



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 328 OF 2016**

**FULGENCE MBELENGA SEMBUA.....APPELLANT**

**VERSUS**

**MWANANCHI CREDIT LIMITED.....RESPONDENT**

**(Being an appeal from the ruling of the Chief Magistrate's Court (Hon. P. Muholi)**

**in Cause No. 120 of 2016 at Nairobi)**

**JUDGMENT**

The appeal is against the ruling of Hon. P. Muholi delivered on 4<sup>th</sup> August, 2016. The grounds of appeal are that: -

- 1. The Learned Magistrate erred in law and in fact in giving a conditional Injunction which had no basis in fact and in Law.**
- 2. The Learned Magistrate erred in law and in fact and completely ignored the fact that the Respondent are in possession of the Log book and a blank transfer form signed by the Applicant hence no need for security of the amounts claimed in the counter claim.**
- 3. The Learned magistrate erred in fact and in law in granting the Respondent's security not pleaded**
- 4. The Learned magistrate erred in fact and in law by pre maturely giving final orders in a matter that is yet to be heard and determined.**
- 5. The Learned Magistrate erred in law and in fact by failing to appreciate and apply the true weight and effect of the issues by the appellant in regards to previous payments made to offset the loan amount.**
- 6. That the Learned Magistrate erred in law and in fact by unfairly and unjustly deeming that the Appellant had not made payments towards offsetting the Defendant's debt despite the attached evidence of payment in complete ignorance of the Appellant's documents.**
- 7. The Learned Magistrate erred in law and in fact in ordering the Applicant to pay an amount of Kshs. 423, 893.93 which is equivalent to the amount counter claimed, which amount ought to have been subjected to a full and fair hearing and compliance of which would be perpetuating an illegality."**

Counsel for the appellant submit that the appellant's application that was the subject of the ruling met the threshold for granting of an order of injunction by establishing that the calculations of the amounts payable to the defendant was an issue for determination. Further, the defendant is still in possession of the logbook and received Kshs. 441,764 from the appellant within a period of three (3) months. Counsel contend that even the court's own calculations showed that there was disparity in the figures. The appellant further argue that there was no need for the trial court to grant a conditional injunction yet the respondent's interest was well covered. The order of the trial court asking the appellant to pay Kshs. 423,893/93 was therefore unnecessary and amounts to a final relief.

On his part, counsel for the respondent contend that the appellant's case and application dated 15<sup>th</sup> January, 2016 which gave rise to the conditional injunction was an abuse of the court process. The trial court exercised its discretion judiciously so as to prevent the ends of justice from being defeated. What the appellant applied for is a discretionary relief and the trial court exercised its discretion properly. The trial court ordered that the appellant to deposit the money as per the counter-claim so as to secure the release of the logbook. The appellant had defaulted in servicing the loan.

The background to the dispute is that the appellant borrowed Kshs. 300,000 from the respondent sometimes in 2015. The security for the loan was the appellant's motor vehicle registration number KBA 933L, Mercedes Benz whereby the logbook was handed over to the respondent. According to the appellant he paid Kshs. 441,764 to the defendant and that amount fully settled the loan. The appellant filed an application dated 15<sup>th</sup> January, 2016 seeking the following orders: -

- a) Pending the hearing and determination of this application inter-parties, this Honourable court do issue an interim injunction restraining the Defendant from repossessing, attaching, disposing or in any way dealing with that vehicle registration number KBA 933C.**
- b) Pending the hearing and determination of this suit, this Honourable court do issue an injunction restraining the Defendant from repossessing, attaching, disposing or in any way dealing with that vehicle registration number KBA 933C.**
- c) This Court do issue an order compelling the Defendant to produce the agreement in court.**

The respondent filed a defence and a counter claim for the sum of Kshs.423,893. The trial court granted the orders being sought on condition that the Appellant deposit the sum of Kshs.423,893 as per the counter claim. The appeal is against the conditional order of injunction. The said amount is to be deposited in a joint interest earning account in the names of Counsel for both parties and was to be deposited within thirty (30) days from the date of the ruling.

The issue for determination is whether the Appellant's application seeking the orders of injunction met the required threshold for granting orders of injunction. In the case of **KENYA HOTELS LIMITED – V- KENYA COMMERCIAL BANK LTD & ANOTHER (2004) 1 KLR, 80** Ibrahim J (as he then was) held: -

**1. The necessary ingredients for the grant of an interlocutory injunction whether it is of a restraining nature or compulsive or mandatory nature are as set out and established in the case of Giella v Cassman Brown Ltd [1973] EA 358 these are;**

- a) The applicant must make out a *prima facie* case with a probability of success at the trial.**
- b) Normally an injunction will not be granted unless it can be shown that the applicant is likely to suffer irreparable injury which cannot be adequately compensated in damages.**
- c) If the court is in doubt it should decide on a balance of convenience.**

**2. An injunction being an equitable remedy, the Court may, while remaining guided by these three principle, also look at all circumstances including the conduct of the parties.**

The pleadings show that the loan agreement was entered into in mid-June 2015. By 12<sup>th</sup> September, 2015 the Appellant had paid Kshs. 441,764. According to the Respondent by that date the loan had already accumulated to Kshs. 865,657/93 and after taking into account the sum of Kshs. 441,764/= paid by the Appellant within the period of three months, there was a balance of Kshs. 423,893/93. The application by the Appellant sought the production of the loan agreement. The loan was attracting interest at the rate of 7% each month. It's not clear whether the interest accrued immediately the loan was taken or was to be computed on a reducing balance basis each month. The loan statement by the Respondent indicate that immediately the loan was taken on 12<sup>th</sup> June, 2015, interest of Kshs. 430,753/= was loaded on the loan and on the same date the loan balance was Kshs. 774,753/=.

From the record, the Appellant did establish that the principal amount was paid within three (3) months. There are issues involving the computation of the interest. The loan was to be paid within a period of one year but the Appellant had his equitable right to redeem it at any time before the expiry of one year. In essence therefore, there was need to understand the terms of the agreement by the parties. The Appellant's position is that he was not given a copy of the agreement and that is why he wanted it to be produced. The Respondent did annex it in the replying affidavit. The Respondent contend that there was default on the loan and this attracted a default penalty of Kshs. 5% per week.

The Appellant moved to court as there was threat to have the security (vehicle) auctioned. By the time the Appellant filed the suit, he had paid the principal sum plus Kshs. 141,000/=. The Respondents were to recover the full interest on the loan in a period of 12 months but were paid almost 40% of the interest within three (3) months.

I am satisfied that the Appellant's application established a *prima facie* case with a probability of success. The interest loaded on the loan soon after the Appellant took it need to be explained in a full hearing. Even if there was default in servicing the loan, I am satisfied that the Appellant has a *prima facie* case with a probability of success. Further, since the Respondent was in possession of the look book, that serves as sufficient security and the condition requiring the Appellant to deposit the sum of Kshs. 423,893/= was uncalled for.

The upshot is that the appeal is merited and is hereby granted as prayed. The ruling delivered by the trial court on 25<sup>th</sup> May, 2016 and all subsequent orders are hereby set aside and replaced with an order granted the Appellant's application dated 15<sup>th</sup> January, 2016 in terms of prayers (c) and (d) thereof. Parties shall meet their respective costs of this appeal. The lower court file to be returned so as to facilitate the hearing and determination of the pending suit.

**DATED AND SIGNED AT NAIROBI THIS 13TH DAY OF JULY, 2021**

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**S. CHITEMBWE**

**JUDGE**