**Momentum Credit Limited v Kamau (Civil Appeal E023 of 2022)**
**[2024] KEHC 9976 (KLR) (4 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 9976 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KAJIADO**

**CIVIL APPEAL E023 OF 2022**

**SN MUTUKU, J**

**JUNE 4, 2024**

**BETWEEN**

**MOMENTUM CREDIT LIMITED ..... APPELLANT**

**AND**

**MARTHA WANGARI KAMAU ..... RESPONDENT**

***(Being an appeal from the entire ruling and consequential orders by Senior Resident Magistrate Hon B. Cheloti (ms) issued and delivered on 4th November, 2021 at the Chief magistrate's court at Kajiado In Civil Suit No E225 of 2021)***

**JUDGMENT**

## Introduction

1. The parties herein entered a contractual arrangement on 29th September 2020 in which the Respondent was granted a credit facility by the Appellant for Kshs 330,000. The said loan was to be repaid in equal monthly instalments for a period of eighteen (18) months.

2. The facility was restricted through a loan restructured arrangement on 5th January 2021 at which date the Respondent owed Kshs 333,876. The restructured loan amount was to be repaid in twenty-four (24) monthly instalments of Kshs 31,273 beginning 5th February 2021.

3. The Respondent breached the agreement and fell into arrears. The Appellant issued a 7-day notice from 15th April 2021 demanding payment of the arrears, which at this date stood at Kshs 29,461. The Respondent did not heed the notice. The Appellant commenced realization process of its security triggering the filing of an application under certificate of urgency. She obtained an interim injunction on 6th July 2021. Ultimately, the trial court granted her an interlocutory injunction pending the hearing of the suit. It is that injunction that has necessitated this appeal.

**Memorandum of Appeal**

4. The Appellant, being aggrieved and dissatisfied with the entire Ruling and orders arising from the trial court delivered on 4th November, 2021 (Hon B. Cheloti, SRM) has filed an appeals setting forth the following Grounds of Appeal:

    i. The learned magistrate erred in fact and in law by granting the Respondent an interlocutory injunction pending determination of the suit by failing to demonstrate how the Respondent satisfied the principles and or requirements of granting an interlocutory injunction.

    ii. The learned magistrate erred in fact and in law by granting the Respondent an interlocutory injunction pending determination of the suit by failing to elucidate how the Respondent established a *prima facie* case.

    iii. The learned magistrate erred in fact and in law by granting the Respondent an interlocutory injunction pending determination of the suit by failing to elucidate how the Respondent shall suffer irreparable harm incapable of being compensated by an award of damages.

    iv. The learned magistrate erred in fact and in law by granting the Respondent an interlocutory injunction pending determination of the suit by failing to elucidate how the balance of convenience lies with the Respondent.

    v. The learned magistrate erred in law and in fact and misdirected herself by taking into account irrelevant considerations in granting the Respondent an interlocutory injunction pending determination of the suit.

    vi. The learned magistrate erred in fact and in law by wholly misdirecting the application of law and irregularly granting the Respondent an interlocutory injunction pending the hearing and determination of the main suit.

5. The Appellant urged that the trial's court ruling and consequential orders be set aside and cost of the appeal be awarded to the appellant.

6. The appeal was canvassed by way of written submissions.

**Appellant's submissions**

7. The Appellant filed his submissions dated 23rd August, 2023. The Appellant's submissions are centered on whether the trial court misdirected its application of the law in affirming an order of temporary injunction in favour of the Respondent.

8. The Appellant relied on *Giella v Cassman Brown & Co. Ltd* [1973] EA 358 and *Mrao Limited v First American Bank of Kenya Limited & 2 others* [2003] eKLR and submitted that, the test for grant of injunctions is:

    a. Whether the applicant has advanced a *prima facie* case with a probability of success.

    b. Whether the applicant has suffered irreparable loss which would not be adequately compensated by an award of damages, and

    c. With which party does the balance of convenience lie?

