REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CORAM: D. K. KEMEI – J

CIVIL APPEAL NO. 33 OF 2020

KENYA LITERATURE BUREAU.....APPELLANT

VERSUS

JONES MAITHYA MUINDI T/A UMANYI

BOOKSHOP & SUPPLIERS.....RESPONDENT

(Being an appeal from the Ruling of Hon. D. Orimba (P.M) in Kangundo Senior Principal Magistrate's Court in Civil Case No. 51 of 2020 delivered on 20th May, 2020)

BETWEEN

JONES MAITHYA MUINDI T/A UMANYI

BOOKSHOP & SUPPLIERS.....PLAINTIFF

VERSUS

KENYA LITRATURE BUREAU.....DEFENDANT

JUDGEMENT

1. The Appeal arises from the Ruling delivered on 20/05/2020 by Hon. D. Orimba (PM) at **Kangundo SPMC in Civil Suit No. 51 of 2020** where the learned trial magistrate granted a temporary injunction to restrain the Appellant/Defendant from proclaiming or attaching for sale the Respondent/Plaintiff's property pending the hearing and determination of the main suit. The Respondent herein had filed a Plaint dated 5th April 2020 seeking certain reliefs against the Appellant namely:-

(a) ***A declaration that the contract between the Plaintiff and Defendant was frustrated and incapable of being performed.***

(b) ***The Defendant be compelled by an order of this court to collect unsold books to recover the balance agreed by the Plaintiff.***

(c) ***Costs of this suit.***

(d) ***Any other remedy the court may deem fit.***

2. The Respondent had supplied the Appellant with various text books to sell to public schools in Kangundo and Matungulu Districts. The Respondent claims to have been supplied with a consignment of books in bulk on 1/12/2017 whereby payment for the orders was contingent upon the Respondent selling of the text books to the aforementioned public schools. The Appellant vide a statement of defence dated 20/4/2020 admitted the existence of the contract but denied that payment for the orders was contingent upon the Respondent selling of the text books to various public schools in Kangundo and Matungulu Districts.

3. The Respondent filed a Notice of Motion dated 5/04/2020 under certificate of urgency premised on *Section 3A* of the Civil Procedure Act and *Order 51,Rule 1,Order 40 Rule 1 & 2* of the Civil Procedure Rules, 2010 seeking the following orders namely:-

(a) The application be certified urgent and heard exparte in the first instance.

(b) A temporary injunction do issue restraining the Defendant or any person claiming through them from proclaiming or attaching for sale the property of the Plaintiff pending the hearing and determination of this said application.

(c) A temporary injunction do issue restraining the Defendant or any person claiming through them from proclaiming or attaching for sale the property of the Plaintiff pending the hearing and determination of the main suit.

(d The OCS Kangundo Police station to ensure compliance with the orders herein.

(e) Costs of this application be provided for.

The Respondent/Plaintiff's application was grounded inter alia on the following:-

(a) The Plaintiff has paid the Defendant to a tune of Kshs.350, 000/- from the order worth Kshs.671, 000/.

(b) The Defendant on 13/2/2019 wrote a demand demanding immediate payment of the outstanding sum.

(c) On 28/3/2020 and 3/4/2020 the Plaintiff received several calls and texts from the Defendant's agents demanding payment failing which the Defendant will instruct auctioneers to attach his property.

(d) The OCS Kangundo Police station to ensure compliance with the orders herein.

(e) Costs of this application be provided for.

4. The Appellant/Defendant filed a replying affidavit sworn on 20/4/2020 by its Senior Accountant who averred inter alia that:-

(1) The Defendant serviced and supplied the Plaintiff the textbooks ordered and invoiced for the same.

(2) The bulk order had specific terms of payment and was not contingent on the sale of the books as alleged. The Plaintiff is put to strict proof.

(3) The terms of payment were 50% payment of the order by Mid-January 2018 and payment of the final balance of 50% by Mid-February 2018. The Plaintiff issued cheque No.004073 of Kshs. 335,689.00 the initial 50% payment towards the bulk order, which was returned unpaid on 31st January 2018 as per the annexed statement marked as JW2.

(4) The Government through the Ministry of Education placed a tender advertisement for purchase of books for public schools in August 2017 which the Defendant tendered like any other publishers and annexed the Tender Advertisement and Defendant's letter of bid as JW3.

