



Rentco Africa Limited (Formerly Rentco East Africa Limited) v Urysia Limited (Commercial Case E931 of 2021) [2023] KEHC 2305 (KLR) (Commercial and Tax) (22 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2305 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E931 OF 2021**

**A MABEYA, J
MARCH 22, 2023**

BETWEEN

**RENTCO AFRICA LIMITED PLAINTIFF
FORMERLY RENTCO EAST AFRICA LIMITED**

AND

URYSIA LIMITED DEFENDANT

RULING

1. Before court is the defendant's motion on notice dated November 29, 2022 brought under order 42 rules 6 and 9 of the *Civil Procedure Rules 2010*. The same sought injunctive orders to restrain the plaintiff from repossessing the motor vehicles subject to the Master Rental Agreement pending the hearing and determination of an intended appeal.
2. The application was premised on the grounds on the face of it and supported by the affidavit of Claude Mwendu sworn on November 29, 2020. It was the defendant's case that on November 24, 2022, the court dismissed the defendant's application dated July 12, 2022. That by doing so, it allowed the attachment and sale of the motor vehicles to proceed.
3. That the defendant has since filed a notice of appeal against the said decision. It is the defendant's contention that the plaintiff had proceeded to instruct auctioneers to attach the said motor vehicles which amounts to a breach of contract between the defendant and a third party. That the defendant would suffer substantial loss as the contract with national treasury would be violated if the orders sought are not granted. It was contended that the defendant had furnished security as the funds in its account were preserved by the court's orders.
4. The plaintiff opposed the application *vide* a replying affidavit sworn on December 16, 2022 by Robert Kanda Nyasimi. He stated that the party's relationship stemmed from the Master Operating Lease



Agreement dated April 6, 2015 whereby the plaintiff had leased 300 units of motor vehicles to the defendant. That in the quarter beginning from May 2020, the defendant failed to pay the lease rentals thus the reason for the suit.

5. It was contended that the total accrued lease rentals and late penalties amounted to Kshs 682,243,193.30 as at the time of filing the suit. That the master operating lease agreement was terminated on March 28, 2022 in line with clause 21(a), (b) and 22(b) of the agreement and the defendant was informed to return the motor vehicles. That the failure by the defendant to return the motor vehicles prompted the plaintiff to instruct auctioneers to repossess the vehicles. That the defendant's application for injunction was dismissed and therefore the plaintiff was allowed to repossess the vehicles.
6. It was contended that the application before court lacked merit and was incurably defective since the agreement between the parties had already been terminated. It was further contended that the application for injunction had already been dealt with and the motor vehicles were not the subject matter of the primary suit. That the ownership of the leased motor vehicles and termination of the master lease agreement was not in issue.
7. The plaintiff observed that the defendant would stand to benefit in the status quo and allowing the orders as sought would amount to curtailing the plaintiff's rights.
8. The application was canvassed by way of written submissions which I have considered. It was the defendant's submissions that the court had the power to grant an injunction pending appeal which discretion should be assessed on the need to preserve the status quo and the property. Counsel submitted that if the orders sought were not granted, the defendant would stand to suffer since the motor vehicles would be repossessed and undermine the lease between it and the National Treasury which will expose it to a separate claim by the national Treasury for breach of contract.
9. The plaintiff submitted that by virtue of order 42 rule 6 of the *Civil Procedure Rules*, the court could only grant an injunction while exercising its appellate jurisdiction. That the motor vehicles were not the subject matter of the suit and the defendant ought to have invoked the correct provisions of the law.
10. It was further submitted that the defendant had misled the court on what pertained the subject matter of the suit. That the injunction sought would greatly prejudice the plaintiff since the plaintiff had terminated the Master Operating Lease Agreement without any objection from the defendant. That the appeal was not arguable since the plaintiff had the right to repossess the motor vehicles.
11. There was a preliminary point that was taken by the plaintiff that the court lacked the jurisdiction to grant the orders sought. The defendant approached this court seeking injunctive orders pending the hearing of the intended appeal. The application was expressed to be brought under order 42 rule 6 and 9 of the *Civil Procedure Rules* which provides that: -

“6 (6) Notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from subordinate court or tribunal has been complied with.”



12. What is in contention is whether the court has jurisdiction to grant the injunctive orders under order 42 rules 6 and 9 of the *Civil Procedure Rules*. In support of its case the defendant relied on the case of *James Juma Muchemi and partner's Ltd v Barclays bank of Kenya Ltd* where it was stated thus: -

“From the foregoing decisions of the court of appeal, I am satisfied and I hold that this court has jurisdiction to entertain a proper application brought under Erinford Principles. Accordingly, I reject the defendant’s contention that this court is functus officio or lacks jurisdiction or that I would be sitting on appeal on the ruling of September 8, 2011 if I entertain the plaintiff’s application before me”

13. The respondent on the other hand observed that the court could only grant the injunction when exercising its appellate jurisdiction and relied on the case of *William Olotch Owako v Christopher Osiro Ogutu & another* [2022] eKLR.

