



**Mwangi v Erdermann Property Limited (Civil Appeal E064 of 2021)
[2023] KEHC 17271 (KLR) (Commercial and Tax) (12 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17271 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E064 OF 2021
FG MUGAMBI, J
MAY 12, 2023**

BETWEEN

STEPHEN MWAI MWANGI APPELLANT

AND

ERDERMANN PROPERTY LIMITED RESPONDENT

*(Being an appeal from the ruling and order of Hon. E. Wanjala Principal
Magistrate delivered at Nairobi on 16th July 2021 in Civil Suit No 79 of 2019)*

JUDGMENT

Introduction and Background

1. The dispute between the parties in this matter is captured in a Plaintiff dated January 7, 2019. It arose from a contract for the purchase of Apartment No F48 at Greatwall Phase III on Land Reference No 12xxx/6322 (the apartment) by the appellant, from the respondent at a purchase price of Kshs. 4,000,000/=. The respondent avers that the appellant issued it with three (3) cheques towards the purchase price, on which basis the respondent proceeded to execute the sub lease and tendered the same for registration.
2. The respondent further avers that when the cheques were presented for payment, they were dishonoured as bad cheques. This prompted the suit in the lower court for Kshs. 1,900,000/=:, being the balance due to the respondent.
3. The appellant filed a Statement of Defence and Counterclaim dated February 18, 2021 in which he denied the claim by the respondent. In his defence he claims that he tendered the full purchase price to the respondent, which payment was acknowledged, confirmed and receipted. On this basis he was registered as the proprietor of the suit property and given possession of the apartment. The appellant



- further denies having issued any bad cheques to the respondent. It is the appellant's case that in his absence and unbeknown to him, the respondent had changed the locks to the subject property and brought in a tenant, who has been remitting rent to the respondent, thereby dispossessing the appellant of his property in breach of the sale agreement.
4. During the pendency of the suit the appellant filed a Motion Application under Certificate of Urgency dated March 2, 2021. He sought mandatory injunctive orders to have the respondent, their agents, servants, tenants or anyone claiming under them ordered to vacate or be evicted and surrender possession of (hereinafter the apartment) to the appellant. The lower court dismissed the application on July 16, 2021.
 5. Aggrieved by the decision of the lower court, the appellant lodged this appeal on the grounds listed in the Memorandum of Appeal dated July 25, 2021 which are as follows;
 - i. That the learned Magistrate erred in law and in fact in failing to find that the claim for lien by the respondent over the appellant's apartment No F48 at Greatwall Phase III (hereinafter 'the House') was unlawful;
 - ii. That the learned Magistrate erred in law and in fact when she determined there were no special circumstances warranting grant of the mandatory injunction sought and surrender of the house to the appellant despite finding that the appellant was the registered proprietor of the house;
 - iii. That the learned Magistrate erred in fact when she found that the appellant had not demonstrated that he has ever occupied the house despite the weight of uncontested evidence to the contrary and despite a concession by the respondent that "it took over the house to hold as a lien" for payment of alleged outstanding debt;
 - iv. That the learned Magistrate erred in law and fact when she determined that the appellant had not demonstrated that he fully paid for the house despite this being a contested question subject of determination in the main suit and having no bearing on the application before the lower court;
 - v. That the learned Magistrate erred in law and in fact in failing to appreciate sufficiently or at all the written submissions made and authorities cited by the appellant;
 6. The appellant sought the following orders;
 - i. That this appeal be allowed and the ruling and order of the Principal Magistrate delivered on 16th July in CMCC Case No 79 of 2019 be set aside and substituted with an order allowing the appellant/applicant's application dated March 2, 2021 as prayed
 - ii. Costs of the appeal.
 7. The appeal was canvassed by Written Submissions. In his Submissions dated June 21, 2022, the appellant dealt with the five grounds in the Memorandum of Appeal as one, the thrust of the submissions being whether the learned Magistrate erred in not granting the mandatory injunction prayers as sought. It was his case that having met the threshold for grant of an interlocutory injunction, he was deserving. Citing the celebrated decision of *Giella v Cassman Brown* as well as the established principles for the grant of a mandatory injunction, it was his case that the court ought to have held in his favour.
 8. The appellant averred that the issues in the case against the respondent were straight forward, because his ownership over the suit property was not in dispute and was not controverted by the respondent.



This meant that the appellant had a prima facie case against the respondent. The appellant submitted that the actions of the respondent had deprived him of his family home and accommodation thus subjecting him to harm that could not be compensated by damages. Further, the fact that the respondent had illegally and forcefully taken possession of the appellant's house is a status quo that the learned Magistrate should not have condoned.

9. The appellant further averred that the claim by the respondent for a lien over the appellant's house was unlawful, invalid and an afterthought raised in response of the appellant's application and not in the plaint. Referring to the *Halsbury's Laws of England* volume 68 at paragraph 802, the appellant stated that for a claim of lien to be valid one must have come into possession of the property belonging to another in a lawful and rightful way. This was far from what happened, as submitted by the appellant. The appellant referred this Court to decisions that restate the point that for a lien to be lawful, possession must have been lawfully obtained.
10. The respondent's submissions dated July 11, 2022 dealt with two issues; whether the appellant has a right of lien over the suit property and whether he had put forward a claim warranting the grant of a mandatory injunction. On the first issue the respondent submitted that as an unpaid seller, it was entitled to a right of lien over the Kshs 1,900,000/= unpaid amount which was uncontroverted. This is a right that the respondent claims did not require it to enter into a concession with the appellant for the right to be asserted and that the same accrued by operation of law because of the balance due.
11. With respect to the injunctive orders, the respondent submitted that the appellant had not established that there was any threat to the property since the lien did not entitle the respondent to sell the property. It was submitted further that the appellant had not set out a *prima facie* case with chances of success as there was no tangible evidence that no amount was owing. On this basis alone, the respondent averred that there was no need to consider the other two cardinal tests for injunctive relief.
12. Finally, the respondent argued that it stands to suffer more loss than the appellant, and doubts that the appellant would be in a position to compensate it in damages. It was therefore submitted by the respondent that the balance of convenience ought to tilt in its favor.

