



Troy Medicare Pharmacy Limited v Nishapa Investments Limited Fashion Plaza Limited & another (Environment & Land Case E236, E033 & E035 of 2023 (Consolidated)) [2023] KEELC 22288 (KLR) (13 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22288 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E236, E033 & E035 OF 2023 (CONSOLIDATED)
MD MWANGI, J
DECEMBER 13, 2023

BETWEEN

TROY MEDICARE PHARMACY LIMITED PLAINTIFF

AND

NISHAPA INVESTMENTS LIMITED FASHION PLAZA LIMITED 1ST DEFENDANT

FASHION PLAZA LIMITED 2ND DEFENDANT

(In respect of the Plaintiff's applications dated 14th July, 2023, 4th August, 2023, & 22nd August 2023, the Defendant's Application dated 25th July, 2023, the 1st Interested Party's application dated 9th August, 2023 and the 2nd Interested Party's Application dated 26th July, 2023 pursuant to the directions of the Court issued on 9th October, 2023)

RULING

Background

1. On 9th October 2023, the Court consolidated 3 suits, that is to say, ELCC No E236 of 2023, ELCC No E233 of 2023 & ELCC No E235 of 2023 with ELCC No 236/2023, being the lead file. The 3 suits relate to one subject matter being, LR No 209/1829, (hereinafter referred to as 'the suit property').
2. In ELCC 236 of 2023, the Plaintiff Troy Medicare Pharmacy Ltd had filed a total of eight (8) interim applications as at 9th October, 2023. On the said date, the Plaintiff withdrew four (4) applications. A fifth (5th) application dated 30th August, 2023 was withdrawn on 25th October, 2023 thereby leaving the three (3) applications that are the subject of this ruling. They are, the Notice of Motion dated 22nd August, 2023 alongside the Amended Notice of Motion dated 14th July, 2023 and the Notice of Motion dated 4th August, 2023.



3. On their part, the Defendants' application under consideration is dated 25th July, 2023. The 1st Interested Party's application on the other hand is dated 9th August, 2023 whereas the 2nd Interested party's application is dated 26th July, 2023.

The Plaintiff's applications:

4. As summarized in its submissions dated 18th October, 2023, the Plaintiff's applications seek the following orders:
 - a. Application dated 14th July, 2023 seeks inter-alia an injunction against the Defendant's jointly and severally by themselves, their agents and assigns or any person acting with their authority / instructions from trespassing and entering into Fashion Plaza, LR No 209/1829, leased to the Plaintiff/Applicant and/ or leasing to a 3rd party and retaking possession, disposing, leasing, selling and/or in any manner alienating the said property.... Interfering with and /or taking over the sub-tenants of the Plaintiff at the premises pending the herring and determination of the application and arbitration.
 - b. Application dated 4th August, 2023 seeks an injunction against the Defendants jointly and severally, by themselves, conies or any person claiming through them from accessing, entering, threatening and or in any manner whatsoever demanding any rent from the sub-tenants, blocking, interrupting the Applicant's business premises on those parcels known as LR No 209/1829 and LR No 209/1742 Nairobi, and the OCS Kamukunji Police Station to enforce the order.
 - c. The Application dated 22nd August, 2023 seeks inter alia an order directing the Interested Party/Respondent to forthwith vacate and remove its offices unlawfully established on the premises known as L. R. No 209/1829 (Fashion Plaza) and LR No 209/1742 (Magic Business Centre), Nairobi and the OCS, Kamukunji to ensure compliance and an order of injunction restraining the Defendants/Respondents as well as the 2nd Interested Party from interfering, interrupting or blocking the Plaintiff's business on all those properties known as LR No 209/1829 (Fashion Plaza) and LR No 209/1742 (Magic Business Centre) Nairobi and the OCS Kamukunji Police Station to ensure compliance.
5. The applications are supported by the various affidavits of Rosemary Mutheu Mwathe dated 14th July, 2023, 4th August, 2023 and 22nd August, 2023 respectively.
6. The Plaintiff explains that its relationship with the Defendants is premised on a lease agreement between them over the suit property, LR No 209/1829, and dated 14th April, 2021. The Plaintiff avers that the lease conferred upon it the right to convert the designated space into stalls and sublet them to other business persons. To achieve its intention, the Plaintiff alleges that it sought and secured financial assistance from various sources including loans from financial institutions, contributions from acquaintances and family members of the director and her personal savings. That was how the Plaintiff was able to transform the rental premises into a mall comprising of well partitioned stalls and shops which were sublet to over 500 subtenants.
7. The Plaintiff further alleged that it diligently honoured its obligation to pay rent to the Defendants through its appointed agent, CURA International Ltd, up and until July, 2023, when the Plaintiff received a notification, albeit unexpectedly, from the Defendants asserting that they had repossessed the suit property. The Defendants, according to the Plaintiff, alleged that they had subsequently leased the suit property to Royal Palms Mustard Ltd. It is further alleged that the Defendants' notification included a directive to the subtenants to remit their rent to Royal Palms Mustard Ltd.



