Covenant House of Prayer Church (Suing Through the Registered Officials Being Daniel Njuguna Ng'ang'a, Kenneth Koome Murungi and Joseph Njenga Njuguna) v Thata (Environment and Land Appeal E056 of 2022) [2023] KEELC 20200 (KLR) (21 September 2023) (Judgment)

Neutral citation: [2023] KEELC 20200 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ENVIRONMENT AND LAND APPEAL E056 OF 2022

BM EBOSO, J

SEPTEMBER 21, 2023

BETWEEN

COVENANT HOUSE OF PRAYER CHURCH (SUING THROUGH THE REGISTERED OFFICIALS BEING DANIEL NJUGUNA NG'ANG'A, KENNETH KOOME MURUNGI AND JOSEPH NJENGA NJUGUNA) .... APPELLANT

AND

CATHERINE NUNGARI THATA .... RESPONDENT

(Being an Appeal arising from the Ruling of Hon E. Ominde, Chief Magistrate, delivered on 31/5/2022 in Kiambu Civil Case Number 510 of 2021)

JUDGMENT

Background

1. This appeal challenges the ruling rendered by Hon E. Ominde, Chief Magistrate, on 31/5/2022, in Kiambu Civil Case Number 510 of 2021. The ruling was a culmination of a notice of motion application dated 8/11/2021, seeking interlocutory injunctive reliefs. The application was filed by Covenant House of Prayer Church through its officials, Daniel Njuguna Ng'ang'a, Kenneth Koome Murungi and Joseph Njenga Njuguna.

2. The following verbatim orders were sought in the said application:

    a. An order of interlocutory injunction does issue against the defendant by herself, her servants or agents or any one authorized by her claiming under her from causing damage of the construction site, encroaching into, evicting, alienating and terminating the plaintiff's tenancy to lease and or in any way interfering with the plaintiff's quiet possession and enjoyment of the demised portion of the suit property. Kiambaa/THIMBIGUA/8877 or otherwise subjecting the plaintiff to any annoyance, violence or harassment with the intention of inducing or

compelling the plaintiff to vacate the demised portion of the suit land in a manner to occasion the frustration or termination of the tenancy over the demised suit premise pending the hearing of this application.

b. An order of interlocutory injunction does issue against the defendant by herself, her servants or agents or any one authorized by her claiming under her from causing damage of the construction site, encroaching into, evicting, alienating and terminating the plaintiff's tenancy to lease and or in any way interfering with the plaintiff's quiet possession and enjoyment of the demised portion of the suit property. Kiambaa/Thimbigua/8877 or otherwise subjecting the plaintiff to any annoyance, violence or harassment with the intention of inducing or compelling the plaintiff to vacate the demised portion of the suit land in a manner to occasion the frustration or termination of the tenancy over the demised suit premise pending the hearing of this suit.

c. The Officer Commanding Station (OCS), Karuri Police Station, do supervise the implementation and enforcement of court order herein.

d. The cost of this application be borne by the respondent.

3. The application was canvassed through written submissions. On 31/5/2022, Hon E. Ominde disposed the application through the following verbatim order:

> " That the application dated 8th November 2021 be and is hereby dismissed with costs."

Appeal

4. Dissatisfied with the ruling and order of the Chief Magistrate Court, the appellant filed this appeal, advancing the following nineteen verbatim grounds of appeal:

1) The learned magistrate erred in law and fact in failing to appreciate that the appellant had demonstrated that they had a *prima facie* case with a dint of the fact that they have a valid lease high probability of success by agreement that is in writing, was made by the mutual agreement of the parties, is duly signed by both parties and duly admitted by the respondent herein.

2) The learned trial magistrate erred in law and in fact in failing to appreciate that the appellant has never defaulted on payments towards the lease, any terms of the 10-year agreement including any a fact duly admitted by the respondent.

3) The learned trial magistrate erred in law and fact in failing to recognize the appellant as a legal tenant was entitled to the property and protection from the honourable court.

4. The learned trial magistrate erred in law and fact in failing to appreciate that if the injunction is not granted the appellant would suffer irreparable loss.

5) The learned trial magistrate erred in law and in fact in failing to appreciate the aspirations of the appellant for a place to worship which cannot be compensated by way of damages.

6) The learned magistrate erred in law and in fact in failing to appreciate that the balance of convenience premises tilts in favour of the appellant as they already are in occupation of the suit premises and have made substantial developments thereon valued at a colossal sum of Ksh 3,885,000.

7) The learned trial magistrate erred in law and fact in failing to find that the appellant had satisfied the requirements for an interlocutory injunction.

8) The learned trial magistrate erred in law and in fact in failing to appreciate that the main leasor is a church and express and implied provisions of the lease agreement was for the purpose of a church and building a permanent structure.

