Mwananchi Credit Limited v Onyango & another (Civil Appeal E037 of 2023) [2024] KEHC 8580 (KLR) (15 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8580 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E037 OF 2023

DKN MAGARE, J

JULY 15, 2024

BETWEEN

MWANANCHI CREDIT LIMITED ..... APPELLANT

AND

JOHN OGWANG ONYANGO ..... 1ST RESPONDENT

FORESIGHT AUCTIONEERS ..... 2ND RESPONDENT

JUDGMENT

1. This is an appeal from the Ruling and Order of the Hon. D. W. Mburu in Mombasa CMCC No. E1006 of 2022. The court allowed an application dated 28/6/2022. The dispute relates to Kshs. 400,000/=. The same was to be paid in 24 monthly instalments of Kshs. 31,872/= totaling to Kshs. 768,928/=.

2. The 1st Respondent maintains that he has paid a sum of Ksh. 733,140/= and has evidence to that effect or so it appears. On the other hand, the Appellant states that a sum of Kshs. 843,184.81 is due and owing, and has loan documents.

3. The court made a decision granting orders in an interlocutory application, which resulted in this appeal. The Appellant raised the following grounds of appeal:-

    a. That the Honourable magistrate erred in law and in fact by capriciously issuing mandatory injunctive orders at an interlocutory stage against the Appellant, that are final in nature, requiring the Appellant to release the motor vehicle registration KCK 263R to the 1st Respondent.

    b. The Honourable magistrate erred both in law and fact in failing to appreciate the overwhelming evidence tendered by the Appellant to prove that the Appellant is at risk of losing the motor vehicle registration number KCK 263R (hereinafter referred to as "the

security"), which is the only source of security of the Appellant for the loan facility of Kshs. 400,000/= advanced to the 1st Respondent.

c. The Honourable magistrate erred in law and in fact by issuing injunctive orders against the Appellant and preventing it from exercising its legal right of sale in respect of the security owing to the default of payment of the loan by the 1st Respondent.

d. The Honourable magistrate erred in law and in fact by blatantly and totally ignoring the Appellant's evidence produced through the Replying Affidavit, Grounds of Opposition and detailed submissions.

e. The Honourable magistrate erred both in law and fact by failing to appreciate the facts and the law presented before him regarding the granting of a mandatory injunctive order at an interlocutory stage that are final in nature.

f. The Honourable magistrate erred both in law and in fact by failing to consider the applicable legal principle before the granting of a mandatory injunctive order at an interlocutory stage, that are final in nature.

g. The Honorable magistrate erred in law and in fact by granting an ambiguous order which is an order of temporary injunction and an order of mandatory injunction against the Appellant.

h. The learned magistrate erred in both fact and law by failing to a mandatory orders of injunction without hearing the Appellant contrary to the salient provisions of Article 50 of the *Constitution* of Kenya 2010.

i. The Honourable magistrate erred both in law and fact by failing to exercise its discretion and authority in a judicious, fair and equitable manner before issuing the orders of 19th January, 2023.

j. The Honourable magistrate's court erred in both fact and law by issuing a nebulous, illegal, null and void order for want of form and substance.

k. The Honourable magistrate erred both in law and in fact in failing to appreciate the evidence tendered by the Appellant in proving its application when he proceeded to consider extraneous issues and purported evidence not presented or led in evidence or at all.

4. The loan was said to be for Kshs. 400,000/= with 6% reducing balance, whatever this means. Default is said to have occurred in March 22 and repossession the same month.

Analysis

5. 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.

6. In the case of *Mbogo and Another vs. 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."

7. 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 Vs 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."

8. 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.

9. In the case of *Peters vs 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..."

10. However, given the fact that the matter proceeded by way of affidavits, the court has a wider latitude. The court must warn itself that the main suit is still pending in the court below. 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: -

> " 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 Vs 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."

11. The 1st respondent took a loan of Ksh 400,000/=. He paid Ksh 733,140, clearing the loan according to him. The Appellant has not produced a single piece of evidence discounting the 1st Respondent's case.

