Equity Bank Limited v Goods Brands Limited (Civil Appeal 78 of 2012)
[2023] KEHC 23845 (KLR) (Civ) (19 October 2023) (Judgment)

Neutral citation: [2023] KEHC 23845 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 78 OF 2012

JN NJAGI, J

OCTOBER 19, 2023

BETWEEN

EQUITY BANK LIMITED ..... APPELLANT

AND

GOODS BRANDS LIMITED ..... RESPONDENT

(Being an Appeal from the ruling of the Hon. S.A Okato, Senior Principal Magistrate, in Milimani SRMCC NO.5495 of 2011 delivered on the 28th February 2012)

JUDGMENT

1. This appeal emanates from the ruling of the trial court dated 28th February, 2012 wherein the trial court dismissed the Appellant's application dated 7th December 2011 in which it sought orders seeking to stay and set aside ex-parte orders of the court dated 15th November 2011. The trial court at the same time allowed the Respondent`s application dated 14th November 2011. The Appellant was aggrieved by the dismissal of their application and the orders allowing the respondent`s application and filed the instant appeal.

2. The grounds of appeal are that:

   (1) The learned Magistrate erred in fact and in law by determining the entire suit at the interlocutory stage and on disputed affidavit evidence as the prayers granted are identical to the final prayers sought in the Plaint.

   (2) The learned Magistrate erred in fact and in law by holding that the Respondent's application dated 14th November 2011 was unopposed while the applicant had filed grounds of opposition and a replying affidavit.

(3) The learned trial Magistrate misdirected himself by relying on technicalities to deny the appellant's right to be heard and barring its filed submissions to go into the court file.

(4) The trial Magistrate erred in law and in fact in ordering the appellant's bank to release a security charged to the bank at the interlocutory stage without taking evidence.

(5) The learned Magistrate erred in fact and in law in granting orders to a party lacking locus.

(6) The learned trial Magistrate misdirected himself by failing to take into account that: the respondent is not the registered owner of the charged security , namely motor vehicle KBL 766C; the registered owner of the subject motor vehicle was not made party to the proceedings; the registered owner of the said motor vehicle had offered it as security for loan facilities advanced by the appellant to himself and a chattel mortgage over the motor vehicle duly registered; and that the registered owner of the said motor vehicle had defaulted in his loan repayment and the appellant's statutory and contractual right to realize the security has arisen.

(7) The learned Magistrate erred in fact and in law by compelling the appellant bank to accept a disputed amount of money from the respondent as settlement of the outstanding debt owed to the appellant by the owner of the suit motor vehicle while the respondent is not a party to the loan agreement and lacks privity of contract with the appellant bank.

Background

3. At the centre of the dispute between the parties herein is a motor vehicle registration number KBC 766C. The Respondent contends that it had imported the motor vehicle in dispute through its agent agent, Yasser Ali Sheikh. Subsequently, the Respondent sold the vehicle to its employee, Daniel Kioko, for a sum of Ksh. 750,000/= to be paid in instalments. Later the services of the said person were terminated by which time he had only paid Ksh,300,000/= of the purchase price.

4. It was the contention of the Respondent that they later learnt that the said Daniel Kioko had, without their knowledge, fraudulently registered the vehicle in his name in total disregard of the sale agreement. That after his dismissal he returned the motor vehicle to them together with duly signed transfer forms and a logbook in his name which the Respondent believed to be genuine. However, that on the 4th November, 2011 the Appellant herein repossessed the said motor vehicle through Antique Auctions on claims that the said Daniel Kioko had used the vehicle as security for a loan guarantee extended to him. The Respondent offered to settle Daniel Kioko's alleged debt of Ksh.157,825.63, but the Appellant rejected this offer.

5. The Appellant on the other had averred that it extended a loan facility of Ksh. 500,000/= to Daniel Kioko, which was to be deducted from his salary. Additionally, another individual named Anthony Njenga applied for a Ksh.150,000/= loan, with Daniel Kioko using the motor vehicle as collateral for both loans. According to the Appellant, both Daniel Kioko and Anthony Njenga defaulted on their loan obligations, resulting in outstanding sums of Ksh. 487,174 and Ksh 157,825, respectively.

6. In response to these developments, the Respondent filed a notice of motion o14th November, 2011. The motion sought various orders, including halting the sale of the motor vehicle, compelling the Appellant to accept the owed amount of Ksh.157,825.63, and requiring the Appellant to release the vehicle's logbook. The trial court made a ruling allowing the application. The Appellant was dissatisfied with the ruling and lodged the present appeal.

Appellant's Submissions

7. The Appellant submitted that this being a first appeal, the court should consider the evidence on record and draw its own conclusion bearing in mind that the trial court had the advantage of seeing and hearing the witness testify before it.

8. It was the Appellant's case that the Respondent had sought an injunction pending the hearing and determination of the suit before the trial court but the learned trial Magistrate ended up determining the entire suit at the interlocutory stage contrary to what the Respondent had prayed for and what the Appellant had expected.

