REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 57 OF 2011

FAULU KENYA DTM LIMITED……..…..……..……..….APPELLANT

VERSUS

ELIZABETH KANYONYE TIMBILI……..…..…….RESPONDENT

(Being an appeal from the order of A. Onginjo, Senior Principal Magistrate in Eldoret SRMCC No. 47 of 2010 delivered on 28th January 2011)

JUDGMENT

1. This interlocutory appeal turns on one issue: Whether the learned trial Magistrate erred by granting a preservatory or mandatory injunction pending the suit. On 22nd November 2010, the learned Magistrate had ordered, *ex parte*, that the appellant do deliver one Friesian cow and a calf to the respondent. On 28th January 2011, and after *inter parties* hearing, the interim orders were confirmed.

2. The appellant is aggrieved by that order. It contends that it was a summary disposal of the suit. The appellant's position is that the thresholds for grant of a mandatory or preservatory injunction were not met; and, that the appellant was condemned unheard. The respondent on the other hand contends that the learned trial Magistrate properly exercised her discretion in granting the injunction.

3. The genesis of this matter is a plaint filed by the respondent dated 22nd November 2010. The respondent pleaded that on 18th November 2010, the appellant attached her livestock. The execution was under the pretext of recovery of a debt owed by one Moses Timbili. The respondent denied ever having a business relationship with the appellant. The plaint had only one principal prayer: an order for delivery of the livestock. Contemporaneously with the suit, the respondent lodged a notice of motion praying that one Friesian cow and calf be delivered back to the plaintiff. Like I stated, the prayer was granted *ex parte* on the same date and confirmed after the *interparties* hearing.

4. The appellant has lodged a memorandum of appeal dated 18th March 2011. It urges six grounds but they can be condensed into three: First, that the trial Magistrate erred in granting mandatory or summary reliefs before the respondent had established her rights over the livestock; secondly, that the appellant was not heard on the matter; and, thirdly, that the orders compromised the suit prematurely.

5. The appeal is contested. The respondent avers that the appellant should have moved the lower court to set aside the impugned order; that the orders granted were meant to preserve the subject matter of the suit; that in any case the appellant did not return the livestock and instead sold them; and, that it was well within the discretion of the court to grant the orders.

6. The parties filed detailed written submissions. Those by the appellant are dated 16th December 2013; those by the respondent 9th June 2014. On 10th February 2015, I heard the learned counsel for the parties on those submissions. I have considered the grounds of appeal, the pleadings in the lower court, the evidence in the trial court; the written submissions by learned counsel for both parties; and, the precedents.

7. This is an interlocutory appeal. It would be prejudicial to comment about the merits of the suit. That will be the true province of the trial court on tested evidence; it remains the ideal forum to determine weighty questions of law and evidence. See *Lifico Trust Registered v Patel* [1985 KLR 538.

8. I will start by setting out the legal parameters for grant of interlocutory injunctions. The principles are well settled. A litigant seeking a *prohibitory* or *preservatory* injunction must rise to the threshold laid in *Giella v Cassman Brown and Company Limited* [1973] E.A 358. Those principles are first, that the applicant must show a *prima facie* case with a probability of success; secondly that he stands to suffer irreparable harm not compensable in damages; and thirdly, if in doubt, the court must assess the balance of convenience.

9. The conditions for grant of a *mandatory* injunction on the other hand go beyond a *prima facie* case. The court must have a *high sense of assurance* that the plaintiff would be entitled to the *same* relief at the trial. See *Shepherd Homes v Sandham* [1970] 3 ALL ER 402, *Locabail International vs Agro Export* [1986]1 ALL ER 901 and *Mucuha vs Ripples Limited* [1990-1994] EA 388, *Kenya Breweries Limited and another v Washington Okeyo* [2002] 1 EA 109, *Rafique Ebrahim v Ochanda & Company Advocates* Nairobi, High Court case 293 of 2013 [2013] eKLR. I think the common thread in all these cases is that the Court will only issue a mandatory order in the clearest of cases.

