



**Fresco Bushlands (K) Limited v Agricultural Development Corporation & another
(Environment & Land Case E040 of 2022) [2023] KEELC 18408 (KLR) (26 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18408 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E040 OF 2022
MAO ODENY, J
JUNE 26, 2023**

BETWEEN

FRESCO BUSHLANDS (K) LIMITED PLAINTIFF

AND

AGRICULTURAL DEVELOPMENT CORPORATION 1ST DEFENDANT

SWIFT AUCTIONEERS 2ND DEFENDANT

RULING

1. This ruling is in respect of two Notices of Motion dated July 12, 2022 and July 22, 2022 by the Plaintiff/applicant seeking the following orders;
 - a. Spent
 - b. Spent
 - c. That the honourable court be pleased to issue orders directing the defendants either by themselves, their agents, employees or servants to release the cows seized on July 9, 2022 belonging to the plaintiff and the same be retained within the 95000acres leased to the Plaintiff for purposes of grazing and watering pending the hearing and determination of this application inter parties.
 - d. Spent.
 - e. That the Honourable Court be pleased to issue orders directing the Defendants either by themselves, employees or servants to release the cows seized on 9.7.2022 belonging to the Plaintiff and the same be retained within the 95000acres leased to the Plaintiff for purposes of grazing and watering pending the hearing and determination of the suit filed herein or arbitration in line with Clause 9 of the lease agreement dated 26.5. 2010.



2. The second application dated July 22, 2022 the plaintiff sought the following orders:
 - a. Spent
 - b. Spent
 - c. Spent
 - d. Spent
 - e. That the Managing Director of the 1st defendant, Mr. Mohammed M Bulle and Mr. Anthony Michael Mwanza Mulwa, the proprietor of the 2nd defendant be summoned to personally attend court and show cause why they should not be punished for contempt of orders issued on July 9, 2022
 - f. That the Managing Director of the 1st defendant, Mr. Mohammed M. Bulle and Mr. Antony Michael Mwanza Mulwa, the proprietor of the 2nd defendant be declared as contemnors and be punished for contempt of court by way of committal to civil jail for a period of six (6) months with no alternative to fine for disobeying the orders issued on September 12, 2022.
 - g. That defendants do pay costs of this application.
3. It was the plaintiff's case that they entered into a lease agreement with the 1st defendant dated 26th May, 2010 over 95,000 acres being part of LR No. 14248 for a period of 16 years and on 9th July, 2022 the Defendants without following the procedures in the Lease seized over 774 cows belonging to the Plaintiff and held the same at the 1st Defendant's holding area at Galana within Kilifi County.
4. The Plaintiff further stated that on 12th July, 2022 they obtained orders restraining the Defendants from disposing of, selling or butchering the said cows. However, in disregard of the said orders the 1st Defendant in collusion with the 2nd Defendant proceeded to relocate some cows, while others were released to third parties and others butchered upon the Defendants' instructions.
5. It was the Plaintiff's evidence that on 25th July, 2022 the Plaintiff obtained another order for grazing, watering and medication of the cows in the 1st Defendant's custody. Of which the 1st Defendant complied with the order for two days and relocated those cows to Ganda Area in Malindi where the Plaintiff's agents have seen the animals and taken photos of the same which are annexed to various Affidavits filed in this matter including the Supplementary Affidavit.
6. The Plaintiff therefore stated that the 1st Defendant still has some cows in its custody hence the application for injunction and release of cows is still alive. That the Defendants having disobeyed court orders of 12th July, 2022 and the subsequent one of 25th July, 2022 should be found to have been in contempt of court.

1st Defendant/respondent's Case.

7. The 1st Defendant relied on the Replying Affidavit sworn by Murasi Mulupi on 30th September, 2022 and deponed that on or about the 8th April, 2022, the 1st Defendant issued a demand Notice to the Plaintiff giving them fourteen days to rectify their default and pay a sum of Kenya Shillings One Hundred and Ninety-Two Million Four Hundred and Eighty Thousand being unpaid rent arrears as at that time to which notice the Plaintiff did not respond and as a result, the 1st Defendant instituted recovery measures by levying distress on the amount accrued in rent arrears. That the 1st Defendant consequently issued formal instructions to the 2nd Defendant on 6th June, 2022.



