Mohammed t/a General Office Technology Solutions & 3 others v Gachie t/a Auctioneers & another (Civil Appeal E1198 of 2024) [2024] KEHC 16014 (KLR) (Civ) (19 December 2024) (Ruling)

Neutral citation: [2024] KEHC 16014 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E1198 OF 2024

LP KASSAN, J

DECEMBER 19, 2024

BETWEEN

FEISAL SHARIFF MOHAMMED T/A GENERAL OFFICE TECHNOLOGY SOLUTIONS ..... 1ST APPLICANT

HAMZA MOHAMMED ..... 2ND APPLICANT

GALGOLO JATTA ..... 3RD APPLICANT

MOHAMMED ABDULLAHI ..... 4TH APPLICANT

AND

PETER M GACHIE T/A AUCTIONEERS ..... 1ST RESPONDENT

MERU CENTRAL COFFEE COOPERATIVE UNION LIMITED THROUGH WAMBUGU MURIUKI ADVOCATES ..... 2ND RESPONDENT

RULING

1. Before the court for analysis and determination at this juncture are multiple applications: the first is the Notice of Motion dated 17.10.2024 (hereafter the first application) brought by Feisal Shariff Mohammed T/A General Office Technology Solutions, Hamza Mohammed, Mohammed Abdullahi and Galgolo Jatta (hereafter the 1st, 2nd, 3rd and 4th Appellants) supported by the grounds laid out on its face and the facts stated in the affidavit of the 1st Appellant, and seeking a temporary injunctive order thereby restraining Peter M. Gachie T/A Auctioneers (hereafter the 1st Respondent) from interfering with the Appellants' quiet and peaceful possession of the shops situated in Imenti House, Moi Avenue Nairobi which is erected on L.R. No. 209/2437 (the subject premises), pending the hearing and determination of the present appeal; and a further order setting a condition for granting

the injunctive order, namely that the Appellants do deposit a sum of Kshs. 2,432,718/- pursuant to a demand made by the Meru Central Coffee Cooperative Union Limited through Wambugu Muriuki Advocates (hereafter the 2nd Respondent) in an interest earning account in the joint names of the parties' respective advocates/firm of advocates.

2. In his supporting affidavit, the 1st Appellant stated that the Appellants herein have at all material times been the lawful tenants of the subject premises belonging to the Respondents, and which has been sub-let to other tenants. The 1st Appellant further stated that recently, the Respondents proceeded to levy distress against the Appellants vide Misc. Application No. E1384 of 2024 filed before the Chief Magistrate's Court at Milimani. That by way of an application dated 15.08.2024 the Appellants sought to have the proceedings struck out for being commenced irregularly, which application was dismissed by the trial court vide the ruling delivered on 4.10.2024 hence the appeal. That unless the orders sought are therefore granted, the Respondents are likely to proceed to levy distress against the Appellants, thereby paralyzing their business and causing them to suffer irreparable harm, yet there are no outstanding arrears in rent on the part of the Appellants. That it therefore follows that the Appellants have an arguable appeal with high chances of success. The 1st Appellant in closing, averred that it is of necessity that the temporary injunctive order sought be granted.

3. The Notice of Motion dated 22.10.2024 (hereafter the second application) was equally brought by the Appellants and the same stands supported by the grounds laid out on its face and the facts stated in the affidavit of the 1st Appellant. The second application seeks a substantive order to the effect that the Chief Executive Officer (CEO) of the 2nd Respondent; Duncan Marete; the current directors of the 2nd Respondent and the Manager of Imenti House; Mr. Vitalis Fausto Kirimi; be cited for contempt of the court orders issued on 18.10.2024 and be committed to civil jail for a term of six (6) months.

4. By way of his supporting affidavit, the 1st Appellant averred that upon perusing the first application ex parte on 18.10.2024 this court granted an interim order for an injunction, pending interparties hearing thereof. That on the said date, this court equally gave directions for the parties to meet and harmonize their accounts. That the above order was duly served upon the 2nd Respondent's advocates as well as its CEO and the Manager present on the subject premises, on the same date. That notwithstanding, the said persons defied the aforesaid court order by locking the subject premises, thereby denying the Appellants access therein and further paralyzing their sub-tenants' respective businesses. It is the averment by the 1st Appellant that the Appellants have on their part since complied with the terms of the aforesaid court by effecting an RTGS transfer for the sum of Kshs. 2,432,718/-. That in the premises, the mentioned persons should be held in contempt of the court order made on 18.10.2024.

