistrate referred to Halsbury's Law of England, 3rd Edition Vol. 21, Para 739, Pg. 352 defining the damage as "..Injury which is substantial and could not be adequately remedied or atoned for by damage, not injury which cannot possibly be repaired and the fact that the plaintiff may have right to recover damages is no objection to the exercise of jurisdiction by grant of injunction, if his rights cannot be adequately protected or vindicated by damages...". Upon considering the question, the learned Magistrate concluded that the Respondent had established the likelihood of irreparable injury if the injunction were not to be granted.

26. The Court of Appeal in Nguruman Limited (supra) observed as follows in respect of irreparable injury; -

> "On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate,

prima face, 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."

27. The Court went on to state that; -

> " In conclusion, we stress that it must always be borne in mind that the very foundation of the jurisdiction to issue orders of injunction vests in the probability of irreparable injury, the inadequacy of pecuniary compensation and the prevention of the multiplicity of suits and where facts are not shown to bring the case within these conditions the relief of injunction is not available."

28. It is undisputed that the Respondent was in possession of the suit motor vehicle and its logbook on account of the asserted parties' agreement dated 25.12.2020. Further, the Respondent's alleged debt or claim against the Appellant was quantified at Kshs. 700,000/- and in respect of which the suit motor vehicle was supposedly to be treated as security. While the Respondent's motion was allegedly prompted by alleged threats by the Appellant to take back possession and dispose of the subject motor vehicle, he did not tender any proof in that regard. In view of his assertion to be in possession of the vehicle and logbook, it is difficult to see how the disposal of the vehicle would have been executed.

29. In the court's view, the Appellant's complaint that the Respondent was by the motion seeking legal sanction for having the vehicle illegally detained taken and by police may not be farfetched in this scenario. And of course, if the police had determined not to press criminal charges against the Appellant in light of the agreement between him and the Respondent, they would have had no further right, absent a court order, to detain the Appellant's motor vehicle in purported furtherance of the civil contract between the parties. On all accounts, it appears that the Respondent's claim was quantified and amenable to pecuniary compensation, negativing the likelihood of irreparable damage. Considering all the foregoing, the trial Magistrate's finding to the contrary was erroneous.

30. In concluding, nothing turns on the complaint of ambiguity of orders granted by the lower court. The ruling shows that the trial Court was alive to the reliefs sought by the Respondent in his motion and replicated them at Pg. 1 and 2. That the Court's itemization of orders granted may have differed from the actual itemization in the motion, but this, without more does not mean there was incongruence or ambiguity.

31. In the result, the court is persuaded that the trial court was in error on the two key considerations pertinent to its exercise of the discretion to grant an interlocutory injunction. The ruling delivered on 22.04.2021 cannot be allowed to stand. Consequently, the said ruling is hereby set aside and the court substitutes therefor an order dismissing with costs the Respondent's motion in the lower court dated 20.01.2021. The Appellant is also awarded the costs of this appeal.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 13TH DAY OF JUNE 2024.

C.MEOLI

JUDGE

In the presence of:

For the Appellant: Mr. Ndemo

For the Respondent: N/A

C/A: Erick