12. From analysis of the Appellant's own evidence there is no court that could deny the 1st Respondent an injunction. Repossession is said to have occurred the same month of default. There is no indication that a notice was given. The Appellant is quiet on the sum of Kshs. 64,782/= paid on 3/3/2022. The default could not have occurred in March when payment was made at the beginning.

13. I have not seen evidence of default. The Appellant did not displace the prima facie evidence placed before the court. The issue of injunction is governed by the locus classicus case of *Giella –vs- 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."

14. In the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR the Court of Appeal was of the view that these tests are sequential. The Court stated: -

> " 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.
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> 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."

15. The 1st Respondent has a prima facie case that he has fully paid. In the case of *Mrao Ltd v First American Bank of Kenya Ltd& 2 others* [2003] eKLR, the court of Appeal noted that the following regarding a prima facie case: -

> 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.

16. The balance of convenience tilts in favour of the 1st Respondent. The Appellant has not shown how a sum of Kshs. 843,184.81 arose. There is an amount of Kshs. Kshs. 722,140 paid and the purported Kshs. 843,184.81 is allegedly outstanding making a total repayment possible to Ksh. 1,576,326/=.

17. Even on the in duplum rule, the amount claimable cannot be Ksh. 1,576,326/=. The prima facie case was proved.

18. In grant of mandatory injunction, it must be shown that the Respondent thereof has no claim. In this case the Appellant did not demonstrate any claim over the vehicle after the entire debt was paid. In the locus classicus case of *Kamau Mucuha vs. 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."

19. Halsbury's Laws of England, Third Edition, Volume 21, paragraph 739, page 352 states :-

> " It is the very first principle of injunction low that primo facie the Court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the Court interferes by way of an injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question"

20. In the case of *Banis Africa Ventures Limited v National Land Commission* [2021] eKLR, Odeny J stated as doth: -

> " In the case of *Said Almed vs. Mannasseh Benga & Another* [2019] eKLR the court held that:
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> > "Where it is clear that the defendant's act complained of is or may very well be unlawful, the issue of whether or not damages can be an adequate remedy for the plaintiff does not fall for consideration. A party should not be allowed to maintain an advantageous position he has gained by flouting the law simply because he is able to pay for it. Support for this view is to be found in the Court of Appeal decision in the case of *Aikman vs Muchoki* (1984) KLR 353.' See the case of *Joseph Mbugua Gichanga vs Co-operative of Kenya Ltd* (2005)eKLR.
> >
> > Further it is trite law that where there is breach of the law, an applicant cannot be compelled to accept damages as compensation. In the case of *Joseph Siro Mosioma vs. Housing Finance Company of Kenya Limited & 3 Others* [2008] eKLR it was held as follows by Warsame, J (as he was then)
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> > > "...that damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be substituted for the loss which is occasioned by a clear breach of the law, in any case, the financial strength of a party is not always a factor to refuse an injunction. More so a party cannot be condemned to take damages

in lieu of his crystallized right which can be protected by an order of injunction.

21. The repossession was of doubtful legality in absence of evidence of default. The Respondent cannot be compelled to accept damages, where there is clear breach. The basis for the amount claimed is equally of doubtful legality. I wish to avoid expressing myself with finality in an interlocutory appeal. There could be some evidence somewhere, other than the ones on record showing that there is default. It is not there now. Therefore, I concur with the court below that respondents proved their case for grant of both mandatory and temporary interlocutory orders. The orders that were issued were properly given.

22. The issues raised can be dealt with at full hearing. The Appeal cannot succeed in the circumstances.

Determination

23. I make the following orders: -

    a. I dismiss the appeal with costs of Kshs. 125,000/= to the 1st Respondent. For avoidance of doubt, the Appellant shall pay auctioneers without debiting the 1st Respondent's account. If so debited all claims related to the auctioneers must be reversed.

    a. The file is closed.

    b. The lower court file shall be mentioned on 28/8/2024 before the CM for directions.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 15TH DAY OF JULY, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:

No appearance for the Appellant

Mr. Maithya for 1st Respondent

Court Assistant – Jedidah