



**Sunlodges Kenya Limited v Hebei Jinshi Industrial Metal Co. Ltd & 3 others  
(Commercial Case E009 of 2023) [2023] KEHC 18802 (KLR) (19 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18802 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
COMMERCIAL CASE E009 OF 2023  
DKN MAGARE, J  
JUNE 19, 2023**

**BETWEEN**

**SUNLODGES KENYA LIMITED ..... APPLICANT**

**AND**

**HEBEI JINSHI INDUSTRIAL METAL CO. LTD ..... 1<sup>ST</sup> RESPONDENT**

**KENYA PORTS AUTHORITY ..... 2<sup>ND</sup> RESPONDENT**

**MEDITERRANEAN SHIPPING COMPANY S.A'. ..... 3<sup>RD</sup> RESPONDENT**

**OCEAN FREIGHT (EA) LTD ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. The parties herein were served on 13<sup>th</sup> June 2023 both physically and via email for the 1<sup>st</sup> Respondent. This was for the application dated 9<sup>th</sup> June 2023. I was satisfied with service. This resulted in the 3 and 4<sup>th</sup> Respondents entering appearance and attending court.
2. The 3 and 4<sup>th</sup> Respondents do not oppose the application provided all conditions precedent are observed.
3. Applicant sought the following orders: -
  - a. Spent.
  - b. Spent
  - c. Pending hearing and determination of the suit and upon arrival at the port of Mombasa of MV Precision, or any other transshipment vessel carrying 13 packages of welded gabion as described vide Mediterranean Shipping Company S.A' s bill of lading number MEDUJ91768(Subject cargo), and upon the applicant depositing In court US \$ 14,878.00



within 24 hours of issuance of this order and subject to payment to all statutory charges/taxes and/or customs payment of statutory charges, the honourable court be pleased to issue

- i. An order of the nature of prohibitory injunction against the 1<sup>st</sup>-4<sup>th</sup> Respondents or any other person and or authority in the seamless clearance and collection by the Plaintiff of the subject cargo from the port of Mombasa, as the case may be, preventing the rechanneling to a different port , reselling, confiscating, destroying ,auctioning or in any way withholding the said cargo on accounts of failure buy the Applicant to furnish any original documentation that is in the 1<sup>st</sup> respondent's possession, namely, Mediterranean shipping S.A' s bill of lading number MEDUUIJ91768(Subject cargo), certificate of conformity issued by the Kenya bureau of standards on 15/5/2023, commercial invoice S/C No.JSS230214 dated 5/5/2023, packing list dated 5/5/2023 S/C No. JSS230214; And certificate of origin number 23C1300C0091/00014;
  - ii. An order of mandatory injunction directing the 1<sup>st</sup>-4<sup>th</sup> Respondents as the case may be, to release to the applicant the subject cargo upon presentation of photocopies of the following documents.
    - a. Mediterranean shipping S.A' s bill of lading number MEDUUIJ91768
    - b. Certificate of conformity issued by the Kenya bureau of standards on 15/5/2023,
    - c. Commercial invoice S/C No. JSS230214 dated 5/5/2023,
    - d. Packing list dated 5/5/2023 S/C No. JSS230214; And
    - e. Certificate of origin number 23C1300C0091/00014;
  - iii. For avoidance of doubt, the requirement to produce aforementioned original clearance documents, for any purpose, aby any of the Respondents herein and /or another authority, required to process the clearance and release of the subject cargo to the Plaintiff be and is hereby dispensed with.
  - d. Costs be provided for.
4. The parties are not disputing on the ownership of the cargo. The only issue that the shipper has retained all the documents of title. They have also changed the price from the original amount from US \$ 17,955 to US \$ 20,265. The consignee who is the plaintiff indicates that the as only paid US \$ 5,387 out of 17955. The change of price increased the balance from US \$ 12568 to 14878, that is an additional costs of US \$ 2310. The shipping line entered appearance and stated they have no objection subject to payments of their charges and the original documents being given.
  5. According to the shipping line, the container was discharged on 16<sup>th</sup> June 2023 and the container is still within the period free of demurrages. The Applicant indicates that they are willing to pay for the cargo at the amount that was agreed.
  6. I have an unenviable task of balancing between all the parties concerned while allowing free commerce. It is clear that the shipper has no other interest than the lien on their money. No other party has interest in the matter. I am therefore satisfied that the matter can be dealt with in the absence of the parties who were served but never entered appearance.
  7. Though the Plaintiff seeks to deposit the amount they say they owe, the correct position is that they at least admit that the 1<sup>st</sup> defendant has lien over the goods. The lien is to the extent of US \$14, 878.



There is no dispute over US \$12, 568. It serves no sense to retain such amounts in court, when the dispute is only over US \$2,310.

8. The nature of the orders are twofold: -
  - a. Is a mandatory injunction.
  - b. Prohibitory injunction
9. A mandatory injunction is issued only in special circumstances. It is issued when a case demands and there is no other alternative way of enforcing the right. The court of Appeal has dealt with this matter in many occasions and settled the principles. In the case of *Joseph Kaloki t/a Royal Family Assembly v Nancy Atieno Ouma [2020]* eKLR, the court of Appeal, was of the considered view that; -

“As this Court stated in *Kenya Breweries Limited & another vs. Washington O. Okeya [2002]* eKLR a mandatory injunction can be granted on an interlocutory application as well as at the hearing but should not normally be granted in the absence of special circumstances but that if a case is clear and which the court thinks it ought to be decided at once, a mandatory injunction will be granted at an interlocutory application.”

10. In the case of *Kenya Breweries Ltd & Another vs Washington O. Okeya [2002]* eKLR, referred above, the Court of Appeal stated as doth: -

“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 defendant had attempted to steal a march on the plaintiff. 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.”

