



Waki Freight Forwarders Ltd v Lalji Mengji Patel & Company Limited (Environment & Land Case E032 of 2023) [2023] KEELC 17726 (KLR) (31 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17726 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E032 OF 2023**

**A NYUKURI, J
MAY 31, 2023**

BETWEEN

WAKI FREIGHT FORWARDERS LTD PLAINTIFF

AND

LALJI MENGJI PATEL & COMPANY LIMITED DEFENDANT

RULING

1. Vide a notice of motion dated 17th April 2023, the Plaintiff/Applicant sought the following orders;
 - a. Spent.
 - b. Spent.
 - c. That pending the hearing and determination of the suit herein the Defendant/Respondent be restrained either by itself, its agents, directors, assigns or otherwise howsoever from attaching, advertising, selling or otherwise dealing with the Plaintiff goods stated in the proclamation notice dated 13th April 2023 issued by PEYWA Auctioneers.
 - d. That pending the hearing and determination of the suit herein the Defendant either by itself, its agents, directions, assigns or otherwise howsoever be restrained from harassing, or levying distress against the Plaintiff premises on a non-existent landlord-tenant relationship.
 - e. That the Defendants do pay costs of this application.
 - f. That this Honourable Court be pleased to make such further or other orders as it may deem fit and expedient in the circumstances of this case.
2. The application is premised on the affidavit sworn by Obadiah Kamau Kihara a director and shareholder of the Plaintiff sworn on 17th April 2023. The Applicant's case is that LR No 12715/586 (suit property) is owned by a Mr. Parbat Lalji Meghji measuring 2.5 acres. That in 2018 Mr. Parbat Lalji



Meghji, now deceased and who was a long-time friend and neighbour of the Plaintiff agreed with the plaintiff to have the plaintiff enter the suit property, develop it for purposes of delivering the obligations under a contract between the Plaintiff and Kenya Ports Authority for five years in which period the Plaintiff will have recouped their investment. That parties also agreed that on the lapse of five years, parties were to agree on how to share the proceeds of the developments and that should the contract with Kenya Ports Authority fail to take off or renewed, the Defendant was to either sell the suit property to the Plaintiff exclusive of the development or compensate the Plaintiff for all the developments.

3. According to the Plaintiff, they entered the suit property on account of the oral agreement aforesaid and made improvements thereon by removing the cotton soil, refilling the parcel with marram, gravelling the parcel, walling and installation of electric fence around the parcel, putting cabro approximately 2 acres, installing flood lights, constructing an all-weather road and drainage between the suit property and an adjacent lab sign plot and construction of a security guard house. He stated that the said development cost a sum of Kshs 49,952,200/- which the Plaintiff borrowed from Equity Bank.
4. The Applicant stated that the developments on the suit property were done with the knowledge and consent of the Defendant's former directors and was approved with his knowledge and assistance. He stated that on 13th April, 2023, Peywa Auctioneers acting on the Defendant's instructions, proclaimed the Applicants 27 goods including the Applicant's motor vehicles and machineries. The Applicant insists that the proclamation was unlawful as there is no tenant-landlord relationship between the Plaintiff and the Defendant as there is no rent due and owing. The Applicant also stated that the said proclaimed goods are its crucial tools of trade and therefore the Applicant is at risk of suffering irreparable damage as its construction business shall be capacitated as 24 vehicles and machineries were proclaimed.
5. The application was opposed. The Respondent filed a notice of Preliminary Objection dated 27th April 2023 as well as the Replying Affidavit sworn on 27th April, 2023 by Cynthia Sheunda, the Legal Officer of the Defendant company. In the Preliminary Objection, the Respondent raised a preliminary objection on the suit on the following grounds;
 1. This court has no jurisdiction to hear and determine this matter.
 2. The dispute herein is a preserve of the Business Premises Rent Tribunal and the suit and the Notice of motion application herein is an abuse of the court process.
 3. The suit and the notice of motion application is premature, ill-informed and bad in law.
 4. The suit and notice of motion application is frivolous, vexatious and an abuse of the court process.
 5. The provision of law under which the Notice of Motion has been bought cannot be the basis of this honourable court to grant the orders sought.
 6. The suit and the Notice of Motion is fatally and incurably defective.
6. In the Replying Affidavit, the Defendant's Legal Officer deponed that the Defendant is the legal registered owner of the suit property and that on 18th December 2018, the Defendant entered into a tenancy relationship with the Plaintiff whereof, and that they agreed to pay monthly rent of Kshs 125,000/- to be increased by 10% after every twelve months. She stated that therefore the Plaintiff was in rent arrears since December 2018.



