



**Estate of the Late Batuk Lakhamsi Lalji Shah v Lariak Properties Limited (Environment & Land Case E366 of 2022) [2023] KEELC 17901 (KLR) (30 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17901 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E366 OF 2022**

**JA MOGENI, J**

**MAY 30, 2023**

**BETWEEN**

**THE ESTATE OF THE LATE BATUK LAKHAMSHI LALJI SHAH .... PLAINTIFF**

**AND**

**LARIAK PROPERTIES LIMITED ..... DEFENDANT**

**RULING**

1. What is before me for determination are two applications, the first one is dated 7/11/2022 and the second one is dated February 24, 2023. The first application was brought under Sections 1A, 1B, 3, 3A, of *Civil Procedure Act* (cap 21), Order 40 rules 1, 2 and 4, and Order 51 other enabling provisions of the laws of Kenya. The other one (called 2<sup>nd</sup> application hereafter) is brought under Sections 1A, 1B and 3A Order 8 Rule 3 (1), 5 and 8 Order 51 rule 1 and all other enabling provisions of the laws of Kenya.
2. The 1<sup>st</sup> application has the following prayers for consideration at this stage:
  1. Spent
  2. That the Defendant, its agents, employee's or servants be enjoined from entering, interfering, demolishing or in any way meddling with the property described as L.R No 1870/III/46, situated on School Lane, Westlands, Nairobi, pending inter- partes hearing of this application.
  3. That the Plaintiffs agents and representatives be permitted to safeguard the property by contracting security guards, pending hearing and determination of this application.
  4. That the proceedings initiated by the Defendant in CMCC ELC 361 of 2022 between it and Metro Pharmaceuticals Limited in respect of LR No 1870/



III/46, situated on School Lane, Westlands, Nairobi be stayed pending hearing and determination of this application.

5. That the Defendant, its agents, employees or servants be removed from the property described as LR No 1870/III/46, situated on School Lane, Westlands, Nairobi restoring the status quo ante and to conserve it pending hearing and determination of this application
  6. That the Defendant, its agents, employees or servant be removed and restrained from interfering with, entering, advertising, offering for sale or any way purporting to deal with the property described as LR No 1870/III/46, situated on School Lane, Westlands, Nairobi
  7. That the file CMCC ELC 361 of 2022 between it and Metro Pharmaceutical Limited in respect of LR 1870/III/46, situated on School Lane, Westlands, Nairobi be called up to this court and the proceedings therein quashed.
  8. That a mandatory injunction is issued to compel the Defendant, its agents, servants, employees, proxies or otherwise howsoever to rebuild and restore the demolished section of the property
  9. That the Defendant be compelled to compensate the Plaintiff for all losses to be quantified and determined by court for the removal and destruction of the assets improperly removed from the property.
  10. That the Plaintiff obtain assistance from the Directorate of Criminal Investigations, Spring Valley Police Station, Parklands Police Station or Westlands Police Station to assist in the restoration of status quo ante by the removal of the Defendant, its agents, employees or servants from the property.
3. The 1<sup>st</sup> Application is premised on the summarized grounds stated on the face of the application and on the supporting Affidavit of Mukhtar Batuk Shah and Avani Niraj Shah. The plaintiff has stated that they are the owner of the suit property and they have stayed on the said suit property for over 45 years. The defendant's action of suing a non-existent defendant who is not in any way related to the suit property through the case filed in the Chief Magistrate's court and the orders obtained were based on a misrepresentation on the said defendant being fronted as the owner of the suit property.
  4. The Application is opposed. The defendant/respondent through its director Samuel K. Chepkwony filed a Replying Affidavit dated February 24, 2023. He averred that the defendant/respondent is the registered owner of LR 1870/III/46, situated on School Lane, Westlands, Nairobi, having been allocated the same when the lease of the suit property expired.
  5. He stated that the government never issued a lease to the late Batuk Lakhmshi Lalji Shah (deceased) since the attempt by the previous owner Phylis McEwan to extend the lease was never acted upon. He attached a letter dated 27/05/1975 marked as "SKC1" to support this averment. That the lease expired in 2003 and reverted back to government which was then free to allocate it to any Kenyan who applied.
  6. It is his contention that the deceased held a forged and irregular title which was void and could not transmit proprietary interest to the applicant. Further that during the period the transmission is alleged to have been done the applicant required a mandatory Memorandum of Registration of Transfer of Land ("MRT"). He referred to four situations where the said MRT was required affecting the suit property and annexed the copies of the transaction marked as "SKC2".