8. He asserted that a Proclamation of Attachment/ Repossession / Distrain Notice was served in accordance with Section 13 (b) of the Auctioneers Rules, 1997 on the same day the 1st Defendant issued instructions to them on 6th June, 2022. That after the expiration of the fourteen days, the 2nd Defendant proceeded to seize 774 cows belonging to the Plaintiff on 6th July, 2022 and issued a notification for sale of the seized cows which were subsequently sold through a public auction on 9th July, 2022.
9. He contended that the 1st Defendant did not willfully disobey the orders issued by this Honourable Court on 12th July, 2022 as the orders were in fact issued after the auction relating to the cows in question had already taken place.

Plaintiff's Submissions.

10. Counsel reiterated the averments of the Plaintiff in the affidavit and relied on the principles for grant of injunction in the case of *Giella vs Cassman Brown (1973) E.A. 358* where an Applicant must prove a prima facie case with a probability of success, whether the Applicant shall suffer irreparable injury which cannot be compensated by damages and if the court is in doubt, then it can decide the application on a balance of convenience.
11. Mr. Abidha submitted that based on the affidavits filed by the Plaintiff, its chances of success are very high based on the Lease Agreement dated 26th May 2010 and that the 1st Defendant breached the agreement by failing to comply with the same and in addition, the rent demanded by the 1st Defendant is unfounded, neither supported by law nor the terms and conditions of the lease. It was counsel's further submitted that the attached list of the buyers and the deposit slips indicate that no auction took place.
12. Counsel submitted that the Defendant's violations should not be viewed in terms of damages as was held in *Joseph Siro Mosioma vs Housing Finance Company Limited & 3 Others (2008) eKLR* stating that the value for which the Defendants are disposing the said cows are so low that it will not make any commercial sense to demand payment of the damages if the disposal can be stopped at this point noting that some cows are still in the custody of the 1st Defendants.
13. Mr. Abidha submitted that the Defendants have neither shown any evidence of any list of purchasers nor have they shown any evidence of payments made by the fictitious buyers and relied on the case of *Mary Mumbua Kiminza v Kiilu Musyimi (2022) eKLR* where the court held that where the violations is continuous as in the instant case in blatant disregard of a court order then the element of irreparable damages is satisfied and the court has to issue restraining orders.
14. On balance of convenience, counsel urged the court to be guided by the decision in *Chebii Kipkoech vs Barnabas Tuitoek Bargarioria & Another (2019) eKLR* submitting that the balance of convenience tilts in favour of the Plaintiff noting that the Defendants have already sold some cows through private treaty at ridiculously low prices. The Plaintiff also urged the court to find in its favour on the basis that the Defendants are now on the rampage and if allowed to continue then they will sell all the cows at throw away prices thus leading to substantial loses to the Plaintiff.
15. On the order for release of the cows, counsel submitted that the 1st Defendant transferred the Plaintiff's cows from their Galana Offices to Ganda near Malindi and that the filed affidavits demonstrate that some cows have been seen grazing around that area as recent as the month of September and the Plaintiff prays that the cows be released to its agents within the suit property pending the hearing and determination of the suit.



16. On the application dated 22.07.2022, counsel submitted that the application is unopposed and urged the court to allow the same as the orders were served upon the Defendants on 12th July, 2022 but the Defendants intentionally opted to disobey the order. That the Defendants disobeyed the court order by transferring the cows to other destinations, selling or donating the same and releasing the same to third parties.

1st Defendant's Submissions.

17. Counsel identified three issues for determination, whether the Plaintiff was in breach of the terms stipulated under the lease agreement dated 26.5.2010, whether the Defendants are in contempt of court orders issued on 12th July, 2022 and whether the injunctive orders sought by the Plaintiff in the application dated 12th July ought to be granted.
18. On the first issue for determination, counsel submitted that the 1st Defendant in an attempt to seek damages for breach of contract initiated recovery proceedings with the 2nd Defendant, actions which led to the current suit being filed.
19. Counsel submitted that the Plaintiff breached the existing Lease Agreement between it and the 1st Defendant and that the latter is entitled to damages and actually, during the auction of the cattle seized by the 2nd Defendant, the 1st Defendant recovered less than what was owed by the Plaintiff therefore the Plaintiff should be held liable for the remainder of the debt.
20. It was counsel's submission that the orders being sought by the Plaintiff are equitable remedies and that the conduct of the Plaintiff in this case betrays them. That he who comes to equity must fulfil all or substantially all his outstanding obligations before insisting on his rights which the Plaintiff has not done.
21. On the second issue for determination, counsel submitted that contempt is conduct that impairs the fair and efficient administration of justice. That the 1st Defendant denies its participation in the impairment of fair and efficient administration and is well aware of the consequences of disobedience of court orders.
22. Ms Kosgey submitted that as at the time the Plaintiff made an application to court for interim orders restraining the Defendants from auctioning the cattle, the Defendants had already attached, advertised and auctioned the cattle in accordance with the law two days prior. Counsel relied on the case of Republic v Public Procurement Administrative Review Board; Rhombus Construction Company Limited (Interested party); Rhombus Construction Company Limited & another (Exparte); Mwangemi (Contemnor) (Judicial Review E002 of 2021) (2021) KEHC 301 (KLR).
23. On whether an injunction ought to be issued, counsel submitted that the livestock seized by the 2nd Defendant on behest of the 1st Defendant have already been auctioned off and there is no livestock which the order can be issued against. Ms Kosgey further submitted that the Plaintiff bearing the onus of proof has failed to demonstrate how they stand to suffer irreparable injury that cannot be compensated by an award of damages. Counsel urged the court to dismiss the application with costs.

