



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 160 OF 2016

(FORMERLY HIGH COURT CIVIL APPEAL NO. 74 OF 2012)

JOSEPH KARIKO MWANGI.....APPELLANT

VERSUS

SHAH MOHAMMED.....1ST RESPONDENT

NAZIR SHAH MOHAMMED.....2ND RESPONDENT

(An Appeal from the ruling and order of Chief Magistrate's Court at Nakuru (Hon. G. M. Mutiso SRM) delivered on 3rd April 2012 in CMCC No. 273 of 2012)

JUDGMENT

1. By agreement dated 3rd November 2009, the appellant on one part and the respondents on the other part agreed that the 1st respondent as proprietor of a parcel of land known as Nakuru/Municipality Block 5/293 would through the 2nd respondent lease to the appellant premises known as "house/shop No. 1 measuring approximately 6 metres by 3.9 metres situated at the entrance of the said premises to be constructed being ground floor facing Pandit Nehru Road" on the aforesaid parcel of land. The specific shop leased was identified in an approved plan of a 3 storey building whose construction was to commence on or before 1st December 2009 and be completed on or before 30th August 2010. It was further agreed in the agreement that the appellant would pay Kshs.600,000 to the 1st respondent as deposit towards a future lease of the shop. In that regard, the appellant paid Kshs.400,000 on the date of execution of the agreement leaving a balance of Kshs.200,000 which was to be paid 3 months after commencement of construction. The 1st respondent bound himself not to lease the shop to any other person besides the appellant. Additionally, it was a term of the agreement that upon completion of the construction, the 1st respondent would offer the appellant a renewable 4 year lease with effect from 30th August 2010 at a monthly rent of Kshs.25,000. The parties further agreed that in the event the agreement is frustrated owing to breach by any party, the party in breach shall pay to the other party "50% of the principal amount, in interest compounded from the date" of the agreement.

2. According to the appellant, the respondents refused to accept the balance of Kshs.200,000 which fell due in February 2011 (three months from commencement of construction). The appellant had to pay it by electronic bank transfer into the account of the 2nd respondent on 7th March 2012. Additionally, construction of the shop was delayed and was 95% complete by 1st March 2012. On 9th March 2012, the appellant took possession of the shop. He however feared that the respondents intended to "breach", renounce and frustrate the agreement.

3. The appellant therefore filed Nakuru CMCC No. 273 of 2012 on 12th March 2012 against the 1st and 2nd respondents herein as 1st and 2nd defendants respectively. He sought judgment against them for:

a) A perpetual/permanent injunction restraining the defendants or their servant/agents from evicting, removing, harassing, intimidating and/or in any way whatsoever interfering with the plaintiff's quiet possession and use of the business Premises shop No. 1 ground floor situate on parcel No. Nakuru Municipality Block 5/293 (zum sum building) without any legal basis or justifiable cause to do so.

b) A declaration that the plaintiff is entitled to be in possession and use of the said shop premises No. 1 ground floor on Nakuru Municipality Block 5/293 (zum sum building) in accordance with the mutual agreement between the parties of 3rd November 2009 and that the agreement is binding on the respective parties whereof the defendants are not entitled to violate the same.

c) Costs of this suit together with interest thereon at such rate and for such period of time as the honourable court may deem fit to grant.

4. Simultaneously with the plaint, the appellant filed Notice of Motion dated 12th March 2012 (the Notice of Motion) in which he sought the

following orders:

a) Spent.

b) Spent.

c) *That pending the hearing and determination of the plaintiff's case as against the defendants, this honourable court be pleased to issue a temporary injunction against the defendants by themselves, their servants/agents from evicting, removing, harassing, intimidating and/or in any way whatsoever interfering with the plaintiff's quiet possession and use of the business premises shop No. 1 ground floor situate on parcel No. Nakuru Municipality Block 5/293 (zum zum building).*

d) *That pending the hearing and determination of the plaintiff's suit, the defendants be ordered to continue receiving rent from the plaintiff for the aforesaid business premises at the current agreed monthly rent remittance of Kshs.25,000/= per month less any renovation and construction expenses to be carried out by the plaintiff.*

e) *That the costs of this application be borne by the defendants/respondents.*

5. The Notice of Motion was supported by an affidavit sworn by the appellant. The contents of the affidavit were generally as I have stated at paragraphs 1 and 2 above in the narration of the appellant's case before the subordinate court.

6. The respondents opposed the application through a replying affidavit sworn by the 2nd respondent on 23rd March 2012. He deposed that the respondents commenced the construction on time but the appellant did not pay the balance of Kshs.200,000 thus frustrating the contract. As a result, the 2nd respondent obtained a loan from elsewhere and as at the date of swearing his said affidavit, the construction was 95% complete. Despite the construction not being complete, the appellant took possession of and closed one shop, thereby interfering with the then ongoing construction. He added that owing to the appellant's breach, he entered into an agreement with a new tenant and the premises were no longer available to be leased to the appellant. He further deposed that through letter dated 10th May 2011 (annexure NSM3), the appellant repudiated the contract and demanded payment of money.

