



**Mohammed Mehdi Bank v Crossroads Limited & 2 others (Commercial Case E516 of 2023)
[2024] KEHC 16690 (KLR) (Commercial and Tax) (5 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 16690 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E516 OF 2023
AA VISRAM, J
NOVEMBER 5, 2024**

BETWEEN

MOHAMMED MEHDI BANK PLAINTIFF

AND

CROSSROADS LIMITED 1ST DEFENDANT

KAREN WATERFRONT PHASE II 2ND DEFENDANT

MADMAX KARTING LIMITED 3RD DEFENDANT

RULING

1. I have considered the Notice of Motion Application dated 25th October, 2023, together with the replying affidavits sworn on 5th February, 2023 and 23rd January, 2024, the submission of the parties, and the applicable law.
2. The Applicant seeks the following orders:-
 - a. An interlocutory injunction be issued pending hearing and determination of the main suit, stopping, refraining, preventing the 1st, 2nd and 3rd Respondents whether by themselves, their agents and their servants from interfering, confiscating, taking, transferring, using, selling the go-kart race track situated at the licensed space L005 comprising of 100,000 square feet external gross area or thereabout situated on the grounds adjacent to the existing paintball venue of the Waterfront Karen Shopping Mall erected on a portion of L.R, No. 30656, along Langata Road, Nairobi Kenya.
 - b. An interlocutory injunction be issued pending hearing and determination of the main suit, stopping, refraining, preventing the 1st, 2nd and 3rd Respondents whether by themselves, their agents and their servants from interfering, confiscating, taking, transferring, tampering, using,



selling the go-karts and other utilities linked to the machines and area situated at the licensed space L005 comprising of 100,000 square feet external gross area or thereabout situated on the grounds adjacent to the existing paintball venue of the Waterfront Karen Shopping Mall erected on a portion of L.R, No. 30656, along Langata Road, Nairobi Kenya.

- c. Costs of the Application be provided for.

Background

3. The Applicant and the 1st Respondent entered into a Lease Agreement dated 8th December, 2020 (“the Agreement”) to run a go-karting business. Upon signing the Agreement, the Applicant incurred numerous expenses and costs associated with constructing the track and setting up the business.
4. The Agreement allowed the Applicant to use premises L005 comprising of 100,000 square feet located at the Waterfront Karen Shopping Mall belonging to the 1st and 2nd Respondent.
5. Pursuant to the provisions of the Lease Agreement, the Applicant was granted a five-month rent-free period to allow him to set up the go-kart race track and the go-kart vehicles. After the expiry of the rent-free period, the Applicant would then start paying Ksh. 200,000/= per month as rent for the premises.
6. Unfortunately, the Applicant fell sick at some point after setting up the business, and defaulted in paying rent as agreed upon for a period of over two years. During this period, there was a break-down of communication between the parties and accordingly, the 1st and 2nd Respondent terminated the Agreement, and auctioned the Applicant’s subject property.
7. The Applicant contended that the business was worth over Kshs. 69,000,000/= and that the auction yielded a return of Kshs. 6,310,000/= only. He was therefore of the view that the Respondents owed him either the goods or the balance of the value.
8. The primary issue for determination is whether the Applicant is entitled to the interlocutory injunction sought for? A secondary issue is whether the Application has been overtaken by events?
9. The applicable law is found at Order 40(1) (a) and (b) of the Civil Procedure Rules 2010 which provides as follows:-

“Where in any suit it is proved by affidavit or otherwise—

- a. That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
 - b. That the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further.”
10. Additionally, the principles guiding the grant of interlocutory injunction 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 restated the law 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.
- i. 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.”

11. Further to the above, Ringera, J (as he then was) in *Airland Tours & Travel Limited vs. National Industrial Credit Bank Nairobi (Milimani) HCCC No. 1234 of 2002*, stated 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.

12. Guided by the above, I address my mind to the first limb of the test; what then constitutes a prima facie case? In the case of *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125, the Court of Appeal held 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. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the Applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

13. Further, guided by the above, I caution myself not to make any definitive findings of fact at the present and interlocutory stage, and based on contradictory affidavit evidence.



