REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCOMMMISC/E151/2021

CYCLO SYSTEMS KENYA LIMITED.....APPELLANT

VERSUS

KIBUWA ENTERPRISES LIMITED.....RESPONDENT

RULING

Introduction

1. A brief history of this matter is useful in order to properly understand the application dated **1st** March 2021, the subject of this ruling. The parties entered into a sale agreement dated **4th** March 2011 pursuant to which the appellant agreed to purchase from the Respondent **LR No. 209/494/1** at an agreed price of **Kshs. 50** million out of which it paid **Kshs. 30** million by three installments. The agreement contained a dispute resolution clause which provided that in the event of a dispute the same would be referred for arbitration by a sole arbitrator whose decision would be final.

2. The point of divergence is that whereas the applicant states that it learnt that the Respondent had sold the same property to Gifted Hands Furnishings & Fabrics Limited who sued the Respondent at the Environment and Land Court and obtained an injunction restraining the Respondent from transferring the property, the Respondent contends that the applicant was unable pay the balance of the purchase price despite being served with a Completion Notice. The Respondent contends that it terminated the agreement and refunded the deposit paid less **10%** forfeiture in accordance with the agreement.

3. The applicant applied and was enjoined in the suit filed by Gifted Hands Furnishings & Fabrics Limited against the Respondent being ELC No. **95** 2011 and it successfully obtained a stay order under section **7** of the Arbitration Act and the dispute was referred to Arbitration before Justice (Rtd) Havelock whose award dated **1st** February 2021was: -

> *a. It is the Respondent's Responsibility of the to pay the Capital Gains Tax assessed on transfer of the property.*
>
> *b. The Respondent by issuing an invalid notice of completion has wrongfully terminated/rescinded the agreement.*
>
> *c. I have found that the claimant is not entitled to the rental income of the property going back to 3rd May 2011 by way of special damages.*
>
> *d. However, the claimant is entitled to general damages in relation to the deposit paid in the amount of Kshs. 30 million plus simple interest thereon at 12% from 30th March 2011 to 15th November 2019 less Kshs. 25 million already repaid by the Respondent in November 2019.*
>
> *e. The claimant is not entitled to an order of specific performance of the agreement.*
>
> *f. The claimant is not entitled to aggravated damages.*
>
> *g. The Respondent shall bear the costs of the arbitration as well as the costs of the arbitral tribunal.*

4. Before the Arbitrator, the parties agreed that section **39** of the Arbitration Act would apply in relation to the award giving either party the right of appeal to the High Court on matters of law only.

The appeal

5. Aggrieved by the award, the appellant filed the instant appeal (curiously commenced by way of Miscellaneous Application as opposed to a substantive appeal) seeking to set aside part of the award citing the following grounds: -

a. The Arbitrator erred in law, by finding that the appellant was in breach of Clause 2 of the Agreement dated 4th March 2011 as well as Clause 4(2) of the Law Society Conditions of Sale.

b. The Arbitrator erred in law and principles regarding a Constructive Trust, by failing to find that a Constructive Trust had been created between the Respondent and appellant whereby the Respondent was, in essence, holding the rental income on trust for the Claimant pending transfer.

c. The Arbitrator erred in law, misapprehended and misunderstood the principles governing Specific Performance by failing to consider the breach by the Respondent that hindered the Claimant from paying the balance of the purchase price, in concluding and finding that an Order for Specific Performance in the favour of the appellant is not appropriate.

d. That having concluded that the purported Completion Notice was null and void, the Arbitrator erred in law by coming to a determination that the Contract had been determined and incapable of performance.

e. The Arbitrator erred in law by misconstruing the terms of the Sale Agreement, the Law Society Conditions of Sale, the Capital Gains Tax and the Land Act.

f. The Arbitrator erred in law by not finding that it is the Respondent that had breached the Agreement for Sale by entering into several Agreements of Sale over the same property.

g. The Arbitrator erred in law by failing to determine the conduct of the Respondent in the entire transaction.

h. The Arbitrator erred in law and in fact by finding that the appellant was not in a position to complete.

i. The Arbitrator erred in law, fact and principle by finding that the balance of the purchase price should have been paid prior to the payment of the Capital Gains Tax.

j. The Arbitrator erred in law and in fact by finding that the appellant was not entitled to aggravated damages.

k. The Arbitrator erred in law and in fact by finding that general damages alone was adequate remedy in the circumstances surrounding the Arbitration, and further the rate of interest awarded was 12%.