5. The 2nd Respondent together with one Peter M Gachie t/a Regent Auctioneers (not a party to the proceedings) filed a Notice of Motion similarly dated 22.10.2024 (the third application) seeking inter alia, an order for review and/or setting aside of the temporary injunctive orders earlier issued by this court on 18.10.2024 and 22.10.2024 respectively, to enable the Respondents levy distress against the Appellants for the arrears in rent; and a further order striking out the appeal and the first application on grounds that the dispute falls within the purview of the Environment and Land Court (ELC). The said application is anchored on the grounds set out on its face and further supported by the affidavit of the 2nd Respondent's CEO, Duncan Kiambia Marete, who in sum stated that this court lacks jurisdiction to entertain both the appeal and the first application. That moreover, the Appellants have not satisfied the conditions pertinent to the grant of a temporary injunction. That contrary to the averments being made in the first application, the arrears in rent on the part of the Appellants stood at Kshs. 7,041,033/-.

6. The 2nd Respondent similarly lodged a notice of preliminary objection of like date, by and large challenging the jurisdiction of this court to entertain the present appeal by dint of Article 162(2)(b)

of *the Constitution* of Kenya, 2010 and the ELC Act and on the premise that the dispute in question relates to the use and occupation of, and title to, land coupled with distress for rent.; and further challenging the competency of the appeal on the ground that the issue whether the Appellants are entitled to injunctive orders against the 2nd Respondent has already been addressed in MCELC No. E525 of 2023 by Hon S. A. Opande on 31.07.2024 and vide a ruling in ELC APPEAL No. E119 of 2024 by Justice Oguttu Mboya on 17.10.2024.

7. The above was followed by the filing of the Notice of Motion dated 23.10.2024 (hereafter the fourth application) by the Appellants. This particular application is related to the second application in that it likewise seeks an order to the effect that the CEO of the 2nd Respondent (Duncan Marete), the current directors of the 2nd Respondent and the Manager of Imenti House (Mr. Vitalis Fausto Kirimi) be cited for contempt of the court orders issued on 22.10.2024 and be consequently committed to civil jail for a term of six (6) months. The Appellant further sought an order to the effect thatthe Respondents be denied audience before this Court until they purge the contempt and an order freezing payment of rent payable from 18.10.2024 when the Respondents purportedly locked the subject premises until such time as the contempt is purged. The said application is anchored on the grounds featured in its body and the facts stated in the affidavit of the 1st Appellant, who averred inter alia, that upon the Appellants filing the second application, this court vide the order issued on 22.10.2024 directed the Respondents to remove the lock attached on the subject premises and enable the Appellants access the said premises, which order was served upon the relevant persons. That in defiance of the said court order, the Respondents denied the Appellants access to the said premises and further instructed security guards to prevent their entry, notwithstanding the fact that they had continually paid their rent. That attempts at engaging the intervention of the OCS Central Police Station, have proved futile.

8. To resist both the third application and the preliminary objection collectively, the 1st Appellant swore a replying affidavit on 1.11.2024 where he deposed that contrary to the averments and grounds featured therein, the present dispute encompasses allegedly unpaid rent monies and does not concern itself with proprietary interests in land. That consequently, the appeal is properly before this court. The 1st Appellant further deposed that contrary to the averments being made in the third application in particular; implying that the Appellants owe a substantial sum in rent arrears, the rent arrears initially sought in the sum of Kshs. 2,432,718/- have been settled, with the Appellants depositing the said sum in a joint interest earning account.

9. The 2nd Respondent equally resisted the first, second and fourth applications by relying on the replying affidavit sworn by Duncan Kiambia Marete on 4.11.2024 stating that the three (3) abovementioned applications are purely intended to prevent the 2nd Respondent from recovering its rent arrears from the Appellants. He restated that the rent arrears have continually accumulated, and now stand at over Kshs. 7,000,000/-. That the contempt applications filed are an attempt at intimidating the 2nd Respondent. That while it is true that the 2nd Respondent has not removed the locks placed on the subject premises, this is justified by the argument that this court lacks jurisdiction to entertain the present matter and further lacked the requisite jurisdiction to issue the interim injunctive orders. That in the circumstances, it would be in the interest of justice for this court to dismiss the Appellants' respective applications, to enable the Respondents proceed to levy distress for rent.