9) The learned trial magistrate erred in law and in fact in failing to appreciate that the objections to the appellant's action came way after the appellant had built the church hence an afterthought.

10) The learned trial magistrate court erred in law and in fact in failing to appreciate that the respondent seeks to rewrite the terms of the lease agreement expressly through his conduct and representation.

11) The learned trial magistrate erred in law and fact by delving into the substantive issues in the suit at the application level and determining them with finality.

12) The learned trial magistrate erred in law and fact in delving into substantive issues of the suit by finding that there was nothing express or implied in building a church and a permanent structure which are substantive issues that require deeper analysis of the lease agreement.

13) The learned trial magistrate in delving into the substantive issues in dispute at interlocutory stage denied the appellant an opportunity to address the issues of the purpose of the lease agreement which should be addressed in the main suit.

14) The learned trial magistrate erred in law and in fact in stating that the lease agreement does not talk about the amount to be paid as compensation for existing structures which was expressly provided in the lease agreement.

15) The learned trial magistrate failed to appreciate that an agreement may not encompass every aspect of the transaction between parties.

16) The learned trial magistrate erred in law and fact in interpreting all ambiguities in the agreement, if at all there were any against the appellant hence exhibiting open bias.

17) The learned trial magistrate erred in law and in fact in failing to appreciate that the substantive issues of the express provisions of the lease agreement and the intention of the parties can only be addressed at the hearing level.

18) The learned trial magistrate erred in law and in fact in failing to appreciate that the effect of the ruling is that the respondents will proceed with demolition and evictions, destroying the subject matter of the suit and hence leaving nothing for the court to determine substantially.

19) The learned trial magistrate erred in law and in fact in failing to consider the appellant's submissions and pleadings.

5. The appellant sought the following verbatim reliefs in the memorandum of appeal:

a. That the ruling by the subordinate court be set aside/and vacated.

b. That the ruling by the subordinate court be set aside and the appellant's application dated 8th November 2021 be allowed.

c. That the costs of this appeal be borne by the respondent.

Appellant's Submissions

6. The appeal was canvassed through written submissions dated 9/4/2023, filed by John Mwariri Advocate. Counsel itemized the following as the two issues that fell for determination out of the nineteen grounds that were itemized in the memorandum of appeal: (i) Whether the learned magistrate erred in law and in fact in failing to find that the appellant had demonstrated that they had a *prima facie* case; and (ii) Whether the honourable court erred in in law in delving on substantive issues at the interlocutory stage [sic].

7. On whether the learned magistrate erred in law and in fact in failing to find that the appellant had demonstrated a *prima facie* case, counsel submitted that the learned magistrate failed to appreciate that the appellant was a legal tenant by virtue of the tenancy agreement dated 30/7/2021. Counsel contended that the main reason the court did not find that the appellant had established a *prima facie* case was that it was of the view that there were ambiguities in the lease agreement. Counsel submitted that the court interpreted the ambiguities against the appellant. Counsel argued that it was wrong for the court to interpret the lease agreement as ambiguous for failure to include the purpose for which the land was being leased. Counsel argued that even if the contract was ambiguous, the court ought to have given it an interpretation that ensured that it was effective and valid because all parties had signed the agreement. Counsel contended that interpreting the ambiguities in favour of the respondent amounted to the court rewriting the agreement. Counsel further submitted that the court erred in finding that the lease agreement did not mention the amount for compensation in relation to the respondent's structures on the leased land. Counsel argued that the amount was provided for at clause 1 (iii) where the figure of Ksh 200,000 was indicated as compensation for existing structures.

8. Counsel contended that the court erred in finding that the lease agreement did not state whether the structure to be erected on the suit land would be a permanent one. Counsel argued that the fact that the respondent was to provide quiet occupancy meant that the appellant was not prevented from constructing a permanent structure and that the purpose of leasing a property for a period of ten years was for a more permanent use. Counsel submitted that the fact that the agreement was dated 30/7/2021 and the demand letter was dated 23/8/2023 (sic) meant that the respondent had about 24 days to raise an objection to the construction of the permanent structure which she did not, hence her actions were an afterthought.

9. Counsel further submitted that the appellant was able to establish that they stood to suffer irreparable loss if the injunction was not granted since the church was intended for spiritual nourishment which could not be compensated by way of damages for the reason that spiritual issues cannot be quantified. Counsel relied on the decisions in the cases of: *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others*; *Nguruman Limited v Jan Bonde Nielsen & 2 Others* and *DI Koisagat Tea Estate Ltd v Eritrea Othodox Tewhdo Church Ltd* [2015] eKLR.

