



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 620 OF 2019**

**JANE MUTIO MUSYOKI.....APPELLANT**

**VERSUS**

**DAVID MAKAU.....1<sup>ST</sup> RESPONDENT**

**MITA SAVINGS AND CREDIT**

**CO-OPERATIVE SOCIETY LIMITED.....2<sup>ND</sup> RESPONDENT**

*(Being an appeal against the Ruling and Orders of Hon.Ms. Kithinji (Deputy Chairman) and F.F. Odhiambo (Member) P, Swanya (Member) dated the 17<sup>th</sup> day of January 2019 in the Co-operative Tribunal Case No. 425 of 2018)*

**JUDGMENT**

This appeal is against the ruling of the Co-operative Tribunal delivered on 7<sup>th</sup> January, 2019. The appellant filed an application dated 30<sup>th</sup> August, 2018 seeking orders of injunction against the respondents. The Tribunal dismissed the application entirely triggering the filing of this appeal. The grounds of appeal are **THAT**:-

- 1. The Honourable Tribunal erred in law and in fact in dismissing the Claimant's Notice of Motion application dated 30<sup>th</sup> August 2018.**
- 2. The Honourable Tribunal erred in law and in fact by disregarding the Claimant's evidence.**
- 3. The Honourable Tribunal erred in law and in fact in finding and holding that the Claimant had not met the threshold to warrant granting the orders for injunction.**
- 4. The Honourable Tribunal erred in law and in fact in holding that the Claimant had not established a *prima facie* case.**
- 5. The Honourable Tribunal erred in law and in fact in failing to properly determine whether the Claimant will suffer irreparable injury that could not be compensated by an award of damages.**
- 6. The Honourable Tribunal erred in law and in fact in failing to properly determine whether this was a proper case for determining the application on the balance of convenience.**
- 7. The Honourable Tribunal erred in law and in fact by finding that the subject Motor Vehicles had not complied with NTSA rules when the letter from NTSA and the Schedule from NTSA on the status of Motor Vehicles of the Sacco showed the Motor Vehicles had complied with the rules.**
- 8. The Honourable Tribunal erred in law and in fact, having found that the 1<sup>st</sup> Respondent was not the Chairman of the 2<sup>nd</sup> Respondent, by failing to find that the letters, communications and orders by the 1<sup>st</sup> Respondent in respect of the matter were null and void *ab initio*.**
- 9. The Honourable Tribunal erred in law and in fact, having found that the 1<sup>st</sup> Respondent was not the Chairman of the 2<sup>nd</sup> Respondent and the 1<sup>st</sup> Respondent having not denied confiscating the TLB Licenses for the subject Motor Vehicles, by failing to find that the confiscation of the TLB Licenses was illegal.**
- 10. The Honourable Tribunal erred in law and in fact in failing to find that the Claimant's evidence was substantially**

unchallenged and uncontroverted the 1<sup>st</sup> Respondent having not tendered conclusive evidence negating that of the Claimant.

**11. The Honourable Tribunal erred in law and in fact by holding that the Tribunal is not able to authenticate and/or verify the issue in the application.**

**12. The Honourable Tribunal erred in law and in fact by failing to properly weigh the rights of the Claimant versus those of the Respondents.**

The appeal was determined by way of written submissions. Mr. Anyonje appeared for the appellant. Counsel urge that the trial court ought to have been guided by the case of **GIELLA –V- CASSMAN BROWN & CO. LTD [1973] E.A. 358** where the court established the principles for granting orders of injunction as follows:-

***“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”***

It is submitted that the appellant established a prima facie case against the respondent. On the case of **MRAO –V- FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS [2003] KLR**, a prima facie case was described as:-

***“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case 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.”***

Mr. Anyonje submitted that the 1<sup>st</sup> respondent purported to be the acting chairman of the 2<sup>nd</sup> respondent yet an official search from the Registrar of societies showed the chairman of the 2<sup>nd</sup> respondent as one Daniel M. Kitungu. The Tribunal correctly observed that the 1<sup>st</sup> respondent was not the chairman of the 2<sup>nd</sup> respondent. The 2<sup>nd</sup> respondent did not sanction the 1<sup>st</sup> respondent’s action of confiscating the Transport Licensing Board (TLB) licence from the appellant’s vehicles. A letter from the NTSA proved that the subject motor vehicle had not been blacklisted.

Counsel for the appellant contend that the appellant has a prima facie case and the orders being sought ought to have been granted. The appellant continues to lose income daily from the vehicles. The vehicles were purchased through loans. The actions of the 1<sup>st</sup> respondent are unlawful and the balance of convenience, it is submitted, is in favour of the appellants.