10. When the parties attended court for hearing, directions were given for the respective applications and the preliminary objection to be heard together, and the parties were to file and exchange written submissions thereon. It is noteworthy that at the interparties hearing, counsel for the Appellants sought to make an oral application to amend prayer 3 of the first application by substituting "the 1st Respondent" with "the Respondent." The same was opposed by counsel for the 2nd Respondent, who argued that a formal application ought to be made to that effect. Consequently, this court directed that

the oral application for amendment be equally canvassed in the respective submissions; however, it is apparent that the issue was not addressed in any of the parties' submissions.

11. From the record, it remains unclear whether the 1st Respondent was equally represented by the same advocate acting for his counterpart, the 2nd Respondent. That notwithstanding, it is apparent that the 1st Respondent did not participate at the hearing of the various applications and the preliminary objection.

12. Nevertheless, the court upon considering the material canvassed in respect of the multiple applications coupled with the preliminary objection, will first make a determination in respect of the amendment application orally made before it, notwithstanding the fact that the same was not canvassed by the parties.

13. The law on amendments is well settled. Under Section 100 of the *Civil Procedure Act* (CPA), this court has general power to amend pleadings to correct any defect or error in a suit at any stage of the proceedings on terms as to costs or otherwise as it may deem just and all amendments should be made for the purpose of determining the real question or issues raised by or depending on the proceedings. The above-cited provision is echoed by Order 8, Rules 3 and 5 of the Civil Procedure Rules (CPR).

14. Order 8, Rule 3 provides thus:

    (1) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.

    (2) Where an application to the court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do.

    (3) An amendment to correct the name of a party may be allowed under subrule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.

    ...

    (5) An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.

15. Order 8, Rule 5 on its part expresses that:

    (1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.

    (2) This rule shall not have effect in relation to a judgment or order.

16. From a reading of the foregoing provisions, it is clear that the courts have wide and unfettered discretion to allow the amendment of pleadings at any stage of the proceedings before judgment is entered, for

purposes of determining the real question or issue raised by parties. Nevertheless, it is noteworthy that such discretionary power ought to be exercised in a judicious and just manner.

17. The foregoing position was echoed in Bullen Leak and Jacobs Precedents of Pleadings, 12th Edition page 127 thus:

> "...The power to grant or refuse leave to amend a pleading is discretionary and is to be exercised so as to do what justice may require in the particular case, as to costs or otherwise. The power may be exercised at any stage of the proceedings and accordingly amendment may be allowed before or at the trial or after trial or even after judgment or an appeal. As a general rule, however, the amendment is sought to be made, it should be allowed if it is made in good faith and if it will not do the opposite party any harm, injury or prejudice him in some way that cannot be compensated by costs or otherwise."

18. As earlier mentioned, the amendment sought by the Appellants' counsel is for correction of the order 3 contained in the first application by substituting "the 1st Respondent" with "Respondent." Upon consideration of the nature of amendment sought, it is clear that the same is purely intended to correct a trivial typographical error and in no way alters or impacts on the substance of the said application or the dispute between the parties. In the premises and in the absence of any credible material or arguments tendered to support the opposition raised by counsel for the 2nd Respondent, the court is inclined to exercise its discretion in favour of the Appellants. Consequently, the oral application for amendment is hereby allowed, accordingly.

19. The court will now address itself on the preliminary objection and whose outcome will in turn dispense with the third application, given that they both raise the primary issue being whether this court has the requisite jurisdiction to entertain the appeal and/or the first application. Before proceeding any further, however, the court noted that the third application equally constituted of an order for review and/or setting aside of the injunctive orders earlier issued by this court on 18.10.2024 and 22.10.2024. From a perusal of the record and more particularly the just mentioned orders, it is clear that they were issued in the interim, pending interparties hearing of the relevant applications. It therefore follows that the said orders are now spent and there is nothing to be reviewed and/or set aside.

20. Turning to the preliminary objection, the court in the renowned case of Mukisa Biscuit Company v West End Distributors Limited (1969) EA 696 defined what constitutes a preliminary objection in the manner hereunder:

> "A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised in any fact that has to be ascertained or if what is sought is the exercise of judicial discretion."