7. He stated that since the MRT was not there, then the assignment dated October 27, 1976 conferring proprietary interest in the suit property to the deceased is a nullity and a product of deceit and forgery. Thus the subsequent transactions on the suit property are null and void and this include the Grant Registration Number I.R 84817 and any members of the family living on the suit property are trespassers since the deponent cannot benefit from acts of illegality.
8. He further averred that upon the expiration of the lease the suit property reverted back to the Government of Kenya by operation of the Law as unalienated land in terms of Section 2 of the Government Lands Act, Cap 280 (Repealed). That the government was therefore free to allocate it to any other person. The Respondent was then allocated the suit property on 4/07/2010 and issued with a lease dated 7/04/2021 and a certificate of Title Number IR 250041 dated 3/08/2021 evidenced by annexure SKC 4 which are copies of the lease and certificate of title in the respondent's name. He contended that the defendant holds a valid title protected under the Constitution and that the defendant's application.
9. Both applications were canvassed by way written submissions. I will first address the issues arising in the application dated November 7, 2022.
10. In my understanding of the first application before me, I find that there are two main issues for consideration. The first issue is whether this Court can stay the proceedings in CMCC ELC 361 of 2022 between the defendant and Metro Pharmaceutical Limited in respect of LR 1870/III/46, situated on School Lane, Westlands, Nairobi. On this issue, I do find that the dispute is between the defendant and another party who is not before this court. If this court stayed or quashed the said proceedings, it would be tantamount to condemning this other party unheard and pushing it away from the seat of justice. The plaintiff/applicant has other interventions that they can initiate to address their concerns as pertains to the said suit. The right course of action for the plaintiff/applicant would have been to seek to be enjoined in the suit and raise their concerns before the court relating to the suit.
11. The applicant has not placed before this court any evidence of the pleadings filed in CMCC ELC 361 of 2022 in order to make an informed decision on whether to stay the proceedings. I am aware from the information before the court that the plaintiff/applicant is not a party to the suit so the prayer for staying a matter where you are not a party is a long shot and an action in vain.
12. The principal issue here is whether this court should issue a stay of proceedings in a matter not pending before it, to wit, CMCC ELC 361 of 2022.
13. Whereas, this court exercises supervisory jurisdiction over the magistrates' courts, it should not appear to arbitrarily interfere with the proceedings before those courts save on appeal or on application in matters of transfer of suit. The applicant herein has not demonstrated that he has sought and been denied an order of stay of proceedings in the Chief Magistrate's court.
14. Ordinarily such an order of stay of proceedings would issue from this court only to preserve the suit from further proceedings pending an appeal against some order made in the trial court, or on appeal against denial of a stay order by the trial court.
15. In the circumstances, it is safe to presume that the trial court would in appropriate circumstances entertain and consider an application for stay of proceedings on its merits and possibly where necessary defer to the priority of a superior court suit on the same subject as the latter's decision would be binding on it. Where no such opportunity has been availed to the trial court to do so, there would be no good ground for approaching a superior court.



