



Precious Heights Limited v Huria Management Company Limited & another (Environment & Land Case E292 of 2022) [2023] KEELC 17565 (KLR) (18 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17565 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E292 OF 2022
OA ANGOTE, J
MAY 18, 2023**

BETWEEN

PRECIOUS HEIGHTS LIMITED PLAINTIFF

AND

HURIA MANAGEMENT COMPANY LIMITED 1ST DEFENDANT

GIDEON KYALO KIMILU 2ND DEFENDANT

RULING

Background

1. Before this Court for determination is the Plaintiff's Notice of Motion application dated 6th September, 2022 brought pursuant to the provisions of Section 1A, 1B, 3, 3A and 63(e) of the *Civil Procedure Act*, and Order 40 Rules 1 & 2 of the *Civil Procedure Rules*, 2010 seeking the following reliefs:
 - i. That this Honourable Court be pleased to issue a temporary injunction, pending the hearing and determination of this suit, restraining the Defendants by themselves, their employees, agents and/or servants from continuing with the construction, modification and/or alteration of Apartment Number LD-4, Block 4 situate on the Ground Floor on Title Number: Dagoretti/Riruta/6809 from a residential apartment to a salon and barbershop.
 - ii. That this Honourable Court be pleased to issue a temporary injunction, pending the hearing and determination of this suit restraining the Defendants by themselves, their employees, agents and/or servants from trespassing accessing and/or in any way interfering with the Apartment Number LD-4, Block 4 situate on the Ground Floor on Title Number: Dagoretti/Riruta/6809.



- iii. That this Honourable Court be pleased to stay and/or set aside the orders of the BPRT issued on the 23rd August, 2022 in Nairobi Business Premises Rent Tribunal Case E735 of 2022 Gideon Kyalo Kimilu vs Huria Management Company Ltd & 2 Others and/or any further proceedings or any subsequent orders therefrom pending the hearing and determination of this suit.
 - iv. The Costs of this Application be borne by the Defendant.
2. The application is premised on the grounds on the face of the Motion and supported by the Affidavit of the Director of the Plaintiff who deponed that by an agreement dated 24th July, 2012, Housing Finance Company of Kenya Limited (hereinafter HFCK) entered into a Joint Venture Agreement with Benedict Ndungu Waweru (the land owner) for the design and development of blocks of apartments on all that parcel of land known as Dagoretti/Riruta/6809(Original Numbers Dagoretti/Riruta/4228, 4229 and 4230)(hereinafter the suit property).
3. It was deposed that as per the terms of the Joint Venture Agreement, HFCK and the landowner established a special purpose vehicle known as Precious Heights Limited for purposes of carrying out the joint venture, including but not limited to designing, constructing, developing, sale and/or letting the apartments erected on the suit property, which apartments are known as Precious Gardens, Riruta.
4. According to the Plaintiff's Director, *vide* a Sale Agreement dated 31st December, 2021 and a subsequent Lease, the Plaintiff sold to the 1st Defendant Apartment LD-4, Block 4 situate on the ground floor; that pursuant to Clause 1.8 of the Lease, the permitted user of the suit property is a private residential apartment for one family and that Clause 1.1 of the third schedule as well as Clause 5.8.2 reiterate that the 1st Defendant can only use the suit property for the permitted user.
5. It was deposed by the Plaintiff's Director that Clause 5.3 provides that the 1st Defendant is not to make any alterations to the Apartment without complying with the necessary consents of competent authorities and without making an application to the management company and seeking its consent and that Clause 5.7.1 provides that no assignment or alienation of the property shall be permitted without the prior written consent of the Plaintiff and the management company and payment of the prescribed fees.
6. According to the deponent, the 1st Defendant contravened the aforestated provisions and has without any colour of right and/or the consent of the Plaintiff and/or the management company entered into an illegal/void Tenancy Agreement with the 2nd Defendant, who, in further contravention of the Lease, intends to use the premises as a saloon and barbershop.
7. It was the deposition of the Plaintiff's Director that the 2nd Defendant has proceeded to alter the suit property by installing metal grills in the common areas adjacent to the suit property denying the residents and occupiers of the development access thereto and that to prevent dissipation of the suit property, the Plaintiff denied the 2nd Defendant access leading to the 2nd Defendant filing a reference at the Business Premises Rent Tribunal being BPRT E735 of 2022.
8. It is the Plaintiff's case that the 2nd Defendant obtained injunctive orders against the 1st Defendant and the HF Development and Investment Limited(hereinafter HFDI Ltd) Management Company denying them access to the suit property; that the Plaintiff is not a party to the proceedings at the BPRT; that the Tenancy Agreement between the Defendants is illegal and the change of user void as it goes against the permitted user and that unless restrained by the Court, the 2nd Defendant will alter the suit property to the detriment of other occupiers of the suit property.