9. The Appellant submitted that the case before the trial court was not a clear and straight forward case to warrant the court's issuance of a mandatory injunction at the interlocutory stage. The Appellant relied on the case of Moses C Muhia Njoroge & 2 others v Jane W.Lesaloi & 5 others [2014] eKLR where it was held that:

> "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, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied or if the Defendant attempted to steal a march on the Plaintiff Mandatory Injunction will be granted on an interlocutory application".

10. The Appellant argued that the trial court failed to consider important issues raised such as the real ownership of the motor vehicle and the fraud allegations, issues which would best be determined at trial. The Appellant contends that the court therefore erred in exercising its discretion.

11. In urging this court to interfere with the discretion of the trial court, the Appellant relied on the case of Lucy Wangui Gachara v Minudi Okemba Lore [2015] eKLR where the court of appeal held:

> "We have ultimately come to the conclusion that the learned judge erred in granting a mandatory injunction at the interlocutory stage in the circumstances of this appeal. He failed to consider important provisions of the law as well as pleadings before him and erroneously concluded that the case before him was a simple and clear case calling for a mandatory injunction, which it was not. In these circumstances, we are therefore entitled to interfere with the exercise of discretion by the learned judge."

12. The Appellant submitted that the trial court failed to admit the Appellant's replying affidavit on the ground that it was undated. That failure to input the date was an error and in no way a deliberate action by the Appellant. The Appellant contends that the affidavit provided contrary evidence which would have assisted the Court in understanding the issues before it.

13. The Appellant further submitted that the trial court ought to have been guided by Order 19 Rule 7 of the Civil Procedure Rules and Article 159 of *the Constitution* and admit the grounds of opposition and the replying affidavit and determine the application on merit. The Appellant cited the case of Peter Nyaga Muvake v Joseph Mutunga [2015] eKLR where the Court of Appeal refused to hold that undated affidavit was bad in law.

14. In submitting that the principles of article 159 should have been applicable, the Appellant cited the case of Law Society of Kenya v Centre for Human Rights & Democracy & 12 others [2014] eKLR.

15. The Appellant contended that the Respondent lacked the locus standi to not only bring the suit and seek orders of ownership but also for the court to grant it the orders. The Appellant argued that there was no agreement between the Respondent and the registered owner assigning ownership and therefore the Respondent lacked locus to claim ownership of the suit motor vehicle.

16. The Appellant faulted the trial magistrate for making an order compelling to accept a sum of Ksh.157.825.63 from the Respondent as payment in full and final settlement of the outstanding facility extended to Daniel Kioko the registered owner of the suit motor vehicle. The Appellant argued that there was no contract between the Appellant and the Respondent and in any event the amount due should have been an issue to be determined at trial.

Respondent's Submissions

17. The Respondent submitted that the trial court in exercising its discretion was correct in striking out the replying affidavit dated 14th October 2011. That section 5 of the Oaths and Statutory Declaration Act CAP.15 is couched in mandatory terms and failure to comply with it cannot be waived away as a technicality. The Respondent relied on the case of Mary Gathoni & another v Frida ariri otolo & another [2020] eklr and the case of Regina Munyiva Nthenge v Kenya Commercial Bank Ltd [2005] eKLR. The Respondent submitted that the application was unopposed upon the striking out of the affidavit.

18. The Respondent further argued that failure by the Appellant to file submissions meant that the Appellant failed to establish that the Respondent was not entitled to the orders as sought in the notice of motion dated 14th November 2011. The Respondent relied on the case of Magnolia Pvt Limited v Synermed Pharmaceuticals (K) Ltd [2018] eKLR where the court held that failure to file submissions meant that the party had failed to establish sufficient cause to be entitled to orders sought.

19. The Respondent argued that the Appellant had failed to establish that the learned Magistrate in exercise of his discretion in granting an injunction misdirected himself on law, or he misapprehended the facts, or he took account of considerations of which he should not have taken account, or he failed to take account of considerations of which he should have taken account, or his decision albeit discretionary was plainly wrong. He cited the case of Kridha Limited v Peter Salai Kituri [2020] eKLR where the court held that:

> I am reminded of the following rendition by Madan JA (as he then was) in United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd [1985] E.A:
>
> > "The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

20. The Respondent submitted that a mandatory injunction can be granted at interlocutory stage in special circumstances. That the claim by the Appellant was specific in nature as they were demanding Ksh.157,825.63 and the Respondent offered to settle the amount hence the Appellant would not suffer any harm. According to the Respondent, the special reasons were that there was no opposition to the

application filed by the Respondent and that the Respondent had undertaken to clear the amount owed before the repossession of the suit motor vehicle.

21. In submitting that in mandatory injunction the Applicant must establish special and exceptional circumstances the Respondent relied on the case of Kenya Breweries Limited & another v Washington O. Okeyo [2002]eKLR and the case of Nation Media Group & 2 others v John Harun Mwau [2014].

Analysis and Determination

22. As a first appellate court, this court's role is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. This position was aptly stated in the case of Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA 123 in the following terms:

> "I accept counsel for the Respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).

23. The issues for determination in this case are as follows:

    a. Whether the trial court should have admitted the appellant's undated replying affidavit.

    b. Whether the trial court erred in granting an interlocutory mandatory injunction.

