Scania Credit Solutions (Pty) Limited v Hodan Wholesale Limited (Commercial Civil Case 583 of 2021) [2021] KEHC 11 (KLR) (Commercial and Tax) (8 September 2021) (Ruling)

Neutral citation: [2021] KEHC 11 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CIVIL CASE 583 OF 2021

JM MATIVO, J

SEPTEMBER 8, 2021

BETWEEN

SCANIA CREDIT SOLUTIONS (PTY) LIMITED .... PLAINTIFF

AND

HODAN WHOLESALE LIMITED .... DEFENDANT

RULING

Introduction

1. In order to put the application dated 18th May 2021 the subject of this ruling into a proper perspective, a summary of the applicant's case as enumerated in its Plaint of even date, albeit briefly, is necessary. In its Plaint, the Plaintiff avers that in conjunction with its South African affiliates, it provides financial leases for commercial vehicles including buses and trucks, mainly Scania model within Kenya and by extension the wider Africa region.

2. It avers that on or about 15th September 2019 and 9th February 2020, it entered into 4 financial lease agreements with the defendant for the lease of 4 motor vehicles. It avers that its General Terms and Conditions as well as a consolidation Agreement collectively constitute the "Lease Agreements" as more particularized in paragraph 4 of the Plaint. It avers that in order to safe guard its legal interests, it registered the leased motor vehicles jointly in its name and the defendant.

3. It avers that the individual Lease Agreements incorporate their respective Transaction Schedules and the General Terms and Conditions, and, that, the Transaction Schedules contain references between the Plaintiff as the Lessor and the defendant as the Lessee; while the nature of the Agreement is described at page 1 of each Transaction Schedule which is marked as a "Financial Lease;" and that the individual Lease Agreements were subsequently consolidated into a single indivisible Agreement dated 9th{{^}}February 2020 and the leased goods were delivered to the defendant receipt thereof it

duly acknowledged. Also, it avers that pursuant to the terms of the Lease Agreements, it granted the defendant the use and possession of the assets, and, in return, it is entitled to payment of the amounts stipulated in the Transaction Schedules. It avers that in breach of the terms of the Lease Agreements, the defendant failed to effect payment as per the terms.

4. The Plaintiff states that owing to the defendant's breach, it is entitled to cancel the Agreements and claim payment for all rentals and any other amounts due under the Agreements for the unexpired term as liquidated damages. It states that it is entitled to retain all monies paid by the defendant under the Lease Agreements. Further, it avers that vide a Notice dated 12th April 2021, it terminated the Lease Agreements owing to the defendant's breach, but despite the termination, the defendant has failed and/or refused to return the leased vehicles to the Plaintiff as per the Agreements.

5. The Plaintiff contends that as at 12th{{^}}April 2021, the defendant was indebted to it in the sum of USD 567,246.19 being amounts due under the Consolidated Agreements comprising of the total consolidated arrears of USD 95,821.13 and the value of the unexpired term on the Lease Agreements amounting to USD 471,425.06. Further, it avers that in terms of the Lease Agreements, interest continues to accrue on the amount in arrears as well as on the amount due on the unexpired term following the termination of the Lease Agreement until final payment. Also, it claims costs and expenses incurred in the recovery of the leased vehicles and debt collection.

6. The Plaintiff prays for judgment against the defendant for: - (a) the principal sum of USD 567,246.19; (b) Interest on (a) above at the contractual rate being the prime overdraft rate for CFC Stanbic Bank Ltd plus 10% per annum from the 12th April 2021 until payment in full; (c) Costs of this suit; (d) Any other just and equitable relief as this court may deem appropriate.

The application

7. Concurrent with the Plaint, the Plaintiff filed the application under determination seeking:-

   a. Spent;

   b. Spent;

   c. Spent;

   d. That a declaration do issue that, pursuant to the terms of the Financial Lease Agreements entered into between the parties herein, the applicant Lessor is entitled to repossess the leased motor vehicles registration numbers KCV 753H, KCV 617H, KCX 102N and KCX 103N, in the event of breach by the Respondent Lessee.