9. In response to the application, the 1st Defendant, through its Director, deponed that the Plaintiff is not a proper Plaintiff in this matter having no interest in the suit property following its sale to the 1st Defendant on 31st December, 2021 and that the 1st Defendant enjoys a leasehold interest in the property for a period of 99 years effective from 1st March, 2015 and whose reversionary interest will reside in the management company.
10. It was deposed by the 1st Defendant's Director that the Plaintiff is not involved in any way whatsoever in the management affairs of the suit property and that having paid the full purchase price, the 1st Defendant is the inalienable owner of the suit property hence prayers 3 and 8 seeking to have the 1st Defendant and his Tenant (the 2nd Defendant) barred from trespassing or accessing the suit property has no merit as one cannot be considered a trespasser on their own property.
11. It is the 1st Defendant's case that the orders issued in Business Premises Rent Tribunal (BPRT) Case No. E735 of 2022 were rightfully granted based on the plain and clear cause of action pleaded against HFDI Ltd, which entity was the appropriate and necessary party in the BPRT suit and that nonetheless, nothing bars the Plaintiff from making an appropriate application to be joined as a party to the suit if it considers itself a necessary party at the Tribunal.
12. According to the 1st Defendant, prior to the purchase of the aforesaid Apartment LD-4, it had purchased Apartment KA1 and Apartment KA5 from the Plaintiff on diverse dates and that the negotiations leading to the purchase of all the Apartments, including the suit property, and signing of the Agreement took place between the 1st Defendant and HFDI Ltd who had incorporated the Plaintiff herein as a Special Purpose Vehicle (SPV) to undertake a Joint venture between itself and other parties.
13. It was deposed that the negotiations and offer culminating into the Sale Agreement were being driven by HFDI Ltd, who sent the 1st Defendant the application form and thereafter the letter of offer which represented beyond doubt to have been in full control of the Special Purpose Vehicle, the Plaintiff herein and that throughout its correspondence with HFDI Ltd, the 1st Defendant made clear its intention to establish a service business in the Apartment sought to be bought, to which no objection whatsoever was registered.
14. It is the 1st Defendant's case that Clause 8.6 of the aforesaid Sale Agreement provides that HFDI Ltd would be tasked with the management of the Estate, including the suit property, upon the exit of the vendor; that in the circumstances, the vendor (the Plaintiff) exited upon the payment of the full purchase price and that flowing from the said provision and HFDI Ltds' extensive involvement, the 1st Defendant rightly believed that it was the overall manager of the Estate and the suit property at large and the Plaintiff herein was a mere Special Purpose Vehicle under the control of HFDI Ltd.
15. According to Mr Nderitu, the 1st Defendant formally requested for the approval of HFDI Ltd to establish a service business in the suit premises, which request was granted in no ambiguous terms and that on the basis of the aforesaid approval, the 1st Defendant entered into a tenancy agreement with the 2nd Defendant, who established a tranquil and noise-free executive barber shop/salon business in the suit property and has been dutifully meeting his rental obligations as per the tenancy agreement.
16. It was deposed that upon signing the tenancy agreement, the 2nd Defendant became a protected tenant under the *Landlord and Tenants (Shops, Hotels & Catering Establishments) Act*; that in setting up his business, the 2nd Defendant did not make any unauthorized alterations nor redevelopment of the suit property beyond the installation of the appropriate fittings necessary to ply his trade and that HFDI Ltd expressly authorized the closing up of the space adjacent to the Apartment's bedroom window.