6. Tin the appeal, the appellant prays that part of the award declining to award the appellant rental income in respect of the property, and declining to grant an Order for Specific Performance and to award aggravated damages be set aside. Alternatively, the appellant prays for an enhancement of the rate of interest to commercial bank rates and/or for judgement to be entered as prayed in its statement of claim and costs of the appeal.

The instant application

7. Vide the application dated **1st** March 2021 the subject of this ruling, the applicant prays for a permanent injunction restraining the Respondent or its agents from dealing with L.R. Number **209/494/1**, in any manner whatsoever pending hearing and determination of the appeal. It also prays for an order that pending determination of the appeal, all rental income accruing from the suit property be deposited in court, or in an account in the joint names of the advocates on record. Also, the applicant prays for costs of the application to be provided. Prayers **(1)** & **(2)** of the application are spent.

8. The application is founded on the grounds that the parties entered into Agreement whereby the Respondent was to purchase the property at **Kshs. 50** million out of which it paid **Kshs. 30** million; but unknown to it the Respondent sold the same property to Gifted Hands Furnishings & Fabrics Limited and received a deposit of **Kshs. 12** million. Further, Gifted Hands Furnishings & Fabrics Limited sued the Respondent in ELC No**. 95** 2011 and obtained an injunction restraining it from transferring the property to the appellant; and, the dispute was referred to arbitration culminating in the said award.

9. The applicant states that after the injunction was lifted, it requested the Respondent to transfer the property but it declined. Also, it states that a disagreement arose between the parties on who was responsible to pay Capital Gains Tax and the Respondent purported to terminate the Agreement. Further, the applicant states that the award is riddled with inaccuracies and incorrect applications of the law and it desires to have it reviewed and set aside. It claims that the Respondent has taken steps to enforce the award and unless restrained by this court, it may transfer the property and render the application nugatory.

The Respondent's Response

10. The Respondent's Response is contained in the Replying Mr. John Muriuki Kibuchi, its director. The substance of its case is that the applicant offered to purchase the subject property from the Respondent at a consideration of **Kshs. 50,000,000/=**subject to the terms set out in the Sale Agreement dated **4th**March 2011; that the applicant deposited **Kshs.30,000,000/ =** with the Respondent's advocates leaving a balance of **Kshs 20,000,000/ =** payable on completion, and that the Respondent was to continue receiving all rental income from the property until such time as the applicant pays the entire price and transfer is done.

11. The Respondent's case is that the sale could not be completed because of the aforesaid injunction and that the Respondent wrote to the applicant twice offering to refund the deposit, but the applicant declined to accept the refund opting to join the proceedings. Further, the Respondent contend that the dispute took long to be concluded, and after the injunction was lifted, the applicant was unable to pay the balance of the purchase price.

12. It is the Respondent's position that it served the applicant with a completion Notice and upon its maturity, **10%** of the purchase price being **Ksh.5,000,000/=** was forfeited and the balance of **Kshs.25,000,000/=** was refunded to the applicant. Further, the Respondent states that the applicant obtained an order barring the Respondent from dealing with the property pending the arbitration which was ultimately concluded on **1st** February 2021.

13. Further, the Respondent maintains that seeking that the rent be deposited in court or joint account amounts to amending the provisions of Clause **4** of the Sale Agreement, a power not donated to this court, and that the applicant has been silent on its failure to pay the balance of the price. Also, it states that whereas it believes that the applicant ought to have forfeited **10%** of the deposit, the arbitrator ordered that the same be refunded to the applicant with interest, which sum was refunded to the applicant, and that, the Sale Agreement having been terminated and the deposit refunded with all interest as ordered by the arbitrator, there can be no right or claim left. Further, that the applicant has no interest or title in the suit property capable of protection by way of injunction; nor is there a point of law raised in the intended appeal to warrant the prayers sought, and, no proper appeal has been filed or sufficient cause to warrant the equitable relief of interlocutory injunction.

