



Techville Company Limited v Katko Investments Ltd & 2 others (Civil Appeal 101 of 2021) [2023] KEHC 1981 (KLR) (Commercial and Tax) (10 March 2023) (Ruling)

Neutral citation: [2023] KEHC 1981 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL 101 OF 2021
A MABEYA, J
MARCH 10, 2023**

BETWEEN

TECHVILLE COMPANY LIMITED APPELLANT

AND

KATKO INVESTMENTS LTD 1ST RESPONDENT

HOMESERCH LIMITED 2ND RESPONDENT

ICON AUCTIONEERS 3RD RESPONDENT

RULING

1. Before Court are three applications, the first dated 12/11/2022 by the appellant, the second dated 16/11/2022 by the interested party and a third one dated 10/11/2022 by the 1st respondent.

Application dated 12/11/2022

2. This application was brought under Articles 48, 50(1) and 159 of *the Constitution* of Kenya, Sections 1A and 1B of the *Civil Procedure Act*, Order 40 rule 1, order 42 rule 6(6), order 43(1)(u) and order 51 Rules 1 and (3) of the *Civil Procedure Rules* 2010.
3. In this application, the appellant sought injunctive orders to restrain the respondent from selling or disposing off the goods and chattels taken from the appellant. It also sought to have access to the distrained goods taken by the 3rd respondent and an order directing the 3rd respondent to furnish the full inventory and statement of accounts on the sale and attachment of the goods.
4. The application was premised on the grounds on the face of it and in the affidavit sworn by Francis Otieno. It was the appellants case that it was a tenant of the 1st respondent and by a proclamation notice dated 22/1/2021, the 3rd respondent distrained its property. It contended that the goods and



chattels proclaimed belonged to third parties that is G4S, MAFI East Africa Limited and Sudden Impact Limited.

5. It was averred that the goods taken from its premises were the subject matter of the arbitration between the appellant and MAFI East Africa Limited and were only to be collected once the award was satisfied. That the 3rd respondent failed to adhere to the proper procedure under the Auctioneers Rules and did not account for the proceeds of attachment. The appellant further faulted the respondent for confiscating goods and documents comprising of the appellant's tools of trade thus subjecting the appellant to substantial loss and damage.
6. The respondents opposed the application vide a replying affidavit dated 27/1/2022 sworn by Shamji Keshra Jesani a director of the 1st respondent. He stated that the application sought final orders that would summarily dispose off the appeal. He contended that the orders sought had already been dismissed by the lower court by Hon DM Kivuti who observed that the appellant ought to have filed a suit with respect to the same. He further stated that the applicant sought an equitable relief of injunction whereas it was guilty of material nondisclosure, misrepresentation and distortion.
7. It was contended that the appellant had not shown any willingness to deposit the rental arrears which continued to balloon and as a result the distressed goods were not sufficient. Finally, that there was no evidence to show that the goods attached belonged to the alleged 3rd parties.

2nd Application dated 16/11/2022

8. This application was brought pursuant to Article 159(2)(d) of *the Constitution* of Kenya, Order 1 rule 10(2), Order 40 rule 1, order 42 rule 22 and order 51 rule 1 of the Civil Procedure Rules 2010, Section 1A,1B and 3A of the *Civil Procedure Act*.
9. In this application, the intended interested party sought to enjoined in these proceedings and for injunctive orders to restrain the respondents from advertising transferring or selling the attached goods which claimed belonged to it. The intended interested party also sought to be allowed to access and recover the subject goods.
10. The application was based on the grounds set out on the face of it and on the affidavit sworn by Jan Sanden. Its case was that the appellant and the intended interested party had a Master Service Agreement for a period of 5 years. That it involved services such as facility management, staffing, office administration among others. That both the appellant and the intended interested party conducted business at the 1st respondent's premises that was leased by the appellant. That the interested party faced difficulties in payment of rent which prompted the arbitration proceedings and in the end the award was entered in favour of the appellant and the same was satisfied by the intended interested party to the appellant.
11. It was contended that the interested party was not a tenant of the 1st respondent and the distrained goods belonged to it. It was further contended that the attached goods were exhibits in arbitration proceedings between the intended interested party and the respondents were at fault in illegally attaching the goods without a proclamation notice.
12. In opposition, the respondents filed a replying affidavit sworn by Shamji Keshra Jesani. It was stated that the application was an abuse of the court process and that the interested party had not disclosed to the court that it was pursuing a similar application in another court and therefore this application was sub-judice. That the intended interested party did not have the locus standi to file the current application and could only await the final determination of the appeal.



