



REPUBLIC OF KENYA



Faza Properties Limited v Mohamed & another; Mwea Rice Mills Limited & another (Interested Parties) (Environment & Land Case E014 of 2022) [2022] KEELC 2225 (KLR) (28 April 2022) (Ruling)

Neutral citation: [2022] KEELC 2225 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENT & LAND CASE E014 OF 2022**

**JA MOGENI, J
APRIL 28, 2022**

BETWEEN

FAZA PROPERTIES LIMITED PLAINTIFF

AND

ABDIRAHMAN SHEIKH MOHAMED 1ST DEFENDANT

HASSAN HUSSEIN MOHAMMED 2ND DEFENDANT

AND

MWEA RICE MILLS LIMITED INTERESTED PARTY

MURAGE ESTATE AGENTS LIMITED INTERESTED PARTY

RULING

1. This application is dated 18.01.2022 the Notice of Motion does not specify under which law it is brought to court. The application seeks the following orders:
 - i. Spent
 - ii. Pending the hearing and determination of this application, this Honorable Court be pleased to issue an injunction restraining the Defendant/Respondents, their servants, employees, agents or any person whatsoever claiming through them from trespassing or in any manner interfering with the Plaintiffs/Applicants' possession, use and/or quiet enjoyment of Land Reference No 209/590 situate at Moi Avenue in Nairobi County.
 - iii. Pending the hearing and determination of this suit, this Honorable Court be pleased to issue an injunction restraining the Defendants/Respondents, their servants, employees, agents or any person whatsoever claiming through them from trespassing or in any manner interfering



with the Plaintiffs/Applicant's possession, use and/or quiet enjoyment of Land Reference No. 209/590 situate at Moi Avenue in Nairobi County.

- iv. Pending the hearing and determination of this Application this Honorable Court be pleased to stay proceeding in Nairobi BPRT No. E 387 of 2021, Abdirahman Sheikh Mohamed v Faza Properties Limited and Milimani CMCC MISC No. E1845 of 2021. Joseph DBK Kimani T/ A Pyramid Auctioneers v Faza Properties Limited.
 - v. Pending the hearing and determination of this suit, this Honorable Court be pleased to stay proceeding in Nairobi BPRT No. E 387 of 2021, Abdirahman Sheikh Mohamed v Faza Properties Limited and Milimani CMCC MISC No. E1845 of 2021. Joseph DBK Kimani T/ A Pyramid Auctioneers v Faza Properties Limited.
 - vi. The costs of this Application be borne by the Defendants/Respondents
2. The application is supported by the affidavit sworn on 18/01/2022 by Noor Sharif Abdulahi the director of the plaintiff.
 3. The defendants did not file a replying affidavit nor submissions.
 4. The 1st and 2nd Interested Parties filed a Replying Affidavit on 10/02/2022 where they noted that the 2nd Respondent is a stranger to the 1st and 2nd interested party and to the suit property.
 5. This court had with consensus of the parties directed that the application be disposed of by way of written submissions only the plaintiff filed their submissions the 1st and 2nd Interested Parties filed their submissions in support of the Application on 18/03/2022.
 6. The application is therefore unopposed.

Determination

Issue

7. The issue for determination is whether this Court has jurisdiction to entertain this matter and if so whether the Plaintiff is entitled to the prayers sought.

Jurisdiction

8. It is not in dispute that this suit relates to a lease agreement for tenancy. The documents filed by the plaintiff/applicant show that there are two pending suits before the BPRT relating to the subject matter herein, to wit, BPRT No. E 387 of 2021, Abdirahman Sheikh Mohamed v Faza Properties Limited And Milimani CMCC MISC No. E1845 of 2021, Joseph DBK Kimani T/A Pyramid Auctioneers v Faza Properties Limited.
9. It is therefore common ground that the right forum to ventilate the dispute between the parties herein is the BPRT.
10. However, the orders sought in the Notice of Motion Application dated 18.01. 2022 and the Plaint are orders of injunction. It is trite law that the BPRT does not have jurisdiction to grant orders of injunction. In the case of *Republic Vs Business Premises Rent Tribunal & another & Exparte Davies Motor Corporation Limited* [2013] eKLR, Odunga, J. held as follows:

“The issue for determination is therefore whether the Respondent had jurisdiction to grant an order of injunction. On my part I agree that the spirit of the Act which is to ensure



the protection of tenants of controlled tenancies from eviction or exploitation would be rendered nugatory if the Tribunal was not similarly granted the jurisdiction to preserve the status quo between the landlord and the tenant pending the determination of the dispute before it. It is however not for this Court to grant to the Tribunal powers which it does not have. As was held by the *Court of Appeal in Italframe Ltd vs. Mediterranean Shipping Co.* [1986] KLR 54; [1986-1989] EA 174:

“It is not competent to any court to proceed upon an assumption that Parliament has made a mistake, there being a strong presumption that Parliament does not make mistakes. If blunders are found in legislation, they must be corrected by legislature, and it is not the function of the Court to repair them. Thus while terms can be introduced into a statute to effect to its clear intention by remedying mere defects of language and to correct obvious misprints or misnomers no provision which is not in the statute can otherwise be implied to remedy an omission... It is one thing to introduce terms into an Act of Parliament in order to give effect to its clear intention by remedying mere defects of language. It is quite another thing to imply a provision which is not in the statute in order to remedy an omission, without any ground for thinking that you are carrying out what Parliament intended. It is not the function of the Courts to repair the blunders that are to be found in legislation. They must be corrected by the legislature.”