21. The above definition was advanced by the Supreme Court in Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others [2015] eKLR when it rendered itself thus:

> "It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law."

22. As already mentioned, the key objection being raised herein concerns the subject of jurisdiction. In this regard, it cannot be emphasized enough that the question of jurisdiction constitutes a pertinent issue of law, with the legal principle being that jurisdiction is everything and that without it, a court

cannot perform any further action in a matter. This position was reaffirmed by the Court of Appeal in Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR when it held thus:

> " Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a complaint one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself. The subordinate court could not therefore entertain the suit and allow only that part of the claim that was within its pecuniary jurisdiction. In another locus classicus in this subject, this Court pronounced; Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd. (1989):
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> "Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given."

23. The argument brought forth by the 2nd Respondent is that pursuant to the provisions of *the Constitution*, 2010 and the ELC Act, the subject matter of the dispute falls within the jurisdiction of the ELC and not the High Court. The Appellants on their part maintain that the present appeal and relevant applications are properly and competently before this court.

24. *The Constitution*, 2010 under Article 162(2) sets out the following:

> " Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to — .....
>
> (b) the environment and the use and occupation of, and title to, land."

25. Pursuant to the above, the ELC was established to deal with issues relating to the environment and land. The ELC Act which establishes the ELC stipulates the following under Section 13:

> " (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
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> (2) In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes——
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> (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
>
> (b) relating to compulsory acquisition of land;
>
> (c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land."

26. Upon perusal of the record coupled with the averments made by the respective parties, it is evident that the subject matter of the dispute is that of outstanding rent arrears allegedly owed by the Appellants to the 2nd Respondents pursuant to a tenancy/lease agreement, which dispute would therefore fall within the ambit of a breach of contract. Claims arising out of a breach of contract are primarily civil in nature and would therefore fall within the jurisdiction of the High Court. This position was reaffirmed by the Court of Appeal in the case of Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna, Edward Njuguna Kangethe, George James Kangethe, Nguru Auctioneers, Leakey Auctioneers & Joserick Merchants Auc [2017] KECA 79 (KLR) when it rendered itself thus:

> " Furthermore, the jurisdiction of the ELC to deal with disputes relating to contracts under Section 13 of the ELC Act ought to be understood within the context of the court's jurisdiction to deal with disputes connected to 'use' of land as discussed herein above. Such contracts, in our view, ought to be incidental to the 'use' of land; they do not include mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court.
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> ...
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> While exclusive, the jurisdiction of the ELC is limited to the areas specified under Article 162 of *the Constitution*, Section 13 of the ELC Act and Section 150 of the *Land Act*; none of which concern the determination of accounting questions. Consequently, this dispute does not fall within any of the areas envisioned by the said provisions. On the other hand, the jurisdiction of the High Court over accounting matters is without doubt, for under Article 165(3) of *the Constitution* provides inter alia, that;
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> 1. subject to clause (5), the High Court shall have-
>
> a. unlimited original jurisdiction in criminal and civil matters."

27. From the foregoing, the court is therefore satisfied that the nature of the dispute; and consequently the appeal; fall well within the purview of the High Court and therefore, this court has jurisdiction in the matter.

28. The preliminary objection also raised an objection to the effect that the first application is res judicata by virtue of the fact that the Appellants filed a similar application seeking injunctive orders and which was conclusively determined in MCELC No. E525 of 2023 by Hon S. A. Opande on 31.07.2024 and vide a ruling in ELC APPEAL No. E119 of 2024 by Justice Oguttu Mboya on 17.10.2024, respectively.

29. The doctrine of res judicata features in the CPA. Section 7 in specific, stipulates that:

> " No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

30. Upon reviewing the record, the court noted that the 2nd Respondent annexed a copy of the order made by the court in ELC APPEAL No. E119 of 2024 on 16.09.2024. It is apparent that the court therein granted an order for status quo to be maintained, up to and until 23.09.2024. In the absence of any material to indicate otherwise, the court finds that the said order has since lapsed. In the same manner, the order and directions issued by the court in MCELC No. E525 of 2023 were to subsist in the interim and are now spent. In the circumstances, the court finds that no credible material has been tendered before it to show that the res judicata doctrine would become applicable here.