   e. That pending the hearing and determination of the suit an Order do issue compelling the Respondent to release, surrender and/or return to the applicant, the vehicles registration numbers; KCV 753H, KCV 617H, KCX 102N and KCX 103N which vehicles are currently in the custody and/or possession of the defendant/Respondent; with the vehicles being placed at a premises designated by the applicant;

   f. That in the alternative to prayer 5 above, pending the hearing and determination of the suit an order do issue authorizing the Plaintiff/Applicant and/or its authorized agents to enter upon or into any land or building in the possession of the defendant/Respondent and/or its agents and/or housing the subject motor vehicles and take possession of the applicant's

motor vehicles registration numbers; KCV 753H, KCV 617H, KCX 102N and KCX 103N, which vehicles are currently in the custody and/or possession of the Respondent.

g. That an order do issue authorizing the Officer Commanding the nearest police station to where the motor vehicles registration numbers KCV 753M, KCV 617H, KCX 102N and KCX 103N may be located to provide escort and security to the applicant and/or its authorized agent(s) to enable it to carry out the repossession duties peacefully.

h. That costs of this application be borne by the Respondent.

Grounds relied upon

8. The application is founded on the grounds enumerated on the face of the application and the supporting affidavit of Mr. Roger Hutton annexed thereto. Some of the grounds cited are essentially a replication of the averments in the Plaint, so, it will add no utilitarian value to rehash them here. Other grounds are that under Order 40 Rule 1 (a) of the Civil Procedure Rules, 2010, this court is mandated to make an order for the purpose of staying and/or preventing the wasting, damaging of property the subject of court proceedings; and, under Order 40 Rule 4 and Order 51 rule 3 of the Civil Procedure Rules, the court is vested with the power to issue an ex parte order where the object of the injunctive orders sought would be defeated by delay and/or where proceeding in the ordinary way would or might entail irreparable or serious mischief.

9. The applicant states that it is apprehensive that if left in the custody of the Respondent, the vehicles are in danger of being wasted, damaged and/or misused such that their value will be diminished and the applicant would not be able to subsequently lease or dispose them to other parties. It states that it is apprehensive that the value of the vehicles diminishes with every use over time, and whatever losses it will suffer, will be substantial and cannot be recovered and/or adequately compensated nor can the applicant mitigate its losses until it regains possession of its motor vehicles. It states that unless the orders sought are granted, the Respondent will continue utilizing the vehicles at the applicant's risk and loss and without paying for them. Lastly, it states that itself or its agents require police presence to undertake the repossession for security purposes.

The Respondent's Replying affidavit

10. The Respondent filed the Replying affidavit of Ahmed Shariff Abdi, its director dated 2nd June 2021 in opposition to the application. The nub of the affidavit is that the orders sought cannot issue because:- (a) the orders sought seek to upset the status quo pending the hearing and determination of the suit; (b) if the orders are granted at the interim period, the suit will be rendered moot because it will amount to determining the suit; (c) the orders as sought if granted will cripple the defendant's business; (d) if the orders sought are granted, the pre-existing contract between the parties will be terminated pre-maturely; (e) that the Plaintiff's application is based on mere rumors because no evidence of indebtness has been offered; and, (f), a mandatory injunction cannot issue at an interlocutory stage without lawful basis.

11. Additionally, the Respondent states that the outbreak of COVID 19 pandemic crippled its business. Also, it states that the tests laid down in Giella v Cassman Brownm for grant of injunctions have not been met, and that the Transaction Schedules exhibited by the Plaintiff are fabricated and include projections up to the year 2022, and therefore cannot be used to ascertain any debt owed.

12. Also, the Respondent states that the Plaintiff breached Clause 45 of the General Terms and Conditions by failing to furnish the Respondent with a certificate of breach and/or affidavit which is prima facie

evidence of the Lessee's indebtness to the lessor for purposes of any legal proceedings that might be instituted.

13. Additionally, the Respondent states that the communication relied upon by the Plaintiff is on a without prejudice basis and notwithstanding the foregoing, the communication was made between December 2020 and February 2021whereas in the month of April, there is seemingly a payment of USD 96, 066.01 in favour of the Plaintiff. Further, it states that the application is an abuse of the court process and that the Plaintiff is attempting to steal a match from the Respondent. Also, the Respondent states that the issues raised in the application can only be substantively determined at a full trial, and, that the orders sought are aimed at enriching the Plaintiff at the expense of justice because the Plaintiff will have both custody of the motor vehicles and the principal amount received. Lastly, that the application is an abuse of court process.

Respondent's grounds of opposition

14. In addition to the Replying affidavit, the defendant filed grounds of opposition dated 26th May 2021 stating- that this court has no jurisdiction to hear and determine the suit; that the procedure adopted is defective; that the suit offends the Law; that the orders sought are not maintainable; that the application is incompetent, misadvised and bad in law; that the application is scandalous, frivolous, vexatious and an abuse of court process; that the application is fatally flawed and incurably defective; and that the application presents a ripe, plain and obvious case for dismissal.

The applicant's submissions

15. The applicant submitted that under Order 40 Rules (1) & (2) of the Civil Procedure Rules an interlocutory injunction may be granted where any property in dispute in a suit is in danger of being wasted or damaged by any party to the suit; and where there is a risk of the defendant committing breach of contract or other injury to the Plaintiff relating to a particular property or right. The applicant cited Giella v Cassman Brown & Company Limited[1] which laid down the tests for granting injunctions and R. J. R. Macdonald v Canada (Attorney General) cited in Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others[2] which stated the applicable principles namely: - (i) is there a serious issue to be tried? (ii) Will the applicant suffer irreparable harm if the injunction is not granted? (iii) Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (Often called "balance of convenience.")

16. The applicant submitted that to establish a prima facie case, the evidence must show an infringement of a right and the probability of success of the applicant's case upon trial. It also cited the definition of a prima facie case in Mrao Ltd v First American Bank of Kenya Ltd and 2 others[3] which is "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." Buttressed by the above decisions, it argued that it has demonstrated a prima facie case with a probability of success.

17. The applicant submitted that the purpose of the interim measure is to ensure that its motor vehicles will be in the same state as they were at the commencement of the proceedings and also to enforce the express terms of the contract between the parties. It argued that there is a real and imminent risk that if the orders sought are not granted, the Respondent's continued possession and use of its motor vehicles

1 {1973} EA 358.

2 {2016} e KLR.

3 {2003} e KLR.

will cause it irreparable loss as a result dissipation of the assets. It argued that the Respondent continues to unlawfully enjoy the profits from the use of the applicant's motor vehicles without paying for the same and without any legal or contractual basis.

18. The applicant cited Joseph Mbugua Gichanga v Co-operative Bank of Kenya Ltd[4] in support of the proposition that the court considers the second condition i.e. irreparable harm only if it entertains some doubt on the first condition i.e. probability of success. It argued that a party should not be allowed to maintain an advantageous position he has gained by flouting the law simply because he is able to pay for it. (Also cited Aikman vs Muchoki.[5])

19. The applicant submitted that it stands to suffer substantial and irreparable harm and it will be seriously prejudiced if the application is not allowed because it cannot be compensated by an award of damages. Additionally, it argued that there is a risk of the vehicles being wasted if left in the hands of the defendant and that their value cannot be adequately ascertained nor will it be possible for the applicant to be compensated. Th applicant cited Philmark Systems Co. Ltd v Andermore Enterprises[6] in support of the proposition that a court cannot rewrite a contract entered into willingly by parties.

20. Regarding balance of connivence, the applicant cited Paul Gitonga Wanjau (supra) for the proposition that "where any doubt exists as to the applicant 's 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... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion, if 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 of convenience lies. "

21. It submitted that under the agreement, the motor vehicles are required to be in the possession of the applicant post termination. He argued that a mandatory injunction has been expressly agreed at Clause 57.2 of the General Terms and Conditions. Additionally, it submitted that a mandatory injunction is a discretionary relief which may be issued by the court both in the main suit or at an interlocutory stage where there are special circumstances, and that the court's discretion ought to be exercised on a case-by-case basis depending on the prevailing circumstances. It cited Alex Wainaina t/a John Commercial Agencies v Janson Mwangi Wanjihia [7] which held inter alia that "a mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances. Also, it placed reliance on Kenya Breweries Limited and Tembo Co-Operative Savings & Credit Society Limited v Washington O. Okeyo[8] which cited Halsbury's Laws of England[9] which reads:

4 {2005} e KLR.

5 {1984} KLR 353.

6 {2018} e KLR.

7 {2015} e KLR.

