



**Osman v Gulaam Enterprises Limited (Environment & Land Case E013 of 2023) [2023] KEELC 18654 (KLR) (13 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18654 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAROK  
ENVIRONMENT & LAND CASE E013 OF 2023**

**CG MBOGO, J  
JULY 13, 2023**

**BETWEEN**

**ABDI NASIR SHEIKH OSMAN ..... PLAINTIFF**

**AND**

**GULAAM ENTERPRISES LIMITED ..... DEFENDANT**

**RULING**

1. Before this court for determination is the Notice of Motion application dated 30<sup>th</sup> June 2023 expressed to be brought under Articles 159 and 40 of *the Constitution*, Sections 1A,1B,3,3A and 63 (c) and (e) of the *Civil Procedure Act*, Order 40 Rules 1(a),2,4(1), Order10 (1)(a) and Order 51 Rule 1,3 and 13 (2) of the Civil Procedure Rules and Section 39 (1) (b) of the *Land Act* seeking the following orders: -
  1. Spent.
  2. That pending hearing and determination of this application/and or suit conservatory orders do issue to restrain the respondent by itself, agents, employees, servants and/or any person claiming and deriving title from the respondent from collecting rental income derived from plot nos. 60,61 and 62 Block 4 within Narok Township, formerly known as plot nos. 243,244 and 245 (the suit properties) and Naivas Supermarket Limited and Kenya Power & Company Limited the tenants in the suit properties withhold payment of all rent accruing.
  3. That in the alternative to prayer 2 above, this honourable court directs that an estate agent be appointed to collect rent from the suit properties under the direction of the court and to give account of the same pending the hearing and determination of this application and/ or suit.
  4. That this honourable court makes such other or further reliefs that it may deem just and expedient to grant for the justice to be met in the circumstances.
  5. That the costs of this application be borne by the respondent.



2. The application is premised on the grounds inter alia that the applicant is the owner of the suit properties and that it has now emerged that there is a dispute which is contested between him and the respondent. That despite being the registered proprietor of the suit property, the respondent is receiving rent.
3. The application is supported by the affidavit of the applicant sworn on even date. The applicant deposed that he filed the instant suit to declare the sale agreement dated 1<sup>st</sup> October 2014 as invalid and the respondent on the other hand filed an application seeking that the suit be referred to arbitration. Further, that it has now emerged that the respondent's application for referral to arbitration indicates that there is a dispute between the parties which is contested.
4. The applicant further deposed that as the registered owner, he has the ownership documents and is also in occupation of the suit property which is developed with a building that is rented out to Naivas Supermarket and Kenya Power & Lighting Company Limited. That despite being the owner, the respondent is receiving the rent from the tenants and it is necessary that appropriate orders be given to preserve not only the suit property but also the rent being paid by the tenants in the suit property.
5. The application was opposed by the replying affidavit of the respondent sworn on 5<sup>th</sup> July 2023 by Abdi Haji Gulleid-Director of the respondent. The respondent deposed that the application seeks similar orders to the notice of motion application dated 6<sup>th</sup> June 2023 and what the applicant is doing is an attempt to appeal/review the orders of 20<sup>th</sup> June 2023.
6. The respondent further deposed that by filing the present application, the applicant has indeed admitted that the application dated 16<sup>th</sup> June 2023 is meritorious and the dispute ought to be adjudicated by an arbitrator in terms of Clause 4 (xviii) and clause 13 of the agreement dated 1<sup>st</sup> October 2014 which agreement was drawn by the same advocates representing the applicant and there is no doubt that the parties in this agreement intended that any dispute between them should be determined through arbitration.
7. The respondent further deposed that the applicant has also not denied that he voluntarily executed the agreement for sale dated 1<sup>st</sup> October 2014 which provided for referral of disputes and rent payments to arbitration. Further, that the orders sought would be extremely prejudicial to the respondent and it would be tantamount to sanctioning the tenants to breach the valid lease agreements executed by the respondents.
8. In addition, the respondent deposed that the applicant has sought similar orders in his plaint and it is only mete and proper that the dispute be first adjudicated before an arbitrator. Also, that the applicant has misapprehended the purport and effect of clause 13.5 of the agreement and that in order for a party to enjoy the provisions of clause 13.5 of the agreement, there ought to be an active dispute before the arbitrator which is not the case herein.
9. Both parties argued the application orally before court on 6<sup>th</sup> July, 2023. Mr. Kamwaro, holding brief for Mr. Kilele for the applicants, submitted that the issue before court is simple i.e., the parties purported to have signed a sale agreement which was not complied with. The applicant is the owner of the suit property which has never changed hands and that it remains in the name of the applicant. That Clause 4 of the agreement had stipulated various obligations to be complied with by the parties as no consideration was paid and as such no party complied with clause 4 (b) which talks of a formal hand over to be signed for in writing.
10. The counsel further submitted that none of the annexures in the replying affidavit which seek to refer the matter for arbitration disclose any payment in respect to the property. The applicant relied on