8. The Plaintiff in its submissions explains that it first sought refuge and intervention from the Business Premises Rent Tribunal (BPRT) in the case number BPRT E1156 of 2022. The BPRT was, as the Plaintiff puts it, unable to entertain the matter due to jurisdictional constraints. This forced the Plaintiff to seek recourse in this Court. The Plaintiff seeks before this Court as already explained, interim injunction orders.
9. In paragraph 18 of its submissions, the Plaintiff asserts that its cause of action is prompted by its concern that the Defendants may proceed with leasing, selling or otherwise alienating the subject property, all the while neglecting their obligation to compensate the Plaintiff company for the goodwill, reimburse the investments made, and account for any loss of income incurred, despite the existence of a valid tenancy and investments on the property, and furthermore, the unwarranted interference with the Plaintiff's possession without proper notice for vacant possession.

Application by the Defendants dated 25th July, 2023.

10. In their application of 25th July, 2023, the Defendants pray for orders:
 - a. That Pending hearing and determination of this application, the Hon. Court be and is hereby pleased to set aside and or vacate the orders issued on 21st July, 2023.
 - b. That this Hon. Court be and is hereby pleased to issue an order that the suit herein is moot, otiose and over-taken by events.
 - c. That the costs of this application and the suit be provided for.
11. The application is premised on the grounds enumerated on the face of it and the supporting affidavit of Kirti Ramji Shah deposed on 25th July, 2023.
12. The Defendants assert that the orders of 21st July, 2023 were issued ex parte and gravely affect the interests of the third party who was not a party to the suit without according it an opportunity to be heard. In any event, the orders were incapable of being enforced and had been overtaken by events. The Defendants further argued that the said orders were issued on account of material non-disclosure on the part of the Plaintiff/Respondent since the lease between them and the Plaintiff had been lawfully terminated as at the date of the issuance of the said orders, and the suit premises leased to a third party, Royal Palms Mustard Ltd with effect from 13th July, 2023 vide a lease agreement of even date.
13. The Defendants' position is that the Plaintiff's suit and the applications therein have been rendered otiose, moot and overtaken by events, in view of the circumstances explained above. The suit therefore is an exercise in futility and a waste of precious judicial time. The Defendants opine that if the Plaintiff has any claim against them, the same lies in damages and not an injunction as sought in this case.

Applications filed by the Interested Parties:

14. The application dated 9th August, 2023 is by Magic Business Centre, Sub-Tenants (Interested Parties in E236/2023). In their application, the Interested Parties (Magic Business Centre Sub-Tenants) pray for orders:
 - a. Spent
 - b. Spent
 - c. That this Honourable Court be pleased to issue a temporary injunction restraining the Plaintiff/Applicant and Defendant/Respondent whether by themselves, agents, Servants or



employees, or whosoever otherwise, from repossessing, evicting, destroying and/or removing structures and interfering with the quiet possession of the Applicants/sub-tenants pending the hearing and determination of this application and the main suit.