31. Consequently, the preliminary objection automatically fails. Similarly, the third application which sought the striking out of the appeal on similar grounds, cannot be sustained.

32. The court will now determine the second and fourth applications contemporaneously, since they respectively seek orders in effect holding the CEO of the 2nd Respondent and his counterparts in contempt of this court's orders. As earlier mentioned, the orders in question were made by this court on 18.10.2024 and 22.10.2024, respectively. By way of the former order, this court granted the interim injunctive orders sought in the first application and further granted the order directing the parties to reconcile their accounts for purposes of the Appellants' settlement of the outstanding rent arrears; conditional upon the Appellants depositing the sum of Kshs. 2,432,718/- in a joint interest earning account. In the latter order, this court granted the interim order sought in the second application, to the effect that the Respondents do remove their locks from the subject premises and cease interfering with the Appellants' access thereto.

33. That said, Section 5 of the *Judicature Act*, Cap. 8 Laws of Kenya is the paramount substantive law granting superior courts the power to punish for contempt. The Section stipulates the following:

> "(1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts..."

34. The term 'contempt' is defined in the Black's Law Dictionary 9th edition as follows:

> "A disregard of, or disobedience to, the rules or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behavior or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body."

35. The Black's Law further defined contempt of court using the following words:

> "Conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment."

36. The rule of law creates an obligation upon persons to ensure that court orders are obeyed, since court orders are not made in vain. Where for good reason a party or person finds it impossible or otherwise difficult to comply with a court order in place, such party or person is expected to seek clarification from the court and unless vacated, set aside or varied, court orders must be obeyed. This position was echoed by the Court of Appeal in Refrigerator & Kitchen Utensils Ltd v Gulabchard Popat lal Shah & Others Civil Appeal Nairobi 39/1990 and in Wildlife Lodges Ltd v County Council of Nairobi & Another [2005] EA 344 when it held that:

> "It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it until that order was

discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt. A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it...it would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order null or valid...whether it was regular or irregular. That they should come to court and not take upon themselves to determine such a question. That the course of a party knowing of an order which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed...if there is a misapprehension in the minds of the defendants as to the reasonable meaning of the order, then the expectation of them is that they would have made an application to the court for the resolution of any misunderstanding and this could have been lawful course...In cases of alleged contempt, the breach for which the alleged contemnor is cited must not only be precisely defined but also proved to be standard which is higher than proof on a balance of probabilities bit not as high as proof beyond reasonable doubt. The inherent social limitations afflicting most people in a developing county such as Kenya have the tendency to restrict access to the modern institutions of governance, and more particularly to the judiciary which is professionally run, on the basis of complex procedures and rules s of law. Yet, this same judiciary is generally viewed as the impartial purveyor of justice, and the guarantor of an even playing field for all, a perception which ought to be strengthened, through genuine respect for the courts of justice, and through compliance with their orders. Consistent obedience to court orders is required, and parties should not take it upon themselves to decide on their own which court orders are to be obeyed and which ones overlooked, in the supposition that this oversight will not impede the process of justice...justice dictates even handedness between the claims of parties ; and if it be the case that the plaintiff/applicant has not been accorded a level playing ground for the realization of its economic activities, a matter that of course can only be established through evidence in the main suit, then the court ought to provide relief, by applying the established principles of law , one of these being the law of contempt... An Exparte order by the court is a valid order like any other order and to obey orders of the court is to obey orders made both exparte and interpartes since the court by Section 60 of *the Constitution* is the repository of unlimited first instance jurisdiction, and in this capacity it may make exparte orders, where, after a careful and impartial consideration, it is convinced that issuance of such an order is just and equitable. There is nothing potentially oppressive in an exporter order, since such an order stands open to be set aside by simple application, before the very same court... where a party considers an exparte order to cause him undue hardship, simple application will create an opportunity for an appropriate variation to be effected thereto, and therefore there will be no excuse for a party to disobey a court order merely on the grounds that it had been made exparte and this argument will not avail either the first or the said defendant."

37. That said, the guiding principles in determining whether there has been contempt of court orders, as expressed in Pinnacle (K) Travel and Safaris Limited v Omar Faruk Osman & 5 others [2017] eKLR and echoed in the case of Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR are:

    a. That the order was clear, unambiguous and binding on the defendant.

    b. That the defendant had knowledge of or proper service of the terms of the order.

c. That the defendant acted in breach of the terms of the order.

d. That the defendant's conduct was deliberate.

