



**Sameja v Sal Tree Hotel Limited (Civil Appeal E079 of 2023)  
[2024] KEHC 14040 (KLR) (Civ) (6 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14040 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E079 OF 2023**

**MA OTIENO, J**

**NOVEMBER 6, 2024**

**BETWEEN**

**AZIM ABDULLA SAMEJA ..... APPELLANT**

**AND**

**SAL TREE HOTEL LIMITED ..... RESPONDENT**

*(An appeal from the Ruling and Order of Honourable Opande S.A (PM)  
delivered on 23rd August 2023 in the Milimani CMCC No. E287 OF 2023)*

**JUDGMENT**

**Background**

1. This is an Appeal from the Ruling of the magistrate's court delivered on 23<sup>rd</sup> August 2023 in the Milimani CMCC No. E287 of 2023 in which the trial court allowed the Respondent's application dated 10<sup>th</sup> April 2023 seeking interlocutory injunction against the Appellant.
2. The background of the matter is that following an advertisement for sale by public auction in a local daily newspaper, the Respondent, being the highest bidder in the auction conducted on 16<sup>th</sup> February 2023, bought motor vehicle registration KBB372F for Kshs. 600,000/- and the motor vehicle subsequently released to them (with all the transfer documents) upon payment of the full purchase price.
3. Subsequent to the release of the motor vehicle to the Respondent, the Appellant in company of police officers (DCI) visited the Respondent premises and asked the Respondent to surrender the subject motor vehicle to the DCI on account that the vehicle had been reported stolen.
4. Apprehensive that the Respondent was illegally and unlawfully trying to regain possession of the subject motor vehicle after its auction, the Respondent moved to court on 10<sup>th</sup> April 2023 and



filed a suit for orders of injunction against the Appellant. Contemporaneously with the plaint, the Respondent also filed a Notice of Motion Application seeking an interlocutory injunctive relief against Appellant; that pending hearing and determination of the suit, the Appellant and his agents, including the police be restrained from interfering with the Respondent's quiet enjoyment of the subject motor vehicle, being, motor vehicle registration number KBB 372F.

5. On 23<sup>rd</sup> August 2023, the trial court delivered its Ruling allowing the Respondent's application dated 10<sup>th</sup> April 2023, thereby issuing an injunction order against the Appellant and his agents, including the police.

### **The Appeal**

6. Aggrieved by the decision of the trial court, the Appellant, vide his memorandum appeal dated 22<sup>nd</sup> December 2023 lodged an appeal to this court, raising six (6) grounds of appeal that; -
  - i. The learned trial magistrate erred both in law and in fact in deliberately failing to appreciate and uphold the hallowed and settled principles for the grant of Orders of injunction.
  - ii. The learned trial magistrate erred in law in granting an injunction restraining the police from discharging their constitutional and lawful duty.
  - iii. The learned trial magistrate grossly erred in law in giving orders against persons who were not parties to the suit.
  - iv. The learned magistrate grossly erred in making final findings at an interlocutory stage.
  - v. The learned magistrate grossly erred in law and in fact in making very prejudicial and determinate pronouncements in the ruling.
  - vi. The learned magistrate erred in law in proffering advice to the parties about joinder of parties into the suit.
7. The appeal was canvassed by way of written submissions. The Appellant's submissions is dated 15<sup>th</sup> May 2024 whilst that of the Respondent is dated 1<sup>st</sup> October 2024.

### **Appellant's submissions**

8. The Appellants submitted that the trial court erred in granting the injunction orders in favour of the Respondent despite the fact that the Respondent had not made a proper case for grant of orders of injunction within the principles set out in the case of *Giella v Cassman Brown & Co. Ltd.* 1973 358.
9. The Appellant submitted that the trial court in granting the injunctive relief was swayed by irrelevant factors. That the court failed to acknowledge and appreciate that issues of rent dispute to which it made reference to, was a matter for Rent Restriction Tribunal and therefore ought not to have been a basis for granting the injunctive relief in the manner that the trial court did.
10. It is the Appellant's position in this appeal that no prima facie case had been demonstrated by the Respondent in the lower court. According to the Appellant, the police against whom injunctive orders were issued are not parties to the suit and were therefore condemned by the court unheard.
11. The Appellant further submitted that the injunctive orders issued by the trial court against the police, amounted to the court preventing the police from undertaking their lawful duty and is contrary to the provisions of the *Government Proceedings Act* which stipulates that no injunctive orders can be issued against the government. The Appellant asserted that actions of the police can only be challenged by way of administrative law and not through the normal civil proceedings.