- d. That the Court be pleased to direct the third parties, currently in occupation of the suit premises, and have been providing services and on the strength of the order dated 27th July, 2023, issued by Justice E.K. Wabwoto in ELC Case No E033 of 2023 to collect rents due and account for the same pending the hearing and determination of the application and the main suit.
 - e. That to the extent that the tenancy of the suit premises is in dispute, an order do issue restraining the main parties in this suit and/or the third parties, their employees, their agents and/or servants from issuing the applicants with new tenancy agreements requiring them to pay deposits afresh, and or altering the terms and conditions of their current leases pending the hearing and determination of the main suit.
 - f. That should this Court deliver judgment in favour of the Defendants/Respondent and/or against the Plaintiff/Respondent, an order do issue directing the third party and /or any other new tenant to recover the deposits from the Plaintiff/Respondent and shall not charge any additional deposits.
 - g. That Costs be in the cause.
15. The application is premised on the grounds stated on the face of it and the joint affidavit of Gladys Wanjiru Njuguna, Reuben Othim, Innocent Arose, Jacinta Mwendu Muasya, Erick Katumo and Steven Otieno.
 16. The deponents state that they are representatives of the Applicants who are sub-tenants of Magic Business Centre located along Ronald Ngala Street. The total number of sub-tenants is about 400, who depend on their respective businesses for subsistence.
 17. The deponents aver that they have been compliant with their obligations of paying rent as tenants. The landlord on the other hand is therefore expected to ensure they enjoy quiet possession and safety of their businesses.
 18. They aver that the principle parties in this suit have been involved in a tenancy dispute commenced at the Business Premises Rent Tribunal. The Tribunal however found that it lacked the jurisdiction to determine the dispute and therefore struck out the matter. Subsequently, the suit property was leased to a new tenant vide a Lease Agreement dated 13th July, 2023.

Court's Directions:

19. The Court directed the filing of written submissions with an opportunity to the parties to highlight their submissions before the court. Parties highlighted their submissions on 25th October 2023. Both the written submissions and the proceedings during the highlighting form part of the court's record.

Issues for Determination:

20. Having considered the various applications and the responses thereto, as well as the submissions by the parties, the issues for determination in this matter are:
 - a. Whether it is appropriate to issue interim measures of protection in this matter;
 - b. Whether the order of 21st July 2023 is overtaken by events;



- c. Whether substantive orders can be sought by or against an interested party in a suit; and
- d. Whether the court should issue orders on costs.

Analysis and Determination

A. Plaintiff's Application

- 21. The Plaintiff commenced its suit by way of a Plaint dated 23rd June, 2023 filed by Zipporah Mwau & Company Advocates. The verifying affidavit accompanying the plaint was sworn by Rosemary Muathe, who described herself as the sole director of Troy Medicare Pharmacy Ltd. She verified all the averments in the plaint as correct.
- 22. In the said Plaint, at paragraph 7 thereof, the Plaintiff averred that it had learnt that the Defendants were in the process of selling the subject property without compensating it. The Plaintiff proceeded to name the 3rd Party to whom the Defendants intended to sell the suit property to being, Gatma Holdings Ltd.
- 23. The Plaintiff prayed for a declaration that any attempt to retake possession and or evict the Plaintiff from the suit parcel (LR No 209/1829 – Fashion Plaza) is illegal, irregular, unlawful and void ab initio. Further that the attempted sale to Gatma Holdings Ltd or any other 3rd Parties is null and void.
- 24. The 3rd Prayer in the Plaint was an order that the Defendants compensates the Plaintiff for loss of income, goodwill and investment made on the premises in the event the Defendants evict the Plaintiff from the premises. The Plaintiff nonetheless prayed for a permanent injunction restraining the Defendants from evicting the Plaintiff and or its sub-tenants, disposing, selling and or in any other way parting with ownership and or changing ownership structure of the suit property in any manner that would affect the Plaintiff's interests, rights and or investments on the suit property.
- 25. The Notice of Motion dated 14th July, 2023 was premised on the grounds that the Defendants were illegally attempting to lease the suit premises to a third party known as Royal Palms Mustard Ltd and had directed its sub-tenants to pay rent to the said 3rd Party. The Plaintiff reiterated that the attempts by the Defendants were being made without compensating the Plaintiff/Applicant for their investment and goodwill and while their lease was subsisting.
- 26. The application of 4th August, 2023 seeks an order of injunction restraining the Respondents from accessing, entering, threatening and or in any manner whatsoever demanding rent from the sub-tenants, blocking, interrupting the Plaintiff's business premises and that the Officer Commanding Station – Kamukunji Police Station to ensure compliance.
- 27. In the application of 22nd August, 2023, the Plaintiff prays for an order directing the 2nd Interested Party (Royal Palms Mustard Ltd) to forthwith vacate and remove its offices unlawfully established in the suit property.
- 28. From the above analysis, it is clearly discernible that the 2nd Interested Party, Royal Palms Mustard Ltd, is in possession of the suit property. That is the reason why, the Plaintiff in its application of 22nd August, 2023 seeks for an order directing the 2nd Interested Party to vacate the suit premises and remove its offices unlawfully established in the premises. The fact of the 2nd Interested Party being in possession of the suit property was also confirmed by the Deputy Registrar of this Court in a report filed upon a site visit ordered by the Court.