10. On whether the trial court erred in law in focusing on substantive issues at the interlocutory stage, counsel submitted that an application for injunction cannot be the basis for determination of substantive issues and that a court ought not to delve into substantive issues whilst determining interlocutory issues. Counsel argued that by the court interpreting the alleged ambiguities in favour of the respondent, it had invalidated the lease agreement, hence it was left with nothing to determine at trial.

11. Counsel submitted that the court determined the rights of the parties with finality without considering that the appellant was merely seeking the preservation of the subject matter pending hearing of the suit. Counsel further submitted that the court should not have interpreted the ambiguities at the

interlocutory stage. Counsel relied on the decisions in the cases of: *Ochola Kamili Holding Limited v Guardian Bank Limited* (2018)eKLR; *Technoservice Limited v Nokia Corporation & 3 Others* [2021] eKLR; and *Euromec International Limited v Shandong Taikai Power Engineering Company Limited* (Civil Case E 527 of 2020) [2021] KEHC 93 (KLR) (Commercial and Tax) (21 September 2021) (Ruling).

Respondent's Submissions

12. The respondent filed written submissions dated 23/5/2023 through M/s Mwangi Wahome & Company Advocates. Counsel for the respondent identified the following as the two issues that fell for determination in the appeal: (i) Whether the lower court erred in fact and in law in dismissing the application dated 8/11/2021; and (ii) Whether there is any reason for this honourable court to interfere with the discretionary powers of the lower court.

13. On the question of whether the lower court erred in fact and in law in dismissing the application dated 8/11/2021, counsel submitted that the appellant failed to establish a *prima facie* case with a probability of success. Counsel submitted that the court had to look into the agreement between the parties and determine what the terms were. Counsel added that the facts of the matter were clear and unequivocal that there was no condition in the agreement for the appellant to demolish the respondent's developments on the premises or construct a permanent structure on the premises. Counsel further submitted that it was a term of the agreement that if the tenant did anything that may amount to nuisance to the landlord and/or breach of any of the terms, then the lease shall terminate with immediate effect. Counsel contended that it was the respondent's position that the appellant caused her and other tenants nuisance hence she issued a notice to terminate the tenancy.

14. Counsel contended that the purpose for leasing the land was not indicated in the lease agreement and that there was nothing to indicate that a church was to be built on the suit property. Counsel submitted that the lease mentioned an amount paid as compensation for existing structures but did not mention whether the structures would remain or would be destroyed. Counsel argued that the court rightly held that the ambiguity in the lease on the matter that was at the core of the application did not help the plaintiff's case. Counsel further submitted that the learned magistrate did appreciate that there was a lease and that the appellant was a tenant but only faulted the appellant for undertaking activities in excess of the provisions of the lease.

15. Counsel submitted that the court's finding that there were ambiguities in the agreement was not the main reason for its ultimate decision, adding that marrying the ambiguities with the evidence relating to the conditions on the ground is what led the court to determine that the appellant lacked authority to do the acts it did. Counsel argued that the facts as presented by the appellant did not establish a prima facie case and hence the lower court had no other option in law but to dismiss the application.

16. Counsel contended that the dismissal of the application did not in any way invalidate the lease agreement, adding that the lower court did not delve into substantive issues. Counsel relied on the decision in the cases of *Kenya Commercial Finance co Ltd v Afraha Education Society* [2001] Vol 1 EA 86 on the issue of the court's discretionary powers. Counsel also relied on the decisions in the cases of *Windsor Drycleaners Ltd v Regent Management Ltd & Another* [2021]eKLR, *Green Buffalo Safaris Ea Ltd v Kenya Wildlife Service* [2014]eKLR and *Orion East Africa Ltd v Ecobank Kenya Ltd & another* [2015]eKLR in support of his submission.

17. On the issue of whether there was any reason for this court to interfere with the discretionary powers of the lower court, counsel relied on the cases of *Child Welfare Society of Kenya v Republic, Exparte*

Child in Focus Kenya & AG & Others [2017]eKLR and *United India Insurance Co. Ltd v East African Underwriters (K) Ltd* (1985)eKLR.

18. Counsel submitted that the appellant did not furnish the court with anything to show that the trial court misdirected itself in law or misapprehended the facts or that it took into consideration matters it ought to have not taken into account or that the decision was plainly wrong.

