



Youth Limited v Kenya Railways Corporation (Environment & Land Case E392 of 2022) [2023] KEELC 17162 (KLR) (27 April 2023) (Ruling)

Neutral citation: [2023] KEELC 17162 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E392 OF 2022**

**LN MBUGUA, J
APRIL 27, 2023**

BETWEEN

YOUTH LIMITED PLAINTIFF

AND

KENYA RAILWAYS CORPORATION DEFENDANT

RULING

1. This suit was commenced by a plaint dated November 23, 2022. Alongside the plaint, the Plaintiff filed a Notice of Motion application of even date which is for determination before this court. It seeks orders that the Defendant delivers to the Plaintiff all goods it carted away on November 19, 2022 from the Plaintiff's property known as LR No. 209/6455 and orders that the Defendant gives access and possession of the said land back to the Plaintiff being status quo ante. The Plaintiff also seeks orders that the Defendant be restrained by an order of injunction from interfering with the suit property.
2. The application is based on grounds on its face and on the supporting affidavit sworn on November 23, 2022 by Samuel Kamau Macharia, a director of the Plaintiff. He deposes that the Plaintiff has been and is still the registered proprietor of the land known as LR No. 209/6445 vide a lease registered on November 21, 2017 for a term of 45 years from October 1, 2011.
3. He avers that on November 19, 2022, the Defendant trespassed on the suit property, broke its premises and carted away assorted goods and chattels belonging to it and its sister company; Royal media Services Limited. The Defendant then took forceful occupation of the suit property claiming ownership and stationed policemen thereon.
4. He avers that the Defendant's actions denied the Plaintiff and its sister company access to the property and premises in which the popular comedy known as Inspecta Mwala is acted and staged thus causing the Plaintiff and its sister company irreparable loss.



5. He deposes that the Defendant has purported to issue illegal notices of termination of tenancies in relation to other premises existing/located on the suit property without consent and/or knowledge of the Plaintiff. He adds that unless the Defendant is enjoined, the Plaintiff stands to lose KSh.3 billion being the value of the subject matter herein.
6. The application is opposed by the Defendant vide the replying affidavit sworn on 27.1.2023 by Wycliffe Agutu, its senior security Officer. He admits that there exists a lease between the Defendant and the Plaintiff in relation to property known as LR No.209/6445. He deposes that clause 3.7 of the lease provides for arbitration in case of a dispute between the parties and as such, this court has no jurisdiction to adjudicate over the dispute.
7. He further deposes that due to review and reorganization of functions within the Defendant's workforce, it became necessary that the Defendant do take steps to utilize the suit property to accommodate these changes. To this end, the defendant issued a 1 month notice to the tenant on the suit property, one Kirimi Rintaugu vide a Notice to terminate tenancy of House No. KRC 19414 WK11 Kileleshwa dated October 28, 2022.
8. He avers that upon the lapse of the notice period and the tenant not having responded to the notice or raised any objection to the same in the intervening period, the Defendant was left with no option but to remove the tenant along with the goods from the suit property. He adds that the exercise was successful and less disruptive and it was carried out and supervised by the Officer Commanding Station (OCS) and the Deputy OCPD Railways Police Station.
9. He avers that during the exercise, one cast member of the show; Inspekta Mwala known by her stage name as Lavender and an Eng. Karanja who introduced himself as the Head of Engineering at Royal Media Services requested to remove critical equipment from the premises which they carted away in Royal Media Services Limited's motor vehicle registration No. KCW 613E. He adds that he was part of the team that carried out the exercise and that they ferried certain goods from the premises for safe keeping as per the annexed inventory.
10. He also deposes that none of the goods removed from the suit property were media equipment that would disable the continuity and production of the Inspekta Mwala show as alleged thus the Plaintiff concealed material facts. He adds that by a letter dated January 17, 2023, the Plaintiff's Advocates requested for return of goods removed from the suit property and the Defendant has indicated that the goods are safe in its stores and can be collected at any time.
11. Along with the replying affidavit, the Defendant also filed a Notice of Preliminary Objection dated January 27, 2021. It objects to the hearing of this suit on the basis that Clause 3.7 of the lease agreement between the parties dated September 6, 2012 stipulates that all questions in dispute between the parties and all claims for compensation or otherwise not mutually settled and agreed between the parties shall be referred to arbitration for final determination.
12. In rejoinder, the Plaintiff filed a further affidavit sworn by its director Dr. Samuel Kamau Macharia on February 17, 2023. He avers that after entering the lease agreement herein, the suit land was subsequently transferred to the Plaintiff and a certificate of title issued. He contends that upon the said transfer, the Defendant's rights became extinguished and the same now vest in favour of the Plaintiff. He adds that the lease agreement and covenants therein equally became extinguished by operation of law. Thus the Plaintiff is entitled to protection of its proprietary rights under Article 40 of the Constitution and Section 26 of the Land Registration Act.
13. On January 31, 2023, the Court directed the parties to file their written submissions by February 24, 2023. As at March 15, 2023, the Defendant had not filed its written submissions.



