



**Runka Services Co-operative Sacco Ltd v Mbaya (Cause
E163 of 2022) [2022] KEELRC 1384 (KLR) (23 June 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1384 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E163 OF 2022
NZIOKI WA MAKAU, J
JUNE 23, 2022**

BETWEEN

RUNKA SERVICES CO-OPERATIVE SACCO LTD APPLICANT

AND

LAWRENCE KATHURIMA MBAYA RESPONDENT

RULING

1. The Claimant/Applicant seeks through his notice of motion application stated to be brought under Order 40(1)(a) and (b) of the Civil Procedure Rules 2010 for various relief against the Respondent in respect of property the Respondent holds. The Claimant's/Applicant's position is that the subject matter needs to be preserved pending the determination of this cause so as to assure the Claimant/Applicant that it will not have a paper judgment should the suit succeed against the Respondent.
2. The Parties agreed to dispose of the application by way of written submissions. The Claimant on his part submits that the issues for determination are:-
 - a. Whether the claimant has established a prima facie case
 - b. Whether the claimant will suffer irreparable loss/damage if the interlocutory injunction is not granted
 - c. Whether the balance of convenience is in favour of the claimant
3. The Claimant/Applicant cites the case of *Giella v Cassman Brown & Company Ltd* [1973] EA 358 and submits that an injunction may be granted if the property in dispute is likely to be wasted, damaged or wrongfully sold or the defendant intends to dispose of the property in a manner that is sufficient to provide reasonable probability that the plaintiff's justice will be obstructed. The Claimant argues that the grounds set out for the granting of an injunction may also be met sequentially. In establishing whether the Claimant has met the prima facie test, the Claimant submits that one only needs to prove



that there is a genuine and arguable case to establish that irreparable damage will occur. The Claimant places reliance on the Treasurer's affidavit where the Treasurer lays out the Respondent's scheme to steal the Claimant's money and points to the existence of criminal charges of stealing in the courts. The Claimant also submits that it is likely to face irreparable damage since the Respondent's financial statements do not indicate stable financial flow and income. It is argued that the Respondent was unable to raise sufficient funds to raise his initial cash bail of Kshs 3,000,000/- granted in Court. The Claimant also submits that the Respondent is heavily indebted as he initiated the sale of his property to service his outstanding loans. The Claimant thus submits that the court should opt for the lower risk in place of the higher risk of injustice while taking into consideration the ground of 'balance of convenience' which is in the court's discretion. It cites in further support of these submissions the cases of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR, *Mrao v First American Bank of Kenya & 2 Others* [2003] KLR 125 and the case of *Moses C. Mubia Njoroge & 2 Others v Jane Lesaloi & 5 Others* [2014] eKLR inter alia. The Claimant thus submits that it has made out a case for the grant of the injunctive orders sought.

4. The Respondent's submissions were to the effect that the evidence adduced by the Claimant to establish their prima facie case did not link the Respondent directly to the missing monies. The Respondent submits that in their attempt to prove that the Claimant is likely to suffer irreparable damage, shifted the burden of proof to the Respondent, which is contrary to civil procedure. With regards to the satisfaction of the ground of 'balance of convenience', the Respondent submits that if the court grants the injunction, his proprietary rights as enshrined in the Constitution would be deprived, yet the property is not in dispute. The Respondent submits that the interlocutory injunction sought by the Claimant infers that he is guilty without a fair trial which goes against his right to a fair trial as enshrined in the Constitution. The Respondent submits that the Claimant has failed to discharge his burden of proof and the application has not demonstrated the principles essential for an interlocutory injunction to be granted. The Respondent submits that the sale of property is not sufficient evidence that he intends to dispose of all of his property. He cites the case of *Giella v Cassman Brown & Company Ltd* [1973] EA 358 and submits that the Claimant/Applicant has failed to meet the threshold for grant of injunction set out in the case. He also cited the cases of *Stek Cosmetics Ltd v Family Bank Ltd & Another* [2020] eKLR and *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR, *Films Rover International v Cannon Films Sales Ltd* [1986] 3 ALL ER 772 and *Mrao v First American Bank of Kenya & 2 Others* [2003] KLR 125.
5. The Claimant/Applicant has to surmount the test in *Giella v Cassman Brown* (supra) for grant of the injunctive relief sought. These are (i) whether the applicant has demonstrated a prima facie case with a probability of success; (ii) whether the applicant shall suffer irreparable injury which cannot be compensated by damages if the injunction is not granted; and finally (iii) if the court is in doubt then it can decide the application on a balance of convenience. These tests are to be applied sequentially. On the first limb, the party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.
6. In the present application, the Applicant was required to show that its right is being violated or is likely to be violated by the Respondent which would shift the burden onto the Respondent to explain or rebut the Applicant's claim. It is not enough for the Applicant to merely state that it has a prima facie case. That alone will not bring it within the meaning of a prima facie case as required by law. Merely being apprehensive that it will have nothing to execute against is not sufficient to restrain the property rights of the Respondent over his land situate in Kiirua, Meru County. Having failed to show the right that is being violated or is likely to be violated by the Respondent, the Claimant herein has not met



the threshold for grant of the relief sought and as such its application is unmerited and accordingly dismissed with costs to the Respondent.

7 It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF JUNE 2022

NZIOKI WA MAKAU

JUDGE

