East Africa Transport Logistics Limited v Bank of Africa Kenya Limited (Commercial Suit E053 of 2022) [2023] KEHC 27543 (KLR) (2 June 2023) (Ruling)

Neutral citation: [2023] KEHC 27543 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

COMMERCIAL SUIT E053 OF 2022

F WANGARI, J

JUNE 2, 2023

BETWEEN

EAST AFRICA TRANSPORT LOGISTICS LIMITED ..... PLAINTIFF

AND

BANK OF AFRICA KENYA LIMITED ..... DEFENDANT

RULING

1. This ruling relates to a Notice of Motion dated 30th September, which sought for the following orders: -

    a. Spent;

    b. Spent;

    c. That pending the hearing and the determination of the Appeal filed herein, an order of injunction pending appeal be granted to restrain the Defendant by itself, its agent/ servants from alienating, selling or in any way dealing with the property known as L.R. No. Mainland North Section 1/9475 (ORIG. NO. 1399 & 9474) (C.R 32445) situated in Shanzu area within Mombasa County.

    d. That costs for of this application be provided for.

2. The application was strenuously opposed through a replying affidavit dated 17th October, 2022. It was sworn by the Respondent's Senior Recoveries Officer on behalf of the Respondent.

3. The application was disposed off by way of written submissions wherein both parties complied by filing detailed submissions together with various authorities in support of the parties' rival positions.

Analysis and Determination

4. I have considered the application, response, submissions together with the authorities relied upon by the parties as well as the law and in my view, the following are the issues for determination

    a. Whether the suit is Res Judicata

    b. Whether the Applicants have made out a case for grant of orders of injunction;

    c. If the answer to (b) above is in the affirmative, what orders should issue?

    d. Whether the application is fatally defective

    e. Who bears the costs of the application?

5. The doctrine of Res Judicata is provided for under section 7 of the *Civil Procedure Act*. It provides as follows;

    Res judicata

    > No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

6. In the case of Abok James Odera vs. John Patrick Machira Civil Application No. 49 of 2001, it was held that in order to rely on the defence of res judicata there must be:

    i. a previous suit in which the matter was in issue;

    ii. the parties were the same or litigating under the same title

    iii. a competent court heard the matter in issue;

    iv. the issue had been raised once again in a fresh suit.

7. It is not in dispute that the Applicant obtained a facility from the Respondent which was secured by the suit property. It is equally not in dispute that a default in terms of repayment of the loan occurred and the Respondent sought to exercise its statutory power of sale. It is also not in dispute that the above triggered the filing of the suit Mombasa HCCC No. 042 of 2019, which had the sae parties and the suit was dismissed.

8. The Applicant thereafter filed this suit i.e. HCCC No. E053 of 2021. Filed together with the Plaint was the Notice of Motion dated 13th May, 2021, which application was dismissed vide the ruling dated 26th November 2021 by Lady Justice D.O Chepkwony. The said ruling is the subject matter of this application which is now coming up for ruling.

9. Both in the pleadings and the written submissions, the Respondents argues that the doctrine of res judicata applies to the application at hand. As it was held by the Court of Appeal in the case of Independent Electoral & Boundaries Commission v Maina Kiai & 5 others (2017) eKLR, the 'doctrine of res judicata' aims to 'bringing a finality to litigation' therefore according 'parties to closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court'

10. The issue coming up for determination is the prayer for an order of injunction pending the hearing and the determination of the appeal of the ruling dated 26/11/2021. The appeal is still pending. It is important to note that after the ruling was delivered and the appeal lodged, the parties engaged in negotiations with a view of settling the matter out of court. From the court documents, the parties agreed to have the Applicant deposit a sum of Ksh. 800,000 in an escrow account with the Respondent, and the suit property was to be released to the Applicant for purposes of subdividing, selling and remitting the sale proceeds to the bank towards settling the loan.

11. The Respondent rescinded the agreement via the letter dated 30/8/2022. The counsel for the Applicant wrote to the Respondents explaining the delay in compliance with the agreement terms. A total amount of Ksh. 800,000 was subsequently deposited to the account in the month of September, 2022. There is no further communication in respect to the deposited amount by the Respondent.

12. The Respondent went and ahead and advertised the suit property for sale, hence triggering this application seeking an injunction order pending the hearing and the determination of the appeal.

13. In the case of Gladys Nduku Nthuki v Letshego Kenya Limited; Mueni Chales Maingi (Intended Plaintiff) [2022] eKLR, Odunga J (as he then was) relied on the cases of Mburu Kinyua v Gachini Tuti [1978] KLR 69; [1976-80] 1 KLR 790 and Churanji Lal & Co. v Bhaije (1932) 14 KLR 28, on res judicata where it was held;

> " However, caution must be taken to distinguish between discovery of new facts and fresh happenings. The former may not necessarily escape the application of the doctrine since parties cannot by face-lifting the pleadings evade the said doctrine. In the case of Siri Ram Kaura vs. M J E Morgan Civil Application No. 71 of 1960 [1961] EA 462 the then East African Court of Appeal stated as follows:
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> "The general principle is that a party cannot in a subsequent proceeding raise a ground of claim or defence which has been decided or which, upon the pleadings or the form of issue, was open to him in a former proceeding between the same parties. The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of res judicata...The law with regard to res judicata is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in a litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show you that this is a fact which entirely changes the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have been ascertained by me before...The point is not whether the respondent was badly advised in bringing the first application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when he made his first application."

14. From the above, the issue of granting an injunction pending appeal has not been dealt with in the previous proceedings. Further, the negotiations that took place and subsequent compliance of the agreement terms though partially, after the delivery of the ruling which is the subject of the appeal,

changes the aspect of the case altogether. I find that the application dated 30/9/2022 does not fall under the doctrine of res judicata.

15. On the second issue, this being an application for orders of temporary injunction, the principles guiding the court whether to grant the orders sought or not are settled. Those principles were set out in East African Industries vs. Trufoods [1972] EA 420 and Giella vs. Cassman Brown & Co. Ltd [1973] EA 358. In Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR the Court of Appeal restated the law as follows:

> "...In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;
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> (a) establish his case only at a prima facie level,
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> (b) demonstrate irreparable injury if a temporary injunction is not granted, and
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> (c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.
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> These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted..." (Underlying for emphasis)

16. While considering the above principles, I take caution that in an interlocutory application, the Court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law. (See the decision of Ringera, J (as he then was) in *Airland Tours & Travel Limited vs. National Industrial Credit Bank Nairobi (Milimani) HCCC No. 1234 of 2002*) However, the Court is not excluded from expressing a prima facie view of the matter and the Court is entitled to consider what else the deponent to the supporting affidavit has stated on oath which is not true. Being an equitable relief, a party seeking this remedy ought to act equitably.

17. Therefore, though at an interlocutory stage the Court is not required and indeed forbidden to purport to decide with finality the various relevant "facts" urged by the parties, the remedy being an equitable one, the Court will decline to exercise its discretion if the Applicant to relief is shown to be guilty of conduct which does not meet the approval of the Court of equity. Injunction being an equitable remedy, the court is enjoined to look at the conduct of the Applicant for the injunctive orders, the surrounding circumstances whether the orders sought are likely to affect the interests of non-parties to

the suit, the issue whether an undertaking as to damages has been given as well as the conduct of the Respondent whether or not he has acted with impunity.

18. The Court is also, by virtue of section 1A (2) of the *Civil Procedure Act*, enjoined to give effect to the overriding objective as provided under section 1A (1) of the said Act in exercising the powers conferred upon it under the *Civil Procedure Act* or in the interpretation of any of its provisions. One of the aims of the said objective as interpreted by the Court of Appeal is the need to ensure equality of arms, the principle of proportionality and the need to treat all the parties coming to court on equal footing.[1] The power of a court to grant stay of execution is discretionary and just like any other discretionary power, the same must be exercised judiciously and not capriciously or whimsically.

19. So has the Applicant established prima facie case? In Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125, prima facie case was defined as follows: - "...In civil cases a prima facie case is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter..."

20. As stated herein above, the parties had commenced negotiations after the ruling which is subject to an appeal and subsequently this application, was delivered. The Applicant proceeded to deposit Ksh. 800,000 in an escrow account. Even though the money was deposited later that the agreed date, the Respondent rescinded the agreement, but still received and retained the money.

21. Now, the Respondent has advertised for the sale of the suit property notwithstanding that the title document to the property was to be released to the Applicant, by the Respondent, for purposes of subdivision and sale, and the sale proceeds were to take care of the loan, and the balance released to the Applicant. In reference to Para 10 above, I am satisfied that by depositing the amount agreed, the Applicant exhibited good faith and I am inclined to exercise the discretion of the court in favour of the Applicant.

22. Thirdly, the Respondents submitted that the application is defective having been brought under non-existent provisions in the Civil Procedure Rules i.e. Order 44 Rule 6. However, from the contents of the application, the same ought to have been brought under Order 42 Rule 6 of the Civil Procedure Rules. I find that failure to cite the correct provisions of the law is not fatal or irredeemably incompetent. The saving grace is Article 159 (2) of *the Constitution* and Section 1A and 1B of the *Civil Procedure Act*.

23. On the issue of costs, Section 27 of the *Civil Procedure Act* decrees that the same follows the event. However, the court retains its discretion to either award or not to award costs. The matter is still at the preliminary stages. Each party shall bear its own costs.

24. From the above, I proceed to order as follows;

    a. The application dated 30/9/2022 is allowed in terms of prayer no. 3.

    b. That either party is at liberty to move the court as and when need arises.

    c. Each party to bear its own costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 2ND DAY OF JUNE, 2023.

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F. WANGARI

[1] See*JM v SMK & 4 Others [2022] eKLR*

JUDGE

In the presence of;

Gwahalla Advocate h/b for Gikandi Advocate for the Plaintiff/ Applicant

Wafula Advocate for Defendants/ Respondent

Guyo, Court Assistant