



Strategic Urembo Sacco Society Ltd v Badawi; Meli (Interested Party) (Environment and Land Miscellaneous Application 56 of 2021) [2023] KEELC 21904 (KLR) (28 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21904 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 56 OF 2021
NA MATHEKA, J
NOVEMBER 28, 2023**

BETWEEN

STRATEGIC UREMBO SACCO SOCIETY LTD APPLICANT

AND

HAIDER SULAYMAN BADAWI RESPONDENT

AND

SHADIA MOHAMED KIPKORIR MELI INTERESTED PARTY

RULING

1. The application is dated 9th December 2021 and is brought under Article 22, 23, 41, 41, 159 of *the Constitution*, 2010 Section IA, 1B and 34 of the *Civil Procedure Act*, 2010 and Order 40 Rule I(a) *Civil Procedure Rules*, 2010 seeking the following orders;
 1. That this Application be and is herein certified as urgent and the same be heard ex-parte in the first instance.
 2. That this Honorable Court be pleased to grant a Mandatory Injunction Orders in favor of the Applicant herein for the Respondent to grant vacant possession of CR. 62863/1 (Apartment No.5, 5th Floor on Subdivision Number: 16900) Original within 14 days hereon upon service of the orders.
 3. That this Honorable Court be pleased to issue orders granting the Applicant access to the property for all such purpose but not limited to exercising its rights as a chargee in making entry to value CR. 62863/1 (Apartment No.5, 5th Floor on Subdivision Number: 16900) Original by itself and/or its assigned agents to access for all such purpose of valuing and all such purpose in efforts to dispose the same through sale for the recovery of the charged amounts.



4. That this Honorable Court be pleased to issue orders to the Officer Commanding Station Nyali Police Station to provide security to Court Bailiff in executing the decree for vacant possession.
 5. That the costs of this application be provided for.
2. It is based on the grounds that on the 9th April of 2020 the Respondent herein applied for a "Business Development Loan Facility" with the Applicant herein seeking the financial backing with the CR. 62863/1 (Apartment No.5, 5th Floor on Subdivision Number: 16900) Original as a charged security. That to date, the loan facility herein through the principal and the interest collectively amounted to Kshs. 5,700,000.00 and counting. That despite the Respondents failure to grant vacant possession, the Applicant herein has come to court in good faith and deemed this application urgent for the reason that it will incur unwanted auditing hardships with the Respondents account whereas the grant of vacant possession would remedy the situation. That on the 7th October 2021, the Applicant issued a follow-up letter to the Respondent stating their actions in default and non-compliance to discharging his obligations in the facility and demanded that the Respondent grant the Applicant vacant possession. On the strength of the documents in the annexures in the supporting affidavit, the application meets the threshold of a prima facie case with a high probability of success. That this Honorable court be pleased to issue the orders sought wherein without which the Applicant might otherwise suffer irreparable harm as the Applicant has managed to secure several purchasers for the property, whom have been hindered from accessing the property, subjecting the Applicant to financial and economic hardships which would not adequately be compensated by an award of damages. The Respondent would not be prejudiced in any way should this Honorable court be pleased to grant the orders sought herein. It is in the interest of justice that this application for vacant possession in CR. 62863/1 (Apartment No.5,5th Floor on Subdivision Number: 16900) Original be allowed.
3. The interested party submitted that they never gave any consent to have the matrimonial property used as security. Further, that she never signed any Affidavit as purported by the Applicant. That the office of the Directorate of Criminal Investigations subjected the purported Affidavit produced by the Applicant to forensic examination and found out that, after comparing the signature therein and her signatures from way back in 2019, 2021 and a specimen obtained this year, the signature in the said affidavit of spousal consent was made by someone else and not her. Annexed and marked SM-I (FA) is a copy of the DCI Forensic Document Examiner's Report. That the office of the Directorate of Criminal Investigations is continuing with the investigations to the person who forged the signature and charge them in a court of law. That it is evident that the Applicant's documents are a forgery.
4. This court has considered the application and the submissions therein. In 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..."



5. 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.
6. 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 vs 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.”
7. Be that as it may, Courts have taken the position that substantive orders cannot be issued in Miscellaneous Applications. This is the position that was adopted in *Witmore Investment Limited vs County Government of Kirinyaga & 3 Others* (2016) eKLR where the court held that;

“... So where a party such as an applicant herein seeks an order that in effect appears to resolve with finality an issue in controversy or a contested issue, the application ceases to be interlocutory and it is a misconception to describe it as such. If the applicant wanted to move this court for a final resolution of the issues in controversy raised in the application, it should have moved this court properly in the manner provided by law.”
8. Similarly in *Nairobi West Hospital Limited vs Joseph Kariha & Another* (2018)eKLR it was held that;

“... In my view this substantive order which for all intents and purposes cannot be issued through a miscellaneous application. A perusal of Order 3 Rule 1 of the Civil Procedure Rules will reveal that suit may be commenced by way of a plaint, a petition and or originating summons which is not the case here. The miscellaneous application may not offer the parties the opportunity to be heard. The order for discharge of a patient who is suffering from a rare condition stated to be ametrophyic lateral scelorsis and still admitted in the Intensive Care Unit of the applicant’s hospital is strenuously opposed....Consequently, the preliminary objection is upheld and this suit is ordered struck out.”
9. For the foregoing reasons, I find that the Interested Party has raised a prima facie case and serious issues of forgery. An order in the nature of a mandatory injunction must be supported by a substantive relief in the main pleading and cannot be obtained through a miscellaneous application. Having found so I need not go into determining the other issues touching on the facts of the case. I find this application is not merited and I dismiss it with costs to the Interested Party.

It is so ordered.



DELIVERED, DATED AND SIGNED AT MOMBASA THIS 28TH DAY OF NOVEMBER 2023.

N.A. MATHEKA

JUDGE