14. On the other hand, the Plaintiff filed written submissions dated February 17, 2023. With regard to the Defendant's preliminary objection dated 27.1.2023, the plaintiff argues that it seeks protection of its rights pursuant to Section 26 of the [Land Registration Act](#) and protection guaranteed under Article 40 of [the Constitution](#), averring that the jurisdiction to hear and determine the Plaintiff's claim against the Defendant is only bestowed upon the Courts and no other person or institution thus the preliminary objection is intended to usurp judicial mandate of the court bestowed on it by the law. Thus clause 3.7 of the lease agreement on arbitration cannot take away the court's jurisdiction and it does not contemplate a dispute on ownership.
15. With regard to its application dated November 23, 2022, it was submitted that the plaintiff has met the requisite criteria for the grant of injunctions as laid down in the case of *Giella v Cassman Brown*. That plaintiff has proven to be the owner of the suit land through the certificate of title and the Defendant does not dispute its ownership, thus it has established a prima facie case.
16. It argues that the balance of convenience tilts in its favour since it has been using the suit land, when the Defendant just woke up and decided to evict the Plaintiff. He adds that there will be irreparable loss and injury as sourcing alternative grounds will not be of the same upmarket and scenic value for casting Inspecta Mwala.
17. The issue for determination is whether the Preliminary Objection dated January 27, 2023 and or the application dated November 23, 2022 are merited.
18. The Defendant admits that it leased the suit premises to the Plaintiff on July 6, 2012 for a term of 45 years. It also admits that it carried out an eviction exercise on one of the houses erected on the suit land on December 19, 2022 but contends that the lessee had been issued with 1 month eviction notice.
19. The Defendant also contends that pursuant to clause 3.7 of the lease between it and the Plaintiff, this court has no jurisdiction to adjudicate the dispute. The said clause states;

“...all questions hereafter in dispute between the parties hereto and all claims for compensation or otherwise not mutually settled and agreed between the parties...shall be referred to arbitration.”
20. The Plaintiff argues that clause 3.7 has been overtaken by provisions of Section 26 of the [Land Registration Act](#) and Article 40 of [the Constitution](#) since the Plaintiff is now the registered owner of the suit land.
21. I find that Plaintiff's interest in the suit land is encumbered by the terms of the lease in terms of the provisions of Section 28 of the [Land Registration Act](#). There is no doubt that clause 3.7 requires parties to refer all questions in dispute to arbitration. It follows that the dispute herein is a matter within the arbitration clause. This does not mean that the jurisdiction of the court has been ousted by the arbitration process, rather, it is a question of exercise of judicial restraint as was held in the Supreme Court case of [United Millers Limited v Kenya Bureau of Standards, Director, Directorate of Criminal Investigations & 5 others](#) [2021] eKLR.
22. The Court of Appeal in [Safaricom Limited v Ocean View Beach Hotel Limited & 2 others](#) [2010] eKLR stated:-

‘It takes time to establish an arbitral tribunal and during the time between the arising of the dispute and the tribunal's establishment vital evidence or assets may disappear unless a national court (in our case, the High Court) is urgently asked to intervene. Moreover even



where an arbitral tribunal has the power to issue interim measures such powers are generally restricted to the parties involved in the tribunal itself.”

23. Guided by the above authority, I opine that the conditions for grant of protective measures pending arbitration have been established.
24. I say so because the Defendant admits to having leased the suit property to the Plaintiff. The Plaintiff has also established that it has been in use and occupation of the suit property. Therefore the court will issue interim measures of protection. Final orders are that; The Preliminary Objection partially succeeds and the matter is hereby referred to arbitration. The application also partially succeeds to the extent that pending the hearing and determination of the arbitration process, the goods carted away from the suit land shall be handed over to the Plaintiff. Further, the Defendant is hereby restrained from interfering with the suit property pending the determination of arbitration proceedings. The costs of the application and the Preliminary objection shall abide the outcome of the arbitration proceedings. Any further proceedings herein are stayed awaiting the outcome of the arbitration proceedings.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF APRIL, 2023
THROUGH MICROSOFT TEAMS.**

LUCY N. MBUGUA

JUDGE

In the presence of:-

Anne Kadima holding brief for M/s Kavachi for Defendant/Respondent

Achieng holding brief for Orege for Plaintiff Applicant

