Amin v ASL Credit Limited (Miscellaneous Civil Application E276 of 2021)
[2021] KEHC 246 (KLR) (Commercial and Tax) (17 November 2021) (Ruling)

Neutral citation: [2021] KEHC 246 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS CIVIL APPLICATION E276 OF 2021

A MABEYA, J

NOVEMBER 17, 2021

BETWEEN

BHAI OMAR AL AMIN ..... APPLICANT

AND

ASL CREDIT LIMITED ..... RESPONDENT

RULING

1. The applicant is the Plaintiff in Milimani Commercial CMCC No. 1111 of 2020: Bhai Omar Al Amin vs ASL Credit Limited wherein she filed an application for a temporary injunction to restrain the respondent from repossessing and selling certain motor vehicles. The lower court dismissed the said application vide a ruling delivered on 18th December 2020.

2. She has now approached this Court vide a Notice of Motion dated 19th April 2021 brought under sections 1A, 1B, 3A, 63 (e), 75(1)(h), 79(G) and 95 of the *Civil Procedure Act*, Orders 42 Rule 1, 4, 6(6), Order 43 Rule 1(u) and 2, Order 50 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules, Section 15 and 16 of the *Hire Purchase Act* seeking leave to file an appeal out of time against the said ruling.

3. She has also sought a temporary injunction to restrain the respondent from repossessing, advertising, selling or interfering in any way with her ownership and possession of motor vehicles registration numbers KBG 984 L, KBG 986 L, ZD 0526, ZD 0527, ZD 2454, KBQ 214S, KCM 127W, KCD 400E, KCG 122R AND KCG 120R, pending hearing and determination of her intended Appeal.

4. The Motion is supported by the grounds on the face of it as well as her affidavit sworn on even date. She contends that whereas the respondent financed the purchase of the subject motor vehicles pursuant to various Hire Purchase Agreements entered into between them, she has since repaid the entire hire purchase amount. She further states that she only became aware that her said application was dismissed when her motor vehicle registration number KCM 127W and trailer registration Number ZE6424

were confiscated without notice on 17th April 2021, by Garam Auctioneers on the instructions of the respondent.

5. By that time, the appeal period had lapsed but she is dissatisfied with the decision which was delivered in the absence of both parties and wishes to appeal against it. She contends that the intended Appeal is arguable and has high chances of success as demonstrated by the annexed Draft Memorandum of Appeal.

6. She also contends that the respondent is unlawfully using the threat of sale of the motor vehicles to exert pressure on her to pay sums not due or owing under the Hire Purchase Agreements. That those actions threaten to cripple her transport business as the said vehicles are her sole source of income.

7. In opposition, the respondent filed a replying affidavit sworn on 4th May 2021 by Daniel Wandera, the Head of Legal at Ramco Group. He contends that the instant application is tainted with misrepresentation and falsehoods, is an abuse of court process, frivolous, vexatious and only meant to delay the course of justice. That the applicant has not demonstrated that she has a good and sufficient cause for failing to file the Appeal on time and her lack of pro-activeness in ascertaining the position of the delivery of the ruling cannot suffice.

8. That the applicant has not met the requirements necessary for the grant of an order of injunction pending appeal as the respondent is merely exercising its legal right to repossess and sell the security motor vehicles to recover the amounts due. Further, that the present application is res judicata since the issue of injunction was substantively canvassed by the parties and determined by the lower in the impugned ruling.

9. That if the Court was minded to grant the injunction sought, it should do so on such terms as will balance and protect the respondent's lawful interest and lower the risk of injustice including ordering a deposit of security of Kshs. 15,871,745/-, which was the debt due from the Applicant as at 29th April 2021, in a joint interest earning account.

10. The application was canvassed by way of written submissions. As regards leave to appeal out of time, the applicant placed reliance on the case of *Buscar EA Ltd t/a Starways Express & another v Patrick Ngala Riziki [2019] eKLR* where the court set out the following factors for consideration: the length of the delay; the reason for the delay; the chances of the appeal succeeding if the application is granted; and the degree of prejudice to the respondent if the application is granted.

11. On the question of delay and the reasons thereto, the applicant submitted that the reason for the delay was because the ruling was delivered without notice to either party. That she only became aware of the ruling on 17th April 2021 and filed the present application almost immediately on 19th April 2021.