Analysis

13. I have considered the record, the rival submissions of the parties and the authorities that have been presented by Counsel for contending sides in support of their cases.
14. The point of convergence in these authorities is that a mandatory injunction is different from a prohibitory injunction. In a prohibitory injunction the applicant must establish the existence of a *prima facie* case with high chances of success, and that he will suffer irreparable loss/damage which cannot be adequately compensated by an award of damages if the injunction is not granted, and further that the balance of convenience tilts in his favour. These points were well elucidated in the *locus classicus* case of *Giella vs Cassman Brown & Co. Ltd* (1973) EA 358.
15. An applicant in a mandatory injunction must, in addition to these parameters, establish the existence of special circumstances which makes it a higher standard of proof. The rationale for this is as was stated in *Shepard Homes – versus – Sandbam* (1970) 3 WLR Pg. 356 that:

“Whereas a prohibitory injunction merely requires abstention from acting, a mandatory injunction requires the taking of positive steps, and may require the dismantling or destruction of something already erected, or constructed. This will result in a consequent



waste of time, money and materials. If it is ultimately established that the Appellant was entitled to retain the erection”.

16. A few cases illustrate this point. In the case of *Kenya Breweries Ltd & Another vs Washington O. Okeya* [2002] eKLR, the Court of Appeal stated as follows:

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the appellant had attempted to steal a march on the appellant. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

17. Similarly, in the case of *Nation Media Group & 2 others vs John Harun Mwan* [2014] eKLR, the Court of Appeal again reiterated that:

“It is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances... A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrate as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases.”

18. In *Malier Unissa Karim –versus - Edward Oluoch Odumbe* (2015) eKLR again the Court held as follows:-

“The test for granting a mandatory injunction is different from that enunciated in the “Giella –versus - Cassman Brown case which is the *locus classicus* case of prohibitory injunctions. The threshold in mandatory is higher than the case of prohibitory injunction and the Court of Appeal in the case of “*Kenya Breweries Ltd-vs- Washington Okeyo* (2002) EA 109” had the occasion to discuss and consider the principles that govern the grant of a mandatory injunction was correctly stated in Vol. 24 *Halsbury Laws of England* 4th Edition Paragraph 948 which states as follows:-

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, it the case is clear and one which the Court thinks ought to be decided at once or if the act done is simple and summary one which can be easily remedied, or if the appellant attempts to steal a match on the respondent, a mandatory injunction will be granted on an Interlocutory application”.

19. From a reading of these and other authorities that have been submitted by the parties, before granting the mandatory injunction the Court must satisfy itself that there are special circumstances pertaining to an application for mandatory injunction. This would include the fact that the facts relate to a simple, clear case that can be determined summarily. In particular, the Court should be disinclined to grant a mandatory injunction if the effect of such an order is to grant the relief or a substantial part of it at the interlocutory stage without giving an opportunity for the suit to be examined on its merits and evidence.



20. The reason for this rule is as was expressed by Megarry, J in the case of “*Shepard Homes case* (supra) that:-

“.....if a mandatory injunction is granted on a motion, there will normally be no question of granting a further mandatory injunction at the trial; what is done and the appellant has, on motion, obtained once and for all the demolition or destruction that he seeks. Where an injunction is prohibitory, however, there will often still be a question at the trial whether the injunction should be dissolved or contained”

21. From the rival submissions presented by the parties, the dispute at hand presents real triable issues between the parties. The appellant’s prayer for mandatory injunction was premised on the fact that it was the rightful owner of the suit property and that there is no lawful lien in favour of the appellant. The *Black’s Law Dictionary* Eighth edition defines lien as:-

“A legal right or interest that a creditor has in another’s property, lasting usually until the debt or duty that it secures is satisfied.”

22. Whether or not there exists a legal right on the suit property is an issue that the court must hear on merits. The appellant will have to produce evidence that the disputed payments were indeed paid into the bank account of the appellant. The appellant on the other hand, would need to prove to the court that the payments were not received in their account as the cheques issued by the appellant were dishonoured by the bank. This would then have an effect on the claim for rightful possession of the suit property and consequently, the right of lien as claimed.

23. At this point the divergent statements by the parties remain allegations until each party can prove their case. To grant a mandatory injunction at this point would amount to granting a substantive prayer contained in the plaint. It is possible for the appellant to get compensation by way of damages for his loss and inconvenience for the period of time that he has been allegedly denied possession, if the respondent is found guilty.

24. In her ruling the learned Magistrate observed that she did not find any special circumstances to warrant grant of the orders sought. I am inclined to agree with this position and as such I find no reason to vary the decision by the Learned Magistrate.

Determination and orders

25. For these reasons, I find no merit in the appeal and the same is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 12TH DAY OF MAY 2023

F. MUGAMBI

JUDGE

Court Assistant: Ms. Lucy Wandiri.

