Mwananchi Credit Limited v Githua & another (Civil Appeal E100 of 2021) [2024] KEHC 7081 (KLR) (11 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7081 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL APPEAL E100 OF 2021

DKN MAGARE, J

JUNE 11, 2024

BETWEEN

MWANANCHI CREDIT LIMITED ..... APPELLANT

AND

PETER KAMAU GITHUA ..... 1ST RESPONDENT

ELIZABETH WANJIKU WARUI ..... 2ND RESPONDENT

(Being an appeal against the Ruling and Order of Hon. D.W. Mburu, SPM, delivered on 8th October, 2021 in Milimani MCCC No. E8101 of 2021)

JUDGMENT

1. This is an appeal from an interlocutory Ruling given by D.W. Mburu, SPM on 8/10/2021. The same related to an order of injunction against the appellant. The appellant was the defendant/respondent in a matter that is still pending for hearing in the lower court.

2. This resulted in the Appellant filing this Appeal vide a Memorandum of Appeal dated 5/11/2021 raising the following grounds:

    a. The learned magistrate erred in both law and fact when he failed to appreciate there was a valid chattels mortgage in place to secure the loan sum of Kshs.2,500,000/= advanced to the respondents by the Appellant.

    b. The learned magistrate erred in both law and fact in ruling that the plaintiff had met the threshold of issuing an injunction as set out in the *Giella v Cassman Brown* (1973) EA 358 case.

    c. The learned magistrate erred in both law and fact in failing to appreciate that a mandatory injunction should not issue in the circumstances where ingredients of issuing a mandatory injunction had not been proved.

d. The learned magistrate erred in law and fact by failing to appreciate that the Respondents had defaulted in paying back the loan that had been advanced to them by the appellant and that the appellant's rights to realize the security had crystalized.

Submissions and issues

3. Parties filed humongous submissions repeating the very same thing, which I have painstakingly read and may not regurgitate in this Appeal.

4. The two issues left for this court to answer, which are all related:

   i. Whether the respondent met the threshold for grant of injunction.

   ii. Whether there is a chattel mortgage.

5. The two issues raised in the lower court were:

   a. Whether the chattel mortgages was registered

   b. Whether any money is due to the Appellant

6. The court below, answered the first two issues in negative. It is doubtful that the chattel mortgage was registered and there is a question relating to the money due.

Background

7. *Vide* an application dated 29/4/2021 the Applicant filed for injunction. The main grounds being that motor vehicle Reg. KBR 833H was unlawfully attached and detained.

8. The Respondent sought to restrain the Appellant from selling motor vehicles Reg. Nos:

   a. KBR 833 H.

   b. KCG 002 P.

9. The Respondent stated they paid all amounts due. There were no other amounts due. The application was supported by the 1st respondent's affidavit sworn on the same day 29/4/2021. He stated that he paid a sum of over Kshs.3,057,522/= .

10. In February the truck KCG 002P Mercedes lorry truck got into an accident. They continued paying on what had been agreed. However the Respondent attached motor vehicle Reg. No. KBR 833H Scania lorry and they were forced to pay Kshs.233,233/=.

11. On 13/3/2021 the defendant attached the vehicle, threw out the driver at Njiru and took control of the vehicle. They had attached KBR 833H while in transit. The Respondents were then claiming Kshs.9,254,767.24/=.

12. The Respondents through Sylvia Wanjiru Njoroge stated that the Respondents borrowed Kshs.2,500,000/= and with security of 2 motor vehicles. They stated that a sum of Kshs.5,259,154.97/= was due. There was of course no mention on how much was paid. They stated that they repossessed the vehicles.

13. The court heard the matter and issued an injunction pending hearing of the suit. The matter has been pending since 2021 for this appeal.

Analysis

14. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

15. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the *locus Classicus* case of *Selle and another v Associated Motor Board Company and others* [1968]EA 123, where the law looks in their usual gusto, held by as follows;-

> " .. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

16. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

17. In the case of *Peters v Sunday Post Limited* [1958] EA 424, court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

18. In the case of *Sugut v Jemutai & 3 others* (Civil Appeal 110 of 2018) [2023] KECA 202 (KLR) (17 February 2023) (Judgment) Neutral citation: [2023] KECA 202 (KLR Kiage JA stated as doth: -