clause 13 (5) of the agreement which allows the party to seek injunctive relief pending the matter being referred to arbitration.

11. Mr Kamwaro further submitted that if the respondent is not restrained from collecting rent from a property he does not own, that will be false enrichment and the respondent should be restrained from collecting rent or in the alternative a reputable agent can be appointed to do so. Mr Kamwaro relied on a copy of the letters of allotment including the latest letter dated 5<sup>th</sup> May 2023 from the County Government showing that the applicant is registered as the owner of the suit property.
12. On the issue of tax obligations, Mr Kamwaro submitted that he is aware that the respondent has said that he has KRA obligation but that obligation is only applicable where rent has been collected. Also, that the respondent has been collecting rent from January 2019 but that was upon compliance with clause 4 of the agreement. It had a completion date which has not been complied with.
13. Mr. Mwangi, the counsel for the respondent started by pointing out that this is a second application on top of the one dated 6<sup>th</sup> June, 2023 by the applicant seeking similar orders of injunction which were discharged by the orders issued on 20<sup>th</sup> June, 2023. Further, that the orders issued have not been challenged and that there are directions for the applicant to reply to their application.
14. Mr Mwangi further submitted that the applicant is abusing the court process with the instant application because on 20<sup>th</sup> June 2023, this court expressly set aside the orders. That there are no circumstances or new facts that have emerged and, in any case, the application is not one for review. As such, the application fails on the issue of abuse of process.
15. Mr Mwangi further submitted that the applicant has conceded that this is a matter for arbitration in ground 3 of the application and paragraph 5 of the supporting affidavit. Essentially, Mr Mwangi opined, the matter is not a fresh transaction as his client started collecting rent in January, 2019 when they took possession as per paragraphs 14 and 15 of the replying affidavit. With regard to the submission by Mr Kamwaro that the applicant is still the owner of the property, the counsel submitted that that could not be further from the truth because they have annexed a letter from Narok County Government dated 24<sup>th</sup> December, 2019 which states that the applicant has sold the suit property to the respondent-annexture AHG 5 and, there is no way both parties can be the owners. That one fact is clear is that the respondent has had possession of the property since 2019.
16. The counsel further submitted that Mr. Kamwaro is potentially a witness who drafted the agreement for sale and he cannot be totally alien as to how the agreement was implemented from the year 2014. That 9 years have lapsed since the agreement was entered into and that points out to the fact that the respondent has taken possession of the property.
17. The counsel further submitted that on page 19 of replying affidavit clauses XVI and XVIII of the agreement, it provided that the applicant was to collect rent from Naivas Ltd up to 31<sup>th</sup> December, 2018 and thereafter, the respondent was to collect rent. It was his submission that the court is being asked to scuttle and re-write the agreement before the arbitrator hears the dispute.
18. With regards to payment, Mr. Mwangi submitted that they have annexed payment records from pages 22 to 61 in their application dated 16<sup>th</sup> June, 2023 showing that the payments are very diverse. The counsel further submitted that the applicant is mostly resident abroad with foreign banks in New York and other places and a substantial payment is in dollars. Further, that until an arbitrator hears and determines the dispute, the applicant cannot generally allege that there has been non-payment.
19. Mr Mwangi further submitted that prayer 2 is seeking conservatory orders which is well known in the form of public order provided for in *the Constitution*. That even if they were to go beyond that, the



applicant is asking that Naivas and KPLC to withhold payment pending the hearing of the suit and not the application. That there are specific leases between Naivas and KPLC as produced on pages 62 to 77 supporting the lease between Naivas and the respondent's application dated 16th June, 2023 while the lease between KPLC and the respondent is at pages 78 to 99. That as it can be seen, the applicant is asking the two entities to breach their obligations under the agreement.