Whether the trial court should have admitted the appellant's undated replying affidavit

24. The affidavit by the Appellant in support of his grounds of opposition though signed by the Appellant before a Commissioner for Oaths was not dated. Rule 10 of the Oaths and Statutory Declarations Rules stipulates:

> "the forms of jurat and of identification of exhibits shall be those set out in the Third Schedule."

25. The Third Schedule shows that the jurat must show the date and the place of oath or affirmation taken, and the name and signature of the commissioner for oaths.

26. The Court of Appeal in the case of Peter Nyaga Muvake v Joseph Mutunga [2015] eKLR held the following on the issue:

> "In this case the supporting affidavit, though signed by the deponent (applicant), and the commissioner for oaths, whose names are reflected in the jurat, it does not show the date when the oath was administered. The supporting affidavit was filed in court on 30th March 2015 without the date on which the oath was administered. It is patent that the date was inadvertently omitted. Did this render the affidavit defective? Article 159(1) (d) of *the*

Constitution enjoins courts in exercising judicial authority to be guided by the principle that justice shall be administered without undue regard to procedural technicalities. The omission of the date in the jurat has not been shown to have been deliberate. It seems, ostensibly, to have been inadvertent. It was a human error. The affidavit was filed in support of the motion which was dated. The date the affidavit could bear could only be a date on or before the date of the filing in Court. The omission does not vitiate the substance of the affidavit. We are not inclined to hold that the affidavit is bad in law on account of the omission when it is plain to discern that the omitted date could be on or before the filing of the application."

27. The facts in the current appeal are closely similar to those in the case of Peter Nyaga Muvake v Joseph Mutunga (supra). I am therefore of the view that the trial court should have admitted the Appellant's supporting affidavit since the omission of the date was not shown to be deliberate. I am persuaded that the omission of the date was inadvertent and in any event the omission does not vitiate the substance of the affidavit.

Whether the trial court erred in granting an interlocutory mandatory injunction.

28. The grant or refusal of an injunction involves the exercise of judicial discretion. The circumstances in which this Court can interfere with the exercise of judicial discretion by the lower court were articulated in the well-known case of Mbogo and Another vs. Shah [1968] EA 93 where the Court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

29. Bearing this in mind, the main issue in this appeal is whether the trial court erred in granting a mandatory injunction at an interlocutory stage and whether doing so constituted an erroneous exercise of judicial discretion.

30. In the case of Kenya Breweries Limited v Washington Okeyo [2002] eKLR cited in the case of Paul Mwaniki Gachoka & another v Nation Media Group Limited & another [2019] eKLR referenced above, the court reasoned that:

> "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, if the case is clear, and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied or if the defendant attempted to steal a match on the plaintiff. A mandatory injunction will be granted on an interlocutory application." ...From my analysis of the respective positions presented above, I have not come across any compelling factors that would warrant the granting of a mandatory injunction at this stage. I also find that the applicant has not brought any credible evidence to show that the injury to his reputation is so immediate as to result in grave hardship unless and until a mandatory injunction is granted at this interlocutory stage."

31. The Court also stated in Shariff Abdi Hassan vs. Nadhif Jama Adan [2006] eKLR that:

> "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."

32. I am further guided by the Court of Appeal decision in the case of Nation media Group & 2 others vs John Harun Mwau (2014) eKLR where the court stated:-

> "It is trite law that for an interlocutory mandatory injunction to issue an applicant must demonstrate existence of special circumstance. 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 demonstrated as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases."

33. In the present case, the court while granting a temporary mandatory injunction ordered the Appellant to accept payment in the sum of Ksh.157,825.63 from the Respondent and in turn release the suit motor vehicle to the Respondent. The Appellant in his replying affidavit had contended that the suit motor vehicle had been used to secure two loan facilities advanced to Anthony Njenga and Daniel Kioko. The Appellant also averred that both Daniel Kioko and Anthony Njenga defaulted on their loan obligations, resulting in outstanding sums of Ksh.487,174 and Ksh.157,825.63 respectively. It is apparent that the disputed sum of money was one of the issues to be determined by the court.

34. It is also clear from the submissions of both parties that the ownership of the suit motor vehicle was disputed.

35. From the cases cited above, it is trite law that for a mandatory interlocutory injunction to be issued the case has to be clear and there should be special circumstances. I am of the view that this case did not warrant granting of such orders since some of the issues in dispute would have been best determined at full hearing. Granting of the interlocutory mandatory injunction in this case amounted to curtailing the appellant's right to be heard as enshrined under Article 50 of *the Constitution*.

36. Based on the foregoing, I will therefore interfere with the decision of the trial court. The ruling of the trial court dated 28th February 2012 is hereby set aside. I order that the suit proceeds for hearing before any other magistrate of competent jurisdiction.

37. Since the appeal has succeeded, I award the costs of the appeal to the Appellant.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF OCTOBER, 2023

J. N. NJAGI

JUDGE

In the presence of:

No appearance for Appellant

Mr. Odipo for Respondent

30 days Right of Appeal..

Thereafter: Miss Aura present – holding brief for Miss Cheruyot for Appellant