



**Abdalla v Oyugi (Environment & Land Case E055 of 2023)
[2023] KEELC 22164 (KLR) (13 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22164 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E055 OF 2023
NA MATHEKA, J
DECEMBER 13, 2023**

BETWEEN

FARIDUN SULEIMAN ABDALLA PLAINTIFF

AND

MARGARET ACHIENG OYUGI DEFENDANT

RULING

1. The application is dated 5th June 2023 and is brought under Section 1A, 3A & 63 (e) of the [Civil Procedure Act](#). Order 40 Rule 1 and 2 and Order 51 Rule 1 of the [Civil Procedure Rules](#) seeking the following orders;
 1. That this matter be certified as urgent and service hereof be dispensed with in the first instance.
 2. That pending the hearing and determination of this application inter partes, the Honourable Court be pleased to issue an order of injunction barring the Defendant, whether by herself, her agents and/or assigns from either letting out, sub-letting, wasting or any other way dealing with the suit property herein, to wit, the premises situated on Land Parcel Subdivision No. CR. 16166/11 Nyali Mombasa other than in the manner contemplated in the agreement to lease between the parties.
 3. That pending the hearing determination of the suit herein, the honourable Court be pleased to issue an order of injunction barring the defendant, whether by herself, her agents and or assigns from either letting out, subletting, wasting or in any other way dealing with the suit property herein, to wit, the premises situated on Land Parcel subdivision No. CR 16166/11 Nyali Mombasa, other than in the manner contemplated under the agreement to lease between the parties.
 4. That pending the hearing and determination of the suit herein, the honourable Court re pleased to issue an order of mandatory injunction directing the Defendant to the vacate and



remove all her belongings from the Suit property herein, to wit, the premises situated on Land Parcel Subdivision No. CR16166/11 Nyali Mombasa.

5. That costs hereof be provided for.
2. It is supported by the sworn affidavit of Faridun Suleiman Abdalla and further on the following grounds that at all material times to this suit, the plaintiff is the registered owner of Land Parcel Sub-Division No. CR 16166/11 Nyali Mombasa and which property comprises of residential premises. In or about the month of May 2023, the plaintiff agreed to let out the suit premises to the Defendant for monthly rent of Kshs. 220,000 subject to the lease agreement being executed. It was a term of the agreement to lease that the suit premises would be utilised for residential purposes only, and further that, the Lessee Could only sub-let the premises with the Lessor's permission. The Defendant subsequently took possession of the suit premises on the 1st May 2023 and on the 4th May 2023, paid 2 months' rent deposit of Kshs. 400,000/= and a further deposit of Kshs.15,000/= for electricity and Kshs. 15, 000/= deposit for water in accordance with the terms of the agreement to lease. Thereafter, a draft Lease Agreement was prepared and forwarded to the Defendant for execution, but she returned the same, requesting that some amendments be effected thereto. Before the Lease document could be executed by the parties, the Plaintiff was informed by his property manager that it had come to her knowledge that the Defendant was using the suit premises for purposes other than those contemplated under the agreement to lease and had converted the same into an Airbnb for short-term letting to third parties. This prompted the Plaintiff to instruct his advocates to issue a demand to the Defendant to vacate the suit premises as the agreement to lease had been rescinded owing to the Defendant's breach of the agreed terms as to the user of the suit premises. The Plaintiff similarly offered to refund the Defendant all the deposits paid as aforesaid for rent, water and electricity.
3. In her rejoinder to the demand to vacate, the Defendant claimed that she rented the suit premises to host and accommodate her team members when they visit Mombasa pursuant to her professional work, and in addition demanded that repair works be-carried out on the suit premises so that she Could execute the amended Lease Agreement commencing the 1st June 2023. Upon the Plaintiff insisting that the Defendant vacates the suit premises. she refused to cooperate and instead referred the matter to her lawyers, who wrote to the Plaintiff erroneously stating that the Defendant had executed a tenancy agreement for a period of 5 years and that she was not ready to move out. It is noteworthy that, during the negotiations by parties leading to the agreement to lease, the Defendant did not disclose that she wanted to rent the premises to host multitudes of people in the course of her professional activities; otherwise, she would not have been let the premises had she done so. The suit premises are not designed to and the facilities therein cannot accommodate large numbers of people and thus the Plaintiff is apprehensive that the same may be subjected to wastage and damage. It is therefore imperative that an order of mandatory injunction is issued to compel the Defendant to vacate the suit premises so as to safeguard it from further wastage and damage. In the meantime, it is also necessary that an order of temporary injunction do issue barring the Defendant from letting out, sub-letting, wasting and or in any other way dealing with the suit property other than in the manner contemplated in the agreement to lease between the parties.
4. This court has considered the application and submissions therein. The Applicant submitted that it was a term of the agreement to lease that the suit premises would be utilised for residential purposes only, and further that, the Lessee Could only sub-let the premises with the Lessor's permission. That it has now come to her knowledge that the Defendant was using the suit premises for purposes other than those contemplated under the agreement to lease and had converted the same into an Airbnb for short-term letting to third parties hence this application. A mandatory/permanent injunction is



ordinarily granted after a full hearing and when all the evidence has been adduced and all facts have been established.

5. In the case of *Kenya Power & Lighting Co. Limited vs 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...”

6. 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 vs 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.”

7. For the foregoing reasons, I find that it would be premature for me to grant final orders at this interim stage in favour of the Applicant. The Respondent was served but failed to file any responses and in her response to the demand to vacate by the Applicant she claimed that she rented the suit premises to host and accommodate her team members when they visit Mombasa pursuant to her professional work, and in addition demanded that repair works be-carried out on the suit premises so that she could execute the amended Lease Agreement commencing the 1st June 2023. I have perused the draft Lease Agreement dated 5th May 2023 which was prepared and forwarded to the Respondent for execution and in clause 4 (d) it is solely to be used as a residential house. Clause 4 (j) prohibit subletting of any kind. I find that the Applicant has established a prima facie case and I grant the following orders;



1. That pending the hearing determination of the suit herein, the honourable Court be pleased to issue an order of injunction barring the defendant, whether by herself, her agents and or assigns from either letting out, subletting, wasting or in any other way dealing with the suit property herein, to wit, the premises situated on Land Parcel subdivision No. CR 16166/11 Nyali Mombasa, other than in the manner contemplated under the agreement to lease between the parties.
2. Costs of this application to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 13TH DAY OF DECEMBER 2023.

N.A. MATHEKA

JUDGE