16. Therefore, the necessary implication is that an order of stay of proceedings must first be sought in the trial court unless it is being sought pending appeal or as a substantive prayer on appeal. Consequently, I do find that this prayer in the application dated 7/11/2022 is not merited.
17. The second issue is whether this court can grant the injunctive orders sought. The application being one that seeks a permanent and a mandatory injunction, this has to be considered within the principles set out in the case of *Giella vs Cassman Brown & Co Ltd* 1973 E.A 358 and which are:-
1. The applicant must show a *prima facie* case with a probability of success at the trial.
  2. The applicant must show that unless the order is granted, he will suffer loss which cannot be adequately compensated in damages and,
  3. If in doubt, the Court will decide the application on a balance of convenience.
18. It must also be added that an interlocutory injunction is an equitable relief and the Court may decline to grant it if it can be shown that the applicant's conduct pertinent to the subject matter of the suit does not meet the approval of a Court of equity. The applicant submitted that the defendant has demolished part of the suit property which belongs to the plaintiff/applicant who claims to be registered proprietor. The defendant on the other hand has also claimed to be the registered owner of the suit property and he attached a copy of the lease and the certificate of title.
19. In the case of *Kibutiri vs Kenya Shell*, Nairobi High Court, Civil Case No3398 of 1980 (1981) KLR, the Court held that;
- “The conditions for granting a temporary injunction in East Africa are well known and these are: First, the Applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which might not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience. See also *E.A Industries .Vs. Trufoods* (1972) EA 420.”
20. In the case of *Robert Mugo wa Karanja vs Ecobank (Kenya) Limited & another* (2019) eKLR where the court in deciding on an injunction application stated;
- “circumstances for consideration before granting a temporary injunction under order 40 rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to a grant a temporary injunction to restrain such acts.....”
21. The plaintiff/applicant submitted that he is the registered proprietor of all that land known as LR 1870/III/46, situated on School Lane, Westlands, Nairobi, on which they claim to have been in possession for the last 45 years. That despite this the defendant/applicant instituted a suit against a third party who is not related in any way to the suit property and obtained an injunction that it used to evict the plaintiff on 4/11/2022. On its part, the defendant/respondent claim to have been allocated the suit property on 4/07/2010 and issued with a lease dated 7/04/2021 and Certificate of Lease of Title Number IR 250041 dated 3/08/2021. Just with the preceding facts as presented by the applicant there certainly is a case the applicant has established a *prima facie* case as there appears to be a dispute



between the parties as to the ownership of the suit land. The defendant/respondent has demolished part of the suit property in an attempt to evict the plaintiff hence the need for interim orders to avoid irreparable loss.

22. The issue of a *prima facie* case was discussed elaborately in the case of *Board of Management of Uburu Secondary School vs City County Director of Education & 2 others* (2015) eKLR where it was stated that;

“In summary, the principles are that the Applicant ought to demonstrate an arguable *prima facie* case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. Further, the Court should decide whether a grant or a denial of the conservatory relief will enhance the Constitutional values and objects of a specific right or freedom in the Bill of Rights, and whether if an interim Conservatory order is not granted, the petition or its substratum will be rendered nugatory. Lastly, that the Court should consider the public interest and relevant material facts in exercising its discretion whether to grant or deny a conservatory order.”

23. Further, the court in the case of *Ochola Kamili Holdings Ltd vs Guardian Bank Ltd* [2018] eKLR, stated that;

“The court is alive to the fact that interlocutory injunction, being an equitable remedy, would be discharged upon being shown the person’s conduct with respect to the matter pertinent to the suit does not meet the approval of the court which granted the orders which is the subject matter and especially where a party upon getting injunction orders sits on the matter and uses the orders to the prejudice of the opponent. The orders of injunction are meant to preserve the subject matter .... Not to oppress another party nor should an injunction be used to economically oppress the other party or to deny justified repayment of outstanding loan. That once such a post-injunction behavior is exposed it would in my view be a ground to discharge an injunction because the order obtained would be an abuse of the purpose for which the injunction was obtained. No court would allow its orders to be used to defeat the ends of justice”.

24. The courts have observed time and again that where parties are really “going for each” and in the process destroying the subject of the suit here being a house then the court needs to move to preserve the status quo. In *Ougo and another v Otieno* [1997] KLR 364, it was held that:

“the general principle is that where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided at the trial.”

25. From what I can read from the pleadings and submissions, *prima facie*, I am unable to see how the purported eviction can be justified, even if the defendant was of the opinion that the plaintiff has no proprietary interest in the suit property. If the defendant is of the view that the plaintiff is occupying land that belongs to them, then all they need to do is to file the appropriate suit for their eviction, and their rights will be determined in such a suit. The avenue is not to proceed to forcefully evict the plaintiff. In any case the defendant has produced a copy of his lease and Certificate of Title.