7. She stated that the Defendant lawfully instructed Peywa Auctioneers to levy distress against the Plaintiff and that therefore this court lacks jurisdiction to hear and determine this matter which should be heard by the Business Premises Rent Tribunal. She stated that no lease has been executed in respect of the suit property by the parties. According to the Defendant, where no agreement is reduced in writing the relationship between the parties is a periodic tenancy and that the rent payment scale was to be reviewed by parties after lapse of five years.
8. She deposed that the Plaintiff owes the Defendant a sum of Kshs 7,144,512/-. She stated that the defence advocate has on two occasions written to the Plaintiff requesting for a copy of the lease signed but none was availed. She maintained that the terms of the Plaintiff application are unconscionable to the proprietor of the suit property as they cannot be expected to forego their property for five years with zero compensation and that this court has power to set aside such a contract if indeed it existed. The Defendant also stated that the Plaintiff has come to court with unclean hands as their advocate drafted and sent a draft lease agreement over the suit property via email sent on 19th December 2018 to one of the Defendant's directors.
9. It was also averred on behalf of the Defendant that the proposed terms in the draft lease was the bargaining power which the Plaintiff used is take occupation of the suit property. That it was on the basis of these negotiations that the Plaintiff took occupation of the suit property and was to remit monthly rent to the Defendant. She deposed that the terms alleged in the application herein do not feature in the proposed lease by the Plaintiff and that therefore it is not true that the Plaintiff was to acquire the suit property and acquire the right to purchase the same after five years or be compensated. She maintained that the terms alleged by the Plaintiff are an afterthought and attempt by the Plaintiff to legalize their continuous illegality and to unjustly enrich themselves.
10. The Defendant stated that being in arrears of Kshs 7,144,512/-, the Plaintiff cannot allege to have a *prima facie* case or suffer irreparable loss. She stated that the Defendant legally terminated the tenancy relationship due to failure to pay monthly rent and therefore the further occupation amounts to trespass which culminated in counsel for the Defendant serving the Plaintiff with a demand letter that the Plaintiff ceases and desists from trespassing on the subject property. She further stated that the Plaintiff had since vacated the suit property fraudulently carting away the attached goods, as the Defendant now has no goods to attach. She stated that it is the Defendant who had a *prima facie* case as they were the registered proprietor of the suit property.
11. In a rejoinder, Mr. Obadiah Kamau Kihara filed a supplementary affidavit sworn on 5th May, 2023. He stated that the suit property was registered in the name of Premji Meghji Patel and Parbat Premji Patel as per the Defendant's letter of 26th August 2022 and that they are the parties that the Plaintiff dealt with.
12. As regards the draft lease, he deposed that the alleged rent was between himself and Premji Meghji Patel and Parbat Premji Patel and not the Defendant. He stated that the draft lease was abandoned and never signed as the underlying business from Kenya Ports Authority never came to fruition and that the Plaintiff never carried any business on the premises and no rent accrued and that alleged rent is based on draft lease and cannot lie.
13. On the issue of jurisdiction, he stated that the jurisdiction of the Business Premises Rent Tribunal was in regard to premises classified as hotels, shops or catering establishments and that save for developing the suit property, they have never carried any business on the suit property as the business with Kenya Ports Authority never took off. That therefore they have never carried out the business of hotels, shops or catering establishments.