12. It was submitted that in *Tabro Transporters Limited v Francis Njenga [2018] eKLR*, it was held that omission to issue a notice of delivery of judgment amounts to a sufficient reason for the purposes of enlargement of time to appeal. There was also reliance on *Republic v Senior Resident Magistrate, Mombasa Ex Parte Kenya Kazi Services Limited & another [2017] eKLR* where failure to issue a notice of delivery of a ruling was found to be a proper ground of Appeal.

13. As regards the arguability of her intended Appeal, it was submitted that the trial court had failed to determine the following pertinent issues which were tabled and canvassed before her: the effect of non-registration of the hire purchase agreements entered into between the parties; the failure by the respondent to give notices of repossession of the motor vehicles to the applicant; the fact of the applicant having already repaid more than two thirds of the Hire Purchase Price; that the *Hire Purchase Act* is not applicable to the Hire Purchase Agreements entered into between the parties since the value

of goods exceeded Kshs. 4 Million; and that the applicant is no longer indebted to the respondent under the Agreements since she had liquidated the entire amount in 2019.

14. Lastly, it was submitted for the applicant that the respondent will not suffer any prejudice if the leave sought is granted since the purported outstanding balance is composed of illegal debits and default illegal interest rates applied.

15. As regards the injunction pending the hearing and determination of appeal, the applicant reiterated that she has an arguable appeal as demonstrated hereinabove. That the fact that the respondent has already initiated the process of illegally repossessing the suit vehicles constitutes sufficient cause to grant the injunctive order. That if the injunction is not granted, it will inflict greater hardship to her as the respondent will proceed with the illegal repossession which will cripple her business operations and be expose her to third party claims over the suit vehicles. That it will render the intended appeal nugatory.

16. Finally, it was submitted that the security contemplated under Order 42 Rule 6 of the Civil Procedure Rules is only applicable when seeking stay of execution and not an injunction pending appeal. That in any event, the respondent is holding logbooks for the suit vehicles valued at over Kshs. 30 million. Any additional security is unjustified in the circumstances.

17. On its part, the respondent reiterated its earlier averments on why the applicant is undeserving of the leave sought. It submitted that the intended appeal is not arguable as all matters raised are res-judicata having been litigated and determined by a court of competent jurisdiction. It was also submitted that the applicant can adequately be compensated in costs by the respondent for any alleged prejudice.

18. As regards the prayer for an injunction pending the intended Appeal, reliance was placed on *Philip Orwa t/a Asquire Diversity v Equity Bank Ltd [2012] eKLR* and *Bilha Mideva Buluku v Everlyne Kanyere [2016] eKLR* where the courts stated that the determination of the same must be preceeded by a consideration of the three part test set out in *Giella v Cassman Brown [1978] EA 358*.

19. On prima facie case, it was submitted that the respondent had advanced the applicant loan facilities in the sum of Kshs. 27,957,600/=. That she had breached the Hire Purchase Agreements by failing to perform her contractual obligations. That clause 7 of Hire Purchase Agreements allows the respondent to immediately retake possession of the motor vehicles without notice on the happening of any of the events specified in clause 7.2 therein.

20. That the Court should give effect to the terms of the agreements and it should not rewrite the contracts. It contended that the applicant's allegation that the interest rates charged are illegal is merely a belated attempt to evade her obligations under the Agreements.

21. That it is dishonest and misleading for the applicant to allege that she has fully repaid the amount advanced whereas the statement of accounts produced by the respondent clearly demonstrate that as at 29th April, 2021, her outstanding balance was Kshs. 15,871,745/=. In the premises, the applicant has not demonstrated a prima facie case with probability of success.

22. On the second limb, it was submitted that the suit vehicles were given as securities and therefore are commodities for sale to which a value can be attached. This means that the applicant will not suffer any loss which cannot be compensated in damages. On the other hand, if the injunction is granted, the said securities will continue to depreciate in value and the recovery of the amounts due will be rendered impossible. The balance of convenience was submitted to tilt in favour of the respondent.

23. In my considered view, the only issues for consideration are:

    i. Whether the applicant has made out a case for the grant of leave to appeal out of time; and

    ii. Whether the applicant has made out a case for the grant of the injunction pending the hearing and determination of the intended appeal?

    iii. Who should bear the costs of the application?

24. On the first issue, section 79(G) of the *Civil Procedure Act* empowers the Court to admit an appeal from a subordinate court out of time where an applicant has a good and sufficient cause for failing to file the appeal within the prescribed period of 30 days.

25. Further, Order 50, Rule 6 of the Civil Procedure Rules also empower courts to enlarge the time required for the performance of any acts stipulated in the Rules notwithstanding the fact that such time has expired. Essentially therefore, the decision of whether or not to enlarge time is a matter of judicial discretion.

26. In Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR, the Supreme Court stated as follows:

    " 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;

    2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;

    3. Whether the court should exercise the discretion to extend time is a consideration to be made on a case to case basis;

    4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;

    5. Whether there will be any prejudice suffered by the respondents if the extension is granted;

    6. Whether the application has been brought without undue delay; and

    7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."

27. The applicant filed the instant application three months after the period within which she was supposed to have filed an appeal against the ruling of 18th December 2020. It is common ground that the ruling was delivered in the absence of both parties since no notice was issued by the court to that effect.

28. The respondent however blames the applicant for not being vigilant enough to find out the status of the ruling. Courts have held that the failure to issue a notice of delivery of ruling or judgment constitutes a good and sufficient cause for granting a party leave to appeal out of time. The requirement that the court gives notice of delivery of ruling or judgment is not a permissible requirement but a mandatory one. There is therefore no doubt that the applicant has given a plausible explanation for the delay in filing the Appeal.

29. The upshot is that the applicant is deserving of leave to appeal out of time against the ruling and order of 18th December 2020.

30. On the second issue, Order 42 Rule 6 of the Civil Procedure Rules, 2010 allows this court to grant a temporary injunction on terms it deems fit so long as the procedure for filing an appeal from the subordinate court has been complied with. It provides thus: -

> "(6) Notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from subordinate Court or tribunal has been complied with."

31. To begin with, there is no doubt that the applicant has complied with the procedure for instituting its intended appeal from the lower court out of the prescribed time in light of the finding I have already made.

32. The principles to consider when determining an application for an injunction pending appeal were set down by Visram J. (as he then was) in Patricia Njeri & 3 Others v National Museum of Kenya [2004] eKLR as follows: -

> "a. An order of injunction pending appeal is a discretionary which will be exercised against an applicant whose appeal is frivolous ... The applicant must state that a reasonable argument can be put forward in support of his appeal.
>
> b. The discretion should be refused where it would inflict greater hardship than it would avoid.
>
> c. The applicant must show that to refuse the injunction would render his appeal nugatory.
>
> d. The court should also be guided by the principles in Giella v Cassman Brown [1973] EA 358."

33. Has the applicant established a prima facie case with a probability of success? The relationship between the applicant and the respondent is governed by the five Hire Purchase Agreements they voluntarily executed between 2016 and 2018. It was an express term of the Agreements that the respondent would repossess and dispose of the vehicles if the monthly installments remain unpaid for three (3) consecutive months and recall the facilities advanced.

34. The applicant defaulted in repaying the loan thereby prompting the respondent to invoke Clause 7 of the agreements and terminate the hiring forthwith and commence immediate repossession of the chattels. The applicant alleged that she liquidated the entire liabilities by paying a lump sum of Kshs. 10,000,000/- on 30th October, 2019 is not supported by evidence. The record shows that that is the amount that the respondent was paid by her Financier as part payment of the outstanding amount at the time.

35. In *Mrao Limited v First American Bank of Kenya and 2 Others [2003] eKLR*, a prima facie case was defined as follows:

> " A prima facie case in a Civil Case include but is not confined to a "genuine or arguable" case. It is a case which on the material presented to the court, a tribunal properly directing itself

will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial."

36. In this case, the applicant has not demonstrated that the respondent has infringed any of her rights under the Hire Purchase Agreements by invoking its right to repossess the motor vehicles upon default. The applicant has not therefore established a prima facie case with a probability of success in this instance.

37. It is also my considered view that damages would be an adequate remedy in this case since the values of the suit vehicles are quantifiable. On the other hand, it is obvious that granting an injunction in the circumstances of this case would inflict greater hardship on the respondent as the debt continues to accrue late payment charges which may soon outstrip the value of the suit vehicles whose values are bound to depreciate overtime.

38. Finally, since there is no doubt as to whether the applicant has satisfied the first two limbs, it is unnecessary for the Court to determine where the balance of convenience lies.

39. The upshot is that the applicant has not established a case for the grant of an injunction pending the hearing and determination of her intended appeal.

40. Accordingly, the application dated 19th April 2021 only succeeds in terms of the prayer for leave to appeal out of time. I will make no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF NOVEMBER, 2021.

A. MABEYA, FCI Arb

JUDGE