



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL CASE NO. 53 OF 2017

STANBIC BANK.....1ST APPELLANT

LEAKEY AUCTIONEERS.....2ND APPELLANT

VERSUS

MARTIN TUMAINI NGALA.....RESPONDENT

CONSOLIDATED WITH

CIVIL APPEAL NO. 54 OF 2017

STANBIC BANK.....1ST APPELLANT

LEAKEY AUCTIONEERS.....2ND APPELLANT

VERSUS

MARTIN TUMAINI NGALA.....RESPONDENT

(Being an appeal from the Ruling and order of the

Hon. Dr. Julie Oseko, Chief Magistrate sitting

at Malindi Chief Magistrate's Court as

delivered on 8th November, 2017

in Civil Case Number 174 of 2017)

JUDGEMENT

1. This appeal is against the ruling delivered on 7th November, 2017 by Dr. Julie Oseko, Chief Magistrate in Malindi CMCC No. 174 of 2017 in which the Respondent, Martin Tumaini Ngala, through a notice of motion dated 12th September, 2017 sought an order staying the auctioning of his motor vehicle registration number KCL 728H Mitsubishi FH 215 by the 1st Appellant, Stanbic Bank and the 2nd Appellant, Leakey Auctioneers. The application also sought the release of the said vehicle which had already been impounded by the appellants. The application was allowed in its entirety.

2. The appellants being aggrieved by the said decision lodged this appeal seeking to overturn the said decision on the grounds that:

“1. That the Learned trial Magistrate erred in law and fact by allowing the Plaintiff/Applicant's application dated 12th September, 2017 as filed in Malindi CMCC No. 174 of 2017 in terms of prayers c of the notice of motion yet the application did not meet the requirements for grant of injunctive orders in the circumstances.

2. That the Learned trial Magistrate erred in law and fact by holding that the Plaintiff/Applicant had properly serviced his

loan for motor vehicle Registration number KCL 728H Mitsubishi FH 215 yet the document before court showed that the said loan was in arrears.

3. That the Learned trial Magistrate erred in law and facts by holding that of the two loans the Plaintiff had with the 1st Defendant, he had properly serviced one loan and that only one loan was in arrears.

4. That the Learned trial Magistrate erred in law and fact by making a finding that the repossessed motor vehicle was not subject to any loan arrears yet all the two loans were in arrears.

5. That the Learned trial Magistrate erred in law and fact by failing to note that the Plaintiff had misled the Honourable court that he had an unsecured loan with the 1st defendant yet he had two secured loans which were all in arrears.

6. That the Learned trial Magistrate erred in law and fact by issuing orders for the release of the attached Motor vehicle in a Hire Purchase agreement wherein it was clear that the Plaintiff was in arrears and the repossessed motor vehicle was the security for fund advanced.

7. That the trial Magistrate erred in fact and law by holding that the Plaintiff had through the notice of motion dated 12th September, 2017 made out a case against the 1st Defendant in the absence of a filed Defence by the Defendants despite the fact that this was an interlocutory application and that the defendants had not been served with summons to enter appearance and defence.”

3. At the time of filing the appeal, the appellants also filed a notice of motion dated 16th November, 2017 seeking orders staying the release of the motor vehicle in question to the Respondent. They also sought an order staying the execution of the appealed ruling. The application was however not heard as the parties agreed to proceed with the appeal.

4. The parties filed submissions and highlighted the same. Counsel for the Appellant submitted on grounds 2, 3 and 4 of the appeal that the fact that the Respondent had defaulted on the loan facility was well-known to the trial court as statements of account showing that the motor vehicle account had outstanding arrears of Kshs.369,872.20 and the tractor account had outstanding arrears of Kshs.189,339.32 as on 14th September, 2017 when the suit was filed had been placed before the court. Further, that the evidence placed before the court showed that the Respondent had violated its agreements with the 1st Appellant. Counsel for the appellants therefore wondered how the trial magistrate concluded that only one of the two loan accounts was in arrears. Accordingly, counsel urges this court to find that the trial court's finding that the repossessed motor vehicle was not subject to any loan arrears had no basis. As such, the appellants contend that the said finding was contrary to the evidence that was placed before the court.

5. Turning to grounds 1, 6 and 7 of the appeal, the appellants' counsel submitted that the conditions for the grant of an injunction were not met by the appellants. According to counsel, for an injunction to issue, the Respondent had to establish that his rights had been breached by the appellants. Counsel asserts that this was not done as the Respondent never disputed the existence of the hire purchase agreement and the chattel mortgage and also conceded that the accounts were in arrears.