29. From the affidavit evidence presented before the Court as well as the report by the Deputy Registrar, it will be right at this juncture to state that all the three Plaintiff's applications as framed are overtaken by events.
30. The Plaintiff through its Advocates led by Senior Counsel, Dr. John Khaminwa advanced an argument that the 2nd Interested Party gained possession of the suit property unlawfully, through collusion and connivance with the Defendants. They therefore urged the Court to put the Plaintiff in possession and issue an order directing the 2nd Interested Party (Royal Palms Mustard Ltd) to forthwith vacate and remove its offices unlawfully established in the suit property.
31. I must state it clearly that whether the action of putting the 2nd Interested Party into possession was lawful or otherwise is not for me to determine at this point in time, if at all. I say this for two (2) reasons. The 1st reason is that this is an interim application. The 2nd reason is that the dispute between the Plaintiff and the Defendants is subject to arbitration in accordance with the lease agreement between them.
32. Interim applications, as Catton L. J put in the case of *Gilbert v Eden* [1878] 9 Ch.D are those applications;
- “ which do not decide the rights of parties, but are made for purposes of keeping things in status quo till the rights of parties can be decided or for purpose of obtaining some direction of the court as to how the cause is to be conducted, as to what is to be done in the progress of the cause for the purpose of enabling the court ultimately to decide upon the rights of the parties.”
33. Ringera, J (as he then was) in *Airland Tours & Travel Limited v National Industrial Credit Bank Nairobi* (Milimani HCCC 1234 of 2002) also affirmed that in an interlocutory application, the court is not required to make any conclusive or definitive findings of facts or law on the basis of contradictory affidavit evidence or disputed propositions of law.
34. The 2nd reason as I have stated is because the dispute between the Plaintiff and the Defendants herein, the main disputants in this matter, is subject to arbitration.
35. In the case of *Infocard Holdings Limited v AG & 2 others* [2014] eKLR, the court held that Section 7 (of the *Arbitration Act*) does not give courts the power to look into the merits of the agreement and the dispute generally lest it interferes with the jurisdiction of the arbitral tribunal. I must leave it to the arbitral tribunal to determine the issues in dispute.
36. Section 7 of the *Arbitration Act*, and in particular on the issue of interim measures by the court, provides that: -
- “It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.”
37. The principles governing the grant of interim orders of protection under the *Arbitration Act* were outlined by the Court of Appeal in the now famous case of *Safaricom Limited v Ocean View Beach*



Hotel Limited & 2 others Civil Application No NAI 327 of 2009 [2010] eKLR, where Nyamu JA., observed as follows: -

“It may be necessary for an arbitral tribunal or a national court to issue orders intended to preserve evidence, to protect assets, or in some other way to maintain the status quo pending the outcome of the arbitration proceedings themselves. Such orders take different forms and go under different names. In the case of Kenya, the Arbitration Act is modeled on the Model Law and the UNCITRAL Rules and this is the reason they are known as ‘interim measures of protection’ under section 7 of the Arbitration Act.

Whatever their description however, they are intended in principle to operate as ‘holding’ orders, pending the outcome of the arbitral proceedings. The making of interim measures was never intended to anticipate litigation.

An interim measure of protection such as that sought in the matter before us is supposed to be issued by the court under section 7 in support of the arbitral process not because it satisfies the civil procedure requirements for the grant of injunctions as the High Court purported to do in this matter. To illustrate the point Article 26-3 of the UNCITRAL Arbitration rules states: -

‘A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of the agreement.’

Such interim measures include, measures relating to preservation of evidence, measures aimed at preserving the status quo, measures intended to provide security for costs and injunctions. Under our system of the law on arbitration the essentials which the court must take into account before issuing the interim measures of protection are: -

- i. The existence of an arbitration agreement.
- ii. Whether the subject matter of arbitration is under threat.
- iii. In the special circumstances which is the appropriate measure of protection after an assessment of the merits of the application.
- iv. For what period must the measure be given especially if requested for before the commencement of the arbitration so as to avoid encroaching on the tribunal’s decision-making power as intended by the parties.”