17. According to the 1st Defendant's Director, in a Supplementary Affidavit sworn by one Joseph Kamau on 3rd January, 2023, on behalf of HFDI Ltd at the Tribunal, he acknowledged that approvals for the establishment of the business were granted, but stated that the same was erroneous; that despite its approvals, HFDI Ltd issued directives among others blocking the 2nd Defendant from accessing the suit property and that it is clear from the foregoing that the HFDI Ltd was a proper party in the BPRT and any allegations to the contrary are erroneous.
18. The 1st Defendant's Director finally deponed that the user of the suit property is commercial cum (shops), and the business in operation is tranquil and noise free; that further, no unauthorized alterations have been made to the suit property and that the Plaintiff has not brought itself within the cognizable grounds nor satisfied the principles necessary for the grant of the orders sought in the application and the same should be dismissed.
19. The 2nd Defendant deposed that he took possession of the suit property on an as is basis and has not altered or modified the property by installing metal grills as alleged by the Plaintiff; that he was unlawfully denied access to the suit property by the manager of the estate HFDI Ltd and not the Plaintiff herein and that as the Plaintiffs' duly appointed manager and principal aggressor, it is HFDI Ltd that is rightfully a party in the Tribunal proceedings.
20. It was deposed by the 2nd Defendant that the Plaintiff exited the suit property upon its sale to the 1st Defendant and cannot be heard to deny the role and relevance of HFDI Ltd; that in as much as the Plaintiff is not a party to the BPRT proceedings, the Tribunal's orders cannot be discharged or stayed as they were issued against HFDI Limited, a proper and necessary party before the Tribunal; and that contrary to the Plaintiff's assertions, the establishment of the salon and barbershop has been warmly received by the estate dwellers who can now access premium salon and barber services in close proximity.
21. It was deposed that since the 1st Defendant effected a change of user of the premises to commercial, the BPRT is fully vested with jurisdiction to handle the matter and no justification has been put forward to warrant the staying and/or setting aside of the orders. The parties filed submissions which I have considered.

Analysis & Determination

22. The issues that arise for determination are;
 - i. Whether the Plaintiff/ Plaintiff has met the threshold to warrant the grant of temporary injunction?
 - ii. Whether the prayer for the stay/setting aside of proceedings in Nairobi Business Premises Rent Tribunal E735 of 2022 is warranted?
23. The law on the grant of interlocutory injunctions is provided for in Order 40 Rule 1 of the [*Civil Procedure Rules*](#), 2010. The same provides as follows:

“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.”

24. Whereas Order 40 Rule 2 provides states as follows:

“(1)In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.

(2)The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.”

25. As correctly submitted by the parties, the principles underpinning the grant of temporary injunctions are now settled. The same are found in the celebrated case of *Giella vs Cassman Brown* (1973) EA 358 thus:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an Plaintiff must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Plaintiff might otherwise suffer irreparable injury, which would 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.”

26. The Plaintiff in this case is expected to meet the three principles and surmount them sequentially. This was stated by the Court of Appeal in *Nguruman Limited vs Jan Bonde Nielsen & 2 Others* [2014] eKLR, where the Court stated thus;

“In an interlocutory injunction application, the Plaintiff has to satisfy the triple 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.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the Plaintiff is expected to surmount sequentially. (See *Kenya Commercial Finance Co. Ltd V. Afraha Education Society* [2001] Vol. 1 EA 86) If the Plaintiff establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the Defendant will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the



Defendant is capable of paying, no interlocutory order of injunction should normally be granted, however strong the Plaintiff's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the Plaintiff to injunction directly without crossing the other hurdles in between."

