



Selectica Limited v Gold Rock Development Limited (Environment and Land Appeal 63 of 2019) [2022] KEELC 2422 (KLR) (28 April 2022) (Judgment)

Neutral citation: [2022] KEELC 2422 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL 63 OF 2019
LC KOMINGOI, J
APRIL 28, 2022
(FORMERLY HCCA NO.48 OF 2015)**

BETWEEN

SELECTICA LIMITED APPELLANT

AND

GOLD ROCK DEVELOPMENT LIMITED RESPONDENT

(Being an appeal from the ruling of the Resident Magistrate Honourable Ms. Leah W. Kabaria in Milimani CMCC No.1534 of 2014-Gold Rock Development Ltd v Selectica Ltd)

JUDGMENT

1. This is an appeal against interlocutory orders of the subordinate court (Hon. Ms. Leah W. Kabaria, Resident Magistrate, Milimani) issued on January 30, 2015 in Milimani CMCC No.1534 of 2014-Gold Rock Development Ltd v Selectica Ltd.
2. The appellant herein was the Defendant and the respondent was the plaintiff. In the plaintiff's Amended Notice of Motion dated May 20, 2014, the lower court issued a mandatory injunction compelling the defendant to vacate and deliver vacant possession of the premises it occupied on property known as Land Reference Number 2/122, Kilimani Estate, Nairobi and the appellant herein being aggrieved, filed this Memorandum of Appeal dated February 12, 2015.
3. The facts at the subordinate court are that the appellant herein entered into a lease dated September 1, 2008 with Tusk Constructions Limited over the premises in the property known as Land Reference Number 2/122 Kilimani, Nairobi for a term of 5 years and 3 months beginning April 1, 2008. The plaintiff subsequently acquired the suit property on or about August 3, 2011 subject to the lease in dispute. The lease expired on June 30, 2013.



4. The plaintiff alleged that the defendant irregularly and without consent continued to hold onto the property without making any payments for rent. The defendant contended that as per clause 5 of the lease in contention, the lease would automatically be renewed provided that the defendant gave notice before expiration of the lease, which notice the defendant allegedly issued to Tusk Constructions Limited and copied to the defendant and by the time the suit was filed, the plaintiff and the defendant were in negotiations to have it renewed.
5. The appellant raised the following grounds of appeal:-
 - a. The proceedings and ruling of the learned Magistrate is a nullity ab initio and unconstitutional for the reason that the Magistrate and indeed the Subordinate Court had no pecuniary jurisdiction to hear the suit. The Respondent in an affidavit filed on its behalf had adduced evidence before the trial Magistrate that the suit property has a value of not less than kshs.200,000,000/= whereas the jurisdiction of the Magistrate is less than kshs.10 million.
 - b. The learned Magistrate erred in law and misdirected herself when she gave final orders that irreversibly and finally disposed of all the issues in dispute in the suit in an interlocutory application thereby rendering any purported hearing of the suit a sham.
 - c. The learned Magistrate erred and misdirected herself in law in granting the Respondent an order to evict the appellant when the prayer for mandatory injunction had been abandoned by the amended Notice of Motion.
 - d. The learned Magistrate erred and misdirected herself in law by granting the respondent in an interlocutory application an order of eviction. The law and the rules of court do not give the court jurisdiction or power to grant an order of eviction in interlocutory proceedings wherefore the said order is unconstitutional, null and void ab initio.
 - e. The learned Magistrate erred and misdirected herself in law in granting temporary orders of injunction when the respondent had not demonstrated under the principles in *Giella v Cassman Brown & Brothers Limited* that unless the temporary injunctions were granted the respondent would suffer irreparable loss that cannot be granted by damages. On the contrary, it is manifest from the material on record that if the orders of the learned Magistrate are executed then it is the appellant that will suffer irreparable loss that cannot be compensated by an award of damages.
 - f. The learned Magistrate erred and misdirected herself in law by ordering the eviction of the appellant without giving it an opportunity by way of a reasonable notice to voluntarily vacate the suit property.
 - g. The decision and order of the learned Magistrate is designed and/or has the purpose and effect of visiting maximum harm ,hardship and ambush on the appellant whereof the same is injudicious, unconstitutional, oppressive, unjust and should be reversed and vacated.
 - h. The decision and orders of the learned Magistrate are a travesty of justice and an abuse of the constitutional and legal rights of the appellant.
 - i. The decision and orders of the learned Magistrate are an affront to the rule of law.
 - j. The learned Magistrate erred in awarding an interlocutory application.
6. The Appeal was canvassed by way of written submissions.



The Appellant's submissions.

7. They are dated July 10, 2019. Counsel for the appellant submitted on the following issues;
 - a. Whether the Learned Magistrate had pecuniary jurisdiction to hear the matter.
 - b. Whether the Learned Magistrate erred in law and misdirected herself when she gave final orders in an interlocutory application.
 - c. Whether the Learned Magistrate erred and misdirected herself in law in granting the respondent an order to evict the appellant when the prayer for mandatory injunction had been abandoned by the amended Notice of Motion.
 - d. Whether the Learned Magistrate erred in law in granting temporary orders of injunction when the respondent had not demonstrated the principles of *Giella v Cassman Brown & Brothers Ltd.*
 - e. Whether the learned Magistrate erred and misdirected herself in law by ordering the eviction of the appellant without giving it an opportunity by way of a reasonable notice to voluntarily vacate the suit property.
8. On the issue of jurisdiction, counsel submitted that the pecuniary jurisdiction of a Resident Magistrate is Ksh.5 Million as provided for under section 7 of the *Magistrate's Court Act 2015*. He further submitted that the respondent adduced an indenture of conveyance dated August 3, 2011 stating that the suit property was purchased by the Respondent in the year 2011 in consideration of kshs.200 million which is well in excess of the trial court's jurisdiction. He cited the case of *Isaac Ngiri Mwangi v Veronica Wangari Isaac & others* 2013 eKLR.
9. It was his submission that the learned magistrate gave final orders in an interlocutory application as the appellant was compelled to vacate the suit premises and there was nothing left to determine. He added that the court failed to consider the appellant's evidence which included the appellant having given sufficient notice of its intention to renew the lease and the correspondence between the parties in which parties negotiated for rent.
10. Counsel also submitted that the respondent had abandoned the prayer for injunction in its amended notice of motion thus it was an unobtainable prayer. He added that the respondent did not deserve injunction orders for failing to demonstrate that it met the principles in *Giella v Cassman Brown & Co. Ltd.*
11. It was counsel's submission that the appellant was denied sufficient notice which is a requirement under the UN Fact Sheet No.21/rev1 thus the trial Magistrate's decision was a travesty of justice and an abuse of the Constitutional and legal rights of the appellant. He added that by failing to issue notice to the appellant, the appellant was denied an opportunity to organize itself thus it suffered inconveniences especially on the struggle of trying to find another place and putting its house in order within a short time.

The Respondent's submissions

12. They are dated September 24, 2021. On the issue of pecuniary jurisdiction, counsel for the Respondent submitted that the purchase price of the suit property was indeed Kshs.200 Million but argued that the subject matter of the suit was not ownership of the suit premises but the question of whether the appellant had a right to hold over the suit premises when its lease had expired. He added that the appellant occupied a room at the suit premises at a rent of kshs.300, 000/= per month which is within