8 Nairobi Civil Appeal No. 332 of2000 (UR).

22. The applicant argued that it has established special circumstances, namely; the express provisions of the contract between the parties because the injunctive orders are provided for and agreed by the parties under the General Terms and Conditions; the reliefs sought are also provided for and agreed under the other provisions set out therein. Further, that the applicant other than seeking an equitable relief, it is also seeking a contractual relief pursuant to the express terms of the Lease Agreements. Additionally, it argued that the validity of the lease agreement is not in question.

The Respondent's submissions

23. The Respondent submitted that the applicant seeks mandatory injunctive orders which cannot be issued at an interlocutory stage because they will not only occasion an injustice but also, they have the effect of determining the suit at an interlocutory stage. It submitted that mandatory injunctions can only be granted in special circumstances and in clear cases. It cited Joseph Kaloki t/a Royal Family Assembly v Nancy Atieno Ouma[10] in which the court referred to Kenya Breweries Limited & another v Washington 0.0keyo[11]which held that a mandatory injunction should not normally be granted in the absence of special circumstances but that if a case is clear and which the court thinks it ought to be decided at once, a mandatory injunction will be granted at an interlocutory application. It argued that the application does not exhibit any special circumstances to warrant the grant of a mandatory injunction. It argued that the Plaintiff has not tendered sufficient evidence to support the alleged breach of lease agreement nor did it tender a true and proper statement of accounts in support of its allegations. It argued that the applicant is in breach of Clause 45 of the General Terms and Conditions for failing to issue a certificate of indebtedness as provided in the said clause, and that the applicant is guilty of material non-disclosure, hence it has not come to court with clean hands.

24. It cited Robert Mugo wa Karanja v Ecobank (Kenya) Limited & Another[12] which cited Kenleb Cons Limited v New Gatitu Service Station Ltd & another[13] which held that a party seeking an injunction must make a full and frank disclosure of all relevant facts to the just determination of the application. It argued that the applicant has failed to avail proper statements revealing the extent of the purported breach and when the breach occurred. It argued that the correspondence relied upon by the applicant was exchanged on a without prejudice basis and cited Guardian Bank Limited v Jambo Biscuits Kenya limited[14] which adopted Geoley Investments Ltd v Behal tla Krishan Behal & Sons[15] for the proposition

9 Vol. 24, 4th Edn. Para 948.

> " A mandatory injunction can be granted on an interlocutory application as well as the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a match on the Plaintiff... a mandatory injunction will be granted on an interlocutory application. ...the consistent reiteration of those principles by the courts is an affirmation that the remedy of mandatory injunction is a drastic one which ought not to be granted mechanically but considered with caution."

10 {2020} e KLR.

11 {2002} e KLR.

12 {2019} e KLR.

13 {1990} e KLR.

14 {2014} e KLR.

15 {2002} 2 KLR 447.

that until such time as there is a definite agreement on the issues at hand, such correspondence cannot be used as evidence against any of the parties.

25. It argued that the issues raised by the applicant require further interrogations in a full hearing and that granting a mandatory injunction at this stage will deprive it its right to be heard. It submitted that the applicant has failed to meet the tests laid down in Giella v Cassman Brown,[16]Cyanamid Co. v Ethicon Limited[17] and Mrao Ltd vs. First American Bank of Kenya Ltd & 2 ors,[18] and that the applicant will not suffer irreparable loss that cannot be adequately compensated by an award of damages because it is claiming a liquidated amount.

26. Citing Paul Gitonga Wanjau v Gathuthi Tea Factory Limited & 2 others[19](supra) it argued that it stands to suffer greater hardship if the injunction is granted because if at all the Respondent owes any money to the applicant, it shall attract interests, while the Respondent will suffer loss of business because the motor vehicles are the income generating tools for his business unlike the applicant who will claim the amount plus interests in addition to retaining the motor vehicles, so the balance of convenience favours refusing the injunction.