26. Given all these developments, I am of the view that the plaintiff has demonstrated a *prima facie* case with a probability of success. I do not hesitate to issue an order of injunction as prayed by the plaintiff/applicant until the final determination of this suit. The plaintiff/applicant had asked for an order compelling the defendant to build and restore the demolished section of the plaintiff’s property to the state that they were in prior to the illegal demolition. I think this order is best left for the final determination of the suit. For now, the plaintiff may choose to engage a quantity surveyor to assess the



- extent of the damage caused, and the amount of money that will be required to put the structures back to its original state. After the report is prepared, the plaintiff is free to repair the demolished section and put it into a habitable state if they are minded to do so. If the plaintiff/applicant succeed in the main suit, then I may make an order compelling the defendant to pay this amount in damages.
27. Since I have established that there is a dispute which is pending before this court on the ownership of the suit property whether or not the Plaintiff/applicant is entitled to possession thereof, it is necessary that the suit property be persevered I am satisfied that this is an appropriate case in which the prevailing status quo ante should be maintained pending the hearing of the suit.
28. Now, unlike a prohibitory injunction, an applicant for a temporary mandatory injunction must show that he has a very strong case that is likely to succeed at the trial. The likelihood of success must be higher than that which is required for a prohibitory injunction. The general principles which the court apply in applications for interlocutory mandatory injunction were set out in the case of *Locabail International Finance Limited v Agro-Export* (1988) 1 All ER 901, where the court stated that:
- “A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the Court thinks that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant has attempted to steal a march on the Plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard that was required for a prohibition injunction”.
29. In the case of *Shepherd Homes Ltd. -vs.-Shandabu* [1971] 1 Ch.304, Meggery J. stated as follows;
- “It is plain that in most circumstances a mandatory injunction is likely other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will of course grant such injunction as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction can be granted even if it is sought to enforce a contractual obligation”.
30. On the material before me the plaintiff has established a *prima facie* case against the defendant who it has been stated that through, its agents, employees or servants have entered the property described as LR No 1870/III/46, situated on School Lane, Westlands, Nairobi requiring this court to issue mandatory order of restoration and to ensure status quo ante in order to conserve the suit property pending hearing and determination of this application and the suit. The plaintiff has demonstrated that there exist special circumstances that warrant the grant of the mandatory injunction sought.
31. I am convinced that at this stage the court needs to ensure that the status quo ante granted and the suit property conserved as the parties list the suit down for hearing.
32. With regard to prayer Number 8 I already stated that this is better canvassed at the hearing of the main suit and so is prayer number 9 because it is not possible to quantify the destruction to the property at this interlocutory stage. Further the proprietorship to the suit property has not yet been determined at this stage.
33. For these reasons I find that the application dated 7/11/2022 partly merited.



## The Second Application

34. The second Notice of Motion application was filed by the Plaintiff and it is dated February 24, 2023 pursuant to the provisions of sections 1A, 1B and 3A of the *Civil Procedure Act*, and Order 8 rule 3(1), (5) and (8) and Order 51 (1) the *Civil Procedure Rules*. He is seeking leave to amend its plaint dated 7/11/2022 and that the amended plaint annexed to be deemed duly filed and served. The grounds thereof are on the face of it in the eight paragraphs and the attached supporting affidavit of Mukta Batuk Shah. In the said application the plaintiff applicant has sought to join Mr. Zachary Baraza t/a Siuma Auctioneers and the Chief Land Registrar as necessary parties to just determination of the suit.
35. The application is strenuously opposed vide the replying affidavit filed by Samuel Chepkwony director of the defendant who avers that he has the authority of his co-directors to swear the affidavit sworn on 9/03/2023. He avers that this application is brought by the plaintiff to conceal the mischief that she is not the registered proprietor of the suit property.
36. Further that the Late Batuk Lakhamshi Lalji Shah never held any proprietary interest in the suit property capable of transmission to the plaintiff. Therefore, the plaintiff has never been a proprietor of the suit property.
37. The issue now for determination is whether the application is merited.
38. The Court will examine whether the joinder of Mr Zachary Baraza t/a Siuma Auctioneers and the Chief Land Registrar is necessary for the just determination of the matters relating to ownership of the suit property. The Defendant has submitted that the plaintiff does not have any proprietary interest in the suit because none was ever passed to her from the late Batuk Lakhamshi Lalji Shah this being the case wanting to join the two defendants is an attempt to cover the mischief of the plaintiff who has no proprietary interest in the suit property. Order 1 rule 10(2) provides as follows: -