20. It was also the counsel's submission that apart from the order being against the rule of law, the respondent questions why they were not enjoined as parties to this suit. As such, this prayer is superfluous. On prayer 3, the counsel submitted that the prayer essentially goes to place their client under receivership. That the applicant is not a shareholder of the respondent's company.
21. The counsel further submitted that prayer 3 is improperly before the court as it does not seem to have any connection with the plaint and is also not available under Order 40 of the Civil Procedure Rules. Further, that if the applicant gets these prayers before arbitration, he will have succeeded in getting the reliefs he seeks before the hearing or arbitration. That these are not the orders that will be available 9 years after the agreement and 5 years after he ceded possession.
22. On the issue of tax obligations, Mr. Mwangi submitted that in their replying affidavit they have annexed a letter from KRA dated 23rd January, 2023 at pages 24 to 26 which clearly stipulates the rental obligations and that any orders will default on these obligations.
23. In reply, Mr Kamwaro submitted that any referral to arbitration has limitations under Section 6 of the Arbitration Act. Also, that the respondent has not paid any money to the applicant as can be seen in the table in their replying affidavit. That clause 4 of the agreement stipulated how the money was to be paid. That if the application is disallowed, the court will have transferred the property to the respondent without any consideration being paid. The counsel submitted that they are in a situation where the court will determine whether the property has passed over to the respondent pursuant to the agreement and where no consideration has been paid. The counsel added that the respondents annexed so many documents for transfer of money but none of them show payment made to the applicant. The counsel reiterated clause 13.5 of the agreement which they have invoked as it allows the property and the revenue arising from it to be preserved.
24. It was also the counsel submissions that in the replying affidavit, no issue has been identified to move this matter for referral to arbitration as the suit property belongs to the applicant. The counsel maintained that the matter is not yet for arbitration and that none of the replying affidavits have shown that there was payment.
25. I have considered the application, replying affidavit and the oral submissions made by the counsel over record for the parties and in my view, there are two issues for determination: -
  1. Whether the applicant is entitled to the orders sought in the application.
  2. Whether the matter ought to be referred to arbitration.
26. The applicant filed a notice of motion application dated 9<sup>th</sup> June 2023 seeking temporary orders of injunction restraining the respondent from collecting rent for the suit properties. This court certified the matter as urgent and gave further directions and mention which was slated for 19<sup>th</sup> June 2023. The applicant sought audience with the court on 12<sup>th</sup> June under a certificate of urgency dated 9<sup>th</sup> June, 2023. The court granted the applicant temporary order of injunction against the respondent pending the hearing and determination of the application dated 6<sup>th</sup> June 2023.



27. Thereafter, on the 19<sup>th</sup> of June, 2023 the respondent filed a notice of motion under certificate of urgency dated 16<sup>th</sup> June 2023 seeking to vary or set aside the orders of this court issued on 12<sup>th</sup> June 2023 and stay proceedings in this matter and refer the parties to arbitration as provided in the agreement for sale. On 20<sup>th</sup> June 2023, this court vacated the interim orders and issued further orders as to the disposal of the application.
28. The foregoing events prompted the filing of the instant application. The bedrock of the dispute arises from a sale agreement entered into by the parties on 1<sup>st</sup> October 2014 for the sale and purchase of the suit property at Kshs. 285,000,000/-. The applicant argued that the agreement terminated on 15<sup>th</sup> April, 2017 due to a fundamental breach on the respondent's part for failure/refusal to pay the rent and honour the terms of the agreement. It is on this strength that the applicant filed the application dated 6<sup>th</sup> June 2023 seeking interim orders of injunction.
29. On the other hand, the respondent contended that this matter ought to be referred to arbitration as there is a dispute arising out of the agreement dated 1<sup>st</sup> October 2014. I have perused the agreement dated 1<sup>st</sup> October 2014 entered into by the parties herein. The agreement relates to the sale and purchase of the suit property known as Plot No. 243/4/5 block 4 situate in Narok Township. The agreement provided the terms of completion as listed thereunder and which includes exchange of commercial properties and balance of Kshs. 90,000,000/- to be paid in installments within the time period stipulated thereunder. Under clause 3, there are obligations which each party was to meet and terms on how rent collection should be done. Clause xviii provided that in case of any dispute, the same shall be referred to arbitration to be determined by two arbitrators to be appointed by the advocates of the 1<sup>st</sup> and 2<sup>nd</sup> party in consultation with the Chairman Law Society of Kenya.
30. The agreement also provided for a period of 21 days' notice to issue to the party in breach to remedy the said breach and in the event of failure to do that, then the aggrieved party is at liberty to rescind the contract giving the requisite 21 days completion notice.
31. The applicant has now come to court seeking that an estate agent be appointed to collect rent pending the hearing and determination of this application/suit.
32. The power exercised by the court in an application seeking an interlocutory order of injunction is discretionary. In the celebrated case of *Giella versus Cassman Brown (1973) EA 358*: it was held as follows:-
- “The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an 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 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.”
33. In *Roberto Mugo wa Karanja versus Ecobank (Kenya) Ltd & Another [2019] eKLR*, it was stated that:
- “The circumstances for consideration before granting a temporary injunction under Order 40 Rule 1 of the Civil Procedure Rules require proof 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 that the defendant threatens or intends to remove or dispose the property; the Court in such a situation is enjoined to grant a temporary injunction to restrain such acts.”



