



Jubiland Ingrevia Limited v Gantrade Uganda Limited (Commercial Case E017 of 2023) [2023] KEHC 23048 (KLR) (8 September 2023) (Ruling)

Neutral citation: [2023] KEHC 23048 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
COMMERCIAL CASE E017 OF 2023
DKN MAGARE, J
SEPTEMBER 8, 2023**

BETWEEN

JUBILAND INGREVIA LIMITED APPELLANT

AND

GANTRADE UGANDA LIMITED RESPONDENT

RULING

1. The Applicant filed suit seeking among other Orders, 4 declarations. They also filed an application seeking the following orders, simultaneously with the filing of the Plaint: -
 - a. Spent
 - b. Spent
 - c. Pending the hearing and determination of this Suit there be an order restraining Emirates Shipping Line as well as Kenya ports Authority, whether by themselves, their employees, servants and/or agents or otherwise assigns and/or any person whatsoever acting on their behalf from parting with possession of the Plaintiff's consignment shipped to the Port of Mombasa under bill of lading number EPIRINDMUM226533 Dated July 26, 2022 that was shipped in container numbers GVCU2139456, TGHU0752601, RFCU2359206, DFSU2666725 and ESPU2017953 that are in the custody of Emirates Shipping Line and Kenya Ports Authority.
 - d. Pending the hearing and determination of this Suit, the Plaintiff's consignment shipped in container numbers GVCU2139456, TGHU0752601, RFCU2359206, DFSU2666725 and ESPU2017953 under bill of lading number EPIRINDMUM226533 Dated July 26, 2022 be released to the custody of the Plaintiff or country of origin or such other destination of the Plaintiff's choice to avoid escalation of demurrage charges, warehouse rent and custom charges.



- e. The OCS port police station do supervise and ensure compliance.
2. The Plaintiff's Application was supported by the affidavit of Chintan T Gosalia, a senior vice president chemical intermediary of the Plaintiff. Their evidence is that they received an email from James Lowthian who represented himself as a business global consultants (GBC).
3. The Defendant indicated their interest in Ethyl Acetate from the Plaintiff. The same was to be sent to Uganda. When the Order was made and accepted, they received an email from Nayana Gregory, who indicated the consignee was Gantrade Uganda ltd. The goods ordered were US \$ 150,108. The same had a stamp of Gantrade Europe Ltd. Two invoices were raised for US \$ 90,064.80 and US \$ 60,043.20, totaling to US \$ 150,108.
4. These goods were packed and sent in 5 containers numbers GVCU2139456, TGHU0752601, RFCU2359206, DFSU2666725 and ESPU2017953. These were sent though the shipping line. The bankers, ICICI Bank ltd shipped the original documents from India to Standard Bank of South Africa.
5. On 23/9/2022, the Applicant was informed that the SWIFT sent was fictitious. The Applicants then contacted Gantrade Europe who denied any link with the Defendant. The Defendant is said to be fictitious.
6. It is the Applicant's view views that the goods are in danger of being released, unless the orders are issued preserving the subject matter. The pleadings were served and a total of service, were filed as proof of service.
7. The pleadings were served and a total of 6 affidavits of service were filed. The Application was not opposed and the Defendant did not bother to enter appearance. I gave directions on 30/8/2023 and directed I was to rule today on the interlocutory application. The ruling date and directions for today were also served and an affidavit of service filed.

Analysis

8. This being an application for injunction, my duty is simple. I am ascertain whether the applicant has met the test for issuance of interlocutory orders. I will also be giving directions regarding the procedure for hearing of the case.
9. The Application before me is for an order of temporary and mandatory injunction. The test for temporary injunction was settled in the locus classicus decision of *Giella vs Cassman Brown & Co. Ltd* (1973) EA, 358, 360, which set out principles for grant of injunction. The former Court of Appeal for East African, through Spry VP, as then he was, stated 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.”



10. This is buttressed by the Court of Appeal in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR, where they posited that the three limbs were sequential. The Court stated as follows:-

“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) allay 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.

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.”

11. The case is documentary in its nature. In disputes where documents are involved, then the same ought to be self-explanatory. The court’s duty is to read documents at the face value, at this stage and without needing any explanation. There cannot be a different explanation for a document that is clear in its literal meaning. It can only take other documents to dispel the documents. In the case of *Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd* (2017) eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth; -

“Courts adopt the objective theory of contract interpretation and profess to have overriding view sometimes called Four Corners of an Instrument, which insists that a documents meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed...”

Prima facie case

12. The first test is the issue of Prima facie case. Different courts have labored on what constitutes a prima facie case. In the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR, the court of Appeal, indicated the following in regard to what constitutes a prima facie case: -

“We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an



urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.”

13. The goods were sent by the Plaintiff to the Defendant. The Plaintiff has not been paid. The SWIFT Transfer is said to have been fictitious. This means, they retain an unpaid seller's lien over the goods. They have thus established a prima facie case. It is my considered view that the matters pleaded, have raised a prima facie case.

Mandatory injunction

14. The last main order sought is in its nature a mandatory nature. An order for Mandatory injunction is given sparingly. Even where the orders are deserving, the court may on its discretion still decline to issue the same. In this matter, if the mandatory injunction is issued, then there is nothing else to hear. If the court issues the orders, and turns out that it is not correct, then the Defendant will suffer irreparable harm.

15. 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. Okeyo* [2002] eKLR a mandatory injunction can be granted on an interlocutory applications 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. I

16. I do not find there are special circumstances in this case for issuance of mandatory order. In the case of *Kenya Breweries Ltd & Another vs Washington O. Okeya* [2002] eKLR, the Court of Appeal stated as doth: -

“A mandatory injunction ought not to be granted on an interlocutory application in the absence or 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



17. Finally, the Court of appeal in the case of stated in *Sbariff Abdi Hassan v Nadbif 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.”

18. In this case, I am reluctant to issue a mandatory order at interlocutory stage. There is nothing that will spoil if the orders are not given. The sky will not fall if the orders are not issued now. The case of *Kenya Power & Lighting Co. Ltd v Samwel Mandere Ogeto* [2017] eKLR, comes in handy. In that case, the High Court sitting at Kisii, stated as doth:

“20. A mandatory injunction is different from a prohibitory injunction in the sense that while an in 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.”

19. I cannot issue a mandatory injunction in this case , since there does not exist special circumstances. In the case of *Nation Media Group & 2 Others vs John HarunMwau* [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.”

20. I therefore, decline to grant prayer of the application (5) and (6) of the Application, in the interim.

Irreparable loss

21. For issuance of orders the applicant has to show irreparable loss. The case of *Paul Gitonga Wanjau v Gatbuthi Tea Factory Company Ltd & 2 others* [2016] eKLR, the Court, Justice John M. Mativo, as then he was stated as doth: -

“I stand guided by the said passage. Steven Mason & McCathy Tetrat in their well-researched article entitled "Interlocutory Injunctions: Practical Considerations"[9]have authoritatively stated as follows:-

"With some exceptions, the first branch of the injunction test is a low threshold. As stated by the Supreme Court in *R. J. R. Macdonald Vs. Canada*



(Attorney General)[10]"Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the Applicant is unlikely to succeed at the trial. Justice Henegham of the Federal Court explained the review as being "on the basis of common sense and a limited review of the case on the merits." [11] It is usually a brief examination of the facts and law.

In certain circumstances, the court will impose a more restrictive standard and require the moving party to demonstrate that it has a more strong prima facie case. If the injunction will likely end the dispute between the parties, then the court may hold the Applicant to this higher standard. Similarly, where the nature of the relief sought is mandatory, or when the question is a question of mere law alone, then this higher standard will apply..."

22. An extra from Halsbury's laws of England vol 21 paragraph 7392, comes in handy: -

"It is the very first principle of injunction law that prima facie the court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the court interferes by way of an injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the injury is irreparable and second, that it is continuous. By the term irreparable is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the Applicant may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if this rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question."

23. The goods belong on a prima facie basis, to the Plaintiff. If the goods are released, they will never be found. The goods have been unpaid. These are chemicals that are likely to spoil or be used up. Therefore, there is a likelihood that the Applicant will suffer irreparable loss.

Balance of convenience

24. The goods are at the port. The Defendant is an unknown entity. If the goods are released, they may never be found. It is better for the goods to remain in the Port as the parties litigate.

25. A balance of convenience, was defined in the case of [Pius Kipchirchir Kogo v Frank Kimeli Tenai](#) [2018] eKLR, where the court held as doth: -

"The meaning of balance of convenience in favor of the Applicant is that if an injunction is not granted and the suit is ultimately decided in favor of the Applicants, the inconvenience caused to the Applicant would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Applicants to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the Applicants who suffer. In other words, the Applicants have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it."



Determination

26. In the circumstances, the application dated 11/8/2023 is allowed in the following terms: -
- a. An order is hereby issued restraining the defendant or any person acting through them in particular the Emirates Shipping Line, Kenya Ports Authority, Kenya Revenue Authority acting whether by themselves, their employees, servants and/or agents or otherwise assigns and/or any person whatsoever from releasing or in any way removing or in any way discharging goods in the possession of goods under the bill of lading number EPIRINDMUM226533 dated July 26, 2022 that were shipped in container numbers GVCU2139456, TGHU0752601, RFCU2359206, DFSU2666725 and ESPU2017953 pending the hearing and determination of this suit.
 - b. The other prayers are declined and shall be dealt with at the final judgment
 - c. The case to proceed by case stated. The defendant to be served forthwith with a judgment date. The defendant to file submissions within the next 7 days after service
 - d. Judgment on September 20,2023

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 8TH DAY OF SEPTEMBER, 2023.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:

Titus Mugambi for the Plaintiff

No appearance for the Defendant

