



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL CASE NO. 16 OF 2016

(Coram: Odunga, J)

TITUS MULWA MBUI.....PLAINTIFF

VERSUS

MATHEW MUTUNGA MULWA

SAMMY MBUI MUTUNGA MULWA

JONAH SILA NDISO.....DEFENDANTS

RULING

1. By a Motion on Notice dated 3rd June, 2016, the applicant/appellant herein, **Titus Mulwa Mbui**, substantially seeks an order that pending the hearing and determination of this suit, the Court issues a temporary injunction restraining the Defendant/Respondents, their servants and/or agents from interfering with the Plaintiff's share No. 200 at Kiu Ranch and Account No. 0001010290338 with Post Bank. It was further sought that the Court issues an order directing Kiu Ranch to transfer back share No. 200 to the Plaintiff.

2. According to the Applicant, the 1st and 2nd Respondents are his sons while he is the legal holder of share No. 200 with Kiu Ranch and Account No. 0001010290338 with Post Bank of Kenya.

3. According to the Applicant, on or about 2011, the 1st and 2nd Respondents stole his ATM Card and without his knowledge and/or consent withdrew Kshs 400,000/= in bits. On or about 2013, the said Respondents, taking advantage of the Applicant's age and trust placed upon them, sold the Applicant's share No. 200 to the 3rd Respondent without the Applicant's consent and/or knowledge which has given some dividends to the 3rd Defendants.

4. The Applicant therefore sought an order directing the Kiu Ranch to stop the Defendants from doing further transactions and/or dealings upon his said share No. 200 and all the dividends which were given out since the time the share was sold be retreated back to him and that the 1st and 2nd Respondents be ordered to refund the money they withdrew without his consent.

5. I have considered the application, the affidavits both in support and in opposition to the same and the submissions of counsel. The law on the grant of injunction in this country is fairly well settled. Conditions for grant of interlocutory injunction as laid down in **Giella vs. Cassman Brown & Co. Ltd [1973] EA 358** are as follows:

(i). *prima facie* case with a probability of success;

(ii). the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages;

(iii). if the Court is in doubt on the existence or otherwise of a *prima facie* case it will decide the application on the balance of convenience.

6. The foregoing conditions are, however, not exhaustive. At an interlocutory stage the Court is not required and indeed forbidden to purport to decide with finality the various relevant "facts" urged by the parties. In the case of **Airland Tours & Travel Limited vs. National Industrial Credit Bank Nairobi (Milimani) HCCC No. 1234 of 2002, Ringera, J** (as he then was) reiterated the conditions for grant of interlocutory injunctions and stated that whereas in an interlocutory application the Court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law and that in an

application for injunction although the Court cannot find conclusively who is to be believed or not, the Court is not excluded from expressing a *prima facie* view of the matter and the Court is entitled to consider what else the deponent to the supporting affidavit has stated on oath which is not true.

7. With respect to what constitutes a *prima facie* case, in Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125, it was held by the Court of Appeal (Bosire, JA) that:

“A mere scintilla of evidence can never be enough; nor can any amount of worthless discredited evidence. It is true that the Court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by “*prima facie* case”, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence... The terms “*prima facie*” case, and “genuine and arguable” case do not necessarily mean the same thing, for in using another term, namely a sustainable cause of action, the words “*prima facie*” are frequently used to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner of considering, which was in relation to the pleadings that had been put forward in the case. It would be in the appellant’s interest to adopt a genuine and arguable case standard rather than one of a *prima facie* case, the former being the lesser standard of the two... In civil cases a *prima facie* case is a case in 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 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. That is clearly a standard, which is higher than an arguable case.

8. The remedy being an equitable one, the Court will decline to exercise its discretion if the supplicant to relief is shown to be guilty of conduct which does not meet the approval of the Court of equity. Where the contract is frustrated by the intervening actions of a third party, it cannot be said that a *prima facie* has been made. It is for the supplicant to injunctive relief to demonstrate that he would suffer loss, which cannot be adequately compensated in damages.

9. The applicant herein contends that his ATM Card was stolen by the 1st and 2nd Respondent who used the same to withdraw money from his account. Theft is a criminal offence and while it is not mandatory that a person whose property has been stolen must report the same to the police, a prudent person would do so if only to show what steps he took upon realisation that his property was stolen. What we have before us in this case are averments made by the applicant as controverted by similar bare averments from the Respondents. In light of the rivalling averments which stand at par evidentially, the Applicant’s case cannot be said to stand on a plane higher than the Respondents’ case, yet the burden is upon him to prove that he has a *prima facie* case. In Gandhi Brothers vs. H K Njage T/A H K Enterprises Nairobi (Milimani) HCCC No. 1330 of 2001, Ringera, J (as he then was) held that:

“Where...[it] is asserted by one party and denied by the other, both the assertion and the denial being on solemn oath taken before a Commissioner for Oaths the Court cannot but be left in a quandary in the absence of cross-examination of the deponents to the contradictory affidavits. In those circumstances the Court is constrained to decide the matter on the basis of fundamental rule of evidence, which is codified in Section 3 of the Evidence Act Cap. 80 Laws of Kenya that a fact is not proved if it is neither proved nor disproved. It is therefore not proved.”

10. I am therefore unable to find, based on material placed before me that a *prima facie* case has been established with respect to the allegation that the Applicant’s ATM Card was stolen by the 1st and 2nd Respondents.

11. As regards the issue that the 1st and 2nd Respondents without the Applicant’s consent or knowledge transferred the Applicant’s shares to the 3rd Respondent, it has not been contended that the value of the said shares cannot be compensated by an award of damages.

12. The Applicant also sought that the Court issues an order directing Kiu Ranch to transfer back share No. 200 to the Plaintiff. That order is clearly in the nature of mandatory injunction. In the case of Kenya Breweries Limited & Another vs. Washington O. Okeyo Civil Appeal No. 332 of 2000 [2002] 1 EA 109 the Court of Appeal stated 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...A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the Court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction the Court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction”.

13. It must now be clear from my finding on the existence of a *prima facie* case that I am not satisfied that this is a clear case that ought to be decided at once or where the injunction is directed at a simple and summary act which can be easily remedied or that the defendants have attempted to steal a march on the plaintiff. Moreover, I do not feel a high degree of assurance that at the trial it will appear that the injunction has rightly been granted.

14. Having considered the material placed before I am of the view and find that the applicant has failed to prove the conditions necessary for an injunction to issue.

15. In the premises the Notice of Motion dated 3rd June, 2016 fails and is hereby dismissed but with no order as to costs.

16. It is so ordered.

Read, signed and delivered in open Court at Machakos this 12th day of October, 2018.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mrs King'oo Wanjau for Mr Musyimi for the Plaintiff

Mr Babu for Mr Sila for the Defendant

CA Geoffrey