11. The Court of appeal in the case of stated in *Shariff Abdi Hassan v Nadhif Jama Adan [2006]* eKLR restated the position on mandatory injunction as follows: -

“The courts have been reluctant to grant mandatory injunction at the interlocutory stage. However, where it is prima facie established as per the standards spelt out in law as stated above that the party against whom the mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case.”

12. In the case of *Kenya Power & Lighting Co. Ltd v Samuel Mandere Ogeto [2017]* eKLR, the high court sitting at Kisii, stated as doth:

“20. A mandatory injunction is different from a prohibitory injunction in the sense that while in a prohibitory injunction the applicant must, as was stated in the celebrated case of *Giella vs Cassman Brown & Co. Ltd (1973)* EA 358, 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 favor, an applicant in a mandatory injunction must, in addition, establish the existence



of special circumstances. Furthermore, an applicant for mandatory injunction must prove his case on a standard higher than the standard in prohibitory injunctions.”

13. In the case of *Nation Media Group & 2 Others vs John Harun Mwan [2014]* eKLR, the court of appeal said:

“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.”

14. In this case, the defendant are not claiming the goods. The shipper is claiming a lien over the same. If the property is leased it will be out of reach of the 1<sup>st</sup> defendant. If on the other hand, it remains the charges will start and continue accumulating if the plaintiff makes payments, there is no way of recovery the balance from the shipper.
15. My duty therefore is to ensure ha parties meet at an equilibrium, point. The shipper is entitled to be paid. However, the issue is how much? The plaintiff has conceded that some money is due, this is US \$12,568. Out of possible US \$17, US \$ 17,955, he reportedly paid US \$ 5,387 leaving a balance of US \$ 12,568. The shipper maintains that the balance is 14,878. H dispute is only US \$ 2,310. The court therefore considered that the order sought can be issued without beading a bone.
16. There is also the aspect of the 1<sup>st</sup> Defendant withholding original documents. There is a clear disconnect on the amount agreed upon and the amount demanded. To this extent the court has to look at the pros and cons of issuing the orders or better still no issuing them. The 1<sup>st</sup> defendant will have been substantially paid for the goods and at a price they quoted.
17. The test is set out in *Giella = vs = Cassman Brown & Co. Ltd (1973) EA, 358, 360* the court must be satisfied in the words or of Spry VP as follows:-

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in east Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

18. This conditions were held in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014]* eKLR by the Court of Appeal to be sequential, when they stated as doth: -

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.



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.”

19. 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.”
20. The Plaintiff will have incurred money to recover goods whose documentation has not been brought. As a result Kenya Revenue Authority will order their auction. On the other hand if the goods are cleared and the court finds that the sum of US \$ 2,310 was due and owing, the same can be payable. I find and hold that the Plaintiff has demonstrated a prima facie case capable of success.
21. The plaintiff stands to suffer irreparable loss as this is an international transaction where he will be unable to recover his money and will bear charges for disposing the imported goods. The demurrage will set in and as a result his indebtedness will skyrocket. The balance of convenience lies in issuance of the order.
22. I will allow the application but with sufficient safeguard.
  - a. Subject to c below, an order of the nature of prohibitory injunction against the 1<sup>st</sup>-4<sup>th</sup> Respondents or any other person and or authority in the seamless clearance and collection by the Plaintiff of the subject cargo from the port of Mombasa, as the case may be, preventing the rechanneling to a different port , reselling, confiscating, destroying ,auctioning or in any way withholding the said cargo on accounts of failure by the Applicant to furnish any original documentation that is in the 1<sup>st</sup> respondent’s possession, namely, Mediterranean shipping S.A’ s bill of lading number MEDUJ91768(Subject cargo), certificate of conformity issued by the Kenya bureau of standards on 15/5/2023, commercial invoice S/C No.JSS230214 dated 5/5/2023, packing list dated 5/5/2023 S/C No. JSS230214; And certificate of origin number 23C1300C0091/00014;
  - b. Subject to c below, an order of mandatory injunction directing the 1<sup>st</sup>-4<sup>th</sup> Respondents as the case may be, to release to the applicant the subject cargo upon presentation of photocopies of the following documents.
    - a. Mediterranean shipping S.A’ s bill of lading number MEDUJ91768
    - b. Certificate of conformity issued by the Kenya bureau of standards on 15/5/2023,
    - c. Commercial invoice S/C No. JSS230214 dated 5/5/2023,
    - d. Packing list dated 5/5/2023 S/C No. JSS230214; And
    - f. Certificate of origin number 23C1300C0091/00014;



- c. The 13 packages of welded gabion as described vide Mediterranean Shipping Company S.A's bill of lading number MEDUUJ91768(Subject cargo) currently at the port of Mombasa be released to the Plaintiff, Sunlodges Kenya Limited, upon the said Plaintiff depositing in court a good and lawful sum of US\$ 2310 and paying to the 1<sup>st</sup> defendant a sum of US\$ 12,568 all totaling to US \$ 14,878.00 within 48 hours of issuance of this order and subject to payment to all statutory charges/taxes and/or customs payment of statutory charges.
- d. The plaintiff to pay the requisite charges and shipping line charges before as per law required.
- e. Upon compliance of the foregoing parties to proceed to court annexed mediation for the determination on the balance.
- f. Failing compliance with forgoing clause c, within 14 days, these orders shall lapse.
- g. Costs in the cause.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 19<sup>TH</sup> DAY OF JUNE 2023.  
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

**In the presence of:-**

Mr Masore for the Plaintiff

Miss Cecilia Nduati for the Defendant

Court Assistant - Brian