Applicant's supplementary submissions

27. The applicant maintained that it complied with the provisions of Clause 45 of the General Terms and Conditions by preparing a Certificate of Balance for purposes of these legal proceedings. The bulk of the submissions relate to factual matters which essentially amounts to adducing evidence from the bar. It reiterated that it will suffer irreparable harm (citing Joseph Mbugua Gichanga v Co-Operative Bank of Kenya Ltd.[20])

Determination

28. A vital query arising in this application it is whether the applicant is inviting this court to grant a final order at this interlocutory stage. Even though this issue was raised and argued by the Respondent's counsel, the applicant's counsel in his submissions did not address it at all. The answer to this question can be gathered from the nomenclature employed in prayer (d) sought in the application. The said prayer reads: -

> That a declaration do issue that, pursuant to the terms of the Financial Lease Agreements entered into between the parties herein, the applicant Lessor is entitled to repossess the leased motor vehicles registration numbers KCV 753H, KCV 617H, KCX 102N and KCX 103N, in the event of breach by the Respondent Lessee.

29. The issue is whether the above prayer as framed is a purely interlocutory prayer or a final order. If the court grants the said prayer as framed, will it have essentially determined the party's rights. Will there be a dispute remaining for resolution? I had earlier summarized the pleadings in the Plaint and the prayers sought in the Plaint. I see no need to rehash them here. The question is whether if the above prayer is granted as framed, the Plaint will be determined.

16 {1973} E.A 358.

17 {1975} ALL ER 504.

18 Civil Appeal No. 39 of 2002

19 {2016} e KLR.

20 {2005} e KLR.

30. Simply put, the question is whether the above order is interlocutory or final. If it is interlocutory, it can be considered on merits. On the other hand, if it is final and has the potential of determining the case, it cannot be granted.

31. In the simplest term possible, 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.

32. Therefore, 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.

33. A reading of the Plaint and the said order 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 in Zweni v Minister of Law-and-Order.[21] These are: - (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.

34. As was held in Ashok Kumar Bajpai v Dr. (Smt) Ranjama Baipai[22] the court should not grant interim relief which amounts to final relief except in exceptional circumstances where the court is satisfied that ultimately the applicant is bound to succeed. However, the court may grant the relief but it must record reasons for passing such an order and make it clear as what are the special circumstances for which such a relief is being granted to a party.

35. In Burn Standard Co. Ltd. and Ors. v Dinabandhu Majumdar and Anr[23] the Supreme Court of India deprecated the practice of granting interim reliefs which amounts to final relief. The court however stated that in exceptional circumstances, where for one reason or the other court feels compulsion to grant an interim relief which amounts to final relief, the court must record reasons for passing such interim relief. The applicant never demonstrated any exceptional circumstances to warrant granting a final order at this stage nor do I find any. On this ground, prayer (d) of the application collapses.

36. The other reason why a declaratory order cannot be issued at an interlocutory stage is discernible in the tests for granting declaratory reliefs. These tests were settled in Durban City Council v Association of Building Societies[24] and confirmed in Cordiant Trading CC v Daimler Chrysler Financial Services

[21] 1993 (1) SA 523 (AD).

[22] AIR 2004, All 107, 2004 (1) AWC 88, at paragraph 17.

[23] AIR 1995 SC 1499.

[24] 1942 AD 27 at 32

(Pty) Ltd.[25]The tests are that the court must first be satisfied that the applicant is a person interested in an existing, future or contingent right or obligation; and if so, the court must decide whether the case is a proper one for the exercise of its discretion. Such a heightened degree of scrutiny can only be achieved after a full trial.

37. Next, I will address the prayers (e) & (f) seeking mandatory injunctions(s). For starters, the proper standard on a motion for preliminary injunction depends on whether the relief sought is a "prohibitory injunction," which "preserves the status quo," or a "mandatory injunction," which goes well beyond simply maintaining the status quopendente lite and is particularly disfavored. In the latter category of cases, the court should deny such relief 'unless the facts and law clearly favor the moving party. A "mandatory" injunction upsets the status quo and is subjected to a heightened preliminary injunction standard.

38. The object of an interlocutory injunction is to maintain the matters in question in the suit in status quo, until the hearing of the cause; and the court will not, therefore, except under very special circumstances, grant, upon an interlocutory application before decree, an injunction which virtually directs the defendant to perform an act. From the facts before me, there is no contestation that the leased vehicles are in the custody of the Respondent. The prayers sought seek to upset the status quo. Such reliefs are subjected to a heightened decree of scrutiny and are only granted in exceptional circumstances.

39. The test whether to grant a mandatory injunction or not is correctly stated in Halsbury's Laws of England[26](supra). It can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. (See Kenya Breweries Ltd & Another v Washington O. Okeyo,[27] and Locabail International Finance Ltd v Agroexport and others[28]). In Nation Media Group & 2 others v John Harun Mwau[29] the Court of Appeal stated: -

40. The principles of law arising from the above decisions is that a court considering an application for interlocutory mandatory injunction must be satisfied that there are not only special and exceptional circumstances, but also that the case is clear and that the applicant has a good case with a likelihood of success.

41. The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy- until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not

[25] 2005 (6) SA 205 (SCA) at para 15 to 17.

[26] Vol. 24, 4th Edition, paragraph 948.

[27] {2002} eKLR

[28] {1986} 1 ALLER 901

[29] {2014} eKLR

> " It is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances ... A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrated as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases."

granting it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain guidelines. Basically, these guidelines are: -[30]

42. Being principally an equitable relief, the grant or refusal of an interlocutory mandatory injunction shall ultimately rest in the sound judicial discretion of the court to be exercised in the light of the facts and circumstances in each case. Though the above guidelines are neither comprehensive or complete or absolute rules, and there may be exceptional circumstances needing action, applying them as pre-requisite for the grant or refusal of such injunctions would be a sound exercise of a judicial discretion.

43. Whereas there is no dispute that the parties entered into the subject agreements, the contestation is whether the Respondent is in breach. The other contest as is the amount payable if the breach is established. Viewed from the diametrically opposed arguments raised by the parties, it cannot be said that the applicant has met the heightened degree of scrutiny required before granting mandatory inunctions. Its trite that an applicant is required to demonstrate the existence of special or exceptional circumstances. Even though the term exceptional circumstances has been rarely defined, I may usefully refer to the following description from a leading South African decision: -[31]

44. What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the action at issue. Exceptional circumstances or exceptional situations are the conditions required to grant additional powers to a government agency, particularly a government leader or

[30] *Jagdish Prasad v Shrawan Kumar & Anr* on 9 March, 2016.

a. The plaintiff has a strong case for trial. That is, it shall be of a higher standard than prima facie cast that is normally required for a prohibitory injunction.

b. It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.

c. The balance of convenience is in favour of the one seeking such relief.

[31] In *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas & another* 2002 (6) SA 150 (C) at 156H.

i. What is ordinarily contemplated by the words "exceptional circumstances' is something out of the ordinary and of an unusual nature; something which is accepted in the sense that the general rule does not apply to it; something uncommon, rare or different . . ."

ii. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.

iii. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the court must decide accordingly.

iv. Depending on the context in which it is used, the word "exceptional" has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.

v. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional. # In a nutshell the context is essential in the process of considering what constitutes exceptional circumstances.

a judge, so as to alleviate, or mitigate, unforeseen or unconventional hardship.[32]Lord Bingham of Cornhill CJ said in R v Kelly (Edward)242:

45. *Black's Law Dictionary*[33] defines "exceptional circumstances" as "conditions which are out of the ordinary course of events; unusual or extraordinary circumstances." The meaning of exceptional circumstances, i.e. circumstances beyond an applicant's control, akin to a force majeure appears to place a heavier requirement on the applicant than a literal interpretation suggests.

46. I my view, the applicant has not raised any circumstance or impediment that could be considered 'exceptional,' nor has it raised any circumstance demonstrating overriding 'interests of justice.' As to 'exceptional' circumstances the applicant has not shown that circumstances similar to force majeure or any other unforeseeable or irresistible circumstances affected it or will affect it if the mandatory injunction is refused. The alleged loss (which is subject to prove) has not been shown to be capable of putting the applicant in a similar position as it was prior to the dispute. As to 'interests of justice,' the applicant has not demonstrated in any way why he should otherwise be permitted, based on conclusive consideration of 'interests of justice,' to retain the vehicles prior to conclusively determining the parties' rights.

47. 'Exceptional' means something out of the ordinary. At the least the circumstances must be unusual, probably quite unusual but not necessarily highly unusual. In the absence of either "insurmountable obstacles" or "exceptional circumstances" as defined, it is clear that a prayer for a mandatory injunction will be refused at the interlocutory stage. My reading of the material before me leaves no doubt that the applicant has not established exceptional circumstances to qualify for the mandatory injunction sought.

