**Rentco Africa Limited v Ndibo & 5 others (Civil Appeal E215 of 2022)**
**[2024] KEHC 11653 (KLR) (3 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 11653 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MOMBASA**

**CIVIL APPEAL E215 OF 2022**

**JK NG'ARNG'AR, J**

**OCTOBER 3, 2024**

**BETWEEN**

**RENTCO AFRICA LIMITED ..... APPELLANT**

**AND**

**ARNOLD NDIBO ..... 1ST RESPONDENT**

**AFRI-SINE LIMITED ..... 2ND RESPONDENT**

**SWIFTWAY AUCTIONEERS ..... 3RD RESPONDENT**

**GOLDWYN CONSULT LTD ..... 4TH RESPONDENT**

**NEVILLE ONYANGO ODENY ..... 5TH RESPONDENT**

**KIPKOECH MOSES NGENO ..... 6TH RESPONDENT**

***(Being an appeal against the Ruling of the Hon. J. B. Kalo (CM) delivered on 21{{^st}} November 2022 in Mombasa Chief Magistrate's Court Civil Suit No. E766 of 2021, Rentco Africa Limited v Arnold Ndibo & 5 Others)***

## JUDGMENT

1. The background of the appeal herein is that the Appellant filed a Notice of Motion application in the trial court seeking for an order for the suit motor vehicle registration number KBV 222J be availed within the jurisdiction of the court and to be preserved within the court yard pending the hearing and determination of the application. The Appellant also prayed that costs of the application be provided for.

2. The application was heard and a ruling delivered where the trial court held as follows: -

> " The vehicle the subject of this suit is alleged to have changed hands in circumstances that the Plaintiff alleges were fraudulent. He states that the vehicle was attached in an alleged distress for rent when it is clear that there existed no landlord/tenant relationship that would result in such an attachment. However, the Plaintiff admits voluntarily assigning the vehicle to the 1st defendant for the exclusive purpose of carrying out official business duties at its Mombasa office (sic). The documents on record show that the vehicle is currently registered in the name of the 6th defendant who says he is in possession and use of the same.
>
> The order sought requires the court to direct that the vehicle be traced, recovered and parked within the court premises pending the hearing and determination of this suit. Balancing the said prayer and the 6th defendant's submission that he will be prejudiced should the order be granted, the court is inclined to agree with the 6th defendant. The balance of convenience does not therefore favour the order sought.
>
> The court finds and holds that the Plaintiff's Notice of Motion application dated 24th May 2021 lacks merit. The same is dismissed. Costs therefore shall abide the outcome of the main suit."

3. Being dissatisfied with the ruling, the Appellant filed an appeal herein through the Memorandum of Appeal dated 16th December 2022 on grounds that despite making a finding that the Applicant had established a prima facie case with a high chance of success, the learned trial magistrate erred in fact and law by: making a finding that the balance of convenience tilts in favour of the 6th Respondent on account of having another logbook of the suit motor vehicle in his name when the Appellant's logbook is dated 7/6/2013 earlier than the 6th Respondent's; failing to make a finding that the Appellant will suffer irreparably should the 6th Respondent proceed to dispose of the suit motor vehicle to other unsuspecting 3rd parties; failing to find that the Respondents have not demonstrated that they are in a position to adequately compensate the Appellant should it be successful in the main suit; failing to appreciate that the ownership of the suit motor vehicle is in serious contestation on account of both the Appellant and the 6th Respondent possessing ownership logbooks and that the Appellant had a high chance of success; and failing to fully consider the Appellant's submissions and authorities in support of its application.

4. The Appellant prayed that the appeal be allowed, the ruling dated 21st November 2022 be set aside and this court to substitute the same with its own ruling, and that costs of the appeal be granted to the Appellant against the Respondent.

5. The 6th Respondent opposed the appeal through Grounds of Opposition dated 7th February 2024 on grounds that the appeal as laid is misconceived, hopelessly defective, a non-starter in law, incompetent and proper for dismissal ex-debito justiciae and that the Appellant having failed to surmount the hurdles of granting an interlocutory injunction the appeal lacks merit and should be dismissed with costs.

6. Directions were given by this court that the appeal be canvassed by way of written submissions. However, as at the time of writing this judgment, only the Appellant and the 6th Respondent had filed their submissions. The Appellant filed submissions dated 11th January 2024 while the 6th Respondent filed submissions dated 14th February 2024 which have been considered by this court.

7. This being the first appellate court, it is guided by the principles in *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1968] EA 123 where it was held that: -

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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..."

8. I have considered the Record of Appeal, grounds of appeal in the Memorandum of Appeal dated 16th December 2022, Grounds of Opposition by the 6th Respondent dated 7th February 2024, and submissions by the Appellant and the 6th Respondent. The issue for determination is whether the Appellant met the three conditions for grant of the order of interlocutory injunction.

9. Court restated the principles guiding the grant of interlocutory injunction in *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR 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. ally any doubts as to (b) by showing that the balance of convenience is in his favour.
>
> ...these are the three pillars on which rest 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... 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 are 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."

10. In dealing with interlocutory injunction, conclusive findings ought not to be made particularly on issues such as contradictory affidavit evidence or disputed propositions of the law. Such issues should be reserved for determination at trial. The issues for determination herein arise from a ruling on an interlocutory application but the main suit in still pending in the trial court. However, this court is not excluded from determining whether the Appellant has established a prima facie case.

11. The court in *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] eKLR defined a prima facie case as follows: -

> " So what is a prima facie case" I would say that in civil cases it 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 as to call for an explanation or rebuttal from the latter."

12. From the evidence on record, admission by the Appellant and the 6th Respondent, the principle of a prima facie case having been established by the Appellant is not in dispute. The ruling of the trial court being appealed against is also to the effect that a prima facie case had been established which has not been disputed by the Appellant and the 6th Respondent. The points of contention are on the other two principles: whether damages would be an adequate remedy for the Appellant; and whether balance of convenience tilts in favour of the 6th Respondent.

13. On whether damages would be an adequate remedy, the court in *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR held: -

> "On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."

14. The Appellant on the one hand submitted that it is likely to suffer the greatest prejudice by virtue of being the true owner of the vehicle. That there is a high likelihood that the vehicle will be transferred to unsuspecting third parties or generally dealt with in a manner that would complicate the Appellant's recovery attempts. That the suit vehicle already exchanged hands twice and there is no guarantee that there will be no further transfer. The 6th Respondent on the other hand argued that that the Appellant will not suffer substantial loss that cannot be adequately compensated by an award of damages, and that the motor vehicle can be sold any time to recover the damages.

15. It is the view of this court that the Appellant's claim is quantifiable with the possibility of pecuniary compensation. This court concurs with the finding of the trial court that the subject matter being a chattel damages would certainly be an adequate remedy.

16. Having found that the Applicant has not met the second condition and that damages would be an adequate remedy, it would not be necessary to consider the last condition as it is a requirement that all the three conditions must be fulfilled for grant of an interlocutory injunction.

17. The appeal herein therefore has no merit and is dismissed. The 6th Respondent to be awarded costs.

**DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 3RD DAY OF OCTOBER, 2024**

**.....**

**J.K. NG'ARNG'AR, HSC**

**JUDGE**

In the presence of: -

No appearance Advocate for the Appellant

Mwakisoso Advocate for the Respondent

Court Assistant – Mr. Samuel Shitemi