IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, GATEMBU & M'INOTI, JJ.A.)

CIVIL APPEAL NO. 100 OF 2011

BETWEEN

TOTAL KENYA LIMITED.....APPELLANT

AND

DAVID NJANE T/A ARGWINGS TWIN SERVICE STATION.....1ST RESPONDENT

TWIN BUFFALOS SAFARIS LIMITED.....2ND RESPONDENT

CO-OPERATIVE BANK OF KENYA.....3RD RESPONDENT

(Appeal from the ruling and order of the High Court at Nairobi (Apondi, J.) dated 10th March 2011

in

HCCC. No. 433 of 2010)

****

JUDGMENT OF THE COURT

This is an interlocutory appeal from the ruling and order of the High Court ***(Apondi, J.)*** dated 10th March 2011 by which the learned judge issued a permanent injunction restraining ***Total Kenya Limited (Total)*** from calling in a guarantee of ***Kshs 3,500,000.00*** given by ***Co-operative Bank of Kenya Limited (the Bank***) on behalf of ***David Njane t/a Agrwings Twin Service Station (Njane)*** and ***Twin Buffalos Safaris Limited (Buffalos Safaris)***. The learned judge also issued a further permanent injunction restraining the Bank from paying to Total the said amount or any other amount, upon demand.

The background to the appeal is that on or about 31st July 2007 Total and Njane entered into a dealership agreement under which Total appointed Njane a distributor of its products from Total's petrol station on ***LR No 209/6409, Hurligham, Nairobi***. Among the terms of the agreement were that Njane would, throughout the period of the agreement, furnish Total with a working capital of ***Kshs 12,500,000.00*** as well as a bank guarantee to secure payment of all moneys due to Total from him. It was also a term of the agreement that upon termination of the dealership, Njane would vacate the petrol station and hand over all equipment to Total and that within 90 days thereafter, Total would prepare and forward to him a comprehensive statement of account for purposes of reconciliation of accounts. Pursuant to the agreement and at Njane's instance and on his behalf, Buffalos Safaris obtained from the Bank in favour of Total, ***Bank Guarantee No. TFBG09699*** for Kshs 3,500,000.00, which was valid up to 30th June 2010.

Subsequently disputes arose between Njane and Total concerning the dealership, and on 20th March 2010 Total took possession of the petrol station. On 23rd June 2010, Njane and Buffalos Safaris filed a suit in the High Court against Total and the Bank claiming a total of ***Kshs 82,282,333.86*** being losses allegedly suffered by Njane on account of various alleged breaches of the dealership agreement by Total, including failure to reconcile accounts. They also prayed for interest on that amount; a declaration that in the circumstances of the case calling in of the guarantee by Total was unreasonable and unjustified; a permanent injunction to restrain Total from calling in the guarantee and a permanent injunction to restrain the Bank from paying to Total the moneys secured by the guarantee.

Contemporaneously with the suit the two filed a chamber summons under certificate of urgency seeking a permanent injunction against Total and the Bank pending the hearing and determination of the suit. Total opposed the application by denying the breaches alleged on its part and accusing Njane instead of violating the agreement, failure to adhere to agreed procedures, mismanagement, and issuing of bad cheques, all of which resulted in default of ***Kshs 1,970,131.35*** by him. It further contended that the guarantee was a separate and distinct agreement from the

dealership agreement and that under it the Bank was obliged to pay to Total the guaranteed amount unconditionally within a maximum of 5 days upon demand; that the Bank was obliged to pay the said sum without cavil, argument or proof of the reason for the demand; and that the Bank had expressly waved the need for Total to first demand the guaranteed sum from Njane before calling upon it to pay.

On its part the Bank reiterated the terms of the guarantee as stated by Total and added that it was bound by the guarantee without being concerned with the relationship between Njane and Total, so long as the conditions precedent were met. It further added that it had not received any demand from total for payment of the guaranteed sums.

After hearing the application, the learned judge held that he was in doubt whether Njane had made out a *prima facie* case with probability of success or whether he would suffer irreparable loss and damage which could not be adequately compensated by award of damages. He therefore fell back on the third consideration in ***Giella v. Cassman Brown & Co Ltd [1973] EA 358,*** that of balance of convenience, and found that the balance of convenience tilted in favour of Njane and Buffalos Safaris. Accordingly he issued the injunction as earlier stated, which aggrieved Total, leading to this appeal.

Although Total's Memorandum of Appeal sets out 13 grounds of appeal, as addressed by its learned counsel, ***Ms. Mbugua***, they all boil down to two main contentions, namely that the learned judge erred by mixing up the issues of the dealership agreement with those of the separate agreement of guarantee; and by granting an injunction when the appellant had failed to satisfy the conditions for award of that relief.