38. In the case of CMC Holdings Limited v Jaguar Land Rover Exports Limited [2013] eKLR, the court too held that: -

“In practice, parties to international arbitrations normally seek interim measures of protection. They provide a party to the arbitration an immediate and temporary injunction if an award subsequently is to be effective. The measures are intended to preserve assets or evidence which are likely to be wasted if conservatory orders are not issued. These orders are not automatic. The purpose of an interim measure of protection is to ensure that the subject matter will be in the same state as it was at the commencement or during the arbitral proceedings. The court must be satisfied that the subject matter of the arbitral proceedings will not be in the same state at the time the arbitral reference is concluded before it can grant an interim measure of protection.”



39. In its submissions which were highlighted before the Court, the Plaintiff submitted that the Court should issue its temporary orders of injunction and reinstate it into the suit property, as an interim measure of protection pending arbitration.
40. The question for the court to decide is whether the Plaintiff is entitled to an interim measure of protection, and whether what it has sought is the appropriate interim measure in the circumstances of this case.
41. Putting the Plaintiff in possession, under the prevailing circumstances of this case means evicting the 2nd Interested Party from the suit property. The 2nd Interested Party has submitted that it has an independent agreement with the Landlords – the Defendants.
42. Putting the Plaintiff in possession cannot, from whatever aspect one looks at it be an interim measure. Even if it were, it is not an appropriate interim measure in this case.
43. Considering the principles elaborated in the case of *Safaricom Ltd v Ocean View Beach Hotel Ltd* (*supra*), I am not persuaded that there is need for any interim measure than what is already in place – maintenance of status quo. No evidence has been presented before me to demonstrate that the suit property is under any threat; neither has a need been proved to preserve any evidence. The dispute between the Plaintiff and the Defendants is premised on the lease agreement between them. As I have already stated above, the Plaintiff submitted that its cause of action was prompted by the concern that the Defendants were likely to proceed with leasing, selling, or otherwise alienating the suit property without compensating the Plaintiff Company for the good will and reimbursement for the investments made and account for losses incurred. From its own pleadings, it is clear that any loss that the Plaintiff has suffered or may suffer is capable of compensation.
44. As such, I disallow the Plaintiff's applications and dismiss them accordingly.

Defendants' Application

45. For the Defendants' application prayer (i) will be allowed. The Defendant has demonstrated that the order, of 21st July, 2023 was issued after the 2nd Interested Party had already taken possession of the suit property. It is incapable of enforcement. In any event, it was premised on one of the applications that the Plaintiff withdrew.
46. The 2nd prayer is premature for consideration at this point in time.

Applications by Interested Parties:

47. I have had to grapple with the issue whether Interested Parties can seek substantive orders in a suit. Secondly, whether substantive orders can be issued against Interested Parties.
48. In the case of *Methodist Church of Kenya v Mohammed Fungicha & 3 others* [2019] eKLR, the Supreme Court of Kenya was categorical that:

“In every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the court will always remain the issues as presented by the principal parties, or as framed by the court from the pleadings and submissions of the principal parties. An Interested Party may not frame its own fresh issues or introduce new issues for determination by the Court.”

49. Guided by the above decision, I disallow the applications by the Interested Parties.



50. On the issue of costs, having considered the peculiar circumstances of this case, I direct that each Party will bear its own costs for purposes of the applications.
51. Having said that, the principal parties in this matter entered into a lease agreement with an arbitration clause. The existence of the arbitration clause in the lease agreement between the Plaintiff and the Defendants is not contested.
52. As the Court of Appeal stated in the case of *Hesamuddin Gulambussein Potbiwalla Administrator, Trustee and Executor of the Estate of Gulambussein & Ebrahim Potbiwalla v Kidogo Basi Housing Corporative Society Limited and 31 others* Civil Appeal No 330 of 2003: -
- “A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge. It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity’s function to allow a party to escape from a bad bargain.”
53. I accordingly stay the proceedings in this matter and refer the dispute between the Plaintiff and the Defendants to arbitration in accordance with the provisions of their own agreement. The parties are bound by the terms of their contract. No coercion, fraud or undue influence has been pleaded nor proved in this matter.
54. *Status quo* shall remain as is pending arbitration.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 13TH DAY OF DECEMBER, 2023.

M. D. MWANGI

JUDGE

In the virtual presence of:

Mr. Mutunga with Dr. Khaminwa, SC. For the Plaintiff

Mr. Gisemba for the Defendants

Mr. Miano for Royal Palms Mustard Ltd (2nd Interested Party)

N/A by the 1st Interested Party

Court Assisntnt: Yvette

M. D. MWANGI

JUDGE