7. The application was heard on 2nd April 2012 by G. M. Mutiso SRM who dismissed it with costs in a ruling delivered on 3rd April 2012, a day after the hearing. Aggrieved by the said ruling, the appellant filed the present appeal on 4th April 2012, similarly a day after the ruling. The grounds stated in the Memorandum of Appeal were as follows:

1. That the learned Magistrate erred in law and fact in failing to properly direct his mind so as to appreciate the law on the principles of granting a temporary injunction and in misinterpreting the principles laid down in the case of *Giella –vs- Cassman Brown & Co. (1973) E.A. 358.*

2. That the learned Magistrate erred in law and fact in making a finding that though the applicant now appellant had established a prima facie case with probability of success at the trial, he was not entitled to an injunction since he had not shown that he would suffer irreparable injury which could not be compensated by damages.

3. That the learned Magistrate erred in law and fact in declaring that the applicant was guilty of material non-disclosure and thus not entitled to an equitable injunction whereas the said allegations of non-disclosure were unfounded.

4. That the learned Magistrate erred in law and fact in directing that the applicant's application be heard on the 2nd day of April 2012 or interim orders be discharged notwithstanding the fact that the application was only slated for a mention to take directions on the said day of 2nd April 2012.

5. That the learned Magistrate erred in law and fact by delivering a confused and self-contradicting ruling.

6. That the learned Magistrate erred in law and fact in failing to appreciate that the applicant stood to suffer irreparable loss and damage if the application was not granted.

7. That the learned Magistrate applied wrong principles of law in arriving at the ruling.

8. The appeal was heard by way of written submissions. Counsel for the appellant argued that the learned magistrate misdirected himself by holding that where damages can be an adequate remedy, an interlocutory injunction is not available under any circumstance. In that regard, counsel referred the court to page 4 of the ruling of the subordinate court. Additionally, counsel argued that the magistrate misapprehended the facts or took into account factors that he ought not to have taken into account when he relied on the respondents' annexure "NSM3" a letter dated 10th May 2011 and concluded that the appellant had been guilty of material non-disclosure and was thereby not entitled to an equitable remedy. Counsel submitted that the letter was of no relevance since it was written about a year before the case was filed and since the respondents had in any case not responded to it. Finally, counsel argued that the learned magistrate's decision was plainly wrong. By way of elaboration, he stated that it was wrong to dismiss the application simply because damages would be an adequate remedy. Further, he argued that the dispute is about a specific shop and if the injunction is denied and the shop let to a third party, the substance of the suit would disappear and the hearing of the suit would be rendered a futility. Counsel therefore urged the court to allow the appeal.

9. On his part, counsel for the respondents submitted that the magistrate did not err in regard to the principles applicable to granting temporary injunctions. Counsel submitted that if damages are an adequate remedy and the respondent is capable of paying, no interlocutory injunction should be granted however strong the applicant's claim is. In that regard, the magistrate exercised his discretion correctly and this

court should not interfere with his decision. Further, counsel submitted that the magistrate did not misapprehend the facts or take into consideration facts which he ought not to. In that regard, counsel submitted that it was correct for the magistrate to find that the appellant's failure to disclose the letter dated 10th May 2011 amounted to inequitable conduct since in the said letter the appellant demanded a specific amount of money from the respondents as compensation. For all those reasons, the respondents urged the court to dismiss the appeal with costs.

10. I have considered the grounds of appeal and the submissions made. This being a first appeal, my role is to re-evaluate, re-assess and re-analyse the material that was before the subordinate court and draw my own conclusions.

11. The application before the subordinate court sought discretionary orders in the nature of an interlocutory injunction. The principles applicable when considering an appeal against an order made in exercise of discretion were reiterated by the Court of Appeal as follows in **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR**:

Reverting to the main appeal, we emphasize by reiterating that this Court will not interfere with the exercise of discretion by the Judge in the court below unless satisfied that the decision of the Judge is clearly wrong because of some misdirection, or because of failure to take into consideration relevant matter or because the Judge considered irrelevant matters and as a result arrived at a wrong conclusion, or where there is a clear abuse by the Judge of his discretion. Whenever a court exercises a discretion, there is always a presumption of correctness of decision which is reversible only upon showing of a clear abuse of discretion.

12. I cannot therefore interfere with the exercise of discretion by the learned magistrate unless I am convinced that his decision is manifestly wrong due to some misdirection, or failure to take into consideration relevant matter or because he considered irrelevant matters and hence reached a wrong conclusion, or because there is clear abuse of his discretion.