27. The Court of Appeal in *Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others* [2003] eKLR defined *prima facie* as follows:

"...So what is a *prima facie* case? I would say that in civil cases it 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 as to call for an explanation or rebuttal from the latter."

28. More recently, the Court of Appeal in the case of *Nguruman Limited vs Jan Bonde Nielsen & 2 Others*(*supra*) while agreeing with the definition of a *prima facie* case in the Mrao Case (*supra*) further expounded as follows;

"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 Plaintiff 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 Plaintiff's case is more likely than not to ultimately succeed."

29. The Court will be guided by the foregoing principles as well as the general principle that no definitive findings on law or facts should be made at this interlocutory stage.

30. The Plaintiff seeks to restrain the Defendants from interfering with the suit property and prays for the proceedings before the Business Premises Rent Tribunal over the property being Nairobi BPRT E735 of 2022, Gideon Kyalo Kimilu vs Huria Management Limited and 2 Others to be stayed pending the determination of this suit.

31. Briefly, the Plaintiff's case is that it is a special purpose vehicle established between Housing Finance Company of Kenya and Benedict Waweru for the design, development sale and letting of the blocks of apartments on the suit property and is the registered proprietor of the suit property on which stands a block of apartments.

32. According to the Plaintiff, *vide* an Agreement of 31st December, 2021 and a subsequent Lease, it sold Apartment LD-4 to the 1st Defendant; that the 1st Defendant has entered into an agreement with the 2nd Defendant, which Agreement contravenes the Lease as it permits the 2nd Defendant to establish a salon and barbershop in the suit premises, contrary to the permitted user; that the 2nd Defendant has



- to that end began to illegally alter and modify the suit property; that *vide* BPRT E735 of 2022, the 2nd Defendant has been granted injunctive orders preventing the 1st Defendant and HFDI Ltd from denying him access to the property and that the Plaintiff is not a party to the suit.
33. The Plaintiff adduced the Sale Agreement dated 31st December, 2021, the Lease Agreement, the Tenancy Agreement between the 1st and 2nd Defendants, photographs of the suit premises, the pleadings and Ruling in Nairobi BPRT E735 of 2022.
 34. In response, the Defendants have deposed that the Plaintiff has no *locus* in these proceedings having sold the suit property to the 1st Defendant who now has rights to the same, including the right to enter into a tenancy agreement; that the 1st Defendant received all the necessary consents from HFDI Ltd, the Plaintiff's manager, and that the Plaintiff cannot now purport to renege on the approvals given.
 35. It is the Defendants' case that there was a change of user of the apartment which is now a commercial premise and the BPRT is duly vested to deal with the dispute taken before it by the 2nd Defendant and that the Plaintiff is at liberty to apply to be a party before the Tribunal.
 36. The 1st Defendant adduced *vide* Affidavit evidence the sale agreement dated 31st December, 2021, correspondence between the 1st Defendant and the Directors of HFDI Ltd, application forms for the purchase of the property issued by HFDI Ltd, offer for sale dated 9th August, 2021, Supplementary Affidavit by Joseph Kamau, the Director of HFDI Ltd in Nairobi BPRT E735 of 2022 and the Notification of Approval of Development Permission.
 37. The 2nd Defendant maintains that it entered into a valid tenancy with the 1st Defendant; that it has not altered or modified the property; that it instituted the suit at the BPRT against HFDI Ltd as the entity that has prevented him from accessing the suit property and that notwithstanding the Plaintiff's absence at the Tribunal, orders were issued against the right parties.
 38. From the foregoing, it is apparent that the dispute herein turns on the role of HFDI Limited vis a vis the Plaintiff, the legitimacy of the tenancy agreement between the 1st and 2nd Defendants and the propriety of the proceedings before the Business Premises Rent Tribunal.
 39. It is undisputed that the Plaintiff is the owner of the suit property, Dagoreti/Riruta/6809, on which stands a block of apartments including Apartment Number LD-4, Block 4, the subject of the suit, and which belongs to the 1st Defendant by virtue of the Sale Agreement of 31st December, 2021 and subsequent Lease Agreement. The 1st Defendant thereafter entered into a tenancy agreement with the 2nd Defendant, which the Plaintiff claims is fraught with illegalities.
 40. The Court has considered the documents and in particular the sale agreement and the Lease agreement. It is clear that whereas indeed the Plaintiff sold the apartment to the 1st Defendant, who is now the owner thereof, the sale was subject to the conditions of the Lease Agreement between the two as Lessor and Lessee.
 41. It is therefore apparent that there is a contractual relationship over the suit property between the Plaintiff and the 1st Defendant. Without more, the Court opines that this constitutes sufficient interest by the Plaintiff in the suit property.
 42. However, considering that there is a suit before the Tribunal challenging the tenancy agreement as between the Defendants, which seems to be the main issue in the current suit, I will decline to comment on whether the Plaintiff has established a *prima facie* case as against the Defendants or not. I will also refrain to make a suggestion on whether the Plaintiff will suffer irreparable injury or not if the injunction order is not given.



43. The general principles which guide the courts whenever they are invited to exercise jurisdiction to stay proceedings are best summarized in Halsbury's Law of England, 4th Edition, Vol 37 at pages 330 and 332 as follows:

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue.”

44. In discussing the concept of stay of proceedings, the court in Ferdinand Ndung'u Waititu vs Independent Electoral & Boundaries Commission (IEBC) & 8 others [2013] eKLR persuasively stated thus;

“A stay of proceedings involves arresting or stopping proceedings. It is a tool used to suspend proceedings to await the action of one of the parties in regard to some step or some act (see Black's Law Dictionary). This implies that the rationale for stay is the pendency of an act or step either required by the court or sought by a party. It may be grounded on a statutory provision or on the need of a party and based on a plea for the plenary exercise of the court's discretion.”

45. The Plaintiff wants this Court to stay and or set aside the orders of the BPRT in Nairobi Business Premises Rent Tribunal Case No E735 of 2022 granted on 23rd August, 2022 and any further proceedings before the Tribunal.

46. The Plaintiff's prayer herein is based on the grounds that despite being the Lessor, it is not a party to the proceedings and as such, has no recourse against the Defendants; that the Tribunal has no jurisdiction over the suit property as the same is private property and lastly that the 2nd Defendant has commenced construction and modification of the suit property without the necessary approvals from the Nairobi City County and the operation of the salon and barbershop contravenes the law.

47. Looking at the reasons advanced for seeking of staying or setting aside the orders of the Tribunal, it would appear that the Plaintiff is inviting this Court to make determinations on the propriety of the proceedings before the Tribunal without the benefit of an appeal. This, the Court cannot do as there is no competent challenge on the Tribunal's orders before this Court.

48. Nonetheless, it is noted that in the Plaintiff's prayer, the Plaintiff is seeking, *inter-alia*, for a declaration that the Tenancy between the Defendants is invalid. Any determination on this question will have an impact on the proceedings before the Tribunal.

49. Considering that the Tribunal is seized of the issue of the validity of the tenancy between the Defendants, the Plaintiff should apply to be joined in that suit, and if not satisfied with the orders of the Tribunal, file an appeal in this court. It is only on appeal that this court will be in a position to consider most of the prayers in the current application, including injunctive orders.

50. For those reasons, the application dated 6th September, 2022 is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 18TH DAY OF MAY, 2023.

O. A. ANGOTE

JUDGE



In the presence of;

Ms Diru for Muthee for Plaintiff/Applicant

Mr. Muteti for 2nd Defendant

Court Assistant - Tracy

