



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

CIVIL APPEAL NO. 97 OF 2010.

BONIFACE OKOTH

BREW MBA CYCO MART ::::::::::::::::::::::::::::::: APPELLANT.

VERSUS

EQUITY BANK LTD

PHILIP KILONZO OLE YIALE T/A

NASIOKI AUCTIONEERS ::::::::::::::::::::::: RESPONDENTS.

JUDGEMENT.

INTRODUCTION.

1. The appeal herein arises out of the ruling delivered on 30th July, 2010 in Kakamega C.M.C.C. No. 212 of 2010 by P.N. Areri where the application dated 5th May, 2010 was certified urgent and a temporary injunction issued to the defendants/respondents from selling and/or disposing off the plaintiff's property pending the hearing and determination of the application inter parties.

2. The appellant being aggrieved by the said ruling has appealed on the following grounds:-

- (1) The proceedings were carried out in an irregular way to the prejudice of the appellant;*
- (2) The court failed to take into account the merits of the application;*
- (3) The reasons given by the learned trial magistrate in dismissing the appellant's application dated 5th May, 2010 were baseless;*
- (4) The court failed to observe established procedure in civil cases;*
- (5) The court's ruling was biased against the appellant;*
- (6) The learned trial magistrate applied wrong principles.*

3. The appellant wants the appeal allowed with costs and the said ruling/order set aside.

Submissions.

4. The appeal was canvassed by way of written submissions and it is only the appellant's submissions that are on record.

5. In his submission, Mr. Ondieki Advocate for the appellant submits that the trial court considered the application dated 5th May, 2010 which was not opposed and dismissed it. He further submits that the learned trial magistrate did not consider the merits of the application nor follow the laid down procedures under Order 50 of the Civil Procedure Rules. He submits that since the application was not opposed it ought to have been allowed in its entirety to enable the parties present the evidence at the main hearing.

6. He further claims that failure on the part of the trial court to grant the appellant an opportunity to present his case in court led to a miscarriage of justice. He opines that the principles applied by the trial court were wrong and led to its arriving at a wrong decision. He prays that in the absence of any evidence before the court on the fate of the attached goods, the goods be preserved until the determination of the suit in the lower court.

Determination.

7. This being a first appeal, this court's duty is to re-evaluate the evidence on record, analyze it and come up with its own conclusion bearing in mind that it never heard the arguments raised and submissions made during trial, then determine whether the conclusions reached by the learned trial magistrate are to stand or not and give reasons either way. See the case of **SELLE VS. ASSOCIATED MOTOR BOAT COMPANY LTD [1968] E.A. 123, 126** where the court considered the principles upon which it acts in a first appeal.

8. The application dated 5th May, 2010 was an application brought pursuant to section 3A of the C.P.A. and the then order XXXIX rules 1, 2 and 3 of the Civil Procedure Rules which is now order 40 of the Civil Procedure Rules. Apart from a temporary injunction stopping the sale of the appellant's goods attached by the respondents, the appellant wanted the said goods restored back to them. As noted above the said application was not opposed. The trial court granted the temporary injunction but refused to give an order that the said goods be returned back to the appellant.

9. In granting the interim orders, the trial court gave its reason being that it did so to preserve the items which are subject matter of the suit. The trial court also observed that prayer 3 of the application sought interlocutory mandatory injunction which if granted would finally conclude the suit.

10. The issue that the appellant is raising is that since the application was not opposed then it ought to have been granted the way it was. If this argument by the appellant is to go by then it would set a bad precedent because applications will be allowed without being scrutinized by the courts and without following the rules and procedure laid down by statute.

11. I find that this argument cannot stand the test of time because the courts are not only guided by pleadings but also by rules of procedure and statute not forgetting precedent in case law. The trial court in this case and in coming up with its ruling was guided by the principles of injunction enunciated in **Giella vs. Cassman Brown and CO. LTD [1973] E.A 358**. These principles have not changed. It would be improper therefore for the appellant to claim that the principles applied by the trial magistrate were wrong. I find that the trial magistrate was right in applying the said principles and he made a right decision which he explained in his ruling.

12. The appellant further submits on the procedure under Order 50 of the Civil Procedure Rules. The said order deals exclusively with "TIME" which is not relevant to their application on injunction. The orders by the trial court did not stop the appellant from pursuing their case in the trial court as alleged. It was their duty to fix the case for trial and pursue the trial to its conclusion.

13. The upshot of all the above is that the appeal lacks merit and the same is dismissed with no orders as to costs.

SIGNED, DATED and DELIVERED at KAKAMEGA this 1ST day of DECEMBER, 2016.

C. KARIUKI

JUDGE.

In the presence of:-

.....**Ondiek N/A** **for the Appellant.**

.....**Manyoni** **for the 2nd Respondent.**

.....**Lilian** **Court Assistant.**