13. The principles applicable when considering an application for an interlocutory injunction were restated in the **Nguruman Limited** case (supra) thus:

In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

(a) establish his case only at a prima facie level,

(b) demonstrate irreparable injury if a temporary injunction is not granted, and

(c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between.

... The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.

14. I will consider grounds 1, 2, 5, 6 and 7 of the appeal together and grounds 3 and 4 separately.

15. Grounds 1, 2, 5, 6 and 7 of the appeal address the question of whether or not the magistrate appreciated and properly applied the principles applicable when considering an application for an interlocutory injunction. A perusal of the ruling reveals that the magistrate addressed his mind to the principles laid down in the **Giella** case and delivered himself thus:

On the first ground in Giella (Supra), there exists an agreement dated 3rd November 2009. Since this agreement was entered into by both parties and they all agree that it exists, I hold that the plaintiff has established a prima facie case with probability of success at the trial.

However, the second requirement in Giella (Supra), has not been fulfilled. I have considered the plaintiff's supporting and supplementary affidavits and I find nothing in those affidavits to suggest that the plaintiff will suffer an irreparable injury which cannot adequately be compensated in damages if an injunction is not granted. Therefore, an interlocutory injunction cannot be given to the plaintiff as he has failed to demonstrate likely irreparable loss.

16. The appellant has faulted the magistrate for holding that the appellant had not shown that he would suffer irreparable injury which could not be adequately remedied by damages in the absence of an injunction and then dismissing the application despite having found that the appellant had established a prima facie case. I do not agree with the appellant. As was stated by the Court of Appeal in the **Nguruman Limited** case (supra), mere existence of a prima facie case does not permit "leap-frogging" by the applicant to an injunction directly without

crossing the other hurdles in between.

17. The agreement between the parties states at clause 9 thereof that in case the agreement is frustrated due to fault on the part of any of the parties, the party at fault would pay the other party 50% of the principal amount in interest compounded from the date of the agreement. The parties had contemplated and provided for how any damage caused by a breach would be compensated. They thereby established a formula for ascertaining the damages and determining who would pay it. They did so knowing fully well that the agreement was in respect of a particular shop and that the respondents had bound themselves not to let the shop to anyone else besides the plaintiff. As was stated by the Court of Appeal in the **Nguruman Limited** case, an injury can only be said to be irreparable where there is no standard by which its amount can be measured with reasonable accuracy. For the foregoing reasons, the damage that the appellant feared cannot be said to be irreparable. Grounds 1, 2, 5, 6 and 7 of the appeal therefore fail.

18. Regarding ground 3 of the appeal, there is no dispute that an interlocutory injunction is an equitable remedy and that a party who seeks equitable relief is under a duty to do equity by making a full and frank disclosure. There is further no dispute that the appellant did not annex a copy of his advocates' letter dated 10th May 2011 to his supporting affidavit. The only question is whether the non-disclosure would disentitle the appellant to the relief sought. In view of my finding regarding the effect of clause 9 of the agreement, the letter dated 10th May 2011 was really neither here nor there. It was simply an attempt at construing and enforcing clause 9 of the agreement, a term of the contract which both parties were well aware of. The magistrate's finding in regard to the letter did not change anything.

19. Finally, pursuant to ground 4 of the appeal, the magistrate is faulted for hearing the application at a mention. The record however shows that counsel for the appellant appeared before Hon. G.M. Mutiso SRM under Certificate of Urgency on 12th March 2012. The magistrate certified the Notice of Motion as urgent and scheduled inter parte hearing for 26th March 2012. On 26th March 2012 the application was listed before Hon. J. Njoroge SPM who ordered that the application be heard inter parte before Hon. G.M. Mutiso SRM on 27th March 2012. For some reason, the application was yet again listed before Hon. J. Njoroge SPM on 27th March 2012 who ordered that it be heard inter parte before Hon. G.M. Mutiso SRM on 2nd April 2012. It was yet again listed before Hon. J. Njoroge SPM on 2nd April 2012. He referred it to Hon. G.M. Mutiso SRM for directions the same day. Hon. G.M. Mutiso SRM ordered the hearing of application to proceed the same day. Counsel for the appellant duly argued the application without any protest. It must be remembered that the application had been scheduled for inter parte hearing on 2nd April 2012 and that when parties appeared before Hon. J. Njoroge SPM earlier that day, they should have been ready to proceed. No prejudice was occasioned by the application being heard later that day before Hon. G.M. Mutiso SRM. I therefore find no merit in ground 3 of the appeal.

20. In view of the foregoing, the appeal herein lacks merit. It is dismissed with costs to the respondents.

Dated, signed and delivered in open court at Nakuru this 6th day of November 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Okeke for the appellant

Mr Mureithi for the respondents

Court Assistants: Gichaba & Lotkomoi