



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MALINDI

ELC CASE NO. 60 OF 2021

SUN PALM LIMITED.....PLAINTIFF

VERSUS

DAVID PIUS MUGAMBI.....DEFENDANT

RULING

This ruling is in respect of an Application brought vide a Notice of Motion dated 21st June 2021 by the Plaintiff/Applicant seeking the following orders; -

a) Spent

b) That pending inter partes hearing of the application, the Defendant by himself, agents and/or those claiming any interest whatsoever under him, be and is hereby restrained from entering and/or remaining upon or in any way whatsoever interfering with the quiet possession and enjoyment of property known as KILIFI/JIMBA/408;

c) That pending the hearing and determination of this application, the Defendant, by himself, agents and/or those claiming any interest whatsoever under him be and is hereby restrained from levying any distress against the suit premises;

d) That pending the hearing and determination of this application, there be a stay of execution of the court order dated 5th May 2021 in Miscellaneous Application No. E630 of 2021- David Pius Mugambi vs Sun Palm Limited & Africa Kivulini Management Limited;

e) That upon hearing of this application and pending the determination of the main suit, the Defendant by himself, agents and or those claiming any interest whatsoever under him, be and is hereby restrained from entering and/or remaining upon or in any way whatsoever interfering with the Plaintiff's quiet possession and enjoyment of the suit premises;

f) That costs be provided for.

Counsel agreed to canvas the application vide written submissions which were duly filed. The application was supported by the Affidavit of Eleonora Cozzi the Director of the Plaintiff company who gave a brief background to the case that the Plaintiff is the registered owner of the suit Premises and that the Defendant illegally and irregularly threatened to invade and forcefully enter into the Suit Premises in the pretext of enforcing court order dated 5th May 2021 in *Miscellaneous Application No. E630 of 2021 – David Pius Mugambi –vs- Sun Palm Limited & Africa Kivulini Management Limited*.

The Applicant deponed that vide an Agreement dated 26th April 2016, the Plaintiff let and leased the Hotel premises standing on Plot No. KILIFI/JIMBA/408 to Africa Kivulini Management Limited for a term of eleven (11) years ending in 2027 and that the Defendant by a letter dated 10th February 2020 purportedly offered to sell Sun Palm Limited to Africa Kivulini Management Limited Sun Palm Beach Resort for US Dollars Ten Million (US\$. 10,000,000) indicating that it was allegedly built on his property known as KILIFI/JIMBA/669.

He further deponed that vide the same letter of 10th February 2020, the Defendant demanded that he be paid rental income instead by the Plaintiff, allegedly because the Hotel Premises was sitting on his property- KILIFI/JIMBA/669. That the Defendant subsequently obtained an order from the *Business Rent Tribunal in Tribunal Case No. 15 of 2019 (Mombasa)* and in *Miscellaneous Application No. E630 of 2021* which in effect allows Work No Words Auctioneers to break into the Hotel premises in aid of distress.

The Applicant further deponed that as a consequence of the said order, Africa Kivulini Management Limited filed a suit against the Plaintiff

and the Defendant in **ELC Case No. 20 of 2020- Africa Kivulini Management Limited –vs- David Pius Muiruri & Sun Palm Limited & Another** seeking injunctive relief against Sun Palm & the Defendant and in the ruling of the Environment and Land Court dated 28th day of May 2021 the Honourable Court issued an order of injunction restraining Africa Kivulini, officers or agents from removing, carrying away, hiving off or taking from Sun Palm Beach Resort Watamu, any equipment, furniture and fixtures therein.

It was the applicant's case that in a Survey Report ordered by the Honourable Court in **ELC Case Number 20 of 2020 at Malindi**, regarding Plots No. **KILIFI/JIMBA/408** and **KILIFI/JIMBA/669** determined that **Sun Palm Limited** squarely sits on Plot No. **KILIFI/JIMBA/408** contrary to the allegations of the Defendant herein.