14. In view of the above, it is apparent that there exist two schools of thought where the court has interpreted the jurisdiction of the court to grant an injunction under order 42 sub rule 6 of the *Civil Procedure Rules*. On one hand there is a holding that the court could only grant an injunction while exercising its appellate jurisdiction while on the other hand, it has been held that the court has the discretion to grant the injunction to preserve the subject matter of the suit so as not to render the appeal nugatory.

15. From the foregoing, I do not seek to go into the merits of which school of thought is better than the other rather I align myself with the decision of the Court of Appeal in *Madbu paper International Ltd v Kerr* (1985) KLR 840 quoted with approval in the case of *James Juma Muchemi and Partners Limited v Barclays Bank Of Kenya Ltd* [2011] eKLR wherein the Court of Appeal held that: -

“The reasoning of the learned judge was, with respect, incorrect. He was referred to *Erinford Properties Ltd v Cheshire County Council*, (1974) 2 All ER 443 in which Mr Justice Megarry held that where a judge dismissed an application for interlocutory injunction he has jurisdiction to grant the unsuccessful applicant an injunction pending an appeal against the dismissal. It is unnecessary for him to apply to the Court of Appeal for it. There is no inconsistency in doing so. The purpose of granting one having just refused to do it is to prevent the decision of the Court of Appeal being nugatory should it reverse the judge below, which sometimes happens.”

...

It is preferable for the High Court to deal with such an application, in any event, not so much as to protect this court from a sudden inconvenient dislocation of its lists but more because this court would have the distinct advantage of seeing what the judge made of it. The learned judges of the High Court should take note of this concurrent jurisdiction which the two courts have and exercise theirs.”

16. In *Julius Musili Kyunga v Kenya Commercial Bank Limited & another* [2012] eKLR, the court opined that: -

“In considering the principles for the grant of injunction pending appeal, the Court of Appeal has developed the tests that the appeal must not be frivolous, or the applicant must show that he has an arguable appeal, and that the appeal, if successful, should not be rendered nugatory. See *Madbupaper v Paddy Kerr* and *Githunguri v Jimba Credit*, supra. Although the jurisdictions of the trial court and the appellate court are concurrent, the



High Court being required to exercise its own jurisdiction (see *Madhupaper* case) and the Court of Appeal being required to assess *denovo* the suitability of grant of the relief (see *Githunguri* case) the emphasis to be placed by each court on each of the two tests of arguable appeal and nugatory appeal is, in my view, different. While both the trial court and the appellate court must consider in equal weighting the question whether the appeal would, if successful, be rendered nugatory, the trial court must defer to the decision of the Court of Appeal with respect to the existence of an arguable appeal because the former court cannot be expected to sit an appeal from its own decision. So that at the trial court level the principle should be considered, that as held in *Bhutt v. Rent Restriction Tribunal* CACA No 6 of 1979, where a party is exercising its undoubted right of appeal, the court ought to ensure that the appeal, if successful, would not be rendered nugatory. For both the trial and the appellate courts, it would be useful to demonstrate an arguable appeal or serious questions for investigation on appeal through a draft memorandum of appeal.

However, the trial court ought not to go into any great length to examine whether the intended appeal demonstrates an arguable case, rather only whether there are serious questions to be put before the appeal court.”

17. From the forgoing, the court was of the view that the High Court had the jurisdiction to grant the injunction to avoid a scenario where the appeal would be rendered nugatory.
18. In the present case, the appeal was prompted by the ruling of the court dated November 24, 2022 in which the court (Okwany J) dismissed the defendant’s application for injunction. The application sought to restrain the plaintiff from repossessing the motor vehicles which according to the applicant were the subject matter of the suit.
19. In this case, I need not go into the details on whether the principles enunciated in the *Giella* case as the same would amount to sitting on appeal of the decision since the ruling on injunction has already been made. What ought to be in consideration is whether the Court of Appeals decision would be rendered nugatory in the event this court’s decision of November 24, 2022 is reversed and whether granting the application would inflict greater hardship.
20. From the circumstances of the case, the motor vehicles in question have been leased to a third party, the National Treasury. The vehicles are in their 100s. They are being used for national and public interest. The payments are still being made to the bank account which the court had preserved. If there is sudden repossession of the said vehicles, one can only imagine the chaos that the same may cause in the provision of services by the Government.
21. My view is that, the plaintiff would not be highly prejudiced and that the appeal would be rendered nugatory if the orders sought are not granted. The injunction is sought for purposes of protecting the subject matter awaiting the determination of the intended appeal. It would be in the interest of justice to allow the application failure of which the substratum of the appeal may be lost.
22. In the upshot, I find merit in the application. Considering that I have determined the application on the basis of the principles in the *Erinford -Properties Case*, I would give the injunction not until the determination of the intended appeal but for a limited period only. That would enable the defendant to approach the Court of Appeal, notwithstanding its busy schedule and compacted diary, to consider either the intended appeal or to exercise its appellate jurisdiction on injunctions pending appeal.
23. Accordingly, the application is allowed and the orders granted shall be in force for 120 days only from, the date of this ruling. The costs shall abide the appeal.

It is so ordered.



DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF MARCH, 2023.

A. MABEYA, FCIArb

JUDGE