(5) The tender was restricted to firms that had approved books for Form 1 to 4 and class 7 and 8.

(6) The tender was awarded based on the Public Procurement and Disposal Act, 2015 hence the claim by the Plaintiff herein that the Government through the Ministry of Education had directed the Defendant to supply books was untrue and has no basis.

(7) The other bookshops sold similar books to other bookshops and they have been selling the books and paying their debts as per their terms of agreement hence the claim by the Plaintiff that they were unable to sell the text books following the government directive is denied.

(8) From the date of supply of the textbooks the Plaintiff had not engaged the Defendant on his inability to sell the textbooks until a letter date 13/2/2019 was sent demanding payment from him.

(9) The allegation by the Plaintiff writing a letter to the Defendant as a result of alleged frustration, is denied and Plaintiff is put to strict proof

(10) There has never been an oral or formal agreement between the parties herein to recall the books from his bookshop.

(11 The Respondent has never acknowledged or received any letter(s) as alleged by the Plaintiff relating to his inability to sell the said text books and put him to strict proof.

(12) There was no instructions to be issued to the Defendant's representative to collect the books from the Plaintiff as alleged by the Plaintiff who was put to strict proof.

(13) The Plaintiff directed its agents/representatives to collect the debt vide a letter dated March 4th 2020 marked as JW4 and that the allegations are false.

(14) The Defendant denies allegations by the Plaintiff that it directed its agents to threaten the debtor with auctioning of its property.

(15) Without prejudice to the forgoing and in the event this Honourable court finds that there was frustration as a result of the pre-existing contractual relationship; the Plaintiff should be compelled to pay the interest and damages accrued for failing to notify the Defendant in time once the government issued the directive.

5. The Respondent/Plaintiff swore a further affidavit on 2/5/2020 in which he averred inter alia that:-

(1) In response to paragraphs 4, 5 and 6 the arrangement between the Plaintiff and Defendant was a consignment as evidenced by issuance of postdated cheque No.004101 alluded in paragraph 6 of the Respondents replying affidavit.

(2) In further response to paragraph 5 of there were no any specific terms of payment as alluded therein save for payment upon selling of the consignment.

(3) In response to paragraph 7, 8 and 9 the Defendant is feigning ignorance despite having been tasked with supply of books directly to schools which information is in public domain having been widely publicized in Numerous Newspapers and also available in their website on the link.

(4) The above link shows shift in government policy.

(5) Paragraph 10 of the response is denied as the Defendant has now been supplying books directly to various schools as per annexure marked as JMM-2 and the Plaintiff cannot sell the said books.

(6) In response to paragraph 11 the Plaintiff has annexed his bank statements marked as annexure JMM-6 which shows a payment amounting to Kshs.350,000/- and the Defendant is engaging in a chancing game.

(7) In response to paragraph 12,13,14,15 and 16 I have always been in constant communication with the Defendant's agents/employees on the return of the said books and the allegation that he has never communicated due to inability to sell the books is misleading to the Honourable court. He annexed a screenshot of his SMS conversation with the Defendants employees dating back 2018 and certificate of Authenticity thereof marked as JW8.

(8) In response to paragraph 17, the Defendant acknowledges instructing Lington Assets Limited who have been threatening the Plaintiff with attachment of his assets.

(9) The Defendants reply is tainted with falsehoods and he urged the court to disregard the same.

6. Parties took directions before the trial court to canvass the Respondent's Notice of Motion dated 5/04/2020 by way of written submissions but it is only the Respondent who filed submissions dated 2/5/2020. The Respondent's advocate relied on ***Geilla vs Cassman Brown(1973) EA 358,Samuel Kimiri Crispol vs John Njeru Kahihu Succ.Cause No.410 of 2015 eKLR*** *and* ***Mrao vs First American Bank of Kenya Ltd & others(2003)eKLR 125***. The learned trial magistrate held that issues as to how much is due to the Appellant and whether payment was contingent upon the Plaintiff selling books to public schools were issues that should go for trial in the main suit. Further, that the issue of whether the contract had been frustrated by the government directive could as well be determined in the trial. The learned trial magistrate issued a temporary injunction to restrain the Appellant/Defendant herein from proclaiming or attaching for sale the Respondent's/Plaintiff's property pending the hearing and determination of the main suit.

7. Being aggrieved by the said ruling and order, the Appellant lodged its memorandum of appeal dated 23/06/2020 wherein it raised the following grounds of appeal:

(i) That the learned trial magistrate erred in law and in fact by finding that the Respondent's application was meritorious despite having no sufficient evidence to the nature and seriousness of the matter.

(ii) That the learned trial magistrate erred in law and fact by finding that the Respondent established a prima facie case a fact which is contrary to the weight of the evidence.

(iii) That the learned trial magistrate erred in law and fact in not giving sufficient consideration to the weight of the evidence by the Appellants who did not have the luxury and privilege to file their submission before the Ruling was delivered.

(iv) That the learned trial magistrate erred in law and fact by disregarding the Appellant's right to be heard; thereby arriving at a wrong conclusion to the prejudice of the Appellant.

(v) That the learned trial magistrate erred in law and fact by failing to observe the essential aspect of the rule of law by condoning unworthy character of sharp practice by the Plaintiff's counsel which as a result the Appellant was condemned unheard.

(vi) That the learned trial magistrate erred in law and fact by failing to consider the authorities cited by the Appellant as well as the submissions which were not filed due to unprofessionalism character of sharp practice.

(vii) The learned trial magistrate erred in law and fact by basing on wrong/mistaken findings that the Appellant's failure to file submissions as was directed by the trial court during the hearing was by choice.

(viii) The Learned trial magistrate erred in law and fact in basing his findings on irrelevant matters.

(ix) The learned trial magistrate reached a wrong decision in law and fact contrary to the weight of evidence.

The Appellant now seeks the following reliefs:-

(a) THAT this Appeal be allowed and the learned trial magistrate's Ruling dated 20/05/2020 be set aside and the Appellant's submissions be allowed for consideration at the magistrate's court.

(b) THAT the Plaintiff's Ruling dated 20/05/2020 be dismissed.

(c) THAT the costs of this Appeal and the lower court case be awarded to the Appellant.

8. This being a first appeal, the role of this court is to re-evaluate and subject the evidence to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. It was held in the case of **Selle –vs- Associated Motor Boat Co [1986] EA 123** as follows:-

"***The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal from the trial court by the high court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions through 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 the 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."***

9. The appeal was canvassed by way of written submissions. Learned counsels for the Appellant and Respondent filed their submissions on 2/12/2020 and 14/1/2021 respectively. The Appellant's counsel submits that the Appellant was condemned unheard since the learned trial magistrate issued a temporary injunction against it without establishing whether the Appellant had filed written submissions hence the Appellant was technically locked out from filing written submissions. The Appellant maintains that the learned trial magistrate condoned sharp practice by the respondent's counsel in respect of filing and serving written submissions which led to the appellant missing out on submissions.

Appellant's counsel submitted that the Respondent's failure to fulfill the terms of the contract prompted the Appellant to write the demand letter found at page 17 of the Record of Appeal demanding the balance of Kshs. 487,651.41. It is the Appellant's contention that the Respondent is relying on his own wrong to defeat the Appellant's demand. The Appellant relied on the case of ***Mohamed vs Bakari & 2 Others (2008) 3 KLR (EP) 54*** *where the court stated that no man can be allowed to rely on his own wrong to defeat the otherwise valid claim of another man.* The Appellant asserts that the Respondent did not adduce any evidence for change of circumstances after the formation of the contract that rendered it physically and commercially impossible for the Respondent to fulfill his obligation and that the Appellant has never received any complaint from any other bookshop they had supplied textbooks and that the bookshops have continued to comply with their obligation to purchase, pay and sell books to public schools. I note that the Appellant's Senior Accountant has denied at paragraph 10 of his replying affidavit that the government directed the Appellant to supply textbooks directly to schools.

The Appellant further submitted that the Respondent did not establish a prima facie case having breached terms of the contract and further that the Respondent's claim is quantifiable and compensable by an award of damages. It was submitted that the Respondent did not demonstrate the damages he will suffer in the event an injunction is denied. Reliance was placed on the case of ***Waithaka vs Industrial & Commercial Development Corporation (2001) eKLR Page 381*** where the court held that *it is an inexorable rule that where damages may be an appropriate remedy, an interlocutory injunction should never arise.* The Appellant submitted that damages would have been the adequate remedy and not an injunction.

Learned counsel for the Respondent submitted that the government directive by the Cabinet Secretary Ministry of Education frustrated the contract. That the Respondent proved that there was a prima facie case since there is a dispute on the outstanding amount and that the Appellant had instructed Lington Assets Limited to collect the outstanding amount of Kshs. 576,198.17 inclusive of collection fees as per the letter dated 4/3/2020. According to the Respondent, the bookshop being his source of livelihood, if the property is attached he will suffer irreparable damage. The Respondent submits that the balance of convenience should tilt in his favour. He has placed reliance on the case of ***Pius Kipchirchir Kogo vs Frank Kimeli Tenai [2018] eKLR*** where the court expounded on the meaning of balance of convenience. Respondent asserts that the Appellant chose not to file written submissions electronically as directed by the learned trial magistrate on 27/4/2020 hence it is baseless for the Appellant to claim that it was denied the opportunity to be heard by the learned trial magistrate. Further, the Respondent submits that the Appellant's allegations of sharp practice by the Respondent's advocate are unsubstantiated since the Appellant's advocate failed to perform his duty to file written submissions on behalf of the Appellant. The Respondent has relied on the ***Gerald Mwithia vs Meru College of Technology & Another (2018) eKLR*** where the court held that a litigant must bear the brunt for mistakes of their advocates, the client would be at liberty to pursue his advocates for such mistake and further in ***Omwoyo vs African Highlands & Produce Company Ltd (2002) 1 KLR*** where ***Ringera J.*** found the case to be good where the Defendant's remedy was against his counsel for professional negligence and in which judgment was set aside.

10. I have given due consideration to the pleadings and written submissions duly filed by parties herein. I have noted that it is not in dispute that the Appellant had entered into a supply contract with the Respondent. The contract and invoices found at pages 28 and 12 of the Record of Appeal establish that the order for text books was in bulk worth Kshs. 671,000.00/-. It is not in dispute that payment for the supplied text books has not been paid for in full.

It is noted that the Appellant and Respondent have disagreed on the amount outstanding. The Appellant claims for the outstanding amount to

Kshs. 487,652.00/- while the Respondent maintains that the unsold books are worth Kshs. 321,000.00/- having paid Kshs. 350,000.00/-. Further, as to whether the payment for the text books supplied was contingent on the Respondent selling the text books, the same seems to be in dispute. There is also a dispute as to whether the bulk order contract was frustrated when the government through the Ministry of Education placed a bid for purchase and direct supply of Text books for primary standard 7-8 and Secondary Schools by the Appellant. The Request for Bid is found at page 49 to 52 of the Record of Appeal. I have read and considered the grounds of appeal raised by the Appellant and find the following issues necessary for determination namely:-

(i) Whether the learned trial magistrate disregarded the Appellant's right to be heard when he proceeded to write and deliver the ruling while the Appellant had not filed written submissions.

(ii) Whether the Respondent did satisfy the conditions necessary for the grant of a temporary injunction.

(iii) What orders may the court make?

11. On the first issue, upon perusal of the lower court file, I confirm that the Appellant did not file written submissions as directed on 27/4/2020 by the learned trial magistrate in the following terms:-

'The parties to file written submissions electronically by 4/5/2020 for an application dated 5/4/2020.

D. ORIMBA (SPM)

27/4/2020.''

The Appellant submits that it was a condition that the Respondent was to serve his written submissions to enable the Appellant respond before 4/5/2020 but no service was effected upon it. However, I have reproduced the court proceedings of 27/4/2020 and I can't find such directions. The ruling appealed against was delivered in the absence of the Appellant or its advocate. I note at page 12 of the ruling that confirms the Coram for 5/6/2020 when the ruling was delivered is missing. The Appellant's advocate claims that she could not file written submissions on behalf of the Appellant since she had not been served with the Respondent's written submissions hence the Appellant was technically locked out of filing its written submissions that could have assisted the learned trial magistrate to know its side of the story. In the case of ***Savings & Loan Kenya Ltd v Odongo [1987] KLR 294***, one of the key holdings by the Court of Appeal was that:-

"……the very foundation upon which any judicial system rests is that a party who comes to court shall be heard fairly and fully. The court is duty bound to hear all parties to a case and failure to do so is an error……."