Analysis and Determination

19. I have read and considered the record filed in this appeal and the parties' respective submissions in the appeal. I have also considered the relevant legal frameworks and jurisprudence. This is an interlocutory appeal against the ruling of a magistrate court rendered on an application where the magistrate court was invited to exercise discretionary jurisdiction. In what is clearly an overkill, the appellant listed 19 repetitive grounds of appeal. When invited to canvass the 19 grounds through written submissions, counsel for the appellant identified and invited the court to determine the following two issues:

    (i) Whether the learned magistrate erred in law and in fact in failing to find that the appellant had demonstrated that they had a *prima facie* case; and

    (ii) Whether the honourable court erred in law in delving on (sic) substantive issues at the interlocutory stage. I will in the circumstances, focus my analysis and determination on the two issues that were framed by the appellant. Before I dispose the two issues, I will outline the principle that guides this court when exercising jurisdiction as an appellate court.

20. This is a first appeal. The principle upon which a first appellate court exercises jurisdiction is well settled. The task of the first appellate court was summarized by the Court of Appeal in the case of *Susan Munyi v Keshar Shiani* (2013) eKLR as follows:

    > "As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions."

21. The above principle was similarly outlined in *Abok James Odera t/a A. J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR as follows:

    > "This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way."

22. The principle that guides our trial courts when exercising jurisdiction in applications for interlocutory injunctions was outlined in the case of *Giella v Cassman Brown Co. Ltd* [1973] E.A. 358 and is well settled. First, the applicant is expected to demonstrate a *prima facie* case with a probability of success. Second, the applicant is expected to demonstrate to the court that if the injunctive relief is not granted, he would stand to suffer injury that may not be adequately indemnified through an award of damages. Thirdly, should the court have doubts on either or both of the above, the application is to be determined based on the balance of convenience. Lastly, at the stage of disposing an application for interlocutory injunctive relief, the court does not make conclusive or definitive pronouncements on the key issues in the suit. The focus of the trial court is the question as to whether the above test has been met.

23. In the case of *Mbogo v Shah* [1968] EA 93, at pg. 94, the Court of Appeal outlined the following principle which guides appellate courts when disposing appeals relating to exercise of discretionary jurisdiction.

> "I think it is well settled that this court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

24. I have looked at the impugned ruling. In dealing with the first limb of *Giella v Cassman Brown* (1973) EA 358 [the question as to whether a *prima facie* case had been established] the learned magistrate considered the pleadings, the application, and all the annexed documents in support of and against the application for injunction. It was the finding of the learned magistrate to the effect that the appellant had not established a *prima facie* case with a probability of success that triggered this appeal. The appeal challenges the trial court's refusal to grant an interlocutory injunction.

25. What then is a *prima facie* case? This question was answered by the Court of Appeal in the case of *Mrao v First American Bank of Kenya Limited & 2 Others* [2003] eKLR where it stated 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."

26. The appellant and the respondent were in a contractual relationship. The relevant contract is the lease agreement dated 30/6/2021, appearing at page 61 of the record of appeal. Part (d) of the last proviso on the last page of the lease agreement gave either party the liberty to terminate the tenancy in the following terms:

> "(d) Any party can issue a notice to terminate the tenancy under this lease, such notice shall be deemed to be sufficiently served if let addressed to either party's premises and should not be below 90 days."

27. Without making any conclusive or definitive pronouncement, it does appear that the above proviso does not require the party giving the 90 days' notice to assign any reason for the termination. Secondly, a perusal of the record of appeal suggests that the appellant gave a 90 days' notice. Given the above interlocutory evidence, I do not think the appellant can be said to have established a *prima facie* case demonstrating that the termination was effected in breach of the parties' mutual contract.

28. On the second identified issue, the appellant faulted the trial court contending that it delved into substantive issues at the interlocutory stage. I do not agree with that view. The trial court cautioned itself, stating at the last paragraph on page 15 of the ruling as follows:

> "Whereas the court is mindful of the fact that at this interlocutory stage it ought not to delve deeply into the issues raised but simply apply the *prima facie* principle as herein above explained. In this regard therefore, given that by their submissions, the plaintiff's entire case seems to hinge on the existence of the lease agreement and its terms and conditions which they insist they have abided by in all its terms and conditions and insist is the basis of all

that they have done, then I believe that a cursory glance at the lease by the court even just to satisfy itself on what is basic are is important."

29. It is clear from the impugned ruling that the lower court was alive to the relevant principle that governs the jurisdiction of a trial court when seized of an application for interlocutory injunction. The court properly cautioned itself against the dangers of delving into the substantive issues in the suit. The contention that the trial court delved into substantive issues is without proper basis.

30. The result is that I do not find merit in this appeal. The appeal is dismissed for lack of merit. In tandem with the principle in Section 27 of the *Civil Procedure Act*, the appellant shall bear costs of the Appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 21ST DAY OF SEPTEMBER 2023.

B M EBOSO

JUDGE

In the Presence of: -

Mr John Mwariri for Appellant

Mr Kimathi for the Respondent

Court Assistant: Hinga