Learned counsel submitted that the learned judge erred by granting the injunction on the basis that there was a dispute between Njane and Total regarding the dealership agreement, which required reconciliation. In Total's view, there was no dispute regarding the terms of the guarantee and the learned judge should not have stopped Total from calling the guarantee. Describing a bank guarantee as an irrevocable commitment to pay a specified sum of money in the event that the party requesting the guarantee fails to perform its promise, Total argued that the guarantee in issue in this case was an unqualified and absolute guarantee by the Bank to pay Total upon demand, without Total having to provide the grounds or reasons for the demand. It was also contended that the guarantee expressly provided that any dispute between Total, Njane and Buffalos Safaris would not affect the Bank's obligation to satisfy the guarantee.

It was Total's further submission that contractually the guarantee was between itself and the Bank; that there was no privity of contract between Total on the one hand and Njane and Buffalos Safaris on the other, and that the latter two had no business interfering in the guarantee. It also contended that the Bank itself had expressly waived the necessity of Total demanding payment of the debt from Njane before demanding payment from the Bank.

Relying on the ruling of the High Court in ***Platinum Traders Ltd v. East African Portland Cement & Co Ltd & Another [2012] eKLR***, and the judgment of the Supreme Court of India in ***UP State Sugar Corporation v M/s Sumac International Ltd, AIR [1997] SC 1644***, Total submitted that bank guarantees are sacred; that they are intended to ease and expedite commercial transactions; that courts do not readily interfere with them; and that in the circumstances of this case it was entitled to call the guarantee according to the terms of the guarantee, irrespective of any pending disputes between it and Njane.

As regards the injunction, Total submitted that the learned judge erred by granting it while he was not satisfied that Njane had established a *prima facie* case with a probability of success or that he would suffer irreparable injury. It was also contended that the learned judge misdirected himself when he justified the injunction on the colossal sums that Njane and Buffalos Safaris were demanding from Total, yet that dispute had nothing to do with the bank guarantee. Accordingly it was submitted that there was no genuine arguable case established by Njane to justify an injunction because he was relying on the dealership agreement to stop payment under the bank guarantee which was an entirely separate contract. The learned judge was also faulted for relying on balance of convenience when Njane had not established a *prima facie* case with a probability of success or satisfied the court that he would suffer irreparable injury if the injunction was not granted.

Njane and Buffalos Safaris, represented by ***Mr. Nyachoti***, learned counsel, opposed the appeal, submitting that the learned judge had properly considered all issues relevant to award of the relief of an injunction. It was further contended that what was challenged in this appeal was exercise of discretion by the learned judge, and that on the authority of ***Mbogo & Another v. Shah [1968] EA 93*** this Court will not readily interfere with exercise of discretion by the trial court unless there is clear misdirection, or the exercise of discretion has led to misjustice. We were urged to find that was not the case in this appeal

The two further contended that there was an unresolved dispute between them and Total regarding the reconciliation of accounts and determination of which of the parties owed the other monies. In their view, the dealership agreement and the guarantee agreement were closely interlinked and must be read together. Without the reconciliation contemplated by the dealership agreement, it was submitted, Total had no basis or right to call in the guarantee. On that basis, it was contended that the learned judge had not erred by issuing the injunction because Total had not established the basis for demanding payment of the guarantee. Njane and Buffalos Safaris also argued that in the circumstances of this case, allowing Total to call in the guarantee was unjust and further that in cases of fraud and such like conduct, the court will not allow a bank guarantee to be called in irrespective of the its terms.

On the award of the injunction, we were urged to find that the learned judge properly considered and applied the conditions for award of that remedy as spelt out in ***Giella v. Cassman Brown & Co. Ltd*** (supra). Having found that the first two considerations did not apply, it was contended, the learned judge was justified to determine the application on the basis of the third consideration, namely balance of convenience, which he properly found to tilt in favour of Njane and Buffalos Safaris.

For its part the Bank, represented by ***Mr. Mutua,*** learned counsel, supported Total's submissions and added that the learned judge erred by conflating the dealership agreement and the contract of guarantee and by misapplying the prerequisites for award of an injunction. Relying on the judgment of this Court in ***Michael Gitau v. Pamela Savage & 4 Others [2002] KLR (E&L) 1,*** the Bank submitted that the learned judge was not entitled to ignore the first two considerations and determine the application on the basis of the third consideration. It was further contended that on the material before him, Njane and Buffalos Safaris Ltd had not made out a *prima facie* case justifying award of an injunction and that in any case the balance of convenience did not tilt in their favour.