38. On the first principle above, it is not contested that this court vide the respective orders made on 18.10.2024 and 22.10.2024 granted the Appellants the interim orders earlier set out, which orders are clear and unambiguous in nature.

39. Concerning the second principle, upon the court's study of the record, it is apparent that the CEO of the 2nd Respondent as well as his counterparts would reasonably have had knowledge of the terms of the aforementioned court orders at all material times by virtue of being represented by counsel. To add on, the Appellants annexed an affidavit of service sworn by process server Geoffrey Migosi on 22.10.2024, indicating that service of the first application and the resulting order of 18.10.2024, among other documentation, had been effected upon the CEO of the 2nd Respondent (Duncan Marete); the advocates for the 2nd Respondent; the OCS Central Police Station; and the Manager of the subject premises (Vitalis Fausto Kirimi) on the said 18.10.2024. Likewise, the Appellants annexed an affidavit of service also sworn by Geoffrey Migosi on 23.10.2024 indicating service of the second application and resulting order made on 22.10.2024 upon the abovementioned persons, on 22.10.2024 and 23.10.2024.

40. The contents of the respective affidavits of service were in no way challenged by the CEO of the 2nd Respondent or any of his counterparts. That being the position, the court is satisfied that the abovementioned persons were notified of the aforesaid court orders and were therefore expected to have knowledge thereof.

41. By way of his replying affidavit in opposition to the respective applications filed by the Appellants, Duncan Kiambia Marete, CEO of the 2nd Respondent, admitted to non-compliance of the court order made on 22.10.2024 and excused the non-compliance with the averment that this court lacks jurisdiction to issue the orders sought. The question of jurisdiction has already been settled hereinabove.

42. In the absence of any credible evidence to indicate otherwise therefore, the court is inclined to find that the non-compliance on the part of the CEO of the 2nd Respondent and his counterparts was deliberate and willful in the circumstances, and was in total disregard of the court's orders. The court is therefore satisfied to exercise its discretion in favour of the Appellants as pertains to the second and fourth applications.

43. This leaves the first application which as earlier mentioned, seeks interlocutory/temporary injunctive orders against the Respondents, pending the hearing and determination of the present appeal.

44. The principles governing the grant of an interlocutory injunction as enunciated in Giella v Cassman Brown & Co Ltd [1973] EA 358 are settled. Similarly, as to what constitutes a prima facie case, this was settled too since the decision in Mrao v First American Bank of Kenya Ltd & 2 others *CA No 39 of 2002* [2003] eKLR. Both decisions have been reaffirmed and applied by superior courts in countless subsequent decisions including the recent decisions cited in this case by the parties.

45. The Court of Appeal in Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR restated the principles governing the grant of interlocutory injunctions enunciated in Giella's case and observed that the role of the judge dealing with an application for interlocutory injunction is merely to consider whether the application has been brought within the said principles. However, it was cautioned that,

such a court ought to exercise care not to determine with finality any issues arising. The court expressed itself as follows:

> " ...Since the fundamentals about the implications of the interlocutory orders of injunctions are settled, at least over four decades since Giella's case, they could neither be questioned nor be elaborated in detailed research. Since those principles are already...by authoritative pronouncements in the precedents, they may be conveniently noted in brief as follows:
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> In an interlocutory injunction application, the applicant has to satisfy the triple requirements to:
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> a) establish his case only at a prima facie level.
>
> b) demonstrate irreparable injury if a temporary injunction is not granted.
>
> c) allay any doubts as to (b) by showing that the balance of convenience is in his favor."

46. In addition, the court stated that the three conditions apply separately as distinct and logical hurdles to be surmounted sequentially by the applicant. That is to say, that the applicant who establishes a prima facie case must further establish irreparable injury, being injury, for which damages recoverable could not be an adequate remedy. And that where the court is in doubt as to the adequacy of damages in compensating such injury, the court will consider the balance of convenience. Finally, where no prima facie case is established, the court need not investigate the question of irreparable loss or balance of convenience.

