



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. 37 OF 2018

KENYA WOMEN MICROFINANCE BANK LIMITED.....APPELLANT/APPLICANT

VERSUS

RUTH NDUNGE MUTULU.....1ST RESPONDENT

JOSEPH MUTISO NZANGI.....2ND RESPONDENT

(An appeal from the Ruling and Orders of the Honorable C. O. Nyawiri (Senior Resident Magistrate) issued in Chief Magistrates Court Civil Suit No. 15 of 2018, Malindi delivered on 1st August, 2018)

CORAM: Hon. Justice R. Nyakundi

Onyango & Ameyo for the Appellants

Omagwa, Angima Advocates for the respondent

JUDGMENT

This is an interlocutory appeal by Kenya Women Microfinance Bank Limited hereinafter referred as appellant challenging the decision by **Hon. C. O. Nyawiri** dismissing an application to grant the relief of an injunction prayed for then by the appellant against the respondents delivered on 1.8.2018.

The order appellant was aggrieved of read as follows:

- 1). That the Learned trial Magistrate erred in law and thereby misdirected himself into granting orders contrary to express contractual security documents signed by the parties and whose effect was to rewrite a negotiated contract between two parties contrary to established legal principles and judicial precedents.*
- 2). That the Learned trial Magistrate erred both in law and in fact by ordering for the release of the subject vehicle without considering the evidence on record of total lack of service/repayment of the loan facility by the Respondents since year 2015.*
- 3). That the Learned Magistrate erred both in law and fact in failing to analyze the evidence and/or submissions tendered/placed before him by the appellants thereby reaching the wrong conclusions.*
- 4). That the Learned Magistrate erred in law and fact and misdirected himself by considering extraneous matters in the grant of an interim mandatory injunction and thus arrived at a wrong conclusion that the parties had admitted as a fact that the subject motor vehicle had been involved in an accident.*
- 5). That the Learned Magistrate erred in law and fact by arriving at a wrong conclusion that the appellant was responsible for the repair costs on the subject motor vehicle following the alleged accident and thus misapplied the law by misdirecting herself in granting the interim injunctive orders.*
- 6). That the Learned Magistrate erred in law and fact by failing to evaluate the evidence on record and as result reached an irrational decision per incuriam, and manifestly unjust leading to a miscarriage of justice.*
- 7). That the Learned trial Magistrate erred in law and in fact by failing to appreciate the weight of evidence in that the respondents having made no payments towards servicing their loan since 2015 were underserving of the equitable remedies granted.*

8). *That the Learned Magistrate erred in law by failing to appreciate that the orders granted were of a mandatory injunctive nature and should only be granted in clear and exceptional circumstances and that the respondents had not met the threshold for grant of such orders.*

9). *That the Learned Magistrate erred in law by misdirecting himself on the principles governing the granting of interlocutory mandatory injunctions and by doing so, wrongly exercised his discretionary powers thereby arriving at an irrational and manifestly unjust decision contrary to established judicial precedents.*

Procedural history

On 23.1.2018, the respondents filed suit against the appellant bank seeking a permanent injunction restraining it, its agents, employees, or any other person acting on their behalf, from selling, advertising and alienating the subject motor vehicle registration number **KAX 2015J FUSO** and order release of the vehicle to their custody. They also prayed for costs of the suit.

The substratum of the claim is based on a loan agreement entered into in the year 2016 between the appellant bank and the respondents to this appeal. The logbook of the subject motor vehicle was deposited with the appellant bank as security for the loan amount of Kshs.1,500,000/=. That the respondents continued honoring their obligations on repayment reschedules that the 31.8.2016 when the said motor vehicle was involved in a road traffic accident, rendering it inoperative for a period of time.

That immediately upon repair of the motor vehicle, the appellant bank moved in to impounded it on ground of default in repayments of the loan balance.

Simultaneously, with the suit, the respondents filed the notice of motion dated 23.1.2018 seeking temporary injunction under Order 40 Rule (1) (2) of the Civil Procedure Rules pending the hearing and determination of the suit. It was the outcome of this notice of motion which later became the subject of the instant appeal.

In support of the appeal Learned Counsel **Mr. Onyango** for the appellant submitted that the gist of the ruling by the Learned trial Magistrate was the error occasioned and misdirection of granting the orders of conditional interlocutory injunction contrary to the clear terms of the contract between the 1st appellant bank and the respondent. It was further Learned counsel's contention that declining to enforce the contract the ruling would have an adverse effect on the legally binding contract in which one of the parties are in default.

In order to buttress the legal arguments, Learned counsel cited the following authorities **National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd and another [2002] EA 503, National Bank of Kenya Ltd v Hamia Bana & 103 others CA 72, Attorney General of Belize vs Belize Telecom Ltd [2009] UKPC 10** What Learned counsel's main concern to the whole dispute was the release of the motor vehicle which the respondents had offered as security for the loan. In the sense, therefore Learned counsel contended exercise of such discretion was wrong in principle as a result it manifestly led to a miscarriage of justice.