9. While relying on *Margaret Njoki Migwi v Barclays Bank of Kenya Ltd* [2016] eKLR as affirmed in *James Maina & 3 others v Attorney General & 4 others* [2017] eKLR, the Appellant submitted that:

> "…. That the phrases '*prima facie*' case, 'irreparable harm' and 'balance of convenience' are not mere rhetoric or incantations but rather important factors to be carefully weighed upon and considered in all applications where an interlocutory injunction is applied for."

10. It is submitted that the Respondent's application did not meet the threshold established in *Giella v Cassman Brown* and that the trial court misdirected itself in finding that it did for the reasons that (a) the Respondent failed to establish a *prima facie* case with a reasonable prospect of success as she did not provide evidence in support of her allegations as to the unjustifiable increase in her loan amount, (b) the Respondent failed to establish or demonstrate that she would suffer irreparable damage that could not be compensated by way of damages, and (c) the Respondent failed to prove with sufficient evidence that the balance of convenience tilted in her favour at it was littered with mere averments.

11. The Appellant submitted that the trial magistrate misapplied the well-established principles in granting interlocutory injunctions when she held that:

> "This being a Court of both Equity and Justice, I find the Application herein raises triable issues which can only be deliberated during a trial, I am of the opinion that the instant application has merit and meets the threshold required before an order for a temporary injunction can issue."

12. It was submitted that the trial magistrate ruled in favour of the Respondent without any evidential basis whatsoever and therefore the orders of the trial court should be set aside on the basis of the decision in *Mbogo & another v Shah* [1968] EA 93 as affirmed in In *Southern Star Sacco Ltd v Vanancio Ntwiga* [2021] eKLR, where the Court of Appeal held that:

> "….that this Court will not interfere with the exercise of discretion by an inferior Court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it acted on matters on which it 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."

13. The Appellant submitted that the Respondent did not demonstrate a *prima facie* case as defined in *Mrao* case. It was submitted that contrary to the allegations by the Respondent that the Appellant overcharged her, there was a contract which she signed; that the loan facility was restructured upon application by the Respondent, but she defaulted in making payments and that she signed the agreement and therefore she had a contractual obligation to make payments on the facility.

14. The Appellant argued that a dispute that is mathematical in nature or on the interest charged or on accounts is not a ground for an injunction as per the Court of Appeal in *Francis J.K Ichatha v Housing Finance Company of Kenya Ltd* [2005] eKLR where the court held that:

> "The applicant recognized in the Plaint that the dispute was of mathematical nature. Thus, this is truly a dispute on the accounts. The existence of such a dispute is not a valid ground for restraining the respondent from exercising its statutory power of sale."

15. It is further submitted that the Respondents did not furnish the trial court with any evidence that the account was overcharged and that it is trite law that he who alleges must proof as stipulated by sections 107(1), 109 and 112 of the *Evidence Act*.

16. The Appellant relied on *Abdul Jalil Yafai v Farid Jalil Mohammed* [2015] eKLR that made reference to *National Bank of Kenya Ltd v Pipleplastic Samkolit (K) Ltd & another* [2002] EA 503 to emphasize the point that "a court of law cannot re-write a contract between the parties and that parties are bound by the terms of their contract unless coercion, fraud and undue influence are pleaded and proved."

17. It was their submissions that the Respondent accepted the terms of the loan restructure and is estopped from turning her back on the contractual repayment obligations that she consented to willingly.

18. It is the Appellant's case that the Respondent offered her vehicle as security for the loan facility; that at all material times she knew that the vehicle would be repossessed if she defaulted in her loan repayments; that by offering the vehicle as security, the Respondent gave it up as a commodity for sale in the event of default and therefore the Respondent did not prove irreparable loss. The Appellant relied on *Andrew Muriuki Wanjohi v Equity Building Society Ltd & 2 others*[2006]eKLR cited with approval in *Kitho Civil and Engineering Company Limited v National Bank of Kenya* [2021]eKLR, where the court held that:

> "Whenever the applicant offered the suit property as security, he was fully conscious of the fact that if the borrower did not meet his obligations, the suit property could be sold off. Therefore, in the event that it later became necessary for the suit property to be sold off, by the chargee, the chargor could not be heard to complain that his loss was incapable of being compensated in damages. He had had the said property evaluated in monetary terms. He had then told the chargee that he knew the property to be capable of providing the chargee with the peace of mind, of knowing that the money given as a loan would become recoverable, even if the borrower did not pay it.
>
> By offering the suit property as security the chargor was equating it to a commodity which the chargee may dispose of, so as to recover his loan together with interest thereon. Therefore, if the chargee were to sell off the suit property, the chargor's loss could be calculable, on the basis of the real market value of the said property."

19. The Appellant submitted that the Respondent did not prove balance of convenience tilted in her favour and argued that by the trial court restraining its efforts to repossess and dispose of the suit vehicle, the balance of convenience lies with them as the loan remains unpaid and continues to attract interest. The Appellant relied on *Stek Cosmetics Limited v Family Bank Limited & another* [2020]eKLR where the court held that:

> "What about the balance of convenience? The loan amount continues to attract interest and the amount could easily outstrip the value of the properties. This means that if the respondent is restrained from exercising its statutory power of sale until the suit is determined, it may not be able to recover the outstanding loan amount and interest by the time the suit will be determined since the value of the properties cannot be guaranteed to be sufficient to cover the amount outstanding then. In that regard, I find the balance of convenience to tilt in favour of the 1st respondent which can pay the value of the properties if it loses the suit."

**Respondent's Submissions**

20. The Respondent's Submissions were filed on 22nd November, 2023. She has raised 2 issues for determination

    i. Whether the trial magistrate erred in law and fact by granting the Respondent an interlocutory injunction restraining the appellant from repossession, sale and or disposal of the suit motor vehicle.

    ii. Who should bear the costs of the application?

21. She submitted that the trial court applied the requirements for temporary injunction set out in the case of *Giella v Cassman Brown* [1973] EA 358 and that she proved that she had a *prima facie* case. She submitted that she lawfully obtained a loan facility which she has been servicing on monthly basis and that she later realized that she was being overcharged; that the Appellant attached the suit property without notice and the same was to be disposed of via public auction and that the amount owned and the amount demanded were beyond the margins of the loan amount including the interest and hence she has an arguable case.

22. She argued that she has suffered an irreparable injury that would not be adequately compensated by an award of damages; that she has been servicing the loan diligently and that the sale of her vehicle would cause her irreparable injury, compared to the Appellant. She relied on the case of *Alternative Media Limited v Safaricom Limited* (2004) eKLR where it was held that:

> "The second principle established by the Giella case for the grant of an interlocutory injunction is that the Plaintiff will suffer irreparable harm which would not be compensated in damages. Considering this very point in the case of *Mureithi v City Council of Nairobi* (1979) LLR 12, Madan, as he then was, cited with approval the speech of Lord Diplock in the case of *American Cynamid Co. v Ethicon* (1975) 1 All ER 504 at page 506 where he said:- 'the object of the interlocutory injunction is to protect the Plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial....if damages in the measure recoverable at common law would be an adequate remedy and the Defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted however strong the Plaintiff's claim appeared to be at that stage."

23. She submitted that the balance of convenience tilts in her favour as she has been using the suit vehicle as her main tool of trade in ensuring that the said loan facility has been paid, and that if the orders are set aside, it would cause injustice to her.

24. The Respondent relied on *Nguruman Ltd v Jan Bonde Nielsen* (2014) eKLR where the court held that:

> "It is where there is doubt as to 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."

25. On the issue of cost, she submitted that costs follow the event as provided under section 27 of the *Civil Procedure Act*. She urged that the application be dismissed with costs to her.

**Analysis and Determination**

26. Mindful that this is a first appeal and the duty placed on this court to re-evaluate and re-consider the evidence and arrive at my own conclusion, I have read the entire record of Appeal, the Application and supporting documents as well as parties' submissions.