The applicant's advocates submissions

14. The applicant's counsel argued that under Order **42** Rule **6 (6)** of the Civil Procedure Rules, 2010, this court has the power to grant a temporary injunction if the procedure for filing an appeal has been complied with. She relied on the principles governing grant of injunctions laid down in *Giella v Cassman Brown.**[1]*** Also, she cited *Luziki Holdings Limited v Elijensons Investntent Limited & another**[2]***in which the court cited the definition of a *prima facie* case in *Mrao Limited v First American Bank of Kenya and 2 Others*. Additionally, she relied on *Kenya Electricity Transmission Company Limited v Kibotu Limited**[3]*** which defined irreparable harm and the balance of convenience.

15. Fortified by the above authorities, she submitted that the appellant has an arguable appeal, hence it has demonstrated a *prima facie* case. Additionally, she cited *Communication Carriers Limited v Commissioner on Domestic Taxes**[4]*** which cited *Hadi Construction & Mineral Limited v Aabu East Africa Limited* [5]which held that "the arguability of an appeal can only be determined by the seriousness of the issues raised or intended to be raised. Further, she cited *Joseph Gitahi Gachau & Another v Pioneer Holdings (A) Ltd & 2 others**[6]*** which held that an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. Counsel submitted that if the property is sold, the applicant will face tremendous difficulty should its appeal succeed and an order of specific performance is granted because a third party will be involved and recovering the property from a third party will be extremely arduous and unfair to even the third party.

16. Lastly, she argued that the balance of convenience tilts in favour of the applicant, because it stands to suffer greater detriment if orders are not granted compared to any detriment the Respondent may suffer with injunctive orders in force until the appeal is determined. She relied on *Charter House Bank v Central Bank of Kenya & Others**[7]*** in which the Court of Appeal held that the purpose of granting an injunction pending appeal is to preserve the *status quo* and to prevent the appeal, if successful from being rendered nugatory. She argued that the applicant has met the threshold for the grant of the injunction.

The Respondent's advocates submissions

17. The Respondent's counsel submitted that Section **7** of the Arbitration Act permits this court to grant interim measure of protection including, injunction during or before arbitral proceedings. He argued that in ELC No. **390** of 2019, the applicant obtained an injunction which was to last until conclusion of the arbitral proceedings and upon conclusion of the arbitral proceedings the parties appeared in court on **11th**March 2021 and the said orders were marked as spent and replaced with the arbitral award.

18. He submitted that the applicant having invoked and exhausted the relief provided under Section **7** of the Arbitration Act, it cannot make another application under the said Act for similar orders as those granted on **18th**Decembe 2019 or as sought in the present application. He argued that the jurisdiction of this court under the Arbitration Act has been exhausted. He argued that the injunctive relief envisaged under Section **7** of the Arbitration Act, can only be granted before or during the arbitration proceedings and not after.

19. Counsel submitted that the Provisions of the Civil Procedure Act & Rules cannot override Section **10** of the Arbitration Act. Further, he argued that the provisions of the Arbitration Act make it clear that it is a complete code except as regards the enforcement of the award/ decree where Arbitration Rules 1997 apply the Civil Procedure Rules. Counsel cited *Talewa Road Contractors Limited v Kenya National Higway Authority*[8] which held that the provisions of the Arbitration Act make it clear that it is a complete code except as regards the enforcement of the award/decree where Arbitration Rules 1997 apply the Civil Procedure Rules. He also cited *Anne Mumbi Hinga v Victoria Njoki Gathara**[9]*** for a similar holding by the Court of Appeal. Counsel argued that the application is incompetent.

20. Additionally, counsel argued that even if the civil Procedure Rules were to apply, the application does not meet the threshold to warrant the orders sought. He argued that the applicant seeks a permanent injunction at the interlocutory stage, such injunction should not be granted, in the absence of special circumstances or only in the clearest of cases. (Citing Lucy Wangui Gachara v Minudi Okemba Lore.[10])

21. Additionally, counsel argued that the parties were to appeal on matters of law only, yet the appellant's appeal discloses contested findings of fact and not law. Further, he argued that the applicant must show, that the property in dispute is (a) in danger of being wasted, damaged or alienated by any party to the suit or (b) that the Respondent is threatening to or intends to remove or dispose of his property in circumstances affording reasonable probability that the applicant will be obstructed or delayed from execution of any decree that may be passed against the Respondent in the suit. He argued that the applicant has not met the tests in *Giella v Cassman Brown & Company Limited*.