47. As to what constitutes a prima facie case, the Court of Appeal in the above-cited case, delivered itself as follows:

> " Recently, this court in Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] KLR 125 fashioned a definition for "prima facie case" in civil cases in the following words:
>
> "In civil cases, a prima facie case 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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but 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."
>
> We adopt that definition save to add the following conditions by way of explaining it. 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. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title, it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means

no more than that the court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."

48. Upon re-examining the averments made in support of the first application, the court observed that the 1st and 2nd Respondents' respective roles in the proceedings are that of auctioneer and landlord and/or proprietor of the subject premises, whereas the Appellants were at all material times the tenants on the subject premises.

49. It is apparent that the dispute relates to allegedly unpaid arrears in rent by the Appellants, as well as challenges in harmonization of the accounts amongst the parties herein, with the Appellants claiming on the one hand that provision has been made for any outstanding rent arrears, while the 2nd Respondent in particular argues that the outstanding arrears exceed the amount being purported by the Appellants. The Appellants equally aver and argue that the trial court declined to allow their application seeking to have the trial proceedings struck out for being commenced irregularly. Upon weighing the rival positions above coupled with the material tendered but without going into the merits of the appeal at this stage, the court is satisfied that the Appellants have demonstrated the presence of a prima facie appeal.

50. On the question of irreparable harm, it is the averment by the Appellants that unless the temporary injunctive order sought is granted, they together with their sub-tenants will be denied rightful and peaceful enjoyment of the subject premises since the Respondents will proceed to levy distress for rent, and that any businesses being undertaken by their sub-tenants stands the risk of being paralyzed as a result. In contrast, the position taken by the 2nd Respondent is that no irreparable loss has been shown here.

51. Upon consideration of the foregoing averments, the court is satisfied that the Appellants have reasonably demonstrated the manner in which irreparable loss/harm would be visited upon them, if the interlocutory injunctive order sought is denied. In any event, it is apparent from the record that the Appellants complied with the condition set by this court vide the order made on 18.10.2024 requiring them to deposit the sum of Kshs. 2,432,718/- in a joint interest earning account. The monetary interests of the 2nd Respondent are therefore catered for.

52. In view of the foregoing, the balance of convenience would automatically tilt in favour of the Appellants in the circumstances. Consequently, the court is convinced to grant the interlocutory injunctive order sought herein, until such time as the appeal is heard and determined.

53. In the end therefore, the following orders are hereby made:

    a. The Notice of Motion dated 17.10.2024 succeeds in terms of prayer 3 therein.

    b. Consequently, a temporary injunction be and is hereby issued against the 2nd Respondent, thereby restraining it from interfering with the Appellants' quiet and peaceful possession of the shops situated in Imenti House, Moi Avenue Nairobi which is erected on L.R. No. 209/2437, pending the hearing and determination of the appeal.

    c. The Notices of Motion filed by the Appellants and dated 22.10.2024 and 23.10.2024 are hereby allowed in terms of order 3 therein.

    d. Consequently, a notice to show cause be and is hereby issued to the Chief Executive Officer of the 2nd Respondent, Duncan Kiambia Marete; the current directors of the 2nd Respondent; the Manager-Imenti House, Mr. Vitalis Fausto Kirimi, to show cause as to why he should not be punished for wilful disregard and disobedience of the order issued by this Honourable Court on 18.10.2024.

e. Further to d) above, a notice to show cause be and is hereby issued to the Chief Executive Officer of the 2nd Respondent, Duncan Kiambia Marete; the current directors of the 2nd Respondent; the Manager-Imenti House, Mr. Vitalis Fausto Kirimi; and Advocate Joe Thuo, to show cause as to why he should not be punished for wilful disregard and disobedience of the order issued by this Honourable Court on 22.10.2024.

f. The 1st, 2nd, 3rd and 4th Appellants shall have the costs of the abovementioned Notices of Motion dated 17.10.2024; 22.10.2024; and 23.10.2024 to be borne by the 2nd Respondent.

g. The Notice of Motion dated 22.10.2024 and filed by the 2nd Respondent is hereby dismissed with costs to the Appellants.

h. The notice of preliminary objection dated 22.10.2024 is hereby dismissed with no order as to costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF DECEMBER 2024.

L. KASSAN

JUDGE

In the presence of:

Kaguru for Applicant

Thuo for Respondent

Carol - Court Assistant