



Kariuki & another v Nairobi City County & another (Environment & Land Case E170 of 2021) [2022] KEELC 2949 (KLR) (12 May 2022) (Ruling)

Neutral citation: [2022] KEELC 2949 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E170 OF 2021**

LC KOMINGOI, J

MAY 12, 2022

BETWEEN

ETHAN CHEGE KARIUKI 1ST APPLICANT

ELIUD NGOCHI NDUGI 2ND APPLICANT

AND

NAIROBI CITY COUNTY 1ST RESPONDENT

NAIROBI METROPOLITAN SERVICES 2ND RESPONDENT