22. He submitted that the applicant has not demonstrated that he has an arguable appeal, and, that section **39** of the Arbitration Act, grants to the High Court jurisdiction to hear and determine appeals filed against Arbitral Awards on questions of law, provided that the parties have agreed to this remedy. He argued that the appeal is not grounded on questions of law but questions of fact, and that, the appeal has no chance of success at all.

23. He submitted that the appellant was unable to pay the balance of the purchase price and that a party in default cannot obtain an order of specific performance. (*Citing Thrift Homes Limited v Kays Investment Limited.**[11]***) Further, he submitted that the applicant has not proved that it is likely to suffer irreparable damage should the application be dismissed.

24. Regarding the prayer for the rent to be deposited in court or a joint account, counsel submitted that this prayer cannot stand since the applicant has failed to demonstrate an arguable appeal, and, that, it was a term of the Sale Agreement between the parties that rental income from the suit property shall continue to be received by the Respondent until such a time as the applicant pays the balance of the purchase price and the property is transferred and registered in its name. Further, counsel argued that the applicant had no claim, right or entitlement to the rent under the Sale Agreement until such a time as it had paid the balance of the purchase price and the title transferred to it. He submitted that this court cannot amend the contract and order deposit of rent to court and/or in a joint account in contravention of Special Conditions **2** and **4** of the Sale Agreement. He cited *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another**[12]*** for the holding that a court cannot re-write a contract between parties.

Determination

25. A useful starting point is to rehash the prayers sought in the appellant's appeal. They are: -

> *a. **That** this appeal be allowed.*
>
> *b. **That** the part of the award dated 1st February 2021, of, Rtd. Hon. Justice J B Havelock, sole Arbitrator, declining to award the Appellant herein rental income of the property, and declining to grant Order for Specific Performance of the Agreement and aggravated damages, be set aside. In the alternative, an enhancement of the rate of interest be enhanced to commercial bank rates.*
>
> *c. **That** judgement be entered as prayed in the statement of claim.*

26. A reading of the above prayers leave no doubt that there is no prayer sought in the appeal seeking to restrain the Respondent or its agents from dealing with L.R. Number **209/494/1**. The only prayer deals with rental collection. It is an elementary principle of law that interlocutory prayers orders must have a relationship with the main suit. As was held in *Winstone v Winstone,**[13]*** the words relationship with the main suit are to be construed and understood as limited to the granting of an injunction ancillary to and comprised within the scope of the substantive relief sought in the proceedings. This position was succinctly repeated in *Des Salles d'Epinoix v Des Salles d'Epinoix**[14]*** that :- "clearly any injunction sought…must bear some appropriate relation to the subject matter of the relief claimed in the proceedings already initiated." Finer J in *McGibbon v McGibbon**[15]*** said an injunction must bear some relationship to the cause of action. A similar reasoning was adopted in *Prabhulal G. Shah & another v Ramesh Meghji Shah.**[16]***

27. There is no prayer for injunction in the appeal nor was injunctive reliefs whether permanent or otherwise the subject of the matters addressed and determined in the award. The stay obtained under section **7** of the Arbitration Act only stays proceedings pending the award. It should not be confused with an injunction and in any event, it lapsed with the determination of the arbitral dispute. The applicant cannot seek the relief of a permanent or temporary injunction when such relief cannot be granted in the main suit or appeal. On this ground, the prayer for a permanent injunction fails.

28. Notwithstanding the above finding, the sapplicant prays for a permanent injunction. Defining an interlocutory order as opposed to a permanent order is a useful starting point. A purely interlocutory order is one not having the effect of a final decree. In a wide and general sense, the term *"interlocutory"* refers to all orders pronounced by the court, upon matters incidental to the main dispute, preparatory to, or during the progress of, the litigation. But orders of this kind are divided into two classes: (i) those which have a final and definitive effect on the main action; and (ii) those, known as "simple (or purely) interlocutory orders" or "interlocutory orders proper," which do not have a final effect on the main action.