14. He further deposed that the 24 vehicles and construction machineries were not stored in the suit property but on an adjacent property owned by the Plaintiff and that the distress for rent was in the Plaintiff's premises and not on the suit property and that therefore the same has no legal basis. That the defendant destroyed, excavated gravel and cabro carried it away and was now using it to construct a building in the premises.
15. The application was disposed by way of written submissions. On record are the Applicant's submissions dated 5th May 2023.

Submissions

16. Counsel for the Applicant submitted that the Applicant had established a *prima facie* case with a probability of success to warrant grant of temporary injunction as the Plaintiff had proved that there was no tenancy relationship between them and the Defendant, that the rent distress is based on a draft lease which was not signed. Further that the attached goods were not on the suit property. Counsel argued that the Applicant entered into discussions with Premji Meghji Patel and Parbat Premji Patel and not the Defendant and that the Defendant is a separate entity. Therefore that the distress for rent is illegal. To buttress their submissions counsel placed reliance on the cases of *Giella v Cassman Brown* (1973) EA 358, *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* (2003) eKLR, *Muchendu v Wanta* (2003) eKLR and *Kenya Tea Development Authority v Samuel Kanogo Ritbo* (2005) eKLR.
17. In addition, counsel argued that the Applicant had demonstrated that they stood to suffer irreplaceable harm which cannot be compensated in damages if the temporary injunction is not granted. Counsel asserted that 24 vehicles and construction machineries had been proclaimed illegally on a non-existent tenancy agreement and that the attached good were the Applicant's tools of trade in its forwarding and clearing business. That the description of all the attached vehicle as old is malicious for the sole intention of disposing them at a throw away price and that if the same are sold, the applicant will be rendered bankrupt. Counsel referred the court to the case of *Milka Chebosis Sitati & another v Nesco Services Limited* (2017) eKLR for the proportion that a party cannot proceed with an illegal distress for rent just because he can pay damages.
18. On the question of where the balance of convenience tilted, counsel submitted that the balance of convenience tilted in favour of granting the injunction for reasons that there has never been any tenancy agreement and that the proclaimed goods were not on the suit property.
19. As regards the question of jurisdiction, counsel contended that not all unwritten tenancies fall within the jurisdiction of the Business Premises Rent Tribunal. That the applicant had shown that they never carried on any business on the suit property and that the applicant's business does not fall within the definition of hotel, shop or catering establishment envisaged in the Act creating the Tribunal, hence the Tribunal has no jurisdiction.

Analysis and Determination

20. I have considered the application supporting and supplementary affidavits, replying affidavits, as well as submissions. The issues arising therefrom for determination by the court are as follows;
 - a. Whether or not this court has jurisdiction to hear and determine this suit.
 - b. Whether the applicant had met the threshold for grant of temporary injunction.
21. The jurisdiction of this court is provided for in Article 162 (2) (b) of the [Constitution](#) as read with Section 13 of the [Environment and Land Court Act](#).



Article 162(2) (b) of the Constitution provides as follows;

2. 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.

Section 13 of the Environment and Land Court Act provides as follows;

- (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.
- (2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution the Court shall have power to hear and determine disputes—
 - 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 contract choses in action or other instruments granting any enforceable interests in land; and
 - e. any other dispute relating to environment and land.

22. Essentially therefore this court has jurisdiction to determine disputes involving the Environment and Land.

23. On the other hand, the business premises Rent Tribunal jurisdiction is provided for in Section 12 of the Landlord and Tenant (shops, hotels and catering establishments Act cap 301 as follows;

1. A Tribunal shall, in relation to its area of jurisdiction have power to do all things which it is required or empowered to do by or under the provisions of this Act, and in addition to and without prejudice to the generality of the foregoing shall have power—
 - a. to determine whether or not any tenancy is a controlled tenancy;
 - b. to determine or vary the rent to be payable in respect of any controlled tenancy, having regard to all the circumstances thereof;
 - c. to apportion the payment of rent payable under a controlled tenancy among tenants sharing the occupation of the premises comprised in the controlled tenancy;
 - d. where the rent chargeable in respect of any controlled tenancy includes a payment by way of service charge, to fix the amount of such service charge;
 - e. to make orders, upon such terms and conditions as it thinks fit, for the recovery of possession and for the payment of arrears of rent and mesne profits, which orders may be applicable to any person, whether or not he is a tenant, being at any material time in occupation of the premises comprised in a controlled tenancy;