- the pecuniary jurisdiction of a Resident magistrate which is set by section 7(1) (a) of the Magistrate's Court Act at Kshs.5 Million. He relied on the case of Peter Gitau Kariuki & another v Nelson Gitabi Wanuna [2021] e KLR.
13. He also submitted that the learned Magistrate did not give final orders which irreversibly and finally disposed of all issues in dispute. He added that besides a mandatory induction, the Respondent sought for mesne profits and costs of the suit and the reliefs granted were all granted pending hearing and determination of the suit.
 14. It was also his submission that in appropriate circumstances, the court has power to grant an interlocutory mandatory injunction which is final in nature as restated in the case of David Mwiyei v Julius Musyoka Kilya [2017]e KLR and the facts of this case before the Magistrate's court demonstrated clear and special circumstances warranting the issuance of an interlocutory mandatory injunction.
 15. On the issue whether the learned trial Magistrate misdirected herself on the law and whether she had jurisdiction to grant an order of eviction in interlocutory proceedings, he submitted that the learned trial Magistrate correctly applied the principles applicable in an application for interlocutory mandatory injunctions from decisions of the courts in Sharrif Abdi Hassan v Nadbif Jama Adan [2006] e KLR and Locabaill International Finance Ltd & anor v Agro Export and others [1986] ALL ER 907; Kenya Breweries Ltd v Washington Okeyo and the Court of Appeal's decision in Ndungu Boro v Peter K Njuguna & another[2002]eKLR.
 16. He submitted that the learned trial Magistrate correctly applied the principles for grant of an interlocutory prohibitory injunction and arrived at a just decision. He pointed out that the learned Magistrate correctly found that a prima facie case had been established as there was a lease between the parties which was set to expire on June 30, 2013. He added that she found that the Respondent had notified the Appellant of its intention to not extend the lease and it was never extended as negotiations to extend did not bear fruit. On the second limb as to whether irreparable loss could result which could not be remedied by damages, he submitted that the learned trial Magistrate correctly found that even though the said loss could be quantified, she would still grant the order for injunction due to balance of convenience.
 17. On the appellant's contention that it was not accorded reasonable notice, he submitted that the appellant had notice of the impending eviction having participated in the application. He added that the appellant was granted a conditional stay of execution subject to payment of USD 200,000.00 into a joint interest earning account but it did not comply with the orders resulting in the eviction carried out on September 3, 2015.
 18. He relied on the case of Famy Care Limited v Public Procurement Administrative Review Board & another & 4 others [2012]eKLR to submit that economic and social rights including the right to housing under article 43(1)(b) of the Constitution and any rights derived from those, including any safeguards against forced evictions are rights which are enjoyed by natural persons and cannot be enjoyed by a juridical entity such as the Appellant.
 19. He argued that the UN Habitat Fact Sheet No.21/rev 1 is not applicable because it is a series of publications issued by the United Nations but it is not a treaty.
 20. I have considered the grounds of appeal, the rival submissions and the authorities cited. The issues for determination are:-
 - i. Whether the Learned Trial Magistrate had pecuniary jurisdiction to entertain the matter.



- ii. Whether the Learned Trial Magistrate misdirected herself in law in granting the Respondent an order to evict when the prayer for mandatory injunction had been abandoned by the amended notice of motion.
 - iii. Whether the Learned Trial Magistrate correctly applied the principles of grant of interlocutory injunctions.
 - iv. Who should bear costs of this Appeal?
21. The appellant contended that the learned trial Magistrate had no jurisdiction to entertain this suit since the value of the subject matter exceeded the pecuniary jurisdiction of a Resident Magistrate. Section 7 of the *Magistrate's Court Act, 2015* provides that a Magistrate's Court has jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed 5 million Kenya Shillings where the court is presided over by a learned trial Magistrate. The parties are in agreement that the suit property was bought at kshs.200 million. However, the respondent has only leased a premises on the suit property to the appellant at Kshs.300,000/= per month. The respondent argued that the Resident Magistrate had jurisdiction to entertain the matter as the dispute revolves around the leased portion of the suit property and not ownership of the entire suit property. It relied on the decision of the court in *Peter Gitau Kariuki & another v Nelson Gitahi Wanuna* (*supra*) where the court opined that the subject matter of the case was the value of the room constructed on the suit property and not be the entire property.
22. In *Anne Lokidor v Nairobi City County* [2019] eKLR, faced with similar facts, the court stated, "The subject matter of the dispute was not the value of the Suit property, rather it was the appellant's claim that she was entitled to remain in the suit premises as a tenant paying rent monthly having expended funds in renovating the house and not being in arrears of rent. The Business Premises Rent Tribunal (BPRT) deals with rent disputes in respect of leases over business premises without basing the claim on the value of the suit premises as the subject matter of the dispute. A tenant leasing a small part of a shopping mall whose market value is Kshs. 1 billion and paying a monthly rent of Kshs. 20,000/= can move the BPRT where it has jurisdiction to determine the dispute over rent increment by the landlord."
23. In another persuasive authority of this court, in *Republic v Chief Magistrate Court of Nakuru & another Ex-parte Charles Njibia Nganga* the court stated; ".....It therefore did not matter whether the plaintiff was asking for eviction, or a declaration of trespass, or for injunction. The prayers were not important. It is the value which was important and the value certainly did exceed that which the Magistrate's Court was permitted to handle." Guided by the above mentioned authorities, the value of the subject matter in this suit is what used to determine pecuniary jurisdiction. The value of the subject matter herein cannot be said to be kshs.200 Million since the Appellant has only leased a premises on the suit land at kshs.300,00/= per month. The pecuniary jurisdiction of a Resident Magistrate being kshs.5 million, the learned Resident magistrate had jurisdiction to hear the matter.
24. The Amended Notice of Appeal dated April 24, 2014 sought the following orders:-
1. That pending the interpartes hearing and determination of this suit this honourable court be pleased to grant an interim injunction restraining the defendant either by itself, its agents or servants from continuing to illegally occupy the premises on Land Reference Number 2/122, Kilimani Estate, Nairobi.
 2. That pending the interpartes hearing and determination of this suit, this honourable court be pleased to issue an order compelling the defendant to vacate and deliver vacant possession of