6. It is the appellants' case that what the Respondent did by approaching the court was trying to avoid liability under the two agreements, which were in any case voluntarily executed. Further, that it was legitimately expected that breach of the agreements would lead to the 1st Appellant enforcing its rights by repossessing the motor vehicle and the tractor.

7. The appellants therefore urge that the Respondent's case had no merit and he had thus not established a prima facie case to warrant the issuance of the orders. That the case not only had no probability of success but was also an abuse of the court process and ought to have been dismissed.

8. The appellants contend that the Respondent was not deserving of any orders as he had approached the court with unclean hands. They submit that the Respondent had averred in paragraph 6 of the affidavit in support of his application that he had been religiously repaying the loan as per the terms of the contract but the averment was not correct.

9. Asserting that the Respondent had not established that he would suffer irreparable loss were the motor vehicle to be sold, counsel submitted that in entering the contract the Respondent knew the vehicle could be sold if he breached the contract hence it cannot be said that he would suffer loss that cannot be compensated by damages. The appellants therefore submit that the Respondent failed to meet the second test for granting an injunction.

10. On the third test, balance of convenience, the appellants contend that the court should take the course that appears to carry the lower risk of injustice if it later turns out that its decision was wrong. According to the appellants, the Respondent had made statements that were not substantiated by tangible evidence. In such a situation, the 1st Appellant is the one to suffer most if the order of the trial court is not upset by this court.

11. The appellants fault the trial court for finding that the appellants had not filed any defence stating that the issue that was before the court was an application which had been responded to and the question as to whether the appellants had not filed a defence was not an appropriate issue at that stage.

12. The appellants conclude by urging this court to find that the trial court misdirected itself and misapplied the law.

13. The appellants cited various decisions in support of their submissions. The cited decisions are **Giella v Cassman Brown & Company**

Ltd [1973] 1 EA 358; Mrao Ltd v First American Bank of Kenya Ltd & 2 others, CACA No. 39 of 2002; Apollo Onyango Njago & another v Savings and Loan Kenya Limited [2012] eKLR; George Munge v Sanjeev Pancho Sharma & 3 others [2012] eKLR; Maithya v Housing Finance Company of Kenya & another 1 EA 133; Elijah King'eno Arap Bii v Kenya Commercial Bank [2001] eKLR; J.M. Gichanga v Cooperative Bank [2005] eKLR; and Jan Bolden Nielsen v Herman Philipus Steyn & 2 others [2012] eKLR.

14. In response to the appeal, it was submitted on behalf of the Respondent that the appeal is incompetent and moot. According to counsel for the Respondent, the motor vehicle in question had already been released to the Respondent but the appellants had not included in their appeal a prayer seeking an order directing the Respondent to release the motor vehicle to them.

15. The Respondent contends that the 2nd Appellant did not follow the law as he was not served with any proclamation notice. He submits that failure by the 2nd Appellant to comply with the law was actually the basis for the issuance of the orders by the trial court.

16. The Respondent insists that the 1st Appellant did not file a defence and the trial court was therefore correct in allowing his application.

17. The question for the determination of this court in this appeal is whether the Respondent met the conditions for the grant of injunctive relief. The appellants' case is that he failed to do so whereas the Respondent avers that he met the conditions for the grant of the orders issued by the trial court.

18. In order for an interlocutory injunction to be granted, an applicant must first show that he has a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant demonstrates that if the injunction is not issued, he will suffer irreparable injury incapable of being adequately compensated by an award of damages. Thirdly, whenever the court is in doubt, it decides the application on the balance of convenience. See **Giella** (supra).

19. Also, as was stated by Ojwang, J (as he then was) in **Suleiman v Amboseli Resort Ltd (2004) KLR 589**, as cited by Mabeya, J in **Jan Bolden Nielsen** (supra), the court **"in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice."**

20. When the Respondent moved to the Magistrate's court, the main relief he was seeking in the plaint dated 12th September, 2017 was:

"A permanent injunction restraining the Defendants, its agents, employees or any other person acting at their behest from selling, advertising and renting the plaintiff motor vehicle Mitsubishi FH 215 Registration Number KCL 728H and order release [of] the vehicle to the plaintiff's custody."

21. In brief, the Respondent's case was that he obtained a loan facility from the 1st Appellant on 10th March, 2017 for the purpose of purchasing motor vehicle Mitsubishi FH 215 registration Number KCL 728H. According to the Respondent, he complied with the terms of the loan agreement and had the motor vehicle jointly registered in his name and that of the 1st Appellant. It was the Respondent's case that he thereafter paid the loan religiously and without fail.