- f. for the purpose of enabling additional buildings to be erected, to make orders permitting landlords to excise vacant land out of premises of which, but for the provisions of this Act, the landlord could have recovered possession;
- g. where the landlord fails to carry out any repairs for which he is liable— (i) to have the required repairs carried out at the cost of the landlord and, if the landlord fails to pay the cost of such repairs, to recover the cost thereof by requiring the tenant to pay rent to the Tribunal for such period as may be required to defray the cost of such repairs, and so that the receipt of the Tribunal shall be a good discharge for any rent so paid; (ii) to authorize the tenant to carry out the required repairs, and to deduct the cost of such repairs from the rent payable to the landlord;
- h. to permit the levy of distress for rent;
- i. to vary or rescind any order made by the Tribunal under the provisions of this Act;
- j. to administer oaths and order discovery and production of documents in like manner as in civil proceedings before the High Court, to require any landlord or tenant to disclose any information or evidence which the Tribunal considers relevant regarding rents and terms or conditions of tenancies, and to issue summons for the attendance of witnesses to give evidence or produce documents, or both, before the Tribunal;
- k. to award costs in respect of references made to it, which costs may be exemplary costs where the Tribunal is satisfied that a reference to it is frivolous or vexatious;
- l. to award compensation for any loss incurred by a tenant on termination of a controlled tenancy in respect of goodwill, and improvements carried out by the tenant with the landlord's consent;
- m. to require a tenant or landlord to attend before the Tribunal at a time and place specified by it, and if such tenant or landlord fails to attend, the Tribunal may investigate or determine the matter before it in the absence of such tenant or landlord;
- n. to enter and inspect premises comprised in a controlled tenancy in respect of which a reference has been made to the Tribunal.

24. A business premises rent tribunal has jurisdiction in respect of controlled tenancies regarding tenancy of a shop, hotel or catering establishment, where the tenancy has not been reduced into writing or if it is written it is for a period no exceeding five years.

25. The preliminary objection raised is that this is a matter for the Business Premises Rent Tribunal. For a preliminary objection to be termed as a proper preliminary objection it must be raised an objection on the pleadings based on a pure point of law where there is no dispute on the facts. In the case of *Mukisa Biscuits v West End Distributors* (1969), the court held as follows;

“a preliminary objection is in the nature of a demister. It raised pure points of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any facts have to be ascertained or if what is sought is the exercise of judicial discretion.”

26. In this case, the defendant's position is that this is a dispute that ought to be determined by the business premises rent tribunal as there is a tenant-landlord relationship between parties herein. I have considered the plaint and the plaintiff's position is that there is no tenancy relationship between the



parties herein. There is no defence filed in response to the plaint. The facts upon which the Preliminary Objection is premised are disputed and there is no demonstration or material placed before court by the Defendant to show that there is a controlled tenancy-landlord relationship between the parties herein. As the preliminary objection is based on facts that are in dispute, it is my finding that it is not a proper preliminary objection and the same is dismissed.

27. To obtain a temporary injunction an applicant must demonstrate that they have a *prima facie* case with a likelihood of success; that if the injunction is not granted, they stand to suffer irreparable injury that may not be compensated by an award of damages; and where the court is in doubt, it ought to decide the matter on a balance of convenience. These are the principles set out in the case of *Giella v Cassman Brown* [1973] EA 358.
28. A *prima facie* case is a case which discloses an arguable case demonstrating that the Applicant's rights have apparently been infringed upon. In the case of [*Mrao Ltd v First American Bank of Kenya Limited & 2 others*](#) (2003) eKLR, the Court of Appeal described a *prima facie* case in the following terms;

