



Enkare Name-Lock Resort Limited v Jepkoech & another (Environment & Land Case E014 of 2023) [2023] KEELC 19999 (KLR) (21 September 2023) (Ruling)

Neutral citation: [2023] KEELC 19999 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE E014 OF 2023
LC KOMINGOI, J
SEPTEMBER 21, 2023**

BETWEEN

ENKARE NAME-LOCK RESORT LIMITED PLAINTIFF

AND

JANE JEPKOECH 1ST DEFENDANT

JEPHYS AUCTIONEERS 2ND DEFENDANT

RULING

1. This ruling is in respect of two Applications. The Notice of Motion dated 24th February 2023 and the one dated 8th May 2023.
2. The Notice of Motion dated 24th February 2023 is brought under; (Under Order 40 Rule 1,2,2a (1) and 3 and Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act, Article 47 and 159 of the Constitution and all enabling provisions of the Law).
3. It seeks Orders:
 1. Spent
 2. Spent
 3. That this Honourable court do issue temporary injunction against the Defendants/ Respondents whether by themselves, their servants, agents and/or any person acting under the instructions from trespassing, entering into the demised premises and taking away the proclaimed properties, evicting and/or in any other matter interfering with the Plaintiff/ Applicant's tenancy pending the hearing and the determination of this suit.
 4. That the Honourable Court be pleased to make such further or other orders as it may deem just and expedient in the circumstances of this case.



5. That the costs of this Application be provided for.
4. The grounds are in the face of the Application and set out in paragraphs (i) to (vi).
5. The Application is supported by the Affidavit of Patricia Monda, a director of the plaintiff/applicant, sworn on the 24th February 2023.
6. The Application is opposed. There is a Replying Affidavit sworn by Jane Jepkoech, the 1st Defendant/ Respondent, sworn on the 9th May 2023.
7. The Notice of Motion dated 8th May 2023 is brought (under Section , 3A and Section 3 of the Civil Procedure Act and Order 2, Rule 15, Order 4, Rule 1 of the Civil Procedure Rules and Article 41 of the Constitution of Kenya 2010 and all enabling provisions of the law)
8. It seeks orders;
 - a. Spent.
 - b. That the suit herein offends the Provision of Order 4 Rule 1 (f) and ought to be struck out.
 - c. That the suit before court seeks to seeks to re-write a contract between two parties and ought to be struck out.
 - d. That the suit before this Honourable court is but a waste and abuse of the due process of curt and ought to struck out.
 - e. Any other order this Honourable court may deem fit and expedient to grant.
 - f. That the costs of this application be provided for.
9. The grounds are on the face of the Application and are set out in paragraphs (1) to (k).
10. The Application is supported by the Affidavit of Jane Jepkoech, the 1st Defendant/Applicant herein, sworn on the 8th May 2023 and a further affidavit sworn on the 24th June 2023.
11. The Application is opposed. There is a Replying Affidavit sworn by Patricia Monda, a director of the Plaintiff/Respondent sworn on the 20th June 2023.
12. On the 13th June 2023, the court with the consent of the parties directed that the two applications be heard together. It also directed that they be canvassed by way of written submissions.

The Plaintiff's Submissions.

13. They are dated 21st June 2023. They are in respect to the Notice of Motion dated 24th February 2023. They raise three issues for determination:
 - i. Whether the Plaintiff/Applicant has established a *prima facie* case.
 - ii. Whether the plaintiff/Applicant shall suffer irreparable harm if the application is not allowed.
 - iii. Whether the balance of convenience tilts in favour of the Plaintiff/Applicant.
14. Counsel has put forward the cases of *Giella v Cassman Brown & Co. Ltd* [1973] EA 358; *Mrao Ltd v First American Bank of Kenya Limited & 2 others* [2023] eKLR.



