



**Laikana Resorts and Lodges Ltd v Ndegwa (Environment & Land Case
E375 & E060 of 2022 (Consolidated)) [2023] KEELC 17700 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17700 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E375 & E060 OF 2022 (CONSOLIDATED)
EK WABWOTO, J
MAY 25, 2023**

BETWEEN

LAIKANA RESORTS AND LODGES LTD PLAINTIFF

AND

MWANIKI WA NDEGWA DEFENDANT

RULING

1. The plaintiff filed notice of motion applications dated November 14, 2022 and February 10, 2023 which were accompanied by a supporting affidavit sworn by James Kariuki Kinyua. The plaintiff sought injunctive orders including:
 - i. ...Spent.
 - ii. That pending the hearing and determination of this application interpartes an order do issue restraining the defendant by themselves, their servants or agents or advocates or any of them or otherwise from auctioning any item attached from the plaintiff business premises on land reference 2/327.
 - iii. That upon hearing of the application, an order do issue directing M/S Moran auctioneers to return forthwith to the plaintiff all items attached from the suit premises.
 - iv. That costs of this application be borne by the defendant and M/S Moran Auctioneers jointly and severally.



2. The applications were made on the grounds that:
 - i. On October 1, 2022 the parties entered into a 6-year lease agreement and the plaintiff made a payment of Kes 750,000 as two months deposit and one month's rent;
 - ii. On November 10, 2022, the plaintiff proceeded to have the lease agreement registered. On the same day, they received termination notice *vide* a letter from the lessor's advocate, Gathemia Gatheru & Company Advocates.
 - iii. On November 11, 2022, the defendant sought to repossess the suit premise and have security agencies assist them to take possession.
 - iv. In February 2023, the defendant obtained orders from the subordinate court in CMCC No E087 of 2023 and intrusted Moran Auctioneers to enter the premise and cart away goods. The plaintiff was also evicted, the premise was locked and private security installed at the gate.
3. In the defendant's replying affidavit in opposition to the application dated November 14, 2022, it was submitted that Kes 750,000/- was to be held as security pending further performance. It was averred that at the time of making the agreement, the defendant had not consulted his family. It was after consultation that he was advised that the agreement was for land reference 209/2/327 and not land reference 2/327 which is his property. Due to this apparent error, it was argued that the lease agreement was void ab initio and therefore a reference to arbitration could not stand.
4. The plaintiff filed submissions dated March 6, 2023, in which two issues for determination were outlined:
 - i. Whether the court ought to have interim measures pending the reference of the dispute to arbitration?
 - ii. Whether the dispute between the parties should be referred to arbitration for final determination in line with clause 5(d) of the lease agreement dated October 1, 2022?
5. It was submitted that in so far as the plaintiff had referred the matter to arbitration, the court could still grant interim reliefs as guided by cases involving *Euromec International Limited v Shandong* [2021]eKLR and *Safaricom Ltd v Ocean View Beach Hotel limited* [2010]eKLR. It was also submitted that the plaintiff was apprehensive that the defendant would destroy the suit premise so as to defeat the ends of justice.
6. In submissions dated March 8, 2023, the defendant submitted that due to the unique procedure under order 37 of the Civil Procedure Rules, there was no need to consolidate the two suits i.e. ELCC/E375/2022 and ELCOS/E60/2022. It was reiterated that no agreement existed and the claim of a typographical error was a lame excuse.
7. I have considered the applications, rival affidavits, respective submissions and authorities cited. In my view, the issue that arises for determination is whether the plaintiff has met the threshold to be granted the temporary injunction order.
8. *Giella v Cassman Brown* (1973) EA 358 sets out the principles to determine the threshold for temporary injunction in that a party seeking a temporary injunction has to establish a prima facie case,



whether the party seeking injunction will suffer irreparable damage if injunction is denied, and in case of doubt the issue in contention ought to be decided on the scale of a balance of convenience.

9. This court is guided by section 63 of the Civil Procedure Act and order 40(1) of the Civil Procedure Rules, where in any suit it is proved by affidavit or otherwise—

“

“(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.[Emphasis Mine]”

10. In Nguruman Limited v Jan Bonde Nielsen & 2 others, CA No 77 of 2012, the court outlined that:

“In an interlocutory injunction application, the applicant has to satisfy the three requirements to;

(a) Establish his case only at a *prima facie* level,

(b) Demonstrate irreparable injury if a temporary injunction is not granted, and

(c) Ally any doubts as to (b) by showing that the balance of convenience is in his favour”.

10. In my opinion, the issue of validity of the agreement is crucial and should be reserved for trial where parties have adequate time to prepare and ventilate their issues. At the moment, it is prudent to maintain the nature of the subject property and cordon off parties from any adverse action by therein.

11. In the foregoing, this court finds that the plaintiff has established a *prima facie* case and therefore the applications dated November 14, 2022 and February 10, 2023 are disposed of in the following terms:

i. That pending hearing and determination of the main suit a temporary order of injunction is hereby issued against the defendant jointly and severally their employees, servants and/or agents from attaching, advertising, disposing, selling by auction and/or in any way interfering with plaintiff properties upon and/or in relation to land reference 2/327 and/or land reference 209/2/327.

ii. The orders herein will similarly apply to ELCOS E060/2022.

iii. Costs will abide the determination of the main suit.

12. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25TH DAY OF MAY 2023.

E. K. WABWOTO



JUDGE

In the presence of: -

Mr. Waweru for the Plaintiff.

Mr. Gathemia for the Defendant.

Court Assistant; Caroline Nafuna.

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