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added”.
39. It is evident from the above provisions of law that the court is empowered to enjoin all the parties that are necessary for effective and complete adjudication of a matter before it.
40. As the Court had observed earlier, the dispute herein is over ownership of suit property L.R No 1870/III/46, situated on School Lane, Westlands, Nairobi, which is being claimed by both the plaintiff and the defendant. The plaintiff's claim is that they have been on the suit property for the last 45 years. The defendant's claim is that he was allocated the said suit property and that he holds title that was issued by Registrar of Titles in accordance with the law.
41. The Plaintiff on the other hand held that they are the proprietors of the suit property which they are in possession of and have been for the last 45 years. It is evident that if the court was to establish the owner of the property then Chief Land Registrar would be a necessary party to the suit being the custodian of the suit property.
42. Mr. Zachary Barasa on the other hand is an auctioneer who the plaintiff submits went to the suit property and tore it down. It is important that it is clearly established what interest he had on the suit property for having moved in and brought down part of the building. The Court finds that the two



are necessary parties herein for effective and complete adjudication of the dispute herein and therefore they should be enjoined to the suit.

43. Having found that the two are necessary parties and there is need to enjoin them herein, then the natural event that follows is that the Plaintiff has to be amended. Order 8 Rule 3(5) provides as follows: -

“An amendment may be allowed under sub rule (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”.

44. Further it is trite that amendment should be freely allowed at any stage of proceedings so long as the said amendments are not prejudicial to other parties. That is what the court held in the case of *Central Kenya Ltd...vs...Trust Bank & 4 others*, CA 222 of 1998, where it was held that:-

“All amendments should be freely allowed at any stage of the proceedings provided that the amendments or joinder as the case may be will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs.”

45. Further as was held in the case of *John Nabashon Mwangi...vs...Kenya Finance Bank Ltd (in liquidation)* eKLR 2015;-

“The overriding consideration in application for leave to amend is whether the amendments are necessary for the just determination of the controversy between the parties”.

46. In the instant suit, the Court finds that the amendment is necessary as the two parties to be enjoined in the suit and their presence will aid the court in the just and effective determination of the dispute between the parties. The courts have always held that ‘leave to amend pleadings should only be denied as a last resort with good or sufficient cause so long as the amendments will not occasion any prejudice to any of the parties’. See the case of *Joseph Ochieng & 2 Others t/a Aquiline Agencies...vs...First National Bank of Chicago* (1995) eKLR.

47. Taking into account the relevant provisions of law, and being guided by Section 3A of the *Civil Procedure Act*, the Court finds that the necessary Order herein is to allow the amendments as sought by the Plaintiff/Applicant since no prejudice will be occasioned to the Defendants.

### Disposal Orders

48. It is therefore accordingly ordered as follows for the Application dated 7/11/2022. The Application is partly merited and I order as follows:

- i. That the Defendant, its agents, employees or servants are hereby enjoined from entering, interfering, demolishing or in any way meddling with the property described as L.R No 1870/III/46, situated on School Lane, Westlands, Nairobi,
- ii. That the Plaintiffs agents and representatives be permitted to safeguard the property by contracting security guards.
- iii. That the Defendant, its agents, employees or servants be removed from the property described as LR No 1870/III/46, situated on School Lane,



Westlands, Nairobi restoring the status ante and to conserve it pending hearing and determination of the main suit

- iv. That the court declines to stay the proceedings initiated by the Defendant in CMCC ELC 361 of 2022 between it and Metro Pharmaceuticals Limited in respect of LR No 1870/III/46, situated on School Lane, Westlands.
- v. That the Defendant, its agents, employees or servant be removed and restrained from interfering with, entering, advertising, offering for sale or any way purporting to deal with the property described as LR No 1870/III/46, situated on School Lane, Westlands, Nairobi
- vi. That the Plaintiff obtain assistance from the Directorate of Criminal Investigations, Spring Valley Police Station, Parklands Police Station or Westlands Police Station to assist in the restoration of status quo ante by the removal of the Defendant, its agents, employees or servants from the property.
- vii. Defendant to bear the cost of the application dated 07/11/2022.

49. For the Application dated February 24, 2023 I order as follows:

- i. The plaintiff is granted leave to amend the plaint dated November 7, 2022 annexed hereto.
- ii. The amended plaint annexed hereto is hereby deemed as duly filed and served after paying the requisite fees.
- iii. The Plaintiff shall meet the defendant's costs of the Notice of Motion dated February 24, 2023.

50 Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF MAY 2023.**

**MOGENI J**

**JUDGE**

In The Virtual Presence Of:

Ms Khadijah holding brief for Senior Counsel Ahmed for Plaintiff

Mr T K Rutto for Defendant

Ms. Caroline Sagina: Court Assistant