15. Counsel further submitted that the Plaintiff/Applicant has been making regular and prompt payments of rent and had then met all obligations under the lease agreement up until the closure of the Hotel, Bar and Restaurant business due to the outbreak of the global Covid -19 Pandemic.
16. It is further submitted that the amount of rent owed by the Plaintiff/Applicant is a matter best left for evidentiary proof during the hearing of the suit.
17. It is further submitted should the levying of Distress be allowed the Plaintiff/Applicant will be crippled in it's operations.
He has put forward the case of *Victoria Pumps Limited v Kenya Parts Authority & 4 others* [2015] eKLR.
18. It is further submitted that the Plaintiff's case raises several facts which can only be resolved at a full hearing. That it has established a *prima facie* case with a probability of success.
19. Counsel also submitted that the business being undertaken by the Plaintiff's/Applicant is highly sensitive and dependent on good will. Its reputation is a paramount and therefore to destroy it would be more than financial loss which harm is irreparable; once tarnished the guests would stop visiting the facility. Further that if the defendants/respondents are not restrained from carting away the proclaimed goods, the plaintiff/applicant will lose its investment, custom and good will and will suffer hardship.
20. It is further submitted that the balance of inconvenience tilts in favour of the Plaintiff/Applicant. He has put forward the case of *Paul Gitonga Wanjau v Gathuti Tea Factory Ltd & 2 others* [2016]eKLR.
It prays that the application be allowed.

The 1st Defendants submissions.

21. They are dated 26th June 2023.
They raise three issues for determination;
 - a. Whether there is a *prima facie* case with a probability of success.
 - b. Whether the applicant will suffer irreparable loss or damage if denied the injunction it seeks.
 - c. Whether the balance of convenience tips in favour of the applicant.
22. Counsel submitted that the facts of this case do not favour the findings of a *prima facie* case in favour of the plaintiff. That the 1st Defendant's/Respondent's right to recover rent arrears due to her and possession of her property upon determination of the lease have been infringed. Further that the lease has lapsed by operation of law as the same is non renewable.
He has put forward the case of *East Africa Industries Ltd v Tru Foods Ltd* [1972] EA 420; *Mrao Ltd v First American Bank of Kenya Ltd & 20 others* [2003] eKLR; *Nguruman Limited v Jan Bonde Nelsen & 2 others* [2014] eKLR.
23. Counsel submitted that this is a case of breach of contract with the balance of probability tipping in favour of the 1st Defendant/Respondent. The Plaintiff/Applicant is in rent arrears amounting to Kshs 9,201,350/70.
24. It is also submitted that the Plaintiff/Applicant has not demonstrated that it will suffer irreparable loss and damage if these orders are not granted.



He has put forward the case of *Robert Ochanda Abuya v Kenya Power and Lighting Company Limited* [2021]eKLR.

25. It is further submitted that the Plaintiff/Applicant seeks to deter the 1st Defendant/Respondent from entering her own property at a period which the tenancy is no longer valid.

It is further submitted that the Plaintiff/Applicant does not stand to suffer irreparable loss if the orders are not granted.

26. It is further submitted that the balance of convenience tilts in favour of the 1st Defendant/Respondent who stands to lose the utilization of her property in a period that she could be using the same to earn income for herself and her family. Further that the rent arrears continue to pile with continuous occupation of the premises by the Plaintiff/Applicant and the latter's refusal to pay.

He has put forward the case of *Paul Gitonga Wanjau v Gatbuti Tea Factory Ltd & 2 others* [2016]eKLR.

It is also submitted that the balance of convenience tilts in the entire application being struck out with costs.

27. I have considered the notice of motion, the affidavits in support and the annexures. I have also considered the responses thereto the written submissions and the authorities cited. The issues for determination are;

- i. Whether the Plaintiffs/Applicant's Application meets the threshold for grant of temporary injunction.
- ii. Who should bear costs of this Application?

28. The principles for granting a temporary injunction were set out in the precedent setting case of *Giella v Cassman Brown* [1973] EA 358.

The Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003]KLR defined what amounts to a *prima facie* case.

29. The Plaintiff/Applicant's case is that it entered into a tenancy agreement with the 1st Defendant/Respondent dated 7th November 2016. It is also its case that the 1st Defendant/Respondent's are in the process of levying distress for rent arrears. Further that it will suffer irreparable loss that cannot be compensated by an award of damages if the orders are not granted.

30. The 1st Defendant/Respondent on the other hand states that the lease has been extinguished by operation of law the same having expired on 31st December 2022. That the Plaintiff/s/Applicant is in rent arrears amounting to Kshs 9,201,350/70 which amount has not been paid.

31. I have gone through the lease dated 7th November 2016. The same is relied on by both parties. The said lease is for six (6) years from 1st December 2016.