22. The Respondent averred that prior to obtaining the asset loan he had obtained an unsecured loan from the 1st Appellant. His averment was that the two loans were independent of each other but he later came to learn that the 1st Appellant was deducting payments for the asset account to offset the unsecured loan arrears without his approval or consent. When he approached the bank manager on the issue he was told that the computer was automatically deducting the loans from the asset account.

23. The Respondent stated that owing to the consolidation of the loan facilities, he fell into arrears on the asset loan and the 1st Appellant had instructed the 2nd Appellant to impound the motor vehicle. The Respondent's case was that the 2nd Appellant had impounded the motor vehicle without following the due process of the law.

24. At the time of filing his claim the Respondent also filed the notice of motion which gave rise to the ruling that is the subject of this appeal. The averments in the affidavit sworn in support of the application mirrored the contents of the plaint save for the addition that he was not served with a proclamation by the 2nd Appellant prior to the impounding of the motor vehicle. Although there is no averment in the affidavit that some documents had been exhibited, the Respondent went ahead and exhibited several documents.

25. The 1st Appellant opposed the application through an affidavit sworn by its Manager for Business Support and Recoveries, Ann Kaswii Muli. Through that affidavit, the 1st Appellant disclosed that it had advanced financing to the Respondent in the accumulative sum of Kshs.6,945,768 which was secured by joint registration of the assets (motor vehicle Reg. No. KCL 728H and tractor Reg. No. KTCB 419P) obtained under the hire purchase agreements. Further, that contrary to the Respondent's averment, besides the facility for the motor vehicle, the 1st Appellant had also advanced the sum of Kshs. 2,745,768 to the Respondent for the purpose of the purchase of a tractor.

26. According to the 1st Appellant, the Respondent had failed to pay the amount due hence re-possession of the motor vehicle. The 1st Appellant pointed out that the Respondent had actually admitted in his pleadings that he was in arrears. Further, that the Respondent all along knew that in case of default the security he had offered would be sold to recover the facility. On the strength of its replying affidavit, the 1st Appellant urged the trial court to dismiss the application.

27. As pointed out by the appellants, the evidence that was before the trial court at the time the matter was heard demonstrated that the Respondent had obtained loans from the 1st Appellant and the loan accounts were in arrears.

28. By approaching the court with a prayer for a permanent injunction restraining the 1st Appellant from repossessing the motor vehicle, the Respondent was seeking the assistance of the court to rewrite the contract between him and the 1st Appellant. One of the terms of the loan agreement was that upon default the 1st Appellant could repossess the motor vehicle for disposal so as to recover the money advanced to the Respondent. A permanent injunction would have therefore denied the 1st Appellant the right to repossess the motor vehicle. The main prayer sought in the plaint was therefore untenable.

29. Turning to the application for temporary relief, it is clear that the Respondent did not establish a *prima facie* case to warrant the grant of an injunction. As already stated, the relief he was seeking in the suit was untenable. Secondly, the Respondent did not demonstrate that if the injunction was not granted he would have suffered injury which could not be compensated by award of damages. There was no evidence placed before the court by the Respondent to show that the appellants were incapable of refunding the money to him were the court to find in his favour. Thirdly, it is clear that an order of injunction was more harmful to the 1st Appellant. It had advanced money to the Respondent and the only way the money could be recovered was through repossession and sale of the security offered by the Respondent. The balance of convenience should have tilted in favour of the 1st Appellant.

30. An injunction is not given as a matter of right. It must be earned. A party seeking an interlocutory injunction, which is discretionary in nature, must demonstrate that he has an arguable case and that unless the order is given, he will suffer loss which cannot be repaired by an award of damages. Where the court is in doubt, it decides the issue on a balance of convenience, always mindful that the decision should be made in favour of the party likely to suffer greater harm if the order is denied or granted.

31. The Respondent did not satisfy the conditions for the grant of orders of injunction. The trial Magistrate therefore erred in granting the orders to the Respondent.

32. In the circumstances of this case, I find that the appeal has merit. The same is allowed and the orders issued by the Chief Magistrate on 8th November, 2017 are set aside. Consequently, the Respondent's application dated 12th September, 2017 is dismissed with costs to the 1st Appellant. The 1st Appellant will also have the costs of this appeal.

Dated, signed and delivered at Malindi this 17th day of May, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT