Mzuri Millers Limited v DIB Bank Kenya Limited (Civil Suit E006 of 2024) [2024] KEHC 16988 (KLR) (19 July 2024) (Ruling)

Neutral citation: [2024] KEHC 16988 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT E006 OF 2024

F WANGARI, J

JULY 19, 2024

BETWEEN

MZURI MILLERS LIMITED ..... PLAINTIFF

AND

DIB BANK KENYA LIMITED ..... DEFENDANT

RULING

1. This ruling relates to the Notice of Motion dated 23/1/2024, the Applicant sought for the following orders: -

    a. Spent

    b. Spent

    c. That an order for injunction be issued pending the hearing and determination of the suit, restraining the Defendant and its servants, agents, employees and any other person acting under their instructions or authority including M/s Ndutumi Auctioneers from attaching, advertising, selling whether by private treaty and/ or public auction, transferring, disposing of and/ or interfering with the properties known as Motor Vehicle Registration No. KDB 557Z, KDB 558Z, KDB 556Z, KDD 351D and KDD 349D (herein after the suit properties), including enforcing and/ or purporting to enforce the Proclamation Notice issued by Ndutuni Auctioneers dated 18/1/2024, or issuing any other proclamation Notice, or even appointing an Administrator, Receiver and/ or any other insolvency practitioner over the said suit properties and/ or business undertaking of the Plaintiff.

    d. Costs of the Application.

2. In support of the application the Applicant state that the Respondent had unlawfully instructed Ndutumi Auctioneers to collect and reposess the bove named otor vehicles that are jointly registered between the Appliant and Premier Bank, where the latter had advanced them a loan facility.

3. The Applicant denied having obtained any loan from the Respondent, and the properties being repossessed had not been charged in favour of the Respondent. The Applicant stated that if the Respondent is not restrained from selling the suit property, it will suffer substantial loss and irreparable harm.

4. The Respondent in its Replying Affidavit dated 20/2/2024 deponed that on 4/11/2022, it had a Tripartie Facility Takeover Agreenent with the Applicant, First Community Bank (Now Premier Bank) and the directors of the Applicant company as the Guarantors. This was after the Respondent made an offer to the Applicant for a total loan facility of Kshs. 109,142,721.23 an offer which was accepted.

5. The original logbooks were therefore released to the Respondent by the now Premier Bank, which would continue to be the security for the loan advanced. The Respondent stated that the Applicant offered the vehicles as security for the financial facility offered, hence capable of being sold in the event the Applicant defaulted in repayment of the loan. The Applicant was said to be in accrued arrears of Kshs. 11,575,221.63, hence the instructions to Ndutumi Auctioneers to repossess the suit motor vehicles.

6. The Applicant filed a Supplementary Affidavit dated 12/4/2024 denied the contents of the Replying Affidavit. Even though the Applicant admits receiving a letter of offer from the Respondent, it was denied that the same was ever executed as there were some issues that were yet to be agreed upon.

7. Further, the Applicant denied being privy to the takeover agreement between the Respondent and the now Premier Bank. The alleged Guarantors to the Tripartite Facility Takeover Agreement denied signing the said agreement and alleged that the document was forged. It was stated that the said signatures were forwarded to a forensic document examiner where the expert report will be shared with the court.

8. Directions were taken that the application be canvassed by way of written submissions. Both the parties complied by filing their rival submissions.

Analysis and Determination

9. I have considered the application, the Replying Affidavit and Supplementary Affidavit, submissions as well as the law and in my view, the following are the issues for determination

    a. Whether the Applicant has made out a case for grant of orders of injunction;

    b. If the answer to (a) above is in the affirmative, what orders should issue?

    c. Who bears the costs of the application?

10. It is in dispute that the Applicant secured a loan facility from the Respondent. I have perused through the documents relied on by the Respondent. The Applicant has averred that the said documents were a forgery as the alleged signatories to the takeover agreement denies the said documents.

11. I have further perused through the copies of the logbooks to the suit motor vehicles. The vehicles re still registered in the names of the Applicant and Premier Bank Limited. If indeed the logbooks were released to the Respondent as security of the alleged loan, the said security was not perfected by having the logbooks charged in their favour.

12. This being an application for orders of temporary injunction, the principles guiding the court whether to grant the orders sought or not are 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 of Appeal 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..." (Emphasis added)

13. While considering the above principles, I take caution that in an interlocutory application, the Court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law. (See the decision of Ringera, J (as he then was) in *Airland Tours & Travel Limited v National Industrial Credit Bank* Nairobi (Milimani) HCCC No. 1234 of 2002).

14. Being an equitable relief, a party seeking this remedy ought to act equitably. The purpose of an order of injunction is to preserve the substratum of the suit. The Applicant states tha the logbooks are still charged by Premier Bank where it has a loan facility. Considering that the loan facility allegedly advanced by the Respondent to the Applicant had been denied, it is critical that the substratum of the suit be preserved, pending hearing and determination of the suit. To this end, I am satisfied that a prima facie case has been established.

15. As held in *Nguruman* (*supra*), having found that a prima facie case has been established, I am duty bound to consider the second facet, that is, irreparable injury. The Court of Appeal in the above case expressed itself thus: -

> "...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." (Emphasis added)

16. On the balance of convenience, In *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR, balance of convenience was defined as follows: -

> "...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 them would be greater than that caused to the defendants if an injunction is granted and suit is ultimately dismissed..."

17. I note that if the Respondent is allowed to proceed with the repossession and subsequent of sale of the vehicles, the Applicant would lose the vehicles despite there being a dispute as to whether there was a loan facility takeover by the Respondent and further advancement of loan to the Applicant . On the contrary, the Defendant still reserves the right to realize the security in the event the suit is dismissed. I am satisfied that the Applicants have met the conditions necessary

18. On the issue of costs, it is settled that the same follows the event. That is the import of section 27 of the *Civil Procedure Act*. The court reserves its discretion on whether to award costs to either party. This was well enunciated by the Supreme Court in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others* [2013] eKLR.

19. Having considered the fact that this is an interlocutory application, it would be onerous to award costs to any party at this stage. Therefore, I direct that costs shall await the outcome of the suit.

20. In order to safeguard the Defendant's interests, I order that the matter be fast tracked. Notice is hereby issued to all parties that once the matter is fixed for hearing; no adjournments shall be allowed.

21. Based on the above discourse, I make the following orders: -

    a. The Notice of Motion dated 23/1/2024 is merited and the same is allowed in terms of prayer (3) thereof, that is, there be a temporary order of injunction pending the hearing and determination of the main suit, but limited to the repossession and sale of the suit motor vehicles.

    b. Costs to abide the outcome of the suit.

    Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 19TH DAY OF JULY, 2024.

F. WANGARI

JUDGE

In the presence of;

Advocate for the Applicant

Advocate for the Defendant

Court Assistant