



Kingorani EPZ Limited v Twaweza Kenya Apparel (EPZ) Limited (Environment & Land Case 149 of 2022) [2023] KEELC 20142 (KLR) (26 September 2023) (Ruling)

Neutral citation: [2023] KEELC 20142 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 149 OF 2022
NA MATHEKA, J
SEPTEMBER 26, 2023**

BETWEEN

KINGORANI EPZ LIMITED PLAINTIFF

AND

TWAVEZA KENYA APPAREL (EPZ) LIMITED DEFENDANT

RULING

1. The first application is dated 29th December 2022 and is brought under Rule 8 of the High Court (Organization and Administration) Act, 2015 Order 40 Rule 1. Rule 3 and Rule 4. Order 51 Rule 1 and Rule 3. Section 15 and Section 22 (h) and Section 23 of the Export Processing Zones Act, Section 54 of the Land Registration Act, Section 3, 13 14. 16, 19 and 22 of the Environment and Land Court Act. Section 1A, 1B. and 3A of the Civil Procedure Act Cap 21 laws of Kenya and Article 40,159(2) of the Constitution of Kenya seeking the following orders;
 1. That this Application be certified as urgent, and service thereof be dispensed with in the first instance and heard *ex parte*.
 2. That this court be pleased to issue an order evicting the Defendants whether by themselves or their agents, employees, servants or otherwise from the Premises being Go Down Number A, B, C, D and E within Kingorani EPZ Complex Changamwe.
 3. That the Honourable Court be pleased to issue a permanent injunction restraining the Defendant, whether by themselves or their servants or agents or otherwise howsoever, from entering, remaining on or continuing to remain in the Premises being Go Down Number A, B, C, D and E within Kingorani EPZ Complex Changamwe and for the unconditional handover and return of the Premises to the Plaintiff.
 4. That the court be pleased to grant a permanent injunction prohibiting, preventing or restraining the Defendant whether by itself, its agents, employees and servants from trespassing



on, wasting, alienating or otherwise interfering or dealing with the Premises being Go Down Number A, B, C, D and E within Kingorani EPZ Complex Changamwe.

5. That this Honourable Court grant the Plaintiff access, entry and the right to continue to use and remain in quiet occupation of the Premises being Go Down Number A, B, C, D and E within Kingorani EPZ Complex Changamwe until hearing and determination of this matter.
 6. That the Honourable Court be pleased to issue a declaration that the Defendant's termination of the tenancy agreement and adamant refusal to execute a lease outlining the terms and condition of lease was unlawful.
 7. That the Honourable Court be pleased to issue a declaration that the Defendant's occupation of the Premises after 31st December 2022 is unlawful, forceful and tantamount to trespass.
 8. That costs and interest of this application be provided for.
2. It is supported by the grounds that the Plaintiff is the duly registered owner and/or proprietor of all that parcel of land CR. 17699 being Land Reference Number 567/V/MN where it has constructed buildings and improvements comprising of several Go Downs and Offices its Premises commonly referred to as Kingorani EPZ Complex and leased the same out to other entities. That the Plaintiff is duly licensed and qualified to operate as an Export Processing Zone Developer and its operations are strictly governed under the [Export Processing Zones Act](#). That the Plaintiff's Premises are Gazetted and duly declared as an Export Processing Zone as per Section 15 (1) of the [Export Processing Zones Act](#). That non-compliance with any provisions of Law may lead to a revocation of the declaration of the Plaintiff's Premises as an Export Processing Zone as per Section 15 (2) of the [Export Processing Zones Act](#). That the provisions of Section 22 (1) (b) of the [Export Processing Zones Act](#) allows the Plaintiff to lease out the Premises. That on or about 3.11.2020 it entered into a tenancy relationship with the Defendant with respect to Godown A, B, C, D and E within Kingorani EPZ Complex, Changamwe. That the Defendant executed a Letter of Offer dated 3rd November 2020 with respect to the Premises. That the continued occupation of the Premises by the Defendant was conditional upon the Defendant executing a formal lease with respect to the Premises. That the Plaintiff does not have the mandate to lease out its Premises without preparing and causing to be executed a formal lease with respect to the leased out Premises. That the Plaintiff instructed its Advocates to prepare a formal lease for execution between the Plaintiff and the Defendant.
3. That on or about 25th November 2020 the Plaintiff's Advocates on record sent a letter dated 25th November 2020 to the Defendant and informed the Defendant that it was required to execute a Lease with respect to the subject Premises.
4. That despite receiving the engrossed Lease, the Defendant failed to execute the Lease and/or inform the Plaintiff of the reasons for its failure to execute the Lease. That the Plaintiff visited the Defendant's Premises and noted that the Defendant closed its Premises after receiving the Leases. That the Plaintiff is highly apprehensive that the Defendant had no intention of executing the Lease despite requesting for the engrossed lease on 30th November 2022. That the Plaintiff believes that the Defendant has since absconded from the Premises to avoid executing the Lease and/or meeting its obligations with respect to restoring the Premises to a good and tenable state. That the Plaintiff has no access to the Premises as the same are closed hence its prayer for break in orders to enable it gain access into the Premises for purposes of ascertaining the state of the Premises after the closure by the Defendant. Further, the Plaintiff is not in a position to lease out the Premises to other interested tenants owing to the closure of the Premises by the Defendant which is bound to occasion loss to the Plaintiff. That the Defendant's unlawful acts of failing to execute a Lease or vacate the Premises exposes the Plaintiff to the risk of



