



REPUBLIC OF KENYA



**Mwananchi Credit Limited v Mwangi (Civil Appeal E064 of 2021)
[2024] KEHC 9961 (KLR) (9 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 9961 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E064 OF 2021
RN NYAKUNDI, J
AUGUST 9, 2024**

BETWEEN

MWANANCHI CREDIT LIMITED APPELLANT

AND

BONIFACE CHEGE MWANGI RESPONDENT

(Being an appeal from the ruling and order of the Senior Principal Magistrate Honourable Naomi Wairimu at Eldoret Chief Magistrate's Court delivered on the 4th June 2021 in Magistrate's Civil Case No. E263 of 2020 at Eldoret, in Boniface Chege Mwangi Vs Mwananchi credit limited)

RULING

1. This is an appeal lodged by the Defendant/Appellant for this Honourable Court to set aside the Ruling of the Court and Order delivered and/or issued on 4th June 2021 and the same be replaced with an order dismissing the Application dated 14th December 2020 as against the Defendant in CMCC No. E263 of 2021 in which Hon. Naomi Wairimu, SPM granted the injunction under Order 40 Rule 1 and 2 of the Civil Procedure Rules against the Defendant/Respondent.

Background

2. The Applicant/Plaintiff had filed a Notice of Motion Application dated 14th December, 2020 before the Senior Principal Magistrate's Court in CMCC. No. E263 of 2020 against the Defendant/Respondent seeking the following orders:
 - a. That an injunction do issue against the Defendant restraining whether by itself, its servants and/or agents from selling and or transferring the motor vehicle registration no. KCC 541Q make Hino pending the hearing and determination of the suit



- b. That the Defendant by itself, its servants and/or agents be compelled to release the motor vehicle registration no. KCC 541Q make Hino to the Plaintiff pending the hearing and determination of the suit
 - c. That the costs of this application be sourced by the Defendant
3. The Application was based on the grounds on the face of it which the trial considered where the Plaintiff stated that he has a prima facie case with a probability of success, that the damages shall not be an adequate remedy for the continued breach of an accrued right under the law; that the Plaintiff's case is simple, plain and clear; that the act to be carried out is of a summary nature as it involves the release of a motor vehicle and that the Defendant has attempted to steal a match against the Plaintiff by seizing his vehicle without complying with the law.
4. The trial court considered the Affidavit evidence in the light of the averments in the Application dated 14th December, 2020 to determine the issues of the notice of motion. The learned trial magistrate by her ruling dated 4th June 2021 granted the orders as crafted in the aforesaid notice of motion dated 14th December, 2020.
5. Being aggrieved with the ruling and order the Appellant sets out the following grounds in his Memorandum in support of the Appeal:
 - a. That the Learned Magistrate erred in both law and fact when she based her ruling on the mere fact that the Plaintiff was dissatisfied with the decision of the Defendant to attach the motor vehicle registration no. KCC 541Q.
 - b. That 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. That the Learned Magistrate erred in both law and fact in failing to appreciate that due notices before attachment of the motor vehicle registration number KCC 541Q were issued pursuant to the *Auctioneers' Act*.
 - d. That the Learned Magistrate erred in both law and fact in failing to consider the Defendants facts contained in his Replying Affidavit together with his submissions.
 - e. That the Learned Magistrate erred in both law and fact in issuing a mandatory injunction in the circumstances when she ordered the release of the motor vehicle registration number KCC 541Q on a running attachment when it was evident the Respondent was in default of repaying a loan owed to the Appellant.
6. Moreover, the Appellant seeks the following orders in his Memorandum in support of the Appeal:
 - a. This Appeal be allowed with costs
 - b. The Ruling of the Court delivered and/or issued on 4th June 2021 be set aside and the same be replaced with an order dismissing the Application dated 14th December 2020 as against the Defendant CMCC No. E263 of 2020 with costs to the Appellant.
 - c. The motor vehicle registration number KCC 541Q if at all released to the Respondent be immediately returned to the Appellant pending the hearing and determination of the main suit in Defendant CMCC No. E263 of 2020.
 - d. The costs be borne by the Respondent.



7. On appeal Mr. Wangila appeared for the Appellant and relying on the Memorandum of Appeal and Affidavit he urged this court to allow the appeal and quash the declarations as decreed by the learned trial magistrate.
8. The Respondent counsel Mr. Wambua in a rather extensive detailed submissions and exhibited annexures forcibly opposed the appeal for the court to interfere with the discretion by the trial court to decline an interlocutory injunction to the Respondent/Appellant.