Technically, the Respondent ought to have served the Appellant with his filed written submissions noting that it was the Respondent's application that was to be heard and determined by the learned trial magistrate. However, I note that the learned trial magistrate only directed parties to file written submissions by 4/5/2020. It is noted at page 83 of the Record of Appeal, the learned trial magistrate in his ruling indicated that counsels appearing for parties had agreed to file their respective written submissions. The Appellant's advocate submits that she tried to establish whether the Respondent had managed to file its written submissions but due to Covid-19 protocol and guidelines, it was impossible. The court is well aware of the Covid-19 period that led to scaling down of court activities hence much reliance was placed on the use of technology as a source of communication. However, well aware of the Covid-19 restrictions, the Appellant's counsel ought to have been more diligent by either contacting the Respondent's advocate via email or mobile requesting to be served with Appellant's written submissions. The Appellant's advocate has not provided such evidence. It is therefore clear that the Appellant's advocate was aware of the directions issued by the learned trial magistrate but failed to take any action. The Appellant's advocate has not denied that she was present when the learned trial magistrate directed parties to file written submissions. The learned trial magistrate did note that the Appellant had not filed written submissions. ***Section 1A (3) of the Civil Procedure Act*** provides that;

"A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court".

Guided by the position in ***Selles case (supra)*** I find that the learned trial magistrate correctly proceeded to deliver the ruling despite the absence of the Appellant's written submissions.

12. As regards the second issue, the Appellant asserts at ground 4 of the appeal that by disregarding the Appellant's right to be heard, the learned trial magistrate arrived at a wrong conclusion to the prejudice of the Appellant. The wrong conclusion being the issuance of a temporary injunction against the Appellant despite lack of a prima facie case. The Respondent's Notice of Motion dated 5/4/2020 was premised on *Order 40 Rule 1* and *2* of the Civil Procedure Rules,2010 that provides:-

1. Cases in which temporary injunction may be granted

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 orders.

2. Injunction to restrain breach of contract or other injury

(1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.

(2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.

The Appellant's advocate submits that the Respondent breached his obligation under the contract for not paying the outstanding sum. The Respondent has pleaded frustration of contract as a result of the government directive. The Respondent submits that the directive made the Appellant supply text books directly to schools hence the Respondent could not proceed to supply the text books and pay for the same. The Appellant on the other hand denies having been directed to supply text books directly. The Respondent avers at paragraph 6 of his supporting affidavit found at page 10 of the Record of Appeal that he tried to sell the text books to public schools but the Principals informed him that the text books had been supplied by the government through the Appellant. The Appellant has denied that the payment was contingent on the sale of text books to public schools in Kangundo and Matungulu Districts. According to the Appellant, the terms of payment were that 50% payment of the order was to be done by mid-January 2018 and the final balance of 50% by Mid-February 2018. The Appellant avers at paragraph 6 of the replying affidavit found at page 24 to 58 of Record of Appeal that the mode of payment was by cheque No.004073 that had been issued by the Respondent as the initial 50% payment but the cheques was returned unpaid on 31/1/2018. The learned trial magistrate held that the claim for balance due to the Appellant and if payment was contingent upon selling of the text books and whether the contract had been frustrated by the government directive were issues that could only be determined during the hearing of the suit.

The use of the word *'may'* under Order 40 of Civil Procedure Rules, 2010 connote that the power exercised by court in an application seeking interlocutory injunctive orders is discretionary. The court's discretion is guided by the case of ***Giella vs Cassman Brown (1973) EA 358*** where the court outlined the guiding principles as follows:-

"Firstly, 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, and thirdly, if the Court is in doubt, it will decide an application on a balance of convenience.

Further in the recent case of ***Nguruman Limited vs Jan Bonde Nielsen & 2 Others [2014] eKLR; Civil Appeal No. 77 of 2012 (Nairobi)*** the Court of Appeal explained that:-

"…all the three conditions are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially."

The learned trial magistrate held that the Respondent had established a prima facie case with a probability of success. A ***Prima facie case*** in the context of the law was set out in the case of **Mrao Limited vs First American Bank of Kenya Limited & 2 others (2003) IKLR** 125 at page 137, to be:-

".....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……"

The court in ***Cyanamid Co. vs Ethicom Limited (1975) A AER 504*** put the three elements stated in *Geilla's case* in the following words that:-

i. There must be a serious/fair issue to be tried,

ii. Damages are not an adequate remedy,

iii. The balance of convenience lies in favour of granting or refusing the application.