29. Thus, when one reads the words *'interlocutory order'* one understands it normally in the context of many types of interlocutory orders. Some of which may be final with all the three attributes of a definitive judgment while others may even be rulings in the wider sense of the word. (I will discuss the three attributes shortly). If an interlocutory order has the three attributes normally used to determine whether the order in question is final in effect and definitive of the rights of the parties, then even if it is interlocutory in the wider sense, the order in question is final in effect. An order is purely interlocutory unless it anticipates or precludes some of the reliefs which would or might be given at the hearing.

30. A permanent injunction (also known as perpetual injunction) is one that is delivered at the time of the final judgement. A Perpetual Injunction is a final order granted after the trial on the merits to protect the legal rights of the plaintiff which has been established at the trial. In this scenario, the defendant is perpetually restrained from the commission of an act, or the abstinence from the commission of an act, which would defeat the interests of the Plaintiff. A permanent injunction can only be granted by a decree made at the hearing and upon the merits of the suit. A Permanent injunction finally determines the rights of the parties and forms part of the decree made at the hearing. It can only be granted at final stage/hearing of the suit. A permanent injunction can only be granted upon the merits of the case and at final hearing of the suit.

31. The above being the definition of a permanent injunction, the key question it is whether the applicant is inviting this court to grant a final order before the hearing of the appeal. The other question is whether if the court grants the said prayer as framed, it will have essentially determined the party's rights. A reading of the prayer for a permanent injunction as drafted shows that it has all the three attributes of a final

order, it is not a simple interlocutory order. The three attributes of a final order were set out by the South African Appellate Division in *Zweni v Minister of Law-and-Order*,***[17]*** namely; (i) the decision must be final in effect and not susceptible to alteration by the Court of first instance; (ii) it must be definitive of the rights of the parties, ie. it must grant definite and distinct relief; and (iii) it must have the effect of disposing of at least a substantial portion (if not all) of the relief claimed in the main proceedings. The permanent injunction sought in the instant application has the three attributes of a final order which cannot be granted at this stage. On this ground alone, the prayer for a permanent injunction is refused.

32. Even if I were to be persuaded that the injunction sought is interlocutory (which is not), I am still not satisfied that it is merited. The purpose of an interlocutory injunction is to preserve the subject matter of a dispute and to maintain the *status quo* pending the determination of the parties' rights. In granting such an injunction, the court is concerned both with: (a) the maintenance of a position that will most easily enable justice to be done when its final order is made; and (b) an interim regulation of the acts of the parties that is the most just and convenient in all the circumstances.

33. The jurisdiction to grant injunctions is discretionary and very wide. However, this power does not confer an unlimited power to grant injunctive relief. Regard must still be had to the existence of a legal or equitable right which the injunction protects against invasion or threatened invasion, or other unconscientious conduct or exercise of legal or equitable rights.

34. For the court to exercise its discretion in favour of an applicant for injunction, certain conditions must be satisfied. These conditions must be deposed to in the affidavit in support of the motion. They are: - (a) Legal Right. The essence of grant of an injunction is to protect the existing legal right or recognizable right of a person from unlawful invasion by another. Therefore, the first hurdle an applicant for an injunction must surmount is to show the existence of a legal right which is being threatened and deserves to be protected. This does not mean that the applicant should prove ownership of the property; it is sufficient for him to show that he claims a legal right over the property on which he seeks the order of injunction. (b)Threat or abuse of legal right. The legal right must be threatened or abused. This may arise by way of a threat to the right, which may result in damage.

35. In an application for an interlocutory injunction the onus is on the applicant to satisfy the court that it should grant an injunction. The jurisdiction to grant an injunction may be exercised "if it is just and convenient to do so." In *Giella v Cassman Brown and Co. Ltd****[18]*** the court set out the principles for Interlocutory Injunctions. They are: -

a. The Plaintiff must establish that he has a ***prima facie*** *case with high chances of success;*

b. That the Plaintiff would suffer irreparable loss that cannot be compensated by an award of damages;

c. If the court is in doubt, it will decide on a balance of convenience.