cancellation or suspension of its Licence on account of indulging in unlawful acts by allowing the occupation of its Premises by the Defendant without a duly executed Lease. That other tenants within the Complex have executed the standard Lease prepared by its Advocates on record and the Defendant is not entitled to any preferential treatment.

5. The second application is dated 19th January 2023 and is brought under order 40 Rule I (a) and Order 51 Rule 1 of the Civil Procedure Rules, Sections IA, 1B and 314 of the *Civil Procedure Act* and Section 23(1) of the *Evidence Act* seeking the following orders;
 1. That this Application be certified urgent and prayer (2) be granted in the interim since this matter is coming up for hearing of the application for injunction by the Plaintiff Landlord on 23rd January 2023.
 2. That pending the hearing and determination of this application, the court be pleased to issue a temporary prohibitory injunction restraining the Plaintiff landlord from denying entry, evicting, interrupting electricity, water, internet or any other services enjoyed by the Defendant tenant under the lease agreement dated 3rd November 2020 on the suit property known as Go-down A, B, C, D & E within Kingorani EPZ Complex Changamwe located on LR 567/V/MN, interfering with the Defendant/tenant's peaceable and quiet enjoyment of the demised premises or otherwise terminating the tenancy agreement dated 3rd November 2020.
 3. That pending the hearing and determination of this suit, the court be pleased to issue an interim prohibitory injunction restraining the Plaintiff landlord from denying entry, evicting, interrupting electricity, water, internet or any other services enjoyed by the Defendant tenant under the lease agreement dated 3rd November 2020 on the suit property known as Go-down A, B, C, D & E within Kingorani EPZ Complex Changamwe located on LR 567/V/MN, interfering with the Defendant/tenant's peaceable and quiet enjoyment of the demised premises or otherwise terminating the tenancy agreement dated 3rd November 2020.
 4. That paragraphs 23-27 of the plaint, both inclusive and the letter dated 1st July 2022 from the tenant's advocates be struck off from the plaint and expunged from the record respectively, to the extent that they purport to plead and produce communication made between counsels on a without prejudice basis.
 5. Cost.
6. Which Application is based on the following grounds that the legal relationship between the parties is that the Defendant/ Applicant is a tenant of the Plaintiff/ Respondent in premises known as Go-down A, B, C, D & E within Kingorani EPZ Complex Changamwe located on LR 567/V/MN. The lease is for 6 years starting 3rd November 2020 and expiring on 2nd November 2026 at an annual rent of USD 3 per square ft. and service charge of 10% of the rent. It is common ground that the parties executed a written tenancy agreement dated 3rd November 2020. The Defendant Tenant/ Applicant took possession of the suit property on 1st December 2020 and has since then remained in possession running a garment making factory. The Applicant/ Tenant has paid the full rent and service charge for the year 2021, 2022 and year ending 3rd November 2023, being USD 182,763 and performed all its other obligations under the said lease. The Applicant/ Tenant has been eager, ready and willing to execute the formal lease on the terms expressed in the foresaid tenancy agreement entered into on 3rd November 2020 and any other term implied by law, but has been prevented by the Respondent/ Landlord who insists on introducing new terms that derogate from the rights of the tenant/applicant under the tenancy agreement executed on 3rd November 2022, impose new obligations, and are unconscionable and oppressive to the Tenant/ Applicant. In the said dispute,



the Landlord has prepared a draft formal lease which introduces new terms that are not expressed or implied in the foresaid tenancy agreement executed on 3rd November 2020, and which new terms are not acceptable to the Tenant.