14. A review of the terms of the lease Agreement at Exhibit MMB2 show that it was a term of the Agreement, namely, Cause 8, that payment of rent would commence from 15th November, 2021, and continue on a monthly basis, subject to escalation for the duration of the lease, and based on the further terms set out in the Agreement. Accordingly, there is no doubt that rent was owed by the Applicant to the 1st and 2nd Respondent. This was not paid for a prolonged period of time.
15. The Agreement further provides, at clause 21, entitled ‘Breach of Covenants’, that in the event of a default of payment of rent, the following is a contractual right of the lessor:-

“If any rent remains unpaid for seven days after becoming payable whether formally demanded or not, it will be lawful for the lessor to re-enter the premises and the lease will cease immediately.”
16. Once again, the Applicant has not contested the default. Further, it is evident from the record that the lessor made several attempts to contact him, but could not do so. A statement of outstanding arrears is annexed at EM1 and the Notice to Terminate is annexed at EM2 of the Respondents replying affidavit.
17. This court may empathize with the unfortunate situation the Applicant found himself in. It cannot however ignore the fact that that the Applicant was in breach of contract, and the lessor took certain actions based on the terms of the lease agreement between the parties. Again, this court does not intend to determine the merits of the suit. That is the role of the trial court. I will however state, that for the purposes of the present application, the facts, as they appear, based on the affidavit evidence before me, is that the Agreement was not performed for almost two years, culminating in the Notice to Terminate dated 24th August, 2022.
18. Based on the above chronology of events, and the facts as stated above, I am not persuaded that the Applicant has made out a prima facie case in the terms required by Nguruman (supra). In short, I do not think that the Applicant has demonstrated a clear and unmistakable right to be protected, which is directly threatened by an act sought to be restrained, or that its right is material and substantive, and there is an urgent necessity to prevent the irreparable damage that may result from the invasion. I say so because the Applicant was clearly in breach of the contractual terms at the time the 1st and 2nd Respondent took the impugned action.
19. However, in the event I am mistaken, I am willing to consider the second condition, or limb of the test, namely, whether the Plaintiff stands to suffer irreparable loss if the injunction is not granted?
20. It was held in Nguruman Limited case (supra), where the court expressed itself as hereunder:-

“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.”



- 21. Guided by the above, I am satisfied that the test has not been met. I do not think that the Plaintiff has surmounted the second limb because in the present matter, the damages are capable of being measured with a fair degree of accuracy.
- 22. I am persuaded of the above position because the Applicant has gone to great length to submit on the various costs, loans, and other expenses undertaken during the course of setting up the business for which he has suffered loss arising out of the actions on the part of the Respondents. In particular, he claimed that his goods were auctioned for undervalue, yielding approximately Kshs. 6,000,000/= only for the goods auctioned, when in fact, in his view, the true cost of setting up the business was approximately Kshs. 69,000,000/=.
- 23. In my view, the said allegations relating to the loss incurred arising out of breach of contract are in fact, the Applicant’s claims for damages, and a remedy in damages is still available to the Applicant. Accordingly, the same ought to be pleaded and eventually proved at trial.
- 24. Finally, I am of the view that the Application has, by and large, been overtaken by events. The Applicant in his own words stated that his property has been auctioned, and it is evident that the subject site has been since leased out to the 3rd Respondent, who has been in possession and in operation of the same for over a year. Therefore, the grant of an injunction would be academic at this point, or if granted, would serve to occasion breach of contract between the 1st and 2nd and the 3rd Respondents. This would cause undue prejudice to the 3rd Respondent, who averred that it was not aware of the history between the Applicant and the 1st and 2nd Respondent, and accordingly leased the property as an innocent lessee.
- 25. Having satisfied myself that the Applicant has failed to surmount the second limb, there is no need to move to the third limb of the test set out above. I therefore will not address the issue of balance of convenience.
- 26. My conclusion in relation to the first and second limb accordingly, brings the matter to an end and based on the reasons set out above, I find and hold that the application is without merit. The same is dismissed with costs.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 5TH DAY OF NOVEMBER 2024

ALEEM VISRAM, FCIArb

JUDGE

In the presence of;

- For the Plaintiff/Applicant
- For the 1st Defendant/Respondent
-For the 2nd Defendant/Respondent
- For the 3rd Defendant/Respondent