12. Regarding the need to demonstrate the possibility of irreparable loss on the part of the Respondent, the Appellant maintained that the interlocutory injunction was issued in favour of the Respondent despite him failing to demonstrate that he was likely to suffer loss that could not be compensated in damages, if the injunctive orders were not to be granted.
13. The Appellant further submitted that the trial court erred in failing to appreciate that in the circumstances of the case, the balance of convenience tilted against having the injunctive orders issued. That in any event, no undertaking as to damages was given by the Respondent.
14. In the premises, the Appellants prayed for orders that the appeal be allowed and that the trial court's Ruling and of 23<sup>rd</sup> August 2023 and the consequential order be set aside.

### **Respondent's Submissions**

15. On his part, the Respondent supported the trial court's Ruling and urged this court to uphold the same.
16. The Respondent submitted that contrary to the Appellant's submissions, it sufficiently demonstrated in the lower court the presence of prima facie case and that it was likely to suffer irreparable loss if the interlocutory injunctive orders were not granted. That in any event, the balance of convenience lay in favour of having the orders being granted in its favour. The case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR was cited by the Respondent in support of his submissions.
17. While concurring with the submissions by the Appellant that the primary dispute emanated from the Rent Restriction Tribunal, the Respondent asserted that the sale of the subject motor vehicle was regular since it was sold in an auction following distress for rent by the landlord after the Appellant failed to pay his rent as had been ordered by the Tribunal.
18. According to the Respondent, the Appellant having failed to challenge the public auction, cannot now turn in subsequent proceedings to seek to reclaim the motor vehicle the subject of the auction sale.
19. Finally, the Respondent submitted that the orders against the police were based on the fact that they were at the time, acting as the Appellant's agents for the purposes of assisting the Appellant to unlawfully reclaim the motor vehicle which had been sold to the Respondent following an auction, lawfully conducted.
20. The Respondent therefore urged this court to find that the appeal unmeritorious and dismiss the same with costs in its favour.

### **Analysis and determination**

21. I have carefully reviewed the Appellant's memorandum of appeal filed herein, the pleadings and proceedings from the lower court as well as the submissions by the parties in support of their respective positions. I note that the only issue for determination in this appeal is whether Respondent proved their case for interlocutory injunction before the trial court.
22. The guiding principles on interlocutory injunctions were stated by the Court of Appeal in East Africa in the case of *Giella v Cassman Brown & Co. Ltd* (1973) EA as follows:
  - i. The Applicant must first establish a prima facie case with a probability of success.
  - ii. The Applicant must then demonstrate that he, she or it stands to suffer irreparable loss that cannot be adequately compensated through damages.



- iii. Where there is doubt on the above, then the balance of convenience should tilt in favour of the Applicant.
23. Similarly, in the case of *Nguraman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR the Court of Appeal held that:
- “In an interlocutory injunction application, the Applicant has to satisfy the triple requirements to; establish his case only at a prima facie level, demonstrate irreparable injury if a temporary injunction is not granted, and 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.”
24. From the record, I note that the subject motor vehicle (KBB 372F Toyota Prado) was sold to the Respondent in a public auction conducted on 16<sup>th</sup> February 2023 by ICON AUCTIONEERS pursuant to distress for rent proceedings against the Appellant. The purchase price was a sum of Kshs. 600,000/-.
25. It is also apparent from the record that the Auctioneers had been instructed by the Appellant’s then landlord, Anchor Investments Ltd to levy distress against the Appellant for the recovery of a sum of Kshs. 985,000/- which was then the outstanding rent arrears.
26. Following the sale of the motor vehicle to the Respondent, it was alleged by the Respondent that the Appellant in company of police officers visited its premises and demanded that the motor vehicle be surrendered to the DCI on account that the same had been reported stolen. This assertion by the Respondent is not denied by the Appellant.
27. To protect its interest, the Respondent (then a Plaintiff) by way of plaint dated 10<sup>th</sup> April 2022 moved to court and instituted a suit against the Appellant seeking for a declaratory order that he be declared the legitimate and lawful owner of motor vehicle registration number KBB 372F and that the Appellant (then a defendant) and his agents, including the police, be permanently restrained from removing or in any way interfering with the Respondent’s quiet enjoyment and possession of the subject motor vehicle.
28. Contemporaneously with the plaint, the Respondent filed a Notice of Motion Application seeking an interlocutory injunction against the Appellant and his agents, including the police, that they be permanently restrained from removing or in any way interfering with the Respondent’s quiet enjoyment of the subject motor vehicle.
29. In response to the Respondent’s application for interlocutory injunction, the Appellant filed his replying affidavit sworn on the 19<sup>th</sup> day of April 2023. In the affidavit, the Appellant deposed that the purported auction was unlawful and that there were no monies owing from him to his then landlord, M/s Anchor Investments Limited.
30. According to the Appellant, there was a valid order by the Rent Restrictions Tribunal issued on 5<sup>th</sup> October 2022 in the Nairobi Rent Restrictions Tribunal Case No. E1057 of 2022: *Azim Abdulla Sameja v Anchor Investments Limited* restraining his then landlord from levying any distress against him.