Counsel for the Applicant submitted that the Hotel Premises is the subject of an ongoing litigation in **ELC Case No. 20 of 2020 at Malindi**, with subsisting orders issued on 28th May, 2021, thus, allowing **Work No Words Auctioneers** to break into the Hotel premises in aid of distress is bound to interfere with the substratum of the matter in the ongoing litigation at the Environment and Land Court which both the Plaintiff and the Defendant are part of.

Counsel further submitted that the Defendant is laying a claim to ownership of the Hotel, though erroneously, and has already attempted to gain entry into the premises forcefully. the Plaintiff has suffered and continues to suffer irreparable loss and harm that cannot be compensated by way of damages should the injunctive reliefs sought not be granted pending the hearing of the main suit.

It was counsel's submission that there has never been any landlord-tenant relationship between the Plaintiff and the Defendant and that in 1996, the Plaintiff bought the two parcels of land namely KILIFI/JIMBA/408 and KILIFI/JIMBA/669 from Mohamed Siaka Ali vide an Agreement dated 22nd October 1996. However, Mr. Ali and the Plaintiff disagreed on purchase price and the acreage of property that was being sold. Before Mohamed Ali Siaka passed on, he instituted **Nairobi ELC Case No. 663 of 2005 – Mohamed Ali Siaka –vs- Sun Palm Limited & 3 Others**.

Mr. Lumumba submitted that upon entering into agreement with Mr. Ali, the Plaintiff herein went on to construct Sun Palm Beach Resort watamu on what the Plaintiff considered as parcel number KILIFI/JIMBA/408 which he let out to M/S Africa Kivulini Limited vide a management contract dated 26th April 2016.

Counsel stated that on 31st July 2015, Judgement was rendered in favour of the Estate of the Deceased by Honourable Justice Mutungi in the following terms: -

a) That the registration of land parcel Kilifi/Jimba/669 in favour of Sun Palm Limited be and is hereby declared null and void and is ordered to be cancelled forthwith;

b) That the Chief Land Registrar through the Land Registrar Kilifi be and is hereby ordered to register Mohamed Shaibu Soshi the personal legal representative of Mohamed Saika Ali (Deceased) as the owner of the land parcel Kilifi/Jimba/669 in place of Sun Palm Limited;

c) The Plaintiff herein being dissatisfied with the said judgement, preferred an appeal in Nairobi Civil Appeal Number 240 of 2015- Sun Palm Limited –vs- Mohamed Saika Ali & others. However, judgment rendered on 7th February, 2020, the Court of Appeal dismissed the Appeal;

Mr. Lumumba for the Applicant further submitted that the existence of varying orders by the lower court and the superior court namely, the Court order dated 5th May 2021 by the Hon. D.N. Kivuti, Principal Magistrate sitting at Milimani Commercial Courts at Nairobi in **Misc. Application No. E 630 of 2021** and a Court Order dated 28th May 2021 by Justice J.O Olola at Environment and Land Court, at **Malindi in ELC Case No. 20 of 2020** has caused confusion which the Defendant is now exploiting in an attempt to deny the Plaintiff the ownership of the suit Premises.

Counsel relied on the principles for grant of injunction as per the **Giella V Cassman Brown** and submitted that the Plaintiff has met the threshold for grant of injunctions and that the conflict as to where the hotel is situate was resolved in **ELC Case No. 20 of 2020** whose finding was that the suit property squarely sits on Plot No. Kilifi/Jimba/408 and there has never been any landlord-tenant relationship between the parties.

On the issue as to whether the court should stay the proceedings at the lower court pending the determination of this suit, counsel submitted that the suit property is subject to an ongoing litigation in **ELC Case No. 20 of 2020** with subsisting orders preserving the subject matter and therefore allowing the auctioneers to break into the suit premises for distress is bound to interfere with the substratum of the subject matter.

Counsel submitted that it is the express statutory prohibition of conducting parallel claims between the same parties seeking the same remedies or substantially the same remedies, in different courts or fora as provided for under Section 6 of the Civil Procedure Act, and urged the court the proceedings in the lower court and allow the application as prayed.

