



**Kariuki T/A Longroom & 2 others v Allan & Bradley Company Limited (Environment & Land Case E004 of 2023) [2023] KEELC 19856 (KLR) (20 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19856 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE E004 OF 2023  
JM ONYANGO, J  
SEPTEMBER 20, 2023**

**BETWEEN**

**MARY KARIUKI T/A LONGROOM ..... 1<sup>ST</sup> PLAINTIFF  
FRANKLIN MWANGI T/A KABIS RESTAURANT ..... 2<sup>ND</sup> PLAINTIFF  
SAMWEL KOSGEI CHEPTOO T/A JASSIN PHARMACEUTICALS .... 3<sup>RD</sup>  
PLAINTIFF**

**AND**

**ALLAN & BRADLEY COMPANY LIMITED ..... DEFENDANT**

**RULING**

1. The Plaintiff filed suit by way of a Plaint dated January 26, 2023 seeking to enforce a lease dated August 1, 2020 over the premises on land parcel number Eldoret Municipality Block 7/22 between the plaintiffs and the Defendant. Contemporaneously with the Plaint the plaintiffs filed a Notice of Motion of even date seeking a temporary injunction to restrain the defendant from interfering with the Applicants tenancy in the premises on title no. Eldoret Municipality Block 7/22 pending the hearing and determination of the suit herein.
2. The application is premised on the grounds set out on the face of the Notice of Motion and the Supporting Affidavits of Mary Kariuki, Franklin Mwangi and Samuel Kisgei Cheptoo.
3. The gist of the plaintiffs' case is that in 2020 they entered into leases with the defendant for a period of 5 years and 3 months which were to run upto 2025. Based on the said leases, the plaintiffs renovated the premises and stocked their businesses at great expense. However sometime in 2020 the defendant informed the plaintiffs that the premises were supposed to be renovated and that they required the plaintiffs to vacate the premises by January 31, 2023. The plaintiffs are of the view that the defendant's intention to terminate the leases before the five-year term amounts to a breach of contract and the plaintiffs will suffer loss and damage.



4. The application is opposed by the defendant through the Replying affidavit sworn by Richard K Cheruiyot on February 14, 2023. He admits that the Landlord entered into a lease with the plaintiffs for a five-year lease but states that on July 4, 2022 the parties entered into a Memorandum of Understanding in which they agreed to terminate the lease to pave way for the demolition of the existing structure and construction of an ultra-modern one and that the court should protect the freedom of the parties to contract. He adds that the plaintiffs were given the right to first refusal to select space once the new building comes up and they were to be refunded their deposit without any deductions. It is his contention that the said Memorandum of understanding having been signed in July 2022 gave the Plaintiffs ample time to look for alternative premises to move to or challenge the terms thereof but they failed to do so and the court should not come to their aid as they were indolent.
5. In addition to the Replying Affidavit, the Defendant filed a Notice of Preliminary Objection on the ground that the Plaintiffs lack the locus to bring the suit as the suit is anchored on a terminated lease agreement whose termination was made through a subsequent duly executed Memorandum of understanding dated July 4, 2022 between the plaintiffs and the landlord. The defendant also stated that the suit does not disclose any proper and/or reasonable cause of action against the defendant.
6. In response to the Replying affidavit the 1<sup>st</sup> plaintiff filed a Further affidavit sworn on February 21, 2023 in which she objected to Mr Richard Kipkorir Cheruiyot, his firms known as Kipkorir Cheruiyot & Company Advocates and Kipkorir Cheruiyot & Kigen Advocates LLP acting in this matter as they are the ones who drew the lease and Memorandum of Understanding for the landlord and Mr Richard K Cheruiyot is the one who has filed the Replying Affidavit in this suit. She is of the view that Mr Richard K Cheruiyot and his firms are heavily conflicted as they are parties, witnesses and advocates in this matter and their continued stay on record will be prejudicial to the plaintiffs and they should be recused from these proceedings.
7. The 1<sup>st</sup> Plaintiff denies that she signed the Memorandum of understanding as she was bed-ridden on July 4, 2022 following her involvement in a road traffic accident. She denies having gone to the defendant's office.
8. She further contends that the Memorandum of understanding is an informal instrument which does not amount to a contract and it cannot vitiate a formal contract signed by the parties.
9. Regarding the issue of locus standi, she depones that the unexpired lease document gives her and her co-plaintiffs the right to prosecute this case as their rights under the said lease have been infringed.
10. Mr Cheruiyot filed an Affidavit in response to the Further Affidavit sworn on March 1, 2023 in which he avers that the plaintiffs executed the Memorandum of understanding voluntarily after the contents were explained to them and that they agreed to be bound by the terms therein.
11. On the issue of conflict of interest, he averred that he is a partner in the firm of Kipkorir Cheruiyot & Kigen Advocates LLP and one of the Directors of Allan & Bradley Company Ltd which is a real estate agent and that the two are separate legal entities, therefore a conflict of interest does not arise. He added that he had sworn the Replying affidavits as a director of the Defendant and not in his own capacity and nothing bars any of the agents of the defendant from appearing as a witness in this case.
12. The application and preliminary objection were canvassed together by way of written submissions and both parties filed their submissions which I have considered.
13. The following issues arise for determination:
  - i. Whether the court has jurisdiction to hear and determine this matter.



- ii. Whether there exists a valid lease between the plaintiffs and Alnoor Abdul Aziz.
  - iii. What is the legal effect of the Memorandum of understanding dated July 4, 2022?
  - iv. Are the Applicants entitled to a temporary injunction?
  - v. Whether the firm of Kipkorir Cheruiyot & Kigen Advocates LLP is conflicted in this case and whether it should recuse itself from acting for the
14. The first issue for determination whether the court has jurisdiction to hear and determine this matter.
15. Article 162 (2) of the Constitution mandates Parliament to enact laws establishing specialized Courts that deal with specific issues. In line with this provision Parliament enacted Environment and Land Court Act, 2011 whose jurisdiction is spelt out in section 13 of the Act as follows:
- (1) The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provision of this Act or any other written law relating to environment and land.
  - "(2) in exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes
    - (a) Relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources...
    - (c) Relating to land administration and management;
    - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land
    - (e) Any other disputes relating to environment and land
  - (7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including –
    - a) interim or permanent preservation orders including injunctions;
    - b) prerogative orders;
    - c) award of damages
    - d) compensation;
    - e) specific performance
    - f) restitution;
    - g) declaration; or
    - h) costs.'
16. The dispute herein relates to a lease in respect of the premises on land parcel no Eldoret Municipality/722 and whether the Memorandum subsequently signed by the parties effectively terminated the said lease. The issue as to whether the Memorandum of Understanding is a contract is at the center of this dispute and the court therefore has jurisdiction to hear and determine the suit.



17. I will deal with second and third issues jointly. The is question of the validity of the lease and the effect of the Memorandum of Understanding form the crux of the dispute herein and will require the full hearing in order for the court to determine whether the lease is valid or not. Although learned counsel for the Respondents has submitted at length on the effect of the Memorandum of Understanding, this court is aware that at the interlocutory stage, it is not required to make any definitive conclusion on the matters in controversy. In the case of *Edwin Kamau Muniu Vs Barclays Bank of Kenya Nbi HCCC No 1118 of 2002* observed that:

' In an interlocutory application, the court is not required to determine the very issues which will be canvassed at the trial with finality. All the court is entitled at this stage is whether the Applicant is entitled to an injunction sought on the usual criteria.'

18. With regard to the prayer for a temporary injunction, I have to determine whether the plaintiffs have met the conditions laid down in the case of *Giella v Cassman Brown & Company Ltd 1973 EA 358* which are as follows:

' First, the applicant must show that he has 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 damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.'

19. As to what constitutes a prima facie case Bosire JA (as he then was) in the case of *Mrao V First American Bank of Kenya Limited (2003) eKLR* stated as follows:

' A prima facie case is one 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.'

20. The plaintiffs' case is that they are on the verge of being thrown out of their business premises contrary to the leases they entered into with their Landlord. They have contended that they have invested heavily in their businesses and if they are forced to move out they will not only suffer financial loss but they will also lose the goodwill they have accumulated over time. I am therefore of the view that the plaintiffs have established a prima facie case with a probability of success.

21. The second condition which the plaintiffs need to satisfy is that they might suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction. The Applicants have in their supporting affidavits deposed that after signing the leases they stocked up their businesses as they knew that they would be in the suit premises for five years. They deposed that if they are forced to vacate the suit premises after a period of two years apart from the huge financial loss they are likelihood to lose their goodwill. Whereas it may be possible to assess their losses based on their past financial statements, their goodwill cannot easily be quantified. I am therefore of the view that the plaintiffs have demonstrated that they would suffer irreparable loss if an order of injunction is not granted.

22. Lastly with regard to the balance of convenience, the plaintiffs are in possession of the demised premises pursuant to a lease and it has not been demonstrated that they have breached any of the terms thereof. The question of termination of the lease is still in contention. In the circumstances, the balance of convenience tilts in favour of the Applicants.



23. With regard to the issue of conflict of interest I note that the Applicants have not sought an order for recusal of Mr Richard K. Cheruiyot or the firms of Kipkorir Cheruiyot & Company Advocates and Kipkorir Cheruiyot & Kigen Advocates LLP in their Notice of Motion. Furthermore, the firm of Kipkorir Cheruiyot & Co. Advocates is not a party to this suit and it would therefore be improper to make orders affecting them in this application. The proper way to bring up the issue of representation would be for the plaintiffs to file a separate application rather than bring it up as a peripheral issue in this application.
24. Having carefully considered the application and the Preliminary objection together with the application and the rival submissions as well as the relevant law and authorities, I am of the view that the Preliminary Objection is unfounded while the application for injunction is merited. Consequently, I make the following orders:
- a. The Preliminary Objection is dismissed.
  - b. A temporary injunction is hereby issued restraining the Defendant/ Respondent from interfering with the Applicants businesses known as Long Room, Kabis Restaurant and Jassin Pharmaceuticals situated on title No.Eldoret Municipality Block 7/22 along Oloo Street pending the hearing and determination of the suit herein.
  - c. The costs of this application shall be in the cause.

**DATED SIGNED AND DELIVERED VIRTUALLY THIS 20<sup>TH</sup> DAY OF SEPTEMBER, 2023**

.....

**J.M ONYANGO**

**JUDGE**

In the presence of;

Miss Kambiha for Mr. Ngigi Mbugua for the Plaintiffs/ Applicants

Mr. Kigen for the Defendant

Court Assistant: A. Oniala

