



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 229 OF 2018

WISEBORN INDUSTRIES (K) LTD.....APPELLANT

VERSUS

FORTUNE SACCO SOCIETY LIMITED.....RESPONDENT

(Being an Appeal from the Ruling/Order of the Co-operatives Tribunal at Nairobi dated 11th April 2018 in Co-operatives Tribunal Case No 811 of 2017)

RULING

INTRODUCTION

1. The Appellant's Notice of Motion application dated and filed on 30th May 2018 was filed pursuant to the provisions of Order 51 Rule 1, Order 42 Rule 6 of the Civil Procedure Rules together with all the enabling provisions of the law. Prayers Nos (1), (2) and (3) were spent. It sought the following remaining orders:-

1. Spent.

2. Spent

3. Spent

4. THAT this Honourable court be pleased to grant the Appellant an order of stay of Execution of the Co-operative Tribunal Order/Ruling dated 11th April 2018 requiring the Appellant to Deposit Kshs 15,500,000/= on or before 11th June 2018 and further grants the Appellant an order of injunction pending the hearing and determination of the Appeal filed herein.

5. THAT the costs of this application be provided for.

2. The Appellant's Written Submissions were dated and filed 16th July 2018 while those of the Respondent were dated 3rd September 2018 and filed on 4th September 2018.

3. When the matter came before the court on 19th September 2018, the parties requested that the court deliver its decision based on their respective Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

THE APPELLANT'S CASE

4. The Appellant's case was that the Respondent did not appreciate the merits of its application for injunction that had been placed before it and that the imposition of the order that it deposits a sum of Kshs 15,500,000/= was outside the injunction principles enunciated in the case of **Giella vs Cassman Brown.**

5. It was its contention that it had raised triable and arguable issues to be argued on appeal and that the order that it deposit the aforesaid sum was harsh as it had already been crippled by the Government in its policies in the entire Brewing Industry. It undertook to pay a sum of Kshs 200,000/= per month pending the hearing and determination of the Appeal.

6. It therefore urged this court to allow its application.

THE RESPONDENT'S CASE

7. In response thereto, Amos Kimotho Njeru, the Respondent's Chief Executive Officer swore a Replying Affidavit on 19th June 2018. The same was filed on 20th June 2018.

8. The Respondent pointed out that as at the time of filing its suit at the Co-operative Tribunal, the Appellant already had a loan running over Kshs 30,000,000/= and that it had only repaid a sum of Kshs 214,445/= since the loan was advanced in 2016. It stated that the loan currently stood at Kshs 37,412,977/=.

9. It stated that the Appellant had never complained of the accounts not being proper and there was no order for taking of accounts.

10. It contended that the Appellant had previously obtained an injunction in the Environment and Land Court but that it never paid a single coin and consequently, the present application was mischievous and it ought not to be restrained from exercising its statutory power of sale.

11. It rejected the proposal by the Appellant to pay monthly instalments of Kshs 200,000/= as it was below the monthly repayments of the loan and thus urged this court to dismiss its present application with costs to it.

LEGAL ANALYSIS

12. According to the Appellant, it had sought an order for injunction before the Co-operative Tribunal (Tribunal) and not an order for stay of execution. It therefore argued that the said Tribunal erred when it granted an order for injunction but on condition that it deposits a sum of Kshs 15,500,000/= within sixty (60) days of its Ruling 11th April 2018.

13. On its part, the Respondent argued that the Co-operative Tribunal acted correctly when it granted the Appellant a conditional injunction and relied on the cases of **Cosmos Kyalo Muthembwa vs Co-operative Bank of Kenya Ltd & Another [2007] eKLR** and **Rehebeam Agencies Ltd vs Equity Bank Ltd & Another [2015 eKLR]** where the courts therein granted orders for conditional injunction.

14. It argued that the Appellant never demonstrated a *prima facie* case but rather, that the conditional injunction was granted on a balance of convenience. It added that the Appellant had come to court with unclean hands and in this regard, it placed reliance on the case of **Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2003] eKLR** where it was held that a party who had come to court with unclean hands, was not entitled to an order of injunction.

15. It was its further submission that the sum of Kshs 200,000/= monthly instalment that the Appellant had proposed was below the monthly instalment of Kshs 214,445/= and as such the proposal was a mockery of its case.

16. This court carefully perused the grounds of the Memorandum of Appeal dated and filed on 11th May 2018 and noted that the Appellant's bone of contention was that the Co-operative Tribunal ought not to have granted a conditional injunction as it had not sought a stay of execution where it would have been required to deposit security. It also noted that the Respondent's submission was that a conditional injunction was well within the discretion of a court to grant.

17. It was therefore the view of this court that determining the issue of whether or not a conditional injunction could be granted at this juncture would amount to determining the entire Appeal herein without having heard it on merit.

18. In the case of **Madhupaper International Limited vs Paddy Kerr [1985] eKLR** and **Butt vs Rent Restriction Tribunal Civil Appeal No 6 of 1979**, it was held that a court may consider whether the *status quo* is to be maintained pending the hearing of an appeal .

19. In the case of **Eringford Properties Ltd vs Cheshire County Council 1974 2 ALL ER 443** which was cited with the approval of the court at **Madhupaper International Ltd vs Kerr** (Supra) Megamy J said:-

“When party is appealing exercising his undoubted right of appeal, the court ought to see that the appeal if successful is not rendered nugatory”.

20. Accordingly, having considered the parties affidavit evidence, their respective Written Submissions and the case law that they relied upon, this court came to the firm conclusion that this was a good case for it to exercise its discretion to grant an injunction pending appeal. This court could only consider the prayer for an injunction as the order the Appellant had intended to appeal was a negative order for which no stay of execution could be granted.

21. Having said so, this court noted that the Appellant was willing to continue paying monthly instalments in the sum of Kshs 200,000/=. The Respondent had rejected this and indicated that the same was lower than the expected monthly payment of Kshs 214,445/=

22. So as not to fetter the Appellant's right of appeal and also not make a mockery of the repayments it was to make, it was necessary that the court cut a balance between the two (2) positions particularly because the Appellant appeared to have fallen behind on its monthly payments.

DISPOSITION

23. For the foregoing reasons, the upshot of the court's Ruling is that the Appellant's Notice of Motion application dated and filed on 30th May 2018 is hereby allowed in the following terms:-

1. THAT the Appellant be and is hereby granted an injunction restraining the Respondent's. On condition that it shall remit to the Respondent's account a sum of Kshs 500,000/= per month commencing on 5th December 2018 and thereafter on every 5th day of every subsequent month pending the hearing and determination of the Appeal herein.

2. THAT the Appellant do file and serve a Record of Appeal within sixty (60) days from the date of this Ruling i.e by 30th January 2019.

3. THAT the Deputy Registrar High Court Milimani Law Courts Civil Division do facilitate the typing of the proceedings in the Tribunal to enable the Appellant comply with Para 23 (2) hereinabove.

4. THAT in the event the Appellant shall default in payment of any one (1) instalment as set out in Para 23 (1) hereinabove, the conditional injunction granted herein shall be automatically discharged the Respondent shall be at liberty to take such appropriate action to protect its interests.

5. Either party is at liberty to apply in respect of Order in Para 23 (2) hereinabove

24. It is so ordered.

DATED and DELIVERED at NAIROBI this 13th day of November 2018

J. KAMAU

JUDGE