



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL APPEAL NO. E001 OF 2019

BETWEEN

JAMII BORA BANK LIMITED.....APPELLANT

AND

JACOB PAUL MUOKIRESPONDENT

(Being an appeal from the ruling and order of Hon. L. M. Kabaria, SRM dated 31st August 2018 in Milimani Magistrates Court Civil Case No. 5511 of 2017)

JUDGMENT

1. This is an appeal against the ruling and order of the subordinate court in which the trial magistrate granted a mandatory injunction on the following terms:

The Defendant is ordered to unconditionally release the motor vehicle registration number KCH 931U to the plaintiff forthwith. The defendant will bear the costs of this application”

2. The respondent’s case before the trial court and more particularly in its Notice of Motion dated 2nd August 2017 is that he was employee of the appellant (“the Bank”) and had been offered a loan to purchase the motor vehicle registration No. KCH 931U (*‘the motor vehicle’*). The loan was for Kshs. 1,020,000/- payable in monthly installments of Kshs. 21,672/- over a period of 60 months. The respondent in his deposition in support of the motion stated that all arrears were deducted from his terminal due hence the Bank could not repossess the vehicle. He further contended that he was not served with the notice of repossession. He prayed for a temporary injunction restraining the Bank from selling the motor vehicle which was in the auctioneer’s custody and a mandatory order directing the Bank to release the vehicle.

3. The Bank through the affidavit of James Murage, its Head of Legal Services, opposed the application. It admitted the loan agreement but added that the respondent had another loan facility where he was advanced money to purchase an immovable property. He stated that after the motor vehicle loan facility was advanced, the respondent only paid three installments. As the respondent was also in breach of the other loan facility, the Bank exercised its right to consolidate the debts and proceeded to take steps to exercise its power of sale and issued a notice to repossess the motor vehicle.

4. The Bank admitted that it deducted arrears of the car loan from the respondent’s terminal dues but this did not clear the whole of the consolidated debt which stood at Kshs. 932,715.29 as at 20th July 2017. He pointed out that the deduction of terminal dues was merely a mitigation measure.

5. In granting the mandatory orders, the trial magistrate held that money deducted from the terminal dues was sufficient to clear the arrears hence the Bank could not repossess the motor vehicle since the payments were up to date and the appellant was entitled to continue servicing the loan.

6. The issue in this appeal concerns the discretion of the court to grant a mandatory injunction at an interlocutory stage. In ***Mbogo v Shah [1968] EA 93***, Newbold P., expressed the nature and extent of the appellate court’s jurisdiction to interfere with the discretion of the lower court as follows;

A court of appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from

the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.

7. The general principles governing the grant of an interlocutory mandatory injunction were set out by the Court of Appeal in the case of **Kenya Breweries Limited & Another v Washington O. Okeyo NBI CA Civil Appeal No. 332 of 2000 [2002] eKLR** where it adopted the test summarized in **Halsbury's Laws of England Vol. 24, 4th Ed. para 948** which reads as follows:

A mandatory injunction 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. 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 march on the plaintiff a mandatory injunction will be granted on an interlocutory application.

8. In essence, there must be a strong case that obviates a need for a trial. Counsel for the appellant pointed out the trial magistrate did not consider that all the facts relating to the loan were not before the court to enable it reach definitive conclusions. For example, the trial magistrate did not consider whether the Bank had a right to consolidate the motor vehicle debt and the charge debt to determine whether the respondent was in arrears. Whether the accounts were in arrears was a question of fact and it is clear that the trial magistrate did not pay attention to the fact that there was an admission on record that the respondent was indebted to the Bank and that the full statements of account for either loan were not exhibited by either party. Finally, the trial magistrate did not take into account equitable principles in considering whether or not to grant the mandatory orders given the evidence of default and non-disclosure of material facts.

9. I therefore find that the trial magistrate failed to exercise her discretion in light of the applicable principles for grant of a mandatory interlocutory injunction as the facts in issue were disputed and evidence before the court was inconclusive. This court is therefore entitled to intervene within the parameters set out in **Mbogo v Shah (Supra)**.

10. Before I conclude let me mention that the firm of *Gulenywa and Company Advocates* were on record for the respondent before the subordinate court. They failed to attend court several time but when served with process they endorsed on the hearing notice that, *"Please serve the Respondent personally, we have no instruction on this appeal and we have not filed any document on this file."* Unless an Advocate has been granted leave to withdraw from acting for the party under the provisions of **Order 9 rule 13** of the **Civil Procedure Rules**, the advocate remains on record for that party to the final conclusion of the matter including any review or appeal. Since counsel for the respondent was properly served the matter proceeded in their absence.

11. For the reasons I have stated, the appeal is allowed. The order of the subordinate court made on 31st August 2018 is hereby set aside and substituted with an order dismissing the respondent's Notice of Motion dated 2nd August 2017. The appellant shall have costs of that application and this appeal.

DATED and DELIVERED at NAIROBI this 17th day of JANUARY 2020.

DAVID S. MAJANJA

JUDGE

Court Assistant: Mr Tupet.

Ms Mumbi instructed by Ashitiva Advocates for the appellant.

No appearance for the respondent.