19. "I have carefully considered those rival submissions by counsel in light of the record and the bundles of authorities placed before us. I have done so mindful of our role as a first appellate court to proceed by way of re-hearing and to subject the entire evidence to a fresh and exhaustive re-evaluation so as to arrive at our own independent conclusions. See rule 29(1) of the *Court of Appeal Rules 2010*; *Selle v Associated Motor Boat Co* [1968] EA 123). I do accord due respect to the factual fndings of the trial court out of an appreciation that it had the advantage, which we do not, of having seen and heard the witnesses as they testified. I am, however, not bound to accept any such findings if it appears that the judge failed to take any particular circumstance into account or they were based on no evidence or were otherwise plainly wrong. I note from the record before us that the learned Judge may not have been in a fully advantageous position in that regard having taken up the case when it was already half-way heard. Her conclusions on the evidence and findings of fact were therefore from a reading of what was recorded by the previous judge."

20. The court is alive to the fact that injunctive orders are discretionary. Exercise of discretion cannot be impugned unless the same was capricious and without any basis in law. As we do the business of judging, we remain human and alive. Though lawyers are known to eschew mathematics, they know when maths is wrong as is in this case.

21. Some of the affidavits, I have read, read from a story in Ali Baba and 40 thieves. When maths is not mathing, logic is not logic, African call it sorcery. It could be the cooling effect of the weather, where I am seated facing mouth Kenya. However, it is not possible to understand the Voodoo Economics and Mickey Mouse arithmetic set out by the appellants.

22. In all interlocutory appeal, this court proceeds with extra circumspection regarding facts in dispute. In this case, it is not in dispute that a sum of Ksh.2, 500,000/= was borrowed. A sum of Kshs.3,057,522/= was paid and a sum of Kshs.5,856,868/= is being demanded.

23. There is also a contention that a sum of Kshs.9,254,767.24/= is outstanding as per the records held by the Appellant. I am not a student in sorcery and magic, but I am unable to fathom the labyrinth or mathematical permutations and flagrant distortion of figures that caused a sum of Ksh. 2,500,000/= to become Kshs.9,254,767.24/= despite payment of three million.

24. The affidavits in response amount to evidence Odunga J (as he then was), alluded to in the case of *Kioko Peter v Kisakwa Ndolo Kingóku* [2019] eKLR while referring to the reasoning of Madan J, (as he then was) in the case of *N v. N* [1991] KLR 685. The Learned Judge lamented as follows:

> " I wish people would not tell me absurd and unbelievable lies. I feel disappointed if a lie told in court is not reasonable imitation of the truth and is not reasonably intelligently contrived. I wish people who tell lies before me would respect my grey hair even if they consider that my intelligence is not of high order. I wish the witness had not told me the most stupid of his lies, which both disappointed and made me feel intellectually insulted."

25. The nature of the order is that of discretion. There are two issues related to discretion. A court cannot set aside discretion simply because it can or because, if it were sitting they will have reached a different conclusion. In the case of *Mbogo and another v. 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 is 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."

26. The issues before the court were twofold. The first one is whether a mandatory order ought to issue, and whether there was a case warranting issuance of mandatory orders.

27. The statement from the Appellant shows that the Respondent can never redeem the loan. The money falls into a bottomless pit. This reminds me of the writings of William Shakesphere in *Merchant of Venice*, Act III, Scene 1.

> " Shylock
>
> There I have another bad match: a bankrupt, a prodigal, who dare scarce show his head on the Rialto; a beggar, that was used to come so smug upon the mart; let him look to his bond: he was wont to call me usurer; let him look to his bond: he was wont to lend money for a Christian courtesy; let him look to his bond.
>
> Salarino Why, I am sure, if he forfeit, thou wilt not take his flesh: what's that good for?"

28. 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;
>
> (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. 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."

29. 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."

30. 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."

31. There is no evidence that the chattel mortgage is registered. Without being registered then the Appellant cannot have the right to attach the goods. It is not the Respondent's duty to prove registration. In the instant case, it is the Appellant who had knowledge whether or not they were registered. Section 112 of the *Evidence Act* provides as follows: -

> " In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

32. In *Kenya Akiba Micro Financing Limited v. Ezekiel Chebii & 14 others* [2012] eKLR the court stated as follows:

> " Section 112 of the *Evidence Act* chapter 80 of the laws of Kenya provides:
>
> 'In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him.'
>
> Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make the adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of *Kimotho v KCB* (2003) 1 EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession."