“in civil cases a *prima facie* case is a case in which all 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 enjoyment 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.
29. On whether the plaintiff is entitled to orders of temporary injunction, I note that at the core of this dispute is the question of whether there is a tenancy relationship between the plaintiff and the defendant. While the plaintiff maintains that no such relationship exists, the defendant on the other hand insist that it does exist. The basis for the defendant's position is a draft lease agreement send by the plaintiff's counsel via email dated 19th December 2018.
30. The plaintiff does not dispute the fact that they sent the draft lease to the advocates representing Premji Meghji Patel and Parbat Premji Patel. Their argument is that the lease was not signed as parties entered into other arrangements and more fundamentally that the proposed lease was between Premji Meghji Patel and Parbat Premji Patel on one hand and Waki Freight Forwarders on the other hand. The plaintiffs main contest being that Premji Meghji Patel and Parbat Premji Patel are not one and the same as Lalji Meghji Patel and Company Limited who are the Defendant herein and therefore that no negotiations were undertaken between the plaintiff and the defendant. While the plaintiff stated that the suit property was purported to be registered in the names of Premji Meghji Patel and Parbat Meghji Patel as per the defence counsel's letter, the defendant averred that the suit property was registered in the name of the defendant. None of the parties availed a copy of the search or title of the suit property, to show who indeed was the registered proprietor of the suit property.
31. Having considered the draft lease, I note that Premji Meghji Patel and Parbat Premji Patel are described as the beneficial owners of the suit property and intended to lease the same as such. Besides, the letter dated 26th August, 2022 by counsel for the defendants clearly state that they had been instructed by Premji Meghji Patel and Parbat Premji Patel, the registered owners of the suit property, to among other matters give notice to cease and desist from trespassing on the suit property. Essentially therefore the defendant does not demonstrate how and when the suit property ceased to be owned by Premji Meghji Patel and Parbat Meghji Patel and to being owned by the Defendant herein, which is limited liability company, and a separate entity from the two individuals stated above.



32. It is trite law that a company is different from individuals forming the company. In any event in the replying affidavit of the Respondent, there is no disclose of the relationship between Premji Meghji Patel and Parbat Premji Patel with Lalji Meghji Patel and Company limited who are the Defendant herein. I therefore find and hold that Premji Meghji Patel and Parbat Premji Patel are separate entities from the Defendant herein.
33. Therefore to the extent that the Defendant did not negotiate with the Plaintiff, neither have they shown by way of search that the suit property belongs to them, then it is my finding that they therefore have no business levying distress against the Plaintiff, as they have no legal or equitable interest in the suit property. In the premises, I am persuaded that the applicant has demonstrated a *prima facie* case.
34. The Applicant states that if the proclaimed 24 vehicles and machines are attached to completion, they stand to suffer irreparable damages as they may be rendered bankrupt. I note from the attached proclamation that among the proclaimed goods are vehicles and construction machinery and I am in agreement with the Applicant that if the same are seized the Applicant shall suffer irreparable loss that cannot be compensated in damages.
35. On where the balance of convenience tilts, I note that as the applicant has shown that he has had no interaction with the defendant and that they stand to suffer irreparable loss and damages, it is my finding that the balance of convenience tilts in favour of grant of the temporary orders of injunction.
36. In the premises, the application dated 17th April, 2023 is merited and the same is allowed as follows;
- a. That pending the hearing and determination of the suit herein an order be and is hereby issued that the Defendant/Respondent be restrained either by themselves, their agents, directors, assigns or otherwise howsoever from attaching, advertising, selling or otherwise dealing with the Plaintiff goods stated in the proclamation notice dated 13th April 2023 issued by PEYWA Auctioneers.
 - b. That pending the hearing and determination of the suit herein an order be and is hereby issued that the Defendant either by themselves, their agents, directors, assigns or otherwise howsoever be restrained from harassing, or levying distress against the Plaintiff premises on a non-existent landlord-tenant relationship.
 - c. Costs of the application shall be borne by the Respondent.
37. Orders accordingly

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 31ST DAY OF MAY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;

Mr. Abdullah holding brief for Mr. Munyalo for Plaintiff/Applicant

Ms. Chitee holding brief for Mr. Osudwa for Defendant

Josephine – Court Assistant