7. The Defendant/ tenant has counterclaimed by seeking specific performance of the foresaid lease agreement and permanent injunction to restrain the Defendant/ Landlord from breaching the lease by terminating, evicting or otherwise interfering with the peaceable and quiet possession of the Applicant/ Tenant. The injury to the applicant/tenant is that in the meantime, the Plaintiff/ Respondent is breaching the foresaid tenancy agreement dated 3rd November 2020 and denying the Applicant/ Tenant quiet and peaceable enjoyment of the suit property.
8. This court has considered both applications and submissions therein. The Plaintiff's application dated 29th December 2022 is for an eviction order and a permanent injunction restraining the Defendant, whether by themselves or their servants or agents or otherwise howsoever, from entering, remaining on or continuing to remain in the Premises. Reasons being that the continued occupation of the Premises by the Defendant without executing a Lease and having the same registered is tantamount to noncompliance with the provisions of Law which may lead to a revocation of the declaration of the Plaintiffs Premises as an Export Processing Zone as per Section 15 (2) of the [Export Processing Zones Act](#). That it is also plainly evident that the continued occupation of the Premises by the Plaintiff was subject to the Parties executing a Lease and the Letter of Offer was not the conclusive instrument between the Parties and which fact is admitted by the Defendant in the pleadings by making reference to a Formal Lease to be drafted by the Plaintiff.
9. The Defendant seeks a permanent injunction against the Plaintiff. That the real dispute in the main suit is whether the landlord is entitled to draw a formal lease that has clauses that contradict, vary, add to, and subtract from the terms of, the tenancy agreement entered into by the parties and executed on 3rd November 2020, by derogating from the rights of the tenant under the said tenancy agreement and imposing new obligations which are unconscionable and oppressive to the tenant/ Applicant. The current status-quo as at 18th January 2023 the date of filing the application is that the applicant/ tenant is in possession and operating the garment making factory with over 500 employees, over 700 pieces of plant and machinery, has paid up rent up to 31st December 2023, and is observing all the other conditions of the lease. That the Respondent/ Landlord will not suffer any loss or damage if the injunction is granted because the applicant/ tenant has already paid the annual rent and service charge up to 31st December 2023, and is able, ready and willing to pay the annual rent and service charge for the years 2024, 2025, and 2026 as and when it falls due under the tenancy agreement dated 3rd November 2020.
10. On the Plaintiff's application for eviction and a permanent injunction the court is guided by the case of [Kenya Power & Lighting Co. Limited v Sheriff Molana Habib](#) (2018) eKLR it was held *inter alia* as follows;

"...A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the Defendant in order for the rights of the Plaintiff to be protected. A permanent injunction is different from a temporary/interim injunction since a temporary injunction is only meant to be in force for a specified time or until the issuance of further orders from the court. Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the parties..."



11. When it comes to mandatory injunctions, courts have been hesitant to grant the same particularly at the interlocutory stage, save in clear-cut cases. Such was the reasoning taken by the court in *Lucy Wangui Gachara v Minudi Okemba Lore* (2015) eKLR when it rendered itself thus:

"...the court will not grant a mandatory injunction if the damage feared by the Plaintiff is trivial, or where the detriment that the mandatory injunction would inflict is disproportionate to the benefit it would confer. We would also add that, save in the clearest of cases, the right of the parties to a fair and proper hearing of their dispute, entailing calling and cross-examination of witnesses must not be sacrificed or substituted by a summary hearing.

Persuasive judicial pronouncements by Indian courts have also affirmed that great circumspection is called for before awarding a mandatory injunction at interlocutory stage. In *Bharat Petroleum Corp Ltd v Haro Chand Sachdeva*, AIR 2003, Gupta, J. of the Delhi High Court observed as follows:

"While Courts power to grant temporary mandatory injunction on interlocutory application cannot be disputed, but such temporary mandatory injunctions have to be issued only in rare cases where there are compelling circumstances and where the injury complained of is immediate and pressing and is likely to cause extreme hardship. If a mandatory injunction has to be granted at all on interlocutory application, it is granted only to restore status quo and not to establish a new state of things."

12. For the foregoing reasons, I find that it would be premature for me to grant permanent injunction at this stage in favour of the Plaintiff. I find that the Defendant has raised a *prima facie* case and I order that the *status quo* be maintained pending the hearing and determination of this suit. Parties are advised to comply with order 11 and set the suit down for hearing within the next 30 (thirty) days. Costs of both applications to be in the cause.
13. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 26TH DAY OF SEPTEMBER 2023.

N.A. MATHEKA

JUDGE