DEFENDANT/ RESPONDENT'S SUBMISSIONS

Counsel for the Respondent gave a brief background to the case and submitted that the orders sought for in the Plaintiff cannot be granted as they are superfluous for reason that title No. Kilifi/Jimba/408 and Kilifi/Jimba/669 are distinct pieces of land with separate titles.

Counsel also submitted that this is a boundary dispute which has already been resolved by the Land Registrar Kilifi in her report dated

18th January, 2021 and in the circumstances the interim orders herein should be vacated as the said orders do not affect Land Parcel No. **KILIFI/JIMBA/669** which is registered in the name of the Defendant/Respondent herein.

Mr. Mugambi submitted that the issue ownership of **KILIFI/JIMBA/669** as between the Plaintiff and the Defendant herein was resolved by the Court of Appeal in Civil Appeal No. 240 of 2015.

Counsel also stated that until the ruling of the Hon Justice Nyakundi is set aside by the Court of Appeal the order remains in force and rent is still accumulating and as 30th November, 2021, the arrears stand at Kshs 89,100,000/= (Eighty-Nine Million and One Hundred Thousand Kenya Shillings). Counsel urged the court to dismiss the application with costs.

ANALYSIS AND DETERMINATION

This is a case that has traversed all the courts, from Magistrates' Court, Environment and Land Courts in Malindi and Nairobi and the High Court in Malindi. The question is why are litigants filing cases involving same parties in different courts in respect of the same subject matter. The current application is for injunction and stay of a lower court *Miscellaneous Application No E0630 of 2021* allowing for distress for rent.

There are several orders that have been issued in these cases from the lower court and the Environment and Land Court in respect of the suit premises. It should be noted that there is active litigation in respect of the same parties and the same subject matter where contradictory orders have been granted including the preservation of the substratum of the suit land and another allowing distress for rent.

The issues for determination is whether the Applicant has met the threshold for grant of injunction and whether the lower court suit should be stayed. The chronology and the history of this case which has orders flying from different courts, there has to be something to be done to bring order to the litigation of this case.

In the case of *Exclusive Estates Ltd V Kenya Posts & Telecommunications Corporation & Another, Civil Appeal No.62 of 2004* the court held that: -

'A temporary injunction is issued in a suit to preserve the property in dispute in the suit of the rights of parties under determination in a suit pending the disposal of the suit, to preserve the subject matter'.

It is on record that the Defendant has threatened to invade and forcefully enter the suit premises in enforcing a court of order dated 5th May 2021 and that he states that he is not interested in occupying the suit premises. There has been protracted litigation between the parties with varying positions that the ownership issue has been resolved so there is no need of the current application.

From the pleadings and the submissions, it is clear that there are many unresolved issues and that there is a pending *Case No. 20 of 2020* which is yet to be determined. I notice that in that case, there is an injunction was issued stopping the removal of equipment, furniture and fixtures from Sun Palm Ltd which is still subsisting. An order for distress and breaking into the premises would be contradictory to the order of injunction.

The court notes that there are varying orders by the lower court and the superior court namely, the Court order dated 5th May 2021 by the Hon. D.N. Kivuti, Principal Magistrate sitting at Milimani Commercial Courts at Nairobi in *Misc. Application No. E 630 of 2021* and a Court Order dated 28th May 2021 by Justice J.O Olola at Environment and Land Court, at Malindi in *ELC Case No. 20 of 2020* which in my view should not be the case where litigants are approaching different courts. This amounts to forum shopping which should be stemmed.

I have considered the pleadings, the submissions by counsel and come to the conclusion that there is a need to preserve the substratum of this case to enable all the issues be determined. The Applicant has met the threshold for grant of an injunction and therefore any distress or removal of the fixtures, equipment or furniture would be interfering with the subject matter. If this is allowed then by the time the cases involving these parties are heard, there will be nothing to litigate on.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF MARCH, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.