48. Even if I were to treat the injunction sought as prohibitory in nature, 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. 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.

49. The interlocutory injunction is merely provisional in its nature, and does not conclude a right. The effect and object of the interlocutory injunction is merely to keep matters in status quo until the hearing or further order. In interfering by interlocutory injunction, the court does not in general profess to anticipate the determination of the right, but merely gives it as its opinion that there is a substantial question to be tried, and that till the question is ripe for trial, a case has been made out for the preservation of the property in the meantime in status quo. A man who comes to the court for an interlocutory injunction, is not required to make out a case which will entitle him at all events to relief

[32] See, e.g., *Kingdomware Technologies, Inc. v. United States, 579 U.S., 136 S.Ct. 1969, 1976 (2016); Spencer v. Kemna, 523 U.S. 1, 17-18 (1998).*

> " We must construe exceptional "as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered."

[33] *W*est Publishing Co., 1990, 6th ed.

at the hearing. It is enough if he can show that he has a fair question to raise as to the existence of the right which he alleges, and can satisfy the court that the property should be preserved in its present actual condition, until such question can be disposed of.

50. 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[34] the court set out the principles for Interlocutory Injunctions. The principles are: -

51. The Canadian case of R. J. R. Macdonald v Canada (Attorney General)[35]laid down three-part test of granting an injunction as follows: -

52. Platt JA in Mbuthia v Jimba Credit Corporation Ltd[36] echoed the "serious question to be tried" test enunciated by Lord Diplockin American Cyanamid[37] 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.

53. Lord Hoffman in Films Rover International Ltd v Cannon Film Sales Ltd[38] statedthat 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). 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.

54. To justify the imposition of an interlocutory injunction, an applicant must show a "sufficient likelihood of success." The plaintiff's prospects of succeeding at trial will always be relevant "as a

34 {1973} E A 358.

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.

35 {1994} 1 S.C.R. 311.

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").

36 {1988} KLR 1

37 {1975} AC 396 at 407.

38 {1987} 1WLR 670 at 680-681.

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.

55. 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. Also, I can usefully cite a passage from Interlocutory Injunctions: Practical Considerations"[39] thus: -

FOOTNOTE 40

Supra

FOOTNOTE 41

Dole Food Co. Vs Nabisco Ltd {2000}, 8 C.P.R. (4TH) 461, (F.C.T.D.)

In certain circumstances, the court will impose a more restrictive standard and require the moving party to demonstrate that it has a stronger prima facie case. If the injunction will likely end the dispute between the parties, then the court may hold the plaintiff to this higher standard. Similarly, where the nature of the relief sought is mandatory, or when the question is a question of mere law alone, then this higher standard will apply…"

56. I now apply the principles discussed above to the instant case. The key issue will be determining whether the Respondent breached the agreement and whether the reliefs prayed in the Plaint are warranted. Simply put, the court will be determining the respective parties' rights at the trial. Such issues will certainly require a full hearing and prove to the required standard. Viewed from this perspective, the applicant's allegations cannot be said to have disclosed a prima facie case with a likelihood of success.

[39] Steven Mason & McCathy Tetraut , available at www.mccarthy.ca.

" With some exceptions, the first branch of the injunction test is a low threshold. As stated by the Supreme Court in R. J. R. Macdonald v Canada (Attorney General)[40]

[40] Supra

"Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at the trial. Justice Henegham of the Federal Court explained the review as being "on the basis of common sense and a limited review of the case on the merits."[41]

[41] Dole Food Co. Vs Nabisco Ltd {2000}, 8 C.P.R. (4TH) 461, (F.C.T.D.)

[illegible] mandatory, or when the question is a question of mere law alone, then this higher standard will apply…"

It is usually a brief examination of the facts and law.

57. Next is the test for irreparable harm. The following excerpt from Halsbury's Laws of England[42] defines what constitutes irreparable harm: -

58. In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured.[43] In my view, the applicant has not established that should its case succeed, it cannot be adequately compensated by way of damages. In fact, the contrary is true. In the plaint, the Plaintiff has clearly quantified its claim, confirming that in the event of its case succeeding, its loss (if any) can be quantified in monetary terms and adequate compensation awarded. A specific amount has been arrived at, pleaded and claimed. Simply put, the applicants claim can actually be quantified and an appropriate compensation awarded by the court. On this ground alone, I find that the applicant has failed to demonstrate irreparable harm.