all that property known as Land Reference Number 2/122, Kilimani Estate, Nairobi to the Plaintiff.

- 2A. That pending the interpartes and determination of this suit, the defendant be evicted from all that property known as Land Reference Number 2/122, Kilimani Estate Nairobi.
 3. That this honourable court be pleased to direct the Provincial Police Officer Nairobi to assist the Plaintiff in the enforcement of the eviction order.
 4. That pending the interpartes hearing and determination of this suit this honourable court be pleased to grant an interim injunction restraining the Defendant either by itself, its agents or servants from interfering with the Plaintiff's quiet possession and enjoyment of all that parcel of land known as Land Reference Number 2/122 Kilimani Estate, Nairobi.
 5. That the costs of this application be provided for.
25. It is clear from the above that prayer No 2 sought an order to compel the defendant to vacate and deliver vacant possession of the suit premises.
 26. It is not therefore true as alleged by the appellant that the prayer for mandatory injunction had been abandoned by the Amended Notice of Motion.
 27. On the issue whether the learned trial Magistrate considered the principles for grant of mandatory injunctions and whether she was seized with jurisdiction to grant interim mandatory injunctions, the learned trial Magistrate applied the principles for grant of interlocutory mandatory injunctions as set by case law, applied them to the facts and reached her finding. In addition to the authorities she relied on, this court is guided by the court of Appeal's decision in the case of *Kenya Breweries Ltd & another v Washington O. Okeyo* [2002] eKLR, where the Court of Appeal stated; "A mandatory injunction ought not to be granted on an interlocutory application in the absence or special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction."
 28. The learned trial Magistrate considered the special circumstances of this case being that there was a tenancy relationship between the appellant and Tusk Constructions Limited and by the time the lease expired, the respondent had acquired the suit property. She took into consideration that there were negotiations to renew the lease on new terms set by the respondent who was the new landlord but the appellant did not agree with the terms. The learned trial Magistrate exercised her discretion and found that since the tenancy had ended, the court could not force a tenant on the landlord thus there was no way the Appellant could remain on the suit property.
 29. This court is guided by the decision of the court in *Mbogo v Shah* [1968] EA 93, where it was held that: "a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been a misjustice."
 30. While the appellant argued that the learned trial Magistrate issued final orders in the interim and there is nothing else to determine, the Respondent's amended plaint dated May 20, 2014 had other prayers which are pending determination including the prayer for mesne profits and costs of the suit.



31. I agree with the respondent's submissions that the appellant having participated in the application had notice of the impending eviction in the event the respondent's application succeeded. I find that the appellant had notice of the impending eviction.

32. In conclusion, I find no merit in this appeal and the same is dismissed with costs to the respondent.

It is so ordered.

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

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L. KOMINGOI

JUDGE

In the presence of:-

Ms Wanyonyi for the Appellant

Mr. Nyaburi for the Respondent

Steve Musyoki - Court Assistant