36. The Canadian case of *R. J. R. Macdonald v Canada (Attorney General)****[19]***laid down three-part test of granting an injunction as follows: -

a. Is there a serious issue to be tried?

b. Will the applicant suffer irreparable harm if the injunction is not granted?

c. Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (often called "balance of convenience").

37. Platt JA in *Mbuthia v Jimba Credit Corporation Ltd*[20] echoed the "serious question to be tried" test enunciated by Lord Diplock in *American Cyanamid* [21] and stated that in an application for interlocutory injunction, the court is not required to make final findings of contested facts and law but only needs to weigh the relative strength of the party's cases. The seriousness of the question, like the strength of the probability, depends upon the nature of the rights asserted and the practical consequences likely to flow from the interlocutory order sought. How strong that probability (or likelihood) needs to be depends, no doubt, upon the nature of the rights the plaintiff asserts and the practical consequences likely to flow from the order he seeks.

38. Lord Hoffman in *Films Rover International Ltd v Cannon Film Sales Ltd****[22]*** stated that in determining whether to grant an interlocutory injunction, a court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong," in the sense of granting an injunction to a party who fails to establish his or her right at trial (or would fail if there was a trial) or in failing to grant an injunction to a party who succeeds (or would succeed at trial). (Interestingly, this is a stated basis for requiring the plaintiff to provide an undertaking as to damages, in case the decision to grant the injunction should be wrong). In determining which course carries the lower risk of injustice, the court is informed by, among other things, the well-established interrelated considerations of whether there is a serious question to be tried and whether the balance of convenience or justice favours the grant.

39. To justify the imposition of an interlocutory injunction, the plaintiff must be able to show a "sufficient likelihood of success." The plaintiff's prospects of succeeding at trial will always be relevant "as a necessary part of deciding whether there is a serious question to be tried" and as an almost invariable factor in evaluating the balance of convenience. The assessment of the strength of the probability of success is an essential factor in deciding which course - whether or not relief should issue and, if so, on what terms – carries the lower risk of injustice. While this is the case, it is suggested that there will be other factors which are relevant having regard to the nature and circumstances of the case.

40. The *prima facie* case test represents the law in relation to the grant of interlocutory injunctions. A *prima facie* case in a civil application includes but not confined to a genuine and arguable case. It is sufficient that the plaintiff shows a sufficient likelihood of success to justify in the circumstances the preservation of the *status quo* pending the trial rather than demonstrating that it was more probable than not that the

plaintiff would succeed at trial. In *Mbuthia v Jimba Credit Corporation Ltd* (supra) Platt JA stated that in an application for interlocutory injunction, the court is not required to make final findings of contested facts and law but only *needs to weigh the relative strength of the parties cases.*

41. I will now apply the above tests to this case. First, the question whether the applicant has established a prima *facie case.* The parties reserved the right to appeal only on matters of law only. When parties agree to reserve the right of appeal to a court of law on points of law only, then questions of law must be distinguished from questions of fact. The courts are likely to construe it as an agreement to the bringing of appeals only if and to the extent that the questions of law will substantially affect the rights of the parties. The courts will not be duped into reopening tribunal's findings of fact in circumstances where they are dressed up as appeals on a point of law. Whether the applicant has remained within the scope agreed by the parties to appeal only on points of law is a live question that will be addressed should the appeal proceed for hearing. I note that grounds (h) to (k) of the appeal attack the award both on questions of fact and law. I have also considered all the grounds of appeal cited. Since I am not determining the appeal, it will suffice to state that the applicant will have to demonstrate that it has remained within the ordained grounds upon which it can appeal. For the purposes of this ruling, it is sufficient to state that the applicant has not established a *prima facie* case.

42. The other test is whether the applicant has demonstrated irreparable harm. The following excerpt from *Halsbury's Laws of England*[23] is instructive on what constitutes irreparable harm. It reads: -

> *"It is the very first principle of injunction law that prima facie the court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the court interferes by way of an injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the injury is irreparable and second, that it is continuous. 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. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question"*

43. In order to show irreparable harm, an applicant must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured.[24] The applicant is claiming rent for a specified period. In my view, should the appeal succeed, the applicant's claim can be quantified and compensated in monetary terms. The rent sought is known. The period claimed will be ascertainable. It can easily be tabulated. There is no argument before me showing that it cannot be recovered. From the facts before me, the applicant has failed to demonstrate irreparable harm. In fact, there is nothing to show that the appeal will be rendered nugatory.