34. It is a longstanding principle of law that parties to a contract are bound by the terms and conditions thereof and that it is not the business of the courts to rewrite such contracts. In *National Bank of Kenya Ltd versus Pipe Plastic Samkolit (K) Ltd* (2002) 2 E.A. 503, (2011) eKLR the Court of Appeal at page 507 stated as follows: -
- “A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”
35. In *Pius Kimaiyo Langat versus Co-operative Bank of Kenya Ltd* (2017) eKLR the Court of Appeal further stated that: -
- “We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties, They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.”
36. While I place reliance on the above cited authorities, this court in making its determination will be reasonably guided by the contract entered into by the parties. Clause 13.2 of the agreement provides that “Any dispute arising out of or in connection with this agreement shall be referred to arbitration by a single arbitrator being a practicing lawyer of not less than fifteen (15) years standing to be appointed by agreement between the parties or in default of such agreement within fourteen (14) days of the notification of a dispute, upon the application of either party, by the chairman for the time being of the law society of Kenya.”
37. Clause 13.5 further provides that “Notwithstanding the above provisions of this section, a party is entitled to seek preliminary injunctive relief of interim or conservatory measures from any court of competent jurisdiction pending the final decision or award of the arbitrator; and...”
38. Based on the terms of the agreement and more so the above clauses that I have reproduced, it is necessary to note that the agreement does not completely oust the jurisdiction of this court to hear and determine any dispute between the parties only that is capped at seeking injunctive reliefs.
39. This court is also aware that it vacated the orders of injunction restraining the respondent from collecting rent from the tenants and which gave way to the respondent to continue to do so. However, the instant application seeks that an estate agent be appointed to collect rent from the suit properties pending the hearing and determination of this suit.
40. Prayer 2 of the instant application cannot be granted in this case as it similar to the prayers sought in the application dated 6<sup>th</sup> June, 2023 which was granted and later vacated by the orders issued on 20<sup>th</sup> June 2023.
41. However, in the interest of justice and while I place reliance on the case of *Giella versus Cassman Brown*, it is necessary to preserve the suit properties from any damage, waste as there are tenants in occupation. I see no harm in having an agent appointed to collect rent on behalf of either of the parties until the dispute between the parties is heard and determined. However, in view of the pending application by the defendant/respondent dated 16<sup>th</sup> of June, 2023 and filed in court on the 19<sup>th</sup> of June, 2023 which primarily deals with the issue of whether or not this dispute should be referred to arbitration I will say no more on this issue until the said application is heard and determined.
42. As such, the instant application succeeds in terms of prayer 3 to the effect that a real estate agent with valuable reputation be appointed to collect rent and account for the same pending the hearing and determination of the dispute between the parties or until further orders of this court. Parties have 7



days from the date hereof within which to agree on an estate agent who is to be appointed and report back to court on 25<sup>th</sup> of July, 2023 when this matter will be further mentioned.

Each party shall bear their own costs. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON 13<sup>TH</sup> JULY, 2023.**

**HON. Mbogo C.G**

**Judge**

**13/7/2023**

**In the presence of: -**

CA:T.Chuma

Mr. Kamwaro holding brief for Mr Kilele for the plaintiff/applicant

Mr Mwangi for the defendant/respondent