The Appellant and Respondent state different outstanding sums but what is not in dispute is that there is an outstanding debt. In a letter dated 4/7/2017 found at page 16 of the Record of Appeal, the Respondent seems to have acknowledged the outstanding balance to be Kshs. 487,652/-. As a result of the said letter acknowledging the debt, the Appellant sent the demand letter dated 13/2/2019 found in page 17 of the Record of Appeal demanding payment of the outstanding sum within 14 days. However, I note at page 11 of the Record of Appeal the Respondent in his supporting affidavit avers to have paid Kshs.350, 000/- to the Appellant leaving a balance of Kshs.320, 000/- and not Kshs.487, 652/-. I have perused the bank statements annexed to the Respondent's supporting affidavit and marked as JMM-6 found at pages 19 to 21 of the Record of Appeal and note that the money sent to the Appellant add up to Kshs. 270,000/- and not Kshs. 350,000/- as alleged by the Respondent. I also note at paragraph 6 of the Appellant's Senior Accountant's replying affidavit, he avers that cheque No.004073 of Kshs. 335,689.00/- bounced. The burden lay on the Appellant to furnish court with proof of payment of the outstanding debt and in the absence of such proof, the court is left with no choice but to place reliance on the Respondent's letter dated 4/7/2018 that acknowledged Kshs. 487,652.00/- as the outstanding debt hence the learned trial magistrate's finding that what is due to the Appellant is an issue to be

canvassed at the hearing of the main suit is not correct.

The Respondent maintains that the payment was contingent on supplying the text books to the schools which is denied by the Appellant. According to the Appellant, the bulk order contract has specific terms of payment and not by contingent as had been alleged by the Respondent. I have perused the Bulk Order contract found at page 28 of the Record of Appeal and note that it does not provide for the mode of payment either as alleged by the Appellant or the Respondent. The Bulk Order contract contains the name of the parties, delivery instructions and signature of the Respondent. I also note that the sale area was not specific. I can therefore correctly conclude that the Bulk order did not place payment conditions. I agree with the Appellant that this is a contract of sale for specific goods. The Appellant has invoked section 20 of the Sale of Goods Act, Cap 31 that provide for Rules for ascertaining intention as to the time when property passes. In particular section 20 (1) (a) provides that:-

> ***Unless a different intention appears, the following rules apply for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:-***
>
> > ***(a) where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery or both be postponed;***

By reading section 20 of the Sale of Goods Act, I can correctly conclude that the property in the text books passed to the Respondent upon the Appellant receiving and accepting the bulk order. The time of delivery was between 25/10/2017 to 8/12/2017 which in the case of section 20(1) (a) to be immaterial. The end result is that the payment was not contingent upon supplying the textbooks as alleged by Respondent or payment of 50% of the order by mid-January 2018 and final balance of 50% by Mid-February 2018 as alleged by the Appellant. Furthermore, the invoices from the Appellant found at page 13 and 14 do not have any payment terms alleged by the Appellant and Respondent. I find the payment terms not to be a dispute to be canvassed at the hearing of main suit.

The learned trial magistrate found that as to whether the government directive frustrated the bulk order is an issue that will be canvassed at the hearing of the main suit. According to the Respondent the government directive frustrated the bulk order contract. The Appellant has denied that the government through the Ministry of Education directed the Appellant to directly supply the text books to schools. At paragraph 10 of the Appellant's Senior Accountant replying affidavit, he avers that other bookshops that had been supplied with the text books have sold similar books to other bookshops or schools and they have been selling the said books and paying their debts as per their terms of the agreement hence the claim that the directive made the Respondent not to sell and pay is denied. The Appellant has placed reliance on the case of ***Showcase Properties Limited vs Kenya Commercial Bank Limited (2015) eKLR*** where the court placed reliance on the case of ***Davis Contractors Limited vs Fareham U.D.C [1956]A.C 696*** where Lord Radcliffe's at page. 729 held:

> ***"...frustration occurs whenever the law recognizes that, without the default of either party a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it a thing radically different from that which was undertaken by the contract. "Non haec in foedera veni". It was not what I promised to Do. There… must be such a change in the significance of the obligation that the thing undertaken would, if performed be a different thing from that contracted for."***

At paragraph 16 in ***Showcase Properties case (supra)*** the court held that ***the mere fact that the Applicant has faced financial hardship is not frustration in itself***. I note that the directive was in reference to public schools and not private school. In a letter dated 15/3/2019 found at page 18 of the Record of Appeal, I note that the Respondent's Director Mr.Jones Maithya Muindi informed the Appellant that he would target private schools and sell few books over the counter. I note that the bulk order arrangement did not take into account the possibilities of the order being frustrated by the government directive. I note in ***Tsakiroglou & Co. Ltd v Noblee & Thorl G.m.b.H [1961] 2 All ER 179*** the court held that

> ***"…there was no frustration of contract in that case where shipping of groundnuts via the Suez Canal was rendered impossible but the groundnuts could be shipped via the Cape of Good Hope, a much longer route.***

In ***Howard & Company (Africa) Ltd vs Burton [1964] EA 157*** Court stated thus:-

> ***"We are thus left with the simple test that a situation must arise which renders performance of the contract 'a thing radically different from that which was undertaken by the contract': see Davis; per Lord Radcliffe. To see if the doctrine applies, you have first to construe the contract and see whether the parties have themselves provided for the situation that has arisen. If they have provided for it then the contract must govern. There is no frustration. If they have not provided for it, then you have to compare the new situation with the old situation which they did provide. Then you must see how different it is. The fact that it has become more onerous or more expensive for one party than he thought, is not sufficient to bring about frustration. It must be positively unjust to hold the party bound."***

The issue of whether the bulk order contract was frustrated by the government directive is not an issue that should go for trial in the main suit. From the foregoing it is therefore clear that the issues found by the learned trial magistrate to be in dispute are not issues that raise a prima facie case.

By finding that the Respondent had established a prima facie case, the learned trial magistrate held that the Respondent was likely to suffer irreparable loss should the Appellant proclaim his property. The Respondent submits at paragraph 20 of his written submissions that the bookshop is his source of income hence if attachment is carried out by the Appellant he will be rendered destitute. As regards the second principle of irreparable injury to be suffered by a party if injunction is not granted the Court of Appeal at length in ***Nguruman Limited(supra)*** held that:-

> ***'…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.***
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> ***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.***
>
> ***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."***

The Court of Appeal in **Director of Public Prosecutions v Justus Mwendwa Kathenge & 2 others [2016] eKLR** stated that-

> **"It is, for instance, critical for courts to remember the sequence of consideration of the *Giella (supra)* principles, that even where prima facie case is established, an injunction will not be granted if the injury or damage to be suffered is not irreparable or is capable of compensation."**

In ***Pius Kipchirchir Kogo versus Frank Kimeli Tenai (2018) eKLR*** in which the court stated:-

> ***"Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.***

The Appellant claims that the Respondent's claim is quantifiable and compensable by an award of damages. Further the Appellant submits that the Respondent failed to demonstrate the damage he would suffer in the event an injunction was to be denied on the basis that damages would be adequate compensation. I note that the Respondent has not substantiated the irreparable injury in his pleadings but only said in his written submissions that the bookshop was his only source of income. Guided by the Court of Appeal findings in *Nguruman case* where the court held that it was needless to consider the other principles if prima facie case had not been established by the Applicant. Further, the court was of the view that if damages are adequate and the Respondent is capable of paying, then interlocutory injunction should not be granted. The Appellant is a main supplier for the government hence capable of paying for the damages to be suffered by the Respondent if injunction is not granted by the court. I find that damages was an adequate remedy to the Respondent.

13. I will not consider rendering myself on the balance of convenience having found that the Respondent had not established a prima facie case and the irreparable damage that he would suffer.

14. As regards the last issue and in view of the forgoing observations, I find merit in the appeal. The same is allowed. The learned magistrate's ruling delivered on 20.05.2020 and the order issued on 28.05.2020 are hereby set aside and substituted with an order dismissing the Respondent's application dated 5.4.2020 with costs. The Appellant is awarded costs of the appeal.

It is so ordered.

Dated and delivered at **Machakos** this **9th** day of **March, 2021.**

D. K. Kemei

Judge