10. After hearing the parties on the notice of motion, the learned trial Magistrate found that the appellant had granted a loan to the respondent's son Moses Timbili. The court found that the appellant had not provided evidence to show the loan was owed or guaranteed by the *respondent*. The court held as follows-

> *"The loan application or approval form was not annexed to defendant's reply or affidavit to prove that the plaintiff's livestock was used to guarantee loan and even terms and conditions of the loan advanced. In the circumstances I do confirm orders issued by the SRM on 22.11.10 and order that the defendant forthwith return cattle to the plaintiff"*

11. The extracted order of 28th January 2011 was worded as follows-

> *"That the defendant forthwith delivers the plaintiff's livestock pending the hearing and determination of this suit, that is;(a) one fresian cow; (b) one calf"*

12. A number of matters arise. First, it is not true that the appellant was *not* heard. The appellant was heard at the inter parties hearing. I think the appellant's case is that the main prayer in the plaint has to all intents and purposes been granted. From the terms of the extracted order, and the prayer in the plaint, it is obvious that the order was *mandatory*. It went beyond preserving the livestock but to require the appellant to forthwith return the cattle. The interim prayer was similar in all respects to the principal prayer in the plaint. It was thus highly prejudicial to grant such far reaching orders *ex parte* on 22nd November 2010. True, the court had discretion. But it required a high sense of assurance that the plaintiff would be entitled to the same relief at the trial. It would be difficult to say that the issues were clear cut at that *ex parte* stage.

13. The situation was slightly different at the *inter parties* hearing. The replying affidavit filed by Majune Kraido on 3rd December 2010 did not attach the loan instrument or chattels mortgage to demonstrate its rights over any chattels or livestock. It was sworn by the appellant's legal counsel. The statement of defence dated 8th December 2010 stated as follows at paragraph 4: *that the*

defendant attached the livestock under the Chattels Mortgage Act to secure a loan advanced to Moses Timbili. On the face of it then, the plaintiff was correct in stating that there was no *privity* of contract between it and the defendant; or, any legal or factual basis for attachment of her livestock. The plaintiff was saying that Moses Timbili was her son; and, that her livestock was not the subject of the mortgage. That is why it behoved the appellant to depose to a few more details to assert its rights over the cattle or demonstrate the link with the respondent.

14. From the materials before the court at that stage, the plaintiff had laid a *prima facie* case for a *preservatory* interlocutory injunction. As her claim on livestock had not been sufficiently rebutted, there is a sense in which the *mandatory* order was also well founded. The subject matter was livestock. The learned trial Magistrate's view was that preservation would be assured by returning the livestock to the plaintiff.

15. Fundamentally, whether or not to grant a preservatory or mandatory injunction remained the *discretion* of the trial magistrate. The power reposed in the court under section 63 of the Civil Procedure Act and Order 40 of the Rules thereunder. The key objective being to ensure that the ends of justice are not defeated. As a general rule, an appellate court will not interfere with the discretion of the lower court unless it has not been exercised judicially. *Sargent v Patel* (1949) 16 EACA 63. I am unable to find in those circumstances that the court employed wrong principles or abused its discretion. The situation may well change when evidence is tendered and tested at the trial. I cannot prejudge the matter.

16. It is also not lost on me that the appellant did not comply with the order of the lower court. The respondent claimed, and the appellant did not contest it, that the livestock was sold by the appellant. That renders this appeal an academic exercise and futile. There is a sense in which the appellant wanted to keep this Court in a blind spot. In short, even if the orders are set aside, the effort is meaningless; and if they are not varied there is no obvious prejudice to the appellant. Granted those circumstances, I decline the invitation to interfere with the discretion of the trial court.

17. In the end I am unable to find that the learned trial Magistrate erred in granting the impugned order. It follows as a corollary that this interlocutory appeal lacks merit. It is hereby dismissed. Costs shall abide the final judgment in the lower court.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 5th day of March 2015.

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:-

No appearance for the appellant.

Mr. Makuto for Mr. Komen for the respondent instructed by Kipchirchir Komen & Company Advocates.

Mr. J. Kemboi, Court clerk.