59. The third test is balance of convenience. In Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others[44] (supra), I have the opportunity of addressing this test in detail as cited by the parties herein. I can only repeat what I said in the said decision. It will suffice to mention that the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. 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.

60. Lastly, an injunction is a discretionary remedy. As was held in Kenleb Cons Ltd v New Gatitu Service Station Ltd & another,[45] "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. Lastly, as was held in Njenga v Njenga[46]"an injunction being a discretionary remedy is granted on the basis of evidence and sound legal principles."

61. In exercising the jurisdiction, the court does not pretend to determine legal rights to property, but merely keeps the property in its actual condition until the legal title can be established. The court interferes on the assumption that the party who seeks its interference has the legal right which he asserts, but needs the aid of the court for the protection of the property in question until the legal right can be ascertained. The courts' power to interfere being founded on the existence of the legal right, a man who seeks the aid of the court must be able to show a prima facie case in support of the title which

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

> " 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 Supra note 3.

44 {2016} e KLR.

45 {1990} K.L.R 557

46 {1991} KLR 401

he asserts. He must satisfy the court that he has a fair question to raise as to the existence of the legal right which he sets up, and that there are substantial grounds for doubting the existence of the alleged legal right, the exercise of which he seeks to prevent. The court must, before disturbing any man's legal right, or stripping him of any of the rights with which the law has clothed him, be satisfied that the probability is in favour of the case ultimately failing in the final issue of the suit.

62. Lord Diplock's re-formulation of the threshold test for an injunction in American Cynamid is so well known that it is pointless reproducing it here. Malaysian courts have interpreted Lord Diplock's speech as involving three steps. In Keet Gerald v Mohd Noor Abdullah,[47] it was held that a judge hearing an application for an interlocutory injunction should undertake an inquiry along the following lines. First, he must ask himself whether the totality of the facts presented before him discloses a bona fide serious issue to be tried. He must, when considering this question, bear in mind that the pleadings and evidence are incomplete at that stage. Above all, he must refrain from making any determination on the merits of the claim or any defence to it. It is sufficient if he identifies with precision the issues raised on the joinder and decides whether these are serious enough to merit a trial. If he finds, upon a consideration of all the relevant material before him, including submissions of counsel, that no serious question is disclosed, that is an end of the matter and the relief is refused. On the other hand, if he does find that there are serious questions to be tried, he should move on to the next step of his inquiry.

63. Second, having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. In making his assessment, he must take into account all relevant matters, including the practical realities of the case before him. He must weigh the harm that the injunction would produce by its grant against the harm that would result from its refusal. If after weighing all matters, he comes to the conclusion that the Plaintiff would suffer greater injustice if relief is withheld, then he would be entitled to grant the injunction especially if he is satisfied that the Plaintiff is in a financial position to meet his undertaking in damages. Similarly, if he concludes that the defendant would suffer the greater injustice by the grant of an injunction, he would be entitled to refuse relief. Of course, cases may arise where the injustice to the plaintiff is so manifest that the judge would be entitled to dispense with the usual undertaking as to damages.[48]

64. Third, the judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and intended to maintain the status quo, an expression explained by Lord Diplock in Garden Cottage Foods Ltd v Milk Marketing Board.[49] Accordingly, the judge would be entitled to take into account all discretionary considerations, such as delay in the making of the application or any adequate alternative remedy that would satisfy the Plaintiff's equity, such as an award of monetary compensation in the event that he succeeds in establishing his claim at the trial.

65. Arising from my analysis of the facts and the law discussed above and the conclusions arrived at, I find that the applicant's application is unmerited. The applicant has failed to satisfy the tests for granting the orders sought. Accordingly, I dismiss the applicant's Notice of Motion dated 18th May 2021 with costs to the Respondent.

Orders accordingly

Signed, dated and delivered vis e-mail at Nairobi **this 8th day of September 2021**

[47] {1995}1 MLJ 193.

[48] *See Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors [1988] 3 MLJ 90*).

[49] {1984} AC 130; {1983} 2 All ER 770; {1983} 3 WLR 143.

John M. Mativo

Judge

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