Analysis And Determination.

24. The issues for determination are as to whether the Plaintiff has met the threshold for grant of injunctions and whether the 1st Defendant is in contempt of court of orders issued on 12th July 2022.
25. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the judicial decision of Giella Versus Cassman Brown (1973) EA 358. This position has been reiterated



in numerous decisions from Kenyan courts and more particularly in the case of Nguruman Limited versus Jan Bonde Nielsen & 2 others CA No.77 of 2012 (2014) eKLR where the Court of Appeal held that;

“In an interlocutory injunction application, the Applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates 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 rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”.

26. It is the Plaintiff/Applicant’s case that on 9th July 2022 the 1st Defendant with the aid of the 2nd Defendant seized 774 cows belonging to the Plaintiff which were hosted within the 95000acres leased pursuant to lease agreement dated 26th October ,2010 which was done without notice or following the procedure in the said lease agreement.
27. On the other hand, the 1st Defendant contends that on or about the 8th April, 2022, the 1st Defendant issued a demand Notice to the Plaintiff giving them fourteen days to rectify their default and pay a sum of Kenya Shillings One Hundred and Ninety Two Million Four Hundred and Eighty Thousand being unpaid rent arrears as at that time to which notice the Plaintiff did not respond and as a result, the 1st Defendant instituted recovery measures by levying distress on the amount accrued in rent arrears. That the 1st Defendant consequently issued formal instructions to the 2nd Defendant on 6th June, 2022.
28. In addition, the 1st Defendant asserted that a Proclamation of Attachment/ Repossession / Distrain Notice was served in accordance with Section 13 (b) of the Auctioneers Rules, 1997 on the same day the 1st Defendant issued instructions to them on 6th June, 2022 and after the expiration of the fourteen days, the 2nd Defendant proceeded to seize 774 cows belonging to the Plaintiff on 6th July, 2022 and issued a notification for sale of the seized cows which were subsequently sold through a public auction on 9th July, 2022.
29. The Applicant must demonstrate that they will suffer irreparable injury if an order of injunction is not issued. The case of Pius Kipchirchir Kogo Vs Frank Kimeli Tenai (2018) eKLR provides an explanation of irreparable injury and it states;

“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury”
30. I find that the Applicant has established a prima facie case and irreparable damage which they have already suffered and continue to suffer due to the Defendant’s action the order relates to stock taking and determining the number of cattle that are in possession of the 1st Defendant which exercise should be done in the presence of the Applicant. The Applicant has also proved by photographic evidence that the livestock were moved to a different location from where the animals were, this shows that there are some animals in the Defendant’s custody. You cannot circumvent the law by trying to using tactics. The law will catch up with you.



31. On the second issue for determination of whether the Defendants ought to be held in contempt of the orders of 12th July, 2022, I have taken into account the events leading to that application which are as follows; a Proclamation of Attachment/ Repossession / Distrain Notice was served in accordance with Section 13 (b) of the Auctioneers Rules, 1997 on the same day the 1st Defendant issued instructions to them on 6th June, 2022. That after the expiration of the fourteen days, the 2nd Defendant proceeded to seize 774 cows belonging to the Plaintiff on 6th July, 2022 and issued a notification for sale of the seized cows which were subsequently sold through a public auction on 9th July, 2022 while the orders of this court were issued on 12th July, 2022. I find that the Defendants are not in contempt of the orders of this court as at the time the orders were being granted, the auction had already taken place.
32. The court granted further orders which the Defendant complied with to feed and graze the animals. The upshot is the application is allowed partially as directed above on stock taking. The order for contempt is declined as you cannot be in contempt of an order that was issued after the fact. Costs in the cause.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 26TH DAY OF JUNE 2023.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