Analysis

I have consciously considered the appeal as filed by the appellant bank against the respondents. Before delving into the merits of the appeal the various principles in regard to grant of interlocutory injunction are now well settled as upheld by the Court of Appeal in **Mr Rao Ltd v First American Bank of Kenya Ltd & 20 Others [2003] KLR 125, Giella v Cassman Brown [1973] EA, Nguruman Ltd v Jan Bunde N. Elsen & 2 others CA NO. 77 of 2012.**

On the basis on the above authorities, the following conditions were the determinants in exercise of the discretion by the trial court to grant or decline injunctive relieves.

The respondents had a duty to discharge the burden of proof:

(a). To establish their case was serious and arguable rising to a level of prima facie case in law.

(b). They had to demonstrate that irreparable harm will be occasioned not compensable by way of damages if a temporary injunction was denied.

(c). That in all these if they fail to persuade the court on the first two grounds, the balance of convenience is to be tilted in their favor.

It was the above test that the Learned trial Magistrate applied to the facts of the case in exercise of discretion to order for conditional release of the motor vehicle pending the hearing and determination of the suit. The appellant's counsel assert that the court in granting the order acted in excess of jurisdiction in ignoring the clear terms of the contract, with a clause on seizure and impounding of the motor vehicle to realize the security. This appeal has therefore its origin in that exercise of discretion resulting in an order prejudicial to the appellants.

In broader context of the jurisdiction of this court, the principles are as laid down in the case of **United India Insurance Co. Ltd v East African Underwriters (Kenyan) Ltd [1985] EA 898** where the court held:

“The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case.”

The Court of Appeal is only entitled to interfere if one or more of the following matters are established:

“First, that the Judge misdirected himself to the law, secondly, that he misapprehended the facts, thirdly, that he took account of consideration of which he should not have taken account. Fourthly, that he failed to take account of considerations of which he should have taken account or fifthly, that his decision albeit a discretionary one is plainly wrong.”

The test for determining whether this court should exercise its discretion to set aside the decision on interlocutory injunction by the Learned trial Magistrate would be based on these guidelines. The decision to grant or refuse an interlocutory injunction being an equitable remedy is meant to ensure that the subject matter of the suit of the litigation is preserved pending the determination of the dispute on the merits.

In this appeal the complaint by the appellants was that the injunction as granted violates the contractual obligations entered with the respondents. That if the appellant has to comply with such an injunction it would require variation of the contractual terms of the loan agreement. Furthermore, the Learned Magistrate did not demonstrate that the respondents had fulfilled the conditions set out in the case of **Mrao Ltd (supra), Giella v Cassman Brown (supra)** on grant of injunctive relief. Indeed, as argued by the appellant, the underlying claim between the 1st appellant bank and the respondents is on the loan facility advanced and utilized by the respondents, duly secured by the subject motor vehicle an issue before the trial court.

From the record the trial court orders prohibited the sale of the motor vehicle and had it released to continue to carry on its business until the determination of the suit. That means that the 1st appellant can access it though it was not in their physical custody, however, given the fact that the log book was deposited as security for the loan it had a lien and equitable interest.

The fundamental question is whether the granting of a conditional injunction by the Learned trial Magistrate was just and equitable in all of the circumstances of the case.

In the instant appeal and the court below the respondents acknowledges and recognizes existence of a loan facility with the 1st appellant. In their affidavit its deposed that before the mechanical breakdown of the motor vehicle, they continued honoring the obligations on loan repayment. That the tilt of the balance of convenience towards grant of an injunction was to enable them to continue business operations in order to repay the loan.

It is clear to this court that the appellants are challenging the reasoning and conclusions of the Learned trial Magistrate in the interpretation of Order 40 Rule 1 and 2 of the Civil Procedure Rules.

In my view in these particular circumstances as outlined there is no evidential foundation that the purpose of the conditional Injunction was not meant to improve the right of the court to do justice to the parties to await the outcome of the suit. If the appellant could have taken the step to have the claim heard on the merits the likely consequences of dissipating, causing damage or depreciation to the only asset to secure the loan to say the least could have been avoided.

The respondents redress through an interlocutory injunction did not in anyway vitiate or vary the terms of the contract as ventilated by the appellant counsel to this appeal.

The Learned Magistrate reliance on a balance of convenience as the main test to be considered at the time was clearly a judicious exercise of discretion to meet the ends of justice of the matter at that stage of the proceedings. The mere fact that the motor vehicle was a security asset with the appellant Bank did not diminish the respondents' likelihood to succeed on the merits at the trial of the main suit.

For the reasons set forth above and exhibited in the record and submissions herewith, the appeal to vary the injunction is respectfully declined with costs to abide the determination of the suit.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 12TH DAY OF NOVEMBER 2019.

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R. NYAKUNDI

JUDGE

In the presence of:

1. Muhuni holding brief for Onyango & Ameyo for the appellant