44. The third test is balance of convenience. Where any doubt exists as to the applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which injury the applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right.[25] The burden of proof that the inconvenience which the applicant will suffer if the injunction is refused is greater than that which the respondent will suffer if it is granted lies on the applicant.[26]

45. The court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If an applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the *status quo* in determining where the balance on convenience lies.

46. If the court is satisfied that there is a serious question to be tried, (or that the plaintiff has made out a *prima facie* case) and that damages are not an adequate remedy, it must go on to consider whether the balance of convenience or justice favours the grant of an injunction. The balance of convenience is the course most likely to achieve justice between the parties pending resolution of the question of the applicant's entitlement to ultimate relief, bearing in mind the consequences to each party of the grant, or refusal, of the injunction.

47. The strength of the applicant's case is relevant in determining where the balance of convenience lies. Where an applicant has an apparently strong claim, the court will more readily grant an injunction even when the balance of convenience is evenly matched. A weaker claim may still attract interlocutory relief where the balance of convenience is strongly in favour of it. The assessment of the likelihood of the plaintiff being successful at trial is critical in determining the first element. I have carefully applied the foregoing tests to this case. It is my conclusion that the balance of convenience is in favour of refusing the injunction.

48. The prayer for rent is unmerited at this stage because it is a substantive prayer which can only be considered at the hearing of the appeal and for such a prayer to issue at this stage, the applicant must not only demonstrate a higher chance of the appeal succeeding and a real possibility that the Respondent will not be able to refund or account for the rent should the appeal succeed. Further, such an order if granted disturbs the *status quo*, and just like a mandatory injunction, it is ordinarily subjected to a heightened decree of scrutiny at this interlocutory stage. The material before me cannot pass such a high degree of scrutiny.

49. Lastly, an injunction is a discretionary remedy. As was held in *Kenleb Cons Ltd v New Gatitu Service Station Ltd & another,*[27] *"to succeed in an application for injunction, an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must also show he has a right legal or equitable, which requires protection by injunction*. A reading of the application shows that the applicant was not candid in its disclosure. As was held *in Njenga v Njenga*[28] *"an injunction being a discretionary remedy is granted on the basis of evidence and sound legal principles*."

50. From my analysis of the facts and the law discussed above and the conclusions arrived at, it is my finding that the applicant's application is unmerited. The applicant does not warrant any of the prayers sought. Accordingly, I dismiss the applicant's Notice of Motion dated **1st** March 2021 with costs to the Respondent.

Orders accordingly

SIGNED, DATED AND DELIVERED VIA E-MAIL AT NAIROBI THIS 19TH DAY OF JULY, 2021

John M. Mativo

Judge

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[1] {1973} 1 E.A. 358.

[2] {2020} e KLR.

[3] {2019} e KLR.

[4] {2020} e KLR.

[5] {2018} e KLR.

[6] Civil Application No. 124 of 2008.

[7] {2007} e KLR.

[8] {2019} e KLR.

[9] {2009} e KLR.

[10]{2015} eKLR.

[11] {2015} e KLR.

[12] {2001} e KLR.

[13] {1959} 3 All ER 580.

[14] {1967} 2 All ER 539.

[15] {1973} 2 All ER 836.

[16] {1980} e KLR.

[17] 1993 (1) SA 523 (AD).

[18] {1973} E A 358.

[19] {1994} 1 S.C.R. 311.

[20] {1988} KLR 1

[21] {1975} AC 396 at 407.

[22] {1987} 1WLR 670 at 680-681.

[23]Halsbury's Laws of England, Third Edition, Volume 21, paragraph 739, page 352.

[24] Supra note 3.

[25] See Halsbury's Laws of England, Third Edition, Volume 21, paragraph 766, page 366.

[26] Ibid

[27] {1990} K.L.R 557

[28]{1991} KLR 401