Therefore whereas it is my view that by not expressly granting the Tribunal the power to grant orders of injunction Parliament made a blunder since it rendered the intention and objective of the whole Act a mirage, based on the authorities from the Court of Appeal I am unable to find that the Tribunal is empowered under section 12 of the Act to grant orders of injunction.

In Narshidas & Company Limited vs. Nyali Air Conditioning and Refrigeration Services Limited Civil Appeal No. 205 of 1995, the Court of Appeal held that a controlled tenant confronted with an illegal threat of forcible eviction cannot go to the Business Premises Rent Tribunal established under the Act as that Tribunal has no jurisdiction to issue an injunction or similar remedy against the landlord. Similar holdings were made in Caledonia Supermarket Ltd vs. Kenya National Examinations Council (supra) and Tiwi Beach Hotel Ltd vs. Julian Ulrike Stamm (supra). It follows that by granting orders of injunction the Respondent acted outside its mandate.” (emphasis mine)

11. It therefore follows that the Plaintiff could not have obtained the orders sought in this case in the cases pending in the BPRT since the BPRT has no jurisdiction to grant reliefs of injunction.
12. Precedence shows that the right forum is to seek orders of injunction in the High Court even if there is a case pending in the PBRT. This was the holding in the case of *S. N. T/A Baby Steps Kindergarten Vs Hasham Lalji Properties Ltd & Another* [2008] eKLR, where Nambuye, J. (as she then was) held that the High Court has jurisdiction to entertain an application for injunction even if the dispute arises from tenant landlord relationship governed by the *Landlord, Tenant, Shops Hotels and Catering Establishment Act*, Cap. 301. The learned Judge held as follows:

“Issue of jurisdiction arises because it is common ground that the dispute arises from a tenant and land lord relationship which relationship is governed by the land lord, tenant, shops, hotels, and catering Establishment Act Cap 301 Laws of Kenya. It is trite law and this court has judicial notice of the fact that the said Act has an inbuilt dispute resolution mechanism



to some extent. This mechanism does not cover disputes seeking such equitable reliefs. The court of appeal in its decision in the case of *Narshidas & Company Ltd Versus Nyali Air Conditioning And Refrigeration Services Ltd Nariobi CA 205/1995* where the central theme in the decision is that a controlled tenant confronted with an illegal threat of forceable eviction cannot go to the business premises rent tribunal established under the Act as that tribunal has no jurisdiction to issue an injunction or similar remedy against the landlord. The CA went on to state that the superior court has jurisdiction not only to entertain the application for the injunctive relief but also to grant the same. On that basis this court is satisfied that it is properly seized of the matter.”

13. A similar holding was made in the case of *Reuben Gitonga M'Mugambi v Kenyatta National Hospital* [2005] eKLR where Ojwang, J. (as he then was) held that the High Court can provide interlocutory relief even if the matter was before the BPRT.
14. In my view, the Application (and the Plaint) for orders of injunction pending hearing and determination of the cases pending in the BPRT is properly before this court. The High Court is an appropriate forum as the Plaintiff could not apply to the BPRT for orders of injunction. This court is enjoined by Section 3A which has been invoked by the Applicant, to exercise its inherent power and to make such orders as may be necessary for the ends of justice.
15. Having established that the Application is properly before this court, it is my view that the same should be determined on the basis of the principles of injunction as laid down in the case of *Giella v. Cassman Brown & Co. Ltd* [1973] EA 358 at page 360 where Spry J. held that:-

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show 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 an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

Are Plaintiffs entitled to prayers sought

16. From the material placed before Court I do find that the Plaintiffs have met the first condition of *Giella V Cassman Brown* (supra). In my view if any injunction was not granted the injury the Plaintiffs may suffer may not be compensable with an award of damages. Moreover, since there are outstanding matters before the BPRT interim measure of protection ought to be granted to the Plaintiffs. Having made that finding I do hereby make the following orders-
 - a. An injunction is hereby issued restraining the Defendants/Respondents their servants, employees, agents or any person whatsoever claiming through them from trespassing or in any matter interfering with the plaintiffs/applicant’s possession, use and/or quiet possession, use and/or quiet enjoyment of Land Reference No. 209/590 situate at Moi Avenue in Nairobi pending the hearing and determination of the main suit or pending the hearing or determination of BPRT No. E 387 of 2021, Abdirahman Sheikh Mohamed v Faza Properties Limited and Milimani CMCC MISC No. E1845 of 2021, Joseph DBK Kimani T/A Pyramid Auctioneers v Faza Properties Limited.
 - b. The costs of the Notice of Motion dated 18/01/2022 shall be in the Cause

DATED, SIGNED AND DELIVERED ON THIS 28TH DAY OF APRIL 2022



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MOGENI J

JUDGE

In the Presence of

Mr. Wafula h/b for Mr. Khaemba for the Plaintiffs/Applicants

Mr. Shikhanda h/b for Mr. Osundo for the 1st Defendant

N/A for the 2nd Defendant

Vincent Owuor - Court Assistant