33. Upon finding *prima facie* case of non-registration, the court was right to find that the Appellant was not entitled to the repossession. A non-registered mortgages is void for all purposes. In *Macfoy v. United Africa Co. Ltd* [1961] 3 All E.R. 1169, Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

> " If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

34. I am unable to resist the finding by the court that a mandatory injunction was due. There is prima facie evidence of illegality. The repossession, as admitted, was gangster like. If we are to let our micro finances fall into the same sheol as the Shylocks, the court will be missing its duty. I however note that the court did not give an executory clause to make the order for mandatory injunction be effected. I shall revert on the same.

35. The issuance of temporary injunction was settled in 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."

36. In the case of *Mrao Ltd v First American Bank of Kenya Ltd& 2 others*[2003] eKLR, the court of Appeal noted that: -

> 4. 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.

37. the Court of Appeal's decision in *National Bank of Kenya Limited v. Shimmers Plaza Limited*, Civil Appeal No. 26 of 2002 [2009]eKLR, stated: -

> "The duration of an order of injunction is at the sole discretion of the trial Judge and depends on the circumstances of each case. In this case, the duration of the injunction until the determination of the suit frustrated the statutory right of the bank to realize the security upon giving a notice which complies with the law. We venture to say that where the court is inclined to grant an interlocutory order restraining a mortgagee from exercising its statutory power of sale solely on the ground that the mortgagee has not issued a valid notice, then.....the order of injunction should be limited in duration until such time as the mortgagee shall give a fresh statutory notice in compliance with the law."

38. In the circumstances the court is satisfied that the court below was correct in finding a prima facie case.

39. Secondly with the patent and flagrant illegality, it is beyond peradventure that there is irreparable loss is due. I am worried about the state of the attached motor vehicles. They were collected literally by goons who may not understand the safeguards obtaining under the *Auctioneers Act*.

40. In the case of *Board of Trustees National Social Security Fund v Michael Mwaloi* [2015]eKLR ,the Court of Appeal cited with approval the Ugandan Court of Appeal decision in *Makula International Ltd v His Eminance Cardinal Nsubuga anothe*r (1982) H.C.B Il that: -

> "A court of law cannot sanction what is illegal, and illegality once brought to the attention of court overrides all questions of pleading, including any admission made thereon.

41. The non-registration of the mortgage was patent. There is no hiding such a fact. If anything, the questions of damages are not in relation to injunction but whether any money is due under the loan .non registration frees the vehicles as security. Any attachment on basis of a chattel mortgage is trespass to the said motor vehicles. The balance of convenience tilts in favour of the Respondent. They stand to lose their vehicles to strangers.

42. The balance of convenience tilts in favour of removing all illegality than letting convenience of asking for reparation.

43. The case reminds of a song by Juliani;

> *Niko njaa hata siezi karanga*
>
> *Hoehae shaghala bhaghala*
>
> *Niko tayari (kulipa)*
>
> *Kulipa gharama*
>
> *(Sitasimama maovu ya kitawala) x 2*

44. There is no court, that will condone the acts perpetuated on the Respondents. The Appellant may have an explanation in full hearing. However, that explanation was not brought out in length hyperbolic affidavits filed in the court below.

45. The phrase that is sometimes used, that you cannot stop a mortgagor from exercising power of sale is overused rhetoric and is useful when: -

    a. There is a mortgage

    b. The dispute is how much is due but indebtedness is admitted.

    c. The mortgage is lawful.

46. In this case, it is pleaded and demonstrated that it is most likely that the entire debt was paid. Secondly the Appellant is not a mortgagor as the chattel mortgage was not registered and as such it is void for all purposes. The amount claimed are fictitious.

47. In the circumstances, I find the Appeal totally unmerited and dismiss the same. It is self-evident that costs should follow the event. Section 27 of the *civil procedure Act* provides as follows: -

48. 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.

49. The subject matter herein are motor vehicles and a dispute over Kshs.9,254,767.24. The court shall thus award a sum of Kshs.291,000/= as costs for the Appeal.

Determination

50. The upshot of the foregoing is that I make the following orders:-

    a. The Appeal lacks merit and is accordingly dismissed with costs of Kshs.291,000/= payable within 30 days in default execution to issue.

    b. The orders of mandatory injunction should be effected forthwith. The respondent to value the subject matter before release using AA valuers and file the report in the Lower Court.

c. The Lower Court matter be fixed for directions on hearing on June 27, 2024 for taking directions.

d. The matter should proceed and be concluded by 1/7/2025.

e. This file is closed.

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

KIZITO MAGARE

JUDGE

In the presence of:-

No appearance for parties

Court Assistant – Jedidah