Mr. Malanga appeared for the respondents. It is submitted that the grant or refusal of an injunction is at the discretion of the court. Counsel referred to the case of **JOSEPH KALOKI T/A ROYAL FAMILY ASSEMBLY –V- NANCY ATIENO OUMA [2020] eKLR** where the Court of Appeal held:-

***“We have considered the appeal and the rival submissions. 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 it 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.”***

The application by the appellant before the trial court is dated 30<sup>th</sup> August, 2018. It sought the following orders:-

**1. The Respondents by themselves, their agents and or employees be and are hereby restrained by the way of injunction from interfering with the operation of motor vehicle Registration numbers KCN 580V, KCC 803G and KCK 875C on the routes authorised by Transport Licensing Board and any other body regulating matters of public service vehicles and until this application is heard *interparte*.**

**2. The Respondent by themselves, their agents and or employees be and are hereby restrained by way of injunction from interfering with the operation of motor vehicle Registration numbers KCN 580V, KCC 803Q and KCK 875C on the routes authorised by Transport Licensing Board and any other body regulating matters of public service vehicles and until this suit is heard and determined.**

**3. The first Respondent be and is hereby ordered to return to the claimant the Transport Licensing Board Licenses for motor vehicle Registration numbers KCN 580V and KCK 875C that he confiscated and in default the Claimant be issued with certified copies of the said license by the said Transport Licensing Board and in the meantime the requirement that the Claimant’s motor vehicles do produce or display the said licenses on the said vehicles’ screens be disposed with.”**

The appellant is a member of the 2<sup>nd</sup> respondent. Her claim before the Tribunal was that her TLB licences for her motor vehicles were confiscated. The vehicles affected are Registration Number KCN 580V, KCK 875C and KCC 803Q. The effect of the confiscation is that the vehicles cannot operate along the licenced route. According to the appellant, the actions of the 1<sup>st</sup> respondent were driven by malice,

revenge and vendetta. The vehicles were purchased through a loan facility. The appellant was required to make monthly payments of Kshs.63,000 and due to the actions of the respondent was unable to service the loan.

The 1<sup>st</sup> respondent filed a replying affidavit sworn on 28<sup>th</sup> September, 2018. According to the 1<sup>st</sup> respondent, the appellant's vehicles were supposed to go for inspection but failed to do so. A letter dated 25<sup>th</sup> May, 2018 requested the appellant to have the vehicles re-inspected. All what the respondents wanted was for the appellant to comply and have the vehicles re-inspected.

The Tribunal was expected to evaluate the rival positions taken by the parties. The record shows that the second respondent had over 47 vehicles under its control as a Sacco. It is not clear why the 1<sup>st</sup> respondent would target the appellant and confiscate her TLB licences thereby grounding her operations. There is no indication from the appellant that she complied with the request to have her vehicles inspected. This request was made way back in May 2018 before the suit was filed in August, 2018. At least the appellant could have taken the vehicles for inspection and thereafter seek her licences. The nature of the operations of the 2<sup>nd</sup> respondent is that non-compliance with Traffic Rules and Regulations by one member is likely to cause suspension of TLB licences for the entire Sacco membership.

In the case of **NJENGA –V- NJENGA [1991] KLR, 401**, Bosire J (as he then was) held:-

***1. an injunction being a discretionary remedy is granted on the basis of evidence and sound legal principles.***

***2. The tests for granting an injunction are well settled. Firstly an applicant must show he has a prima facie case with reasonable probability of ultimately succeeding upon trial. Secondly, that in the event that the injunction be refused he stands to suffer loss or damage of such nature and magnitude that damages will not adequately compensate him Thirdly, that the comparative mischief likely to result to him should the injunction be refused outweighs that which results to the opposite party should be granted.***

It is true that the National Transport and Safety Authority had not cancelled the appellant's TLB licences as per its letter dated 26<sup>th</sup> July, 2018. However, that in itself does not prove that the appellant's vehicles were fully complying with all the relevant regulations. The 2<sup>nd</sup> respondent was concerned that the appellant's vehicles had not been inspected and that was likely to cause damage and loss to other members.

The appellant is of the view that the 1<sup>st</sup> respondent is not the Chairman of the 2<sup>nd</sup> respondent. I do agree with the findings of the Tribunal that the issue of leadership of the Sacco could have been dealt with by its members at a Special General meeting. The Tribunal further correctly noted that the appellant did not demonstrate that she responded to the communication from the 1<sup>st</sup> respondent on re-inspection.

Given the facts and circumstances of the dispute, I do find that the Tribunal cannot be faulted for its decision not to grant the orders of injunction sought by the appellant. I do find that the appeal lacks merit and is hereby dismissed. Parties shall meet their respective costs of the appeal.

**Dated and Signed at Nairobi this 12<sup>th</sup> day of May, 2021**

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**S. CHITEMBWE**

**JUDGE**