



**Nderitu v Spring Board Capital Limited (Civil Appeal 90 of 2020)
[2024] KEHC 16769 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 16769 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL 90 OF 2020**

**NIO ADAGI, J
JULY 25, 2024**

BETWEEN

GABRIEL NDERITU APPELLANT

AND

SPRING BOARD CAPITAL LIMITED RESPONDENT

JUDGMENT

1. The Appellant lodged this appeal vide a Memorandum of appeal dated 17th July 2020 basically the appeal seeks to set aside the ruling of the subordinate court dated 16th July 2020 which disallowed the Appellant’s application for temporary injunction pending the determination of the lower court suit.
2. The Appellant has in this appeal also filed a notice of motion application dated 18.04.2023 (hereinafter referred to as “the application”) under Section 1, 1A and 3A of the *Civil Procedure Act*, Order 50 of Civil Procedure Rules 2010, Article 159 of *the Constitution* and all enabling provisions of the law.
3. The Appellant seeks for orders that:-
 1. Spent
 2. The honourable court be pleased to review and set aside the order and directions issued on 16th May 2022;
 3. The honourable court be and is pleased to reinstate this suit;
 4. The honourable court be and is pleased to issue a temporary injunction restraining the Defendant whether by themselves, their agents, assigns, employees and/or anyone else claiming under them from selling, transferring, hiring, proclaiming, auctioning or selling the Plaintiff’s motor vehicle KCA 928K pending hearing and determination of this application.



5. The honourable court be and is pleased to issue a temporary injunction restraining the Defendant whether by themselves, their agents, assigns, employees and/or anyone else claiming under them from selling, transferring, hiring, proclaiming, auctioning or selling the Plaintiff's motor vehicle KCA 928K pending hearing and determination of this suit.
 6. The Chief Magistrate to either allocate this file to a different magistrate and in default Hon. O.M. Wanyaga to recuse himself from proceedings.
 7. The honourable court be pleased to make a finding that the Plaintiff's loan against motor vehicle KCA 928K has been fully paid.
 8. Costs be in the cause.
4. The Appellant's counsel filed written submissions dated 21.11.2023 and in expanding on the grounds of the appeal and grounds on which the application is predicated, as well as the Appellant's supporting affidavit sworn on 18.04.2023, urged the court to allow the appeal and grant the prayers sought in the application.
 5. The Respondent has opposed the Appellant's appeal and application. Through the Replying Affidavit sworn on 11.05.2023 by its Chief Executive Officer one Carolyn Gathuru and through its counsel's submissions dated 11.12.2023. The Respondent contests the application for being mischievous and deliberately misleading to this court as the application is based on fraudulent misrepresentation and non-disclosure of material facts.
 6. I have read the grounds of appeal, the application, affidavit in support thereof, the replying affidavit and their accompanying annexures.
 7. I have also considered and weighed the Parties' Counsels rival submissions in this appeal and on the application and the grant of orders sought by the Appellant and also taken into consideration the judicial decisions cited and attached.
 8. I will draw issues for determination based on the prayers sought by the Appellant as follows: -

whether this court can review and set aside the order and directions issued on 16th May 2022;

9. I must say that this prayer is unclear, incompetent and ambiguous in the manner sought. It is not clear which court's order and directions the Appellant is seeking to review or set aside. No extract of the referred to order or directions has been annexed to the application for ease of this court's reference and consideration.
10. Having perused the Record of appeal, I will assume the Appellant is referring to the subordinate court's proceedings of 16th May 2023 where his suit was dismissed for want of prosecution and that he wishes to review and set aside the dismissal. This court finds that it has no jurisdiction and cannot review a matter that is not before it. A review could properly lie before the court that made the decision. As to whether this court can set aside the dismissal, I will consider the same under the next issue.
11. The Appellant can only review the ruling on the grounds set out in Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules. Review is impermissible without a glaring omission, evident mistake or similar ominous error. The power of review is available only when there is an error apparent on the face of the record. Review proceedings are not an appeal. The review must be confined to error apparent on the face of the record and re-appraisal of the entire evidence or how the judicial officer applied or interpreted the law would amount to exercise of appellate jurisdiction, which is not permissible.



12. Section 80 of the *Civil Procedure Act* provides as follows:-

Any person who considers himself aggrieved-

- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is allowed by this Act,

May apply for a review of judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

13. Order 45 Rule 1 of the Civil Procedure Rules provides as follows:-

Any person considering himself aggrieved-

- (a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- (b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay.”

14. A clear reading of the above provisions shows that section 80 gives the power of review while Order 45 sets out the rules. The rules restrict the grounds for review. They lay down the jurisdiction and scope of review. They limit review to the following grounds:-

- a) Discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;
- b) On account of some mistake or error apparent on the face of the record, or
- c) For any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.

15. The court lacks jurisdiction to entertain it on the grounds that Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules permitted a party to file an application for review only where no appeal had been filed. This is an appeal filed by the Appellant and there is no room for review. The Appellant seems to be gambling with the law

whether this court can reinstate this suit.

16. On this prayer I will equally assume the Appellant refers to the subordinate court suit and again this court finds that it cannot reinstate a case already dismissed before the lower court. An application for reinstatement of the suit ought to have been made before the lower court and not on appeal. An appeal could only suffice if the reinstatement was declined by the court dismissing the suit. This court can only set aside orders on a decision made on an application for reinstatement of a suit. This prayer must therefore fail.



whether this court can issue a temporary injunction restraining the Defendant whether by themselves, their agents, assigns, employees and/or anyone else claiming under them from selling, transferring, hiring, proclaiming, auctioning or selling the Plaintiff's motor vehicle KCA 928K pending hearing and determination of this application and suit/appeal.

17. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the judicial decision of *Giella Versus Cassman Brown* (1973) EA 358. This position has been reiterated in numerous decisions from Kenyan courts and more particularly in the case of *Nguruman Limited versus Jan Bonde Nielsen & 2 others* [CA No.77 of 2012](#) (2014) eKLR where the Court of Appeal held that;

“in an interlocutory injunction application the Applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates 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 rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”.

Consequently, in the judicial decision of *Mrao Ltd Versus First American Bank of Kenya Ltd* (2003)eKLR, the Court of Appeal gave a determination on a prima facie case. The court stated that:

“... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

18. Clearly, the Appellant was at the time of entering into the loan agreement and executing the Chattels Mortgage fully aware of the nature of the transaction, the rights, obligations and liabilities of both the borrower and the lender and the consequences of any default thereof. At the time of filing suit, the Appellant admitted to be in arrears of the loan. He only rushed to court seeking injunction orders against the Respondent who was exercising its legal remedy available to the lender in the event of breach of repayment as per the loan agreement. The Appellant had failed to honour his loan repayment obligation and therefore the trial court was right in finding that he did not establish a prima facie case.

19. Secondly, the Applicant has to demonstrate that irreparable injury will be occasioned to him if an order of temporary injunction is not granted. The judicial decision of *Pius Kipchirchir Kogo Vs Frank Kimeli Tenai* (2018)eKLR provides an explanation for what is meant by irreparable injury and it states;

“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.

20. From the facts of this matter, the value of the subject vehicle is known or can be ascertained. From the Appellant's own pleadings, loss of user has been ascertained per day and therefore the damages he would suffer if any are quantifiable and can thus be adequately compensated.

The Appellant has not satisfied this second condition.



21. Thirdly, the Applicant has to demonstrate that the balance of convenience tilts in her favour. In the case of Pius Kipchirchir (*supra*) which defined the concept of balance of convenience as:

‘The meaning of balance of convenience will favour of the Plaintiff’ is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.

In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting”.

22. In the case of Paul Gitonga Wanjau Vs Gathuthia Tea Factory Company Ltd & 2 others (2016) eKLR, the court dealing with the issue of balance of convenience expressed itself thus:-

“Where any doubt exists as to the Applicants’ right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies.”

23. The Appellant has by his own pleadings demonstrated that he is having financial difficulties and thus unable to meet his financial obligations under the loan agreement. However, there is nothing to suggest that the Respondent which is a financial institution would be unable to compensate the Appellant should he succeed in the suit.
24. Adopting this court’s finding on issues (i) and (ii) above I also find that the Appellant has not satisfied that the balance of convenience tilts in his favour.
25. In view of the foregoing, I find that the Appellant has not met the criteria for grant of orders of temporary injunction sought.

whether Chief Magistrate is to either allocate this file to a different magistrate and in default Hon. O.M. Wanyaga to recuse himself from proceedings.

26. I find this prayer to be misconceived and misplaced. To begin with, the Appellant has not pointed out any allegation of misconduct or bias on the part of the Magistrate he has named in handling the case to warrant his recusal. The law on recusal of a judicial officer in a case is very clear. Such a prayer has to be instituted by a way of a formal application and a chance given to the concerned judicial officer to respond to the application.
27. The test to be applied in determining whether or not a judge ought to recuse himself from a suit or proceeding on account of alleged bias was considered by the East African Court of Justice in the case



of Attorney General of Kenya –vs- Prof. Anyang’ Nyong’o & 10 Others EACJ Application No. 5 of 2007 as follows:

“We think that the objective test of ‘reasonable apprehension of bias’ is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the mind of the reasonable, fair-minded and informed member of the public that the judge did not (will not) apply his mind to the case impartially. Needless to say. The litigant who seeks disqualification of a judge comes to court because of his own perception that there is appearance of bias on the part of the judge. The court, however, has to envisage what would be the perception of a member of the public who is not only reasonable but also fair-minded and informed about all the circumstances of the case.”

28. Similarly, in the South African case of *President of the Republic of South Africa v South African Rugby Football Union* [1994] 4SA 147 at 1-77 the test for recusal of a judge was rendered as follows:

“... the correct approach to this application for the recusal of members of this court is objective and the onus of establishing it rests upon the Applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel.”

I therefore decline to allow this prayer.

Whether the court can make a finding that the Appellant’s loan against motor vehicle KCA 928K has been fully paid.

29. Again, I find this prayer to be misplaced. This court has not had the opportunity to hear the parties and to analyze the evidence on the matter. It cannot therefore make any finding on any paid or unpaid loan subject of this matter.

This prayer is also declined.

Who shall bear the costs of the application?

30. On the issue on costs; section 27 of the *Civil Procedure Act* provides that costs shall follow the event. The successful party shall ordinarily have costs.

31. Accordingly, I make the following orders:-

1. The appeal as well as the application dated 18th April 2023 are dismissed.
2. Costs of Kshs.40,000/= are awarded to the Respondent.

DATED, SIGNED & DELIVERED VIRTUALLY AT MACHAKOS THIS 25TH DAY OF JULY 2024

NOEL I. ADAGI

JUDGE