31. I have carefully reviewed the Respondent's application dated 10<sup>th</sup> April 2022, the Appellant's response thereto and the trial court's ruling of 23<sup>rd</sup> August 2023 on the application and agree with the Appellant that the trial court in its ruling went beyond the issues in the application which was before him. The Application before the court was simply one for interlocutory injunction by the court issued orders which appear to have disposed the substantive suit at an interlocutory stage.
32. By making a final definitive finding that the auction was lawful and that the property/title in the subject motor vehicle already passed to the Respondent at the fall of the hammer, the trial court, in my view, appears to have issued final orders on the primary dispute. Making a final determination at an interlocutory stage is contrary to the settled principle that a court, at an interlocutory stage, is not expected to make a final determination of the issues that will be discussed at the trial.
33. What the court is expected to do at an interlocutory stage is simply to assess, without venturing into the merits of the case, whether an applicant is entitled to the temporary/interlocutory injunction sought. In *Nguruman Limited (supra)*, the Court of Appeal stated as follows on the issue; -
- “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.....”
34. As to whether the Respondent established a prima facie case, it is trite that a 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. In the instant case, the Respondent pleaded that he bought the subject motor vehicle from a public auction and that he was therefore lawfully entitled to quite enjoyment and possession of the same. In his affidavit in support of the application, he attached documents such as the proclamation notice, newspaper advertisement, certificate of sale, payment details and transfer of ownership form.
35. At this stage, what is required of the court is to determine the priority of rights as between the Respondent and the Appellant. Considering the Respondent's averments in his application for interlocutory injunction and taking into account the Appellant's response thereto, I am satisfied that the Respondent established a prima facie case that his right to quite possession and enjoyment of the subject motor vehicle is likely to be threatened directly if the orders sought are not granted.
36. The second consideration for grant of an injunction is whether the Applicants have shown that they are likely to suffer irreparable injury, which would not adequately be compensated by an award of damages. The court in *Paul Gitonga Wanjau V Gathuthi Tea Factory Company Ltd & 2 Others*, [2016] eKLR referred to the Halsbury's Laws of England on what irreparable loss is and stated that:
- “By the term irreparable injury 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 plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages.”
37. The Respondents submitted that they have a title that requires protection by this court. The Appellant on the other hand argued that there was no suggestion whatsoever by the Respondents that they cannot be adequately compensated in damages.



38. On this point, I concur with the finding of Warsame J (as he then was) in Joseph Siro Mosioma V Housing Finance Company of Kenya & 3 Others, [2008] eKLR where he stated that:

“Damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be a substitute for the loss, which is occasioned by a clear breach of the law. In any case the financial strength of a party is not always a factor to refuse an injunction. More so a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction.”

39. Having found that the Respondents established a prima facie case with triable issues, I am of the view that they would suffer irreparable loss if an injunction is refused, for purposes of preserving the subject motor vehicle until the issues between the parties are determined. Finally, on the balance of convenience, I think the same tilts in favour of the Respondent.

40. Before I pen off, I find it important that I address the Appellant’s argument that the trial court’s ruling and order had the effect of restraining the police from exercising their statutory duties contrary to the law. First, it is critical to note that in the proceedings before the lower court, the police were restrained in their capacity as the agents of the Appellant and not in their capacity as police qua police. In any event, I note that the police have not filed any appeal against the trial court order. It therefore does not therefore fall on the Appellant to argue the case of the Police.

41. Further it is critical to note that the Appellant did not dispute the Respondents allegations that the Appellant together with the police, went to the its (Respondent’s) premises and asked that the subject motor vehicle be handed over to the police on account that the same had been reported stolen.

### **Final Orders**

42. Accordingly, the lower court’s ruling of 23<sup>rd</sup> August 2023 is hereby varied, but only to the extent that the court’s final and definitive pronouncement on the issues in dispute in the main suit are set aside.

43. For the avoidance of doubt, the question as to whether the auction was lawful or not is a question for determination in the main suit. The same applies to the question as to whether the title to the subject motor vehicle had validly passed to the Respondent.

44. Save for my finding above, the Appeal is found without merit and the same is hereby dismissed.

45. The Respondent’s Notice of Application dated 10<sup>th</sup> April 2023 is hereby allowed and the temporary injunction accordingly issued pending the hearing and final determination of the main suit.

46. I direct that each party to bear their own costs of this Appeal. Costs in the lower court be in the cause.

47. It so ordered.

**SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 6<sup>TH</sup> DAY OF NOVEMBER 2024**

**ADO MOSES**

**JUDGE**

In the presence of:

Moses Court Assistant

Nduli h/b for Mwende..... for the Appellants

Gekonge.....for the Respondent