Analysis

9. At the heart of this appeal is the question whether the learned trial magistrate was right in granting the Applicant/Respondent relief of temporary injunction.
10. The answer still is to be found in the illuminating principles which have influenced the exercise of discretion under Order 40 Rule 1, 2 and 3 of the *Civil Procedure Rules*. On injunctions in the cases of *Giella v Cassman Brown and Mrao Ltd v First American Bank of Kenya Ltd & 2 others* 2003, *Nguruman Ltd (supra)* where the courts have approved the following conditional principles to be met by an applicant that:-
 - a. An applicant must show a prima facie case with a probability of success to be tried at the main suit.
 - b) That the applicant would suffer irreparable harm not capable of being reserved by way of damages.
 - c) That the balance of convenience in the interest of justice does tilt in favour of the applicant.
11. From the record the case involved different issues raised by the Plaintiff/Applicant against the Defendant/Respondent. In the Application, the Plaintiff stated that he has a prima facie case with a probability of success, that the damages shall not be an adequate remedy for the continued breach of an accrued right under the law; that the Plaintiff's case is simple, plain and clear; that the act to be carried out is of a summary nature as it involves the release of a motor vehicle and that the Defendant has attempted to steal a match against the Plaintiff by seizing his vehicle without complying with the law.
12. Moreover, the Plaintiff submitted that he is the registered owner of the motor vehicle registration number KCC 541Q make Hino. He stated that he took a loan which was to be paid on reducing the balance method to the Defendant and he repaid the loan well however, on the 7th July 2020, the Defendant without any demand or notice proceeded to seize the motor vehicle registration number KCC 541Q make Hino unlawfully over alleged default however, by the said time he had paid kshs. 424, 555. The Plaintiff stated that he paid to the Defendant kshs. 1, 500 and kshs. 50,000 bringing the total amount to paid to the Defendant as at 23rd September 2020, to kshs. 476,055. He further stated that he engaged the Defendant and it was agreed that kshs. 146,500 be paid in order to settle and close the amount in full and final settlement and based on the said representation, on the 30th November, 2020 he paid the sum of kshs. 146,500 to the Defendant which brought the total amount paid to the Defendant on the loan to kshs. 622,555.
13. The Plaintiff also stated that despite being with the Defendant despite being in receipt of the said funds has failed to release the motor vehicle registration number KCC 541Q make Hino and instead insists that he still indebted to it in the sum of kshs. 907,814.38. he further stated that the loan agreement as clearly indicated in the statement was to be liquidated on a reducing balance method thus interest can only be levied on the reduced principal sum as it diminishes and that the Defendant is liable for unconscionable conduct by seeking to be paid kshs. 907,814.38 in addition to the kshs. 622,555 already



bringing to a total of kshs. 1,530,369 over a sum advanced of kshs. 400,000 which is about 4 times the principal advanced and well amounts to charging interest at a rate of 400%.

14. The court in its ruling considered that the notice of motion in terms of the statutory creation of a legal charge the merits and prospects of success of the prospective suit was remotely unlikely given the pleaded facts of the Application. These factors taken into account are similar if not identical as set out in the cited cases of *Giella Cassman, Nguruman and Mrao (supra)* case.
15. The principles in the above case provides novel and clear guidelines in respect to the court's jurisdiction and exercise of discretion to grant interlocutory orders of injunction when considering whether to exercise discretion to interfere with the decision by the trial court an excellent exposition of the Law is found in the persuasive English case of *Headman Productions Ltd Elal v Hanulum & another* 1983 AC 191 where the court held to: -

“Upon an appeal from a judge's grant or refusal of an interlocutory injunction the further of an appellate court... is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently. ... it may set aside the judge's exercise of his discretion on the ground that it was based upon a misunderstanding of the law or the evidence before him or upon an inference. That particular facts existed or did not exist, which although it was one that might legitimately have been drawn upon the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the trial of the appeal, or on the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunction may sometimes be sketchy, there may be occasional cases where even though no erroneous

assumption of law or fact can be identified. The judge's decision to grant or refuse the injunction is so aberrant that it must be set aside upon the grant. That no reasonable judge regardful of his duty to act judiciously could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside grant or of these reasons, that it becomes entitled to exercise an original discretion of its own.”

16. Bearing in mind the basic principles on the test of exercising discretion the burden of proof rest with the Appellant especially when the interest of justice so requires for such an interference by the appellate court of the impugned decision.
17. In determining this appeal, the legal position is quite clear and has been quite clear for some considerable time. The persuasive decision in *Erica Francis-Griffiths v Patricia Griffiths*, [2016] JMSC Civ. 68 sums it all as follows:
 - (a). Whether an interlocutory injunction is prohibitory or mandatory, the same fundamental principle is that the court should take whatever course appears to carry the lower risk of injustice if it should turn out that the court turns out (sic) to be wrong or which seems likely to cause the least irremediable prejudice to one party or to the other.
 - (b). Whether an interlocutory injunction is prohibitive or mandatory, the claimant must demonstrate that there is a serious issue to be tried before any injunction will be granted.



- (c). There is no usefulness to be derived from arguments based on semantics as to whether an injunction is prohibiting or mandatory. What is required in each case is to examine the particulars facts of the case and the consequences of granting or withholding of the injunction is likely to be.”
18. Within the context implicit in the statutory notice of sale the redress for an interlocutory injunction as properly known to comprise of a prima facie case, irreparable harm not compensable by way of damages, balance of convenience was not clearly available in favor of the Appellant. He who comes to equity must come with clean hands.
19. After careful consideration of the arguments and submissions made in relation to this appeal, I will not interfere with the discretion of the Learned Trial Magistrate as there was no misdirection which was fatal to the decision.

I am of the considered view the irremediable prejudice and injustice tilts more in favor of the Respondent if this appeal was to be allowed. For the foregoing reasons, the appeal is therefore refused and dismissed with costs to the Respondent.

DATED AND SIGNED AT ELDORET THIS 9TH DAY OF AUGUST, 2024

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R. NYAKUNDI
JUDGE