From the lease agreement, it provides that the obligation of the tenant is;

- a) To pay to the Landlord interest for late payment of the rent at the prevailing market rate from the date it becomes due;
- b. To pay rent reserved to the Landlord aforesaid at the times and in the manner aforesaid by bankers cheque or cash"



A look at the Plaintiff's and 1st Defendant's Affidavits confirm that the Plaintiff/Applicant fell into rent arrears. The amounts are disputed but the fact is the Plaintiff/Applicant is on rent arrears.

32. This necessitated the 1st Defendant to instruct the 2nd defendant to levy distress.
33. In paragraph 6 of the Replying Affidavit of Patricia Monda to the Notice of Motion dated 8th May 2023, she states;

“That despite the challenges caused by the Covid – 19 Pandemic the Plaintiff/Respondent has nevertheless continued paying rent though not as regular as before”.

In Paragraph 8 she states;

“That the Plaintiff /Respondent has already paid Kshs 2,200,000/= towards the agreed amount and is making all efforts to clear the balance the soonest possible”

34. This confirms that the Plaintiff/Applicant in rent arrears and the 1st Defendant/Respondent has a right to recover rent arrears due to her.
35. It is also not in dispute that the lease was for a period of six (6) years. It is stated;

“To hold the same unto the Tenant for the term of six years (6 years) from the first day of December Two Thousand and Sixteen (herein after called “the said term”) And the said lease is not RENEWABLE) subject nevertheless to determination as herein after provided yielding and paying therefore and there out unto the land lord”.

It is clear that the lease was not renewable. The same has lapsed by operation of law.

36. Infact it lapsed on 31st December 2022. I find that there is no lease that the Plaintiff/Applicant can rely on as things stand. The Plaintiff/Applicant's assertion of Covid-19 pandemic is non-issue. I agree with the 1st Defendant's submission that it is not a justification to default on payment of rent. I also agree with the 1st Defendants submission that there is no tenancy in existence whose termination can be a subject of litigation.
37. I find that the Plaintiff/Applicant has failed to establish a *prima facie* case in the probability of success at trial.
38. Having stated so, I find that the Plaintiff/Applicant is not likely to suffer any irreparable loss or damage if these orders are not granted as the lease has expired.
39. The balance of convenience tilts in not granting an order of Status quo. The lease has expired and the Plaintiff/Applicant has to deliver possession of the premises to the Landlord (the 1st defendant) I rely on the case of *Paul Gitonga Wanjau v Gathuti Tea Factory Limited & 2 others* [2016]eKLR.
40. The 1st Defendant/Respondent is entitled to utilize her property after the expiration of the lease.
41. The upshot of the matter is that I find no merit in the Notice of Motion dated 24th February 2023 and the same is dismissed with costs to the Defendants/Respondents.
42. With respect to the Notice of Motion dated 8th May 2023. I will consider whether the Plaintiff/Applicant has a valid cause of action against the Defendants Order 4 Rule 1 (f) of the *Civil Procedure Rule* provides that;

“(1) The plaint shall contain the following particulars—



- (f) An averment that there is no other suit pending, and that there have been no previous proceedings, in any court between the plaintiff and the defendant over the same subject matter and that the cause of action relates to the plaintiff named in the plaint”.

43. It is not in dispute that in the verifying affidavit Patricia Monda, a director of the plaintiff, stated there were no previous proceedings between the parties based on the same cause of action.

This is not true because the Plaintiff/Applicant had filed another suit over the same subject matter being Kajiado CM ELC No. E122 of 2022; Enkare Namelock Resort Ltd v Jane Jepkoech which was dismissed.

44. The averment made by Patricia Monda is therefore Contrary to Order 4 (1) (f) of the *Civil Procedure Rule, 2010*.

However, one of the prayers in the plaint dated 24th February 2023 is for an order for taking of accounts.

45. From the 1st and 2nd defendant’s statement of defence and counter claim the 1st defendant claims from the Plaintiff outstanding arrears amounting to Kshs 4,622,800/= and damages for trespass for the Plaintiff’s continued occupation of the premises after the lease had expired. From the foregoing, it is my view that even though the lease had expired there are pending issues which ought to go to trial.

It is on these grounds that I decline to strike out the suit herein.

46. In conclusion the Notice of Motion dated 8th May 2023 is found to be unmerited and the same is dismissed with no order as to costs.

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

L. KOMINGOI

JUDGE.

In the presence of:

Mr. Anyoka for the Plaintiff/Applicant.

Mr. Chemwok for the 1st Defendant/Respondent.

Court Assistant – Mutisya.