Application dated 10/11/2022

13. This last application by the 1st respondent was brought under sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 25 Rule 5 of the Civil Procedure Rules 2010.
14. It sought that the appellant deposit a sum of Kshs 23,408,050.87 in a joint interest earning account and upon grant of the order, the appellant be at liberty to collect the distrained goods. It further sought an order that the arbitral award had compromised the award and hold that the appellant was entitled to the immediate payment of Kshs 23,408, 050.87 as per the acknowledgement in the arbitral award.
15. The application was supported by the affidavit sworn by Shamji Keshra Jesani and the grounds on the face of it. He stated that the distressed goods had attracted storage charges and were at risk of being disposed to recover the charges. It was contended that the distrained goods were wasting away the substratum of the appeal and the purpose of the distress of rent would be defeated. That the arbitral award had compromised the appeal by requiring the interested party to settle the rent and service charge.
16. On 14/11/2022, the Court directed that this application be responded to within 14 days of service. However, as at the time of writing the ruling, the same had not been responded to.
17. I have considered the three applications, the responses as well as the submissions. The applications give rise to similar issues thus the need to determine all the issues raised in one ruling. The first issue is with respect to the injunctive orders sought to restrain the respondents from either selling, transferring or disposing off the goods or chattels said to belong to the interested party.
18. Order 42 Rule 6 (6) of the Civil Procedure Rules grants this Court the jurisdiction to grant an injunction pending appeal. It provides as follows: -
 - “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.”
19. Both the appellant and the intended interested party sought to have the respondents restrained from disposing off the distrained goods on the grounds that the goods belonged to the interested party. It was contended that the appellant was in possession of the goods by virtue of the Master Service Agreement which allowed the two parties to trade on different capacities. That the appellant had leased the premises to the intended interested party and after a disagreement on payment of rent, the parties proceeded for arbitration whereby an award was issued in favour of the appellant requiring the interested party to pay the rent owed.
20. The respondents in opposing the applications stated that the application had been previously raised in the lower court and it sought orders that were conclusive. The respondents further faulted the appellants and the respondents for failing to give evidence to show that the distrained goods belonged to the interested party. It was further contended that the respondent had a right to distress for rent and thus granting the orders sought would prejudice it.
21. In *Patricia Njeri & 3 Others v National Museum of Kenya* [2004] eKLR, the court outlined the following principles for granting an injunction pending appeal. It was stated: -

“What are the principles that guide the court in dealing with such an application?”



In the *Venture Capital case (Venture Capital and Credit Ltd v Consolidated Bank of Kenya Ltd* Civil Application No. Nairobi 349 of 2003 (UR)) the Court of Appeal said that an order for injunction pending appeal is a discretionary matter. The discretion must, however, be “exercised judicially and not in a whimsical or arbitrary fashion.” This discretion is guided by certain principles some of which are as follows:

- a) The discretion will be exercised against an Applicant whose appeal is frivolous (See *Madhupaper International Limited v Kerr* [1985] KLR 840 which cited *Venture Capital*). The Applicant must state that a reasonable argument can be put forward in support of his appeal (*J. K. Industries v KCB* 1982 – 88) KLR 1088 (also cited in *Venture Capital*).
- b) The discretion should be refused where it would inflict greater hardship that it would avoid (See *Madhupaper supra*).
- c) The Applicant must show that to refuse the injunction would render his appeal nugatory (See *Butt v Rent Restriction Tribunal* [1982] KLR 417 (cited also in *Venture Capital*).
- d) The Court should also be guided by the principles in *Giella v Cassman Brown & Company Ltd* [1973] EA 358 as set out in the case of *Sbitukha Mwamodo & Others* [1986] KLR 445 (also cited in *Venture Capital*.)”

22. Applying the above principles to this matter, the parties must demonstrate that the appeal is not frivolous and that in dismissing the application the appeal would be rendered nugatory.
23. Starting with the principles in *Giella v Cassman Brown & Co. Limited* [1973] EA 358, the applicants must establish a prima facie case with a probability of success, that they will suffer irreparable loss and damage and finally, if the Court is in doubt it will determine the matter on the balance of convenience.
24. In this case on determining whether the applicants have made out a prima facie case, this court is tasked with establishing whether the appeal is merited. I have perused the Memorandum of Appeal. The appeal challenges the decision of Hon D. M Kivuti delivered on 8/11/2021 which dismissed the appellant’s application dated 28/9/2021. The appellant faulted the trial court for failing to find the respondents at fault for unlawfully possessing the goods and failing to grant interim orders.
25. I have looked at the grounds of appeal set out in the Memorandum of Appeal. The appellant faults the trial court for failing to note that the distraint was for no rent due, that it was against Rule 12(2) of the Auctioneers Rules, 1997, amongst others. I do find the appeal to be arguable and not frivolous.
26. On the issue of which party stands to suffer much harm, my view is that the goods in question are said to belong to the interested party. I have seen the Master Service Agreement and it is indeed true that the parties were transacting together and the property had been leased to the interested party. My finding is that the interested party has a stake in these proceedings and at this stage the said goods are the subject matter of the appeal. It is my view that the appeal would be compromised if the distressed goods are disposed of by the respondent. The balance of convenience would be in favour of protecting the subject matter of the appeal.
27. The second issue is with respect to the application dated 10/11/2022 where the applicant seeks to have the respondents deposit the sum of Kshs.23,408,050/= in a joint interest earning account and a holding that the arbitral award compromised the appeal. It was the applicants case that it was yet to



recover the outstanding rent and the storage charges continued to accrue. The applicant stated that the goods would be released upon deposit of the rental charges.

28. From the record, what is before the court is an appeal on the ruling of the trial court where the court failed to grant the injunctive orders on the possession of the goods. In determining the appeal, the Court would be called upon to examine the matters pertaining the Master Service Agreement and the arbitral award.
29. My take is that the issues raised in this application are premature and ought to await the hearing of the appeal. The issue of storage charges can be remedied by damages after the hearing.
30. In conclusion, I find merit in the application dated 12/11/2022 and 16/11/2022 and order as follows: -
 - a) That a temporary injunction hereby issues restraining the respondents from alienating, advertising, transferring, selling, disposing the goods taken from the applicant (techville Company Limited).
 - b) The application dated 10/11/2022 is dismissed.
 - c) Costs shall abide in the appeal.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF MARCH, 2023.

A. MABEYA, FCIArb

JUDGE