27. The Memorandum of Appeal lists six (6) grounds. In my view, grounds 1, 2, 3 and 4 are related. They relate to whether the trial magistrate applied the principles of granting injunctions as set out in various authorities. Ground 5 questions the trial magistrate's consideration of irrelevant matters in granting the interlocutory injunction and Ground 6 is questioning her error in misdirection the application of the law.

28. The facts of the case before the lower court are clear from the pleadings and the documents relied on in this appeal. I have summarized the case in the introductory part of this judgment, and I need not repeat them in the determination of this matter.

29. It is trite that before an order for an injunction, whether interlocutory or otherwise, can be issued, a party coming to court to seek such orders must satisfy the principles set out in the case of *Giella v Cassman Brown & Co. Ltd* [1973]EA 358.

30. I have read the impugned ruling. The trial magistrate narrated the case for each party as captured in their pleadings and in one paragraph stated:

> "I have perused through the Application dated 5th July 2021, the affidavits for and against, submission, annexed documents and authorities. I find the issue for determination is whether or not an order for a temporary injunction sought is merited. It is trite law that before an order for an injunction can issue, a party has to satisfy the principles set out in the case of *Giella v Cassman Brown* [1973] E.A 358. This being a Court of both equity and justice, I find the Application herein raises triable issues which can only be deliberated during a trial, I am of the opinion that the instant Application has merit and meets the threshold required before an order for a temporary injunction can issue. To this end, Court orders the following:
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> a. That the Defendant is restrained whether by itself, representatives, employees, servants, agents or any other person acting on its behalf or claiming through it from possessing, selling, advertising for sale, transferring, and or dealing with the Plaintiff's motor vehicle KCB 041C in any manner whatsoever pending the hearing and determination of this Application (sic).
>
> b. There are no order as to costs."

31. The trial magistrate, in her ruling, did not demonstrate in her reasoning, how the Applicant had satisfied the principles for grant of an injunction. The issue before her, with respect, was not about whether the case raised triable issues. It was about whether the Applicant had demonstrated that she had a *prima facie* case with a probability of success; whether she had suffered irreparable loss which would not be adequately compensated by an award of damages, and where the balance of convenience lay.

32. As can be seen from the Ruling, the trial court relied on the Applicant's Supporting Affidavit dated 5th July 2021 and the Appellant's Replying Affidavit sworn on 13th August 2021. Submissions of the parties' are mentioned but there is nothing to show that those submissions were analyzed and the reasoning of the trial court based on those submissions.

33. My reading of the pleadings of the parties show that the Respondent does not dispute that she was advanced a loan facility by the Appellant and her named motor vehicle used as security. It is not denied that the loan facility was restructured. What seems to be the problem is that the Respondent claims to have been charged a higher figure. This is a matter to be determined during full trial where the evidence to be adduced can be tested through cross-examination.

34. Given that this matter is still pending, I have restrained myself from making pronouncements that may prejudice any of the parties. It is however clear to me that the trial court is in error in arriving at a conclusion that the Respondent had satisfied the principles for granting an injunction without demonstrating how this was done.

35. The arguments by the Appellant are plausible. There trial magistrate is in error. The Respondent did not demonstrate to satisfaction that the principles of granting an injunction as stated in various authorities cited had been proved.

36. I agree with the Appellant. In so agreeing, I am alive to the applicable principles set out in *Mbogo & another v Shah*, [1968] EA, that:

> " An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice."

37. It is my finding that the trial court misdirected itself in exercising its discretion. It did not delve into considering whether the Respondent has placed sufficient material before it to demonstrate to the satisfaction of the court that she had a *prima facie* case with a probability of success; that she stands to suffer irreparable injury that an award of damages cannot adequately compensate her and that the balance of convenience tilted in her favour. It is my considered view that an award of damages would be an adequate remedy if the Appellant had proceeded to attach the motor vehicle and the Respondent were to succeed in her claim.

38. Consequently, the Appeal herein is merited. I will and do hereby allow it with costs to the Appellant. Orders shall issue accordingly.

**DATED, SIGNED AND DELIVERED THIS 4TH JUNE 2024.**

**S. N. MUTUKU**

**JUDGE**