As we consider the merits of this appeal, we bear in mind that it is an interlocutory appeal and that the dispute before the High Court has not been heard and determined on merit. Accordingly we must refrain from expressing any concluded views on any issue that may arise in the pending trial. (See ***David Kamau Gakuru v. National Industrial Credit Bank Ltd, CA No. 84 of 2001)***. Secondly, what is challenged in the appeal is essentially exercise of discretion by the trial court in granting an injunction. As an appellate Court, we are slow to interfere with exercise of discretion by the Court below unless we are satisfied that the learned judge misdirected himself in the law, misapprehended the facts, took into account matters he should not have or failed to consider matters he should have, or that on the whole the decision is plainly wrong. (See ***United India Insurance Co. Ltd v. East African Underwriters (Kenya) Ltd [1985] E.A 898).***

There is no dispute that to entitle Njane and Buffalos Safaris to an injunction, they had first and foremost to demonstrate a prima facie case with a probability of success at trial. In ***Mrao Ltd v. First American Bank of Kenya Ltd& 2 Others [2003] eKLR, Bosire, JA*** defined a *prima facie* case as follows:

> ***"So what is a prima facie case? I would say that in civil cases it 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 as to call for an explanation or rebuttal from the latter." (Emphasis added).***

Later in the same judgment, his Lordship added:

> ***"But as I earlier endeavoured to show, and I cited ample authority for it, a prima facie case is more than an arguable case. It is not sufficient to raise issues. 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." (Emphasis added).***

Before the High Court, the case put forward by Njane and Buffalos Safaris to justify an injunction stopping the calling in of the guarantee was that there was no reconciliation of accounts with Total as required by the dealership agreement and that in any case they were claiming a colossal sum of money from Total. To entitle them to an injunction on the basis of a *prima facie* case with a probability of success, they had to show that under the guarantee, the disputes they were citing were capable of lawfully preventing Total from calling the guarantee. In other words, they had to show that by calling in the guarantee, Total was going to infringe on their rights under the terms of the guarantee.

The guarantee provided as follows in the pertinent part:

> ***"In consideration of your agreeing to supply petroleum products to Messrs. Twin Buffalos Safaris Ltd of P.O. Box 48609-00100, Nairobi („the Customer") we the Co-operative Bank of Kenya Limited of P.O. Box 48231-00100 Nairobi do hereby irrevocably undertake to act as surety and guarantor of the Principal Debtor of any due payment to yourselves, and/or the product?s worth for the sum of KES. 3,500,00.00.***
>
> ***We undertake to pay you unconditionally within a maximum of five days upon sight of your first written demand to us declaring the Principal Debtor to be in default under your Agreement and/or conditions of supply without cavil or argument any sum within the limits of Kenya Shillings Three Million Five hundred Thousand Only (KES, 3,500,000.00) without you needing to prove or show grounds or reasons for your demand of the sum specified therein.***
>
> ***...We hereby waive necessity of your demanding the said debt from the Principal Debtor before presenting us with a demand." (Emphasis added).***

The learned judge paid absolutely no regard to the above critical provisions of the guarantee and very surprisingly, concluded that the considerations whether Njane and Buffalos Safaris had made out a *prima facie* case with a probability of success or whether they would suffer irreparable loss and damage which could not be adequately compensated by award of damages, did not apply in this case. With great respect, that was a fundamental misdirection, which led to an entirely wrong conclusion as regards the application for injunction, because under the terms of the guarantee, the alleged infringement of the rights of Njane and Buffalos Safaris by Total that would have justified an injunction was not obvious. The failure by the learned to address the terms of the guarantee in determining whether a *prima facie* case with a probability of success had been made out, together with his failure to evaluate the alleged disputes against the terms of the guarantee is in our view sufficient misdirection to entitle us to interfere with the exercise of discretion by the learned judge.

But there is a second and equally compelling reason why we should interfere with the exercise of discretion by the learned judge. In ***Nguruman Ltd v. Jan Bonde Nielsen & 2 Others, [2014] eKLR*** this Court held that the three conditions for granting an injunction are considered sequentially, so that the second and third conditions cannot be considered once the first condition is not established. The Court expressed itself 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 learned judge totally failed to properly address the considerations in a logical sequential manner but merely latched onto the last consideration of balance of convenience. That, he was not entitled to do. He also omitted totally consideration of whether in the event the guarantee was called in Njane and Buffalos Safaris would suffer irreparable injury, which would not be adequately compensated by an award of damages.

For the above reasons, we find that this appeal has considerable merit and we allow the same with costs to Total and the Bank. We set aside the ruling and order of the High Court dated 10th March 2011 and substitute therefor an order dismissing with costs Njane and Bufallos Safaris Chamber Summons dated 23rd June 2010. It is so ordered.

Dated and delivered at Nairobi this 20th day of April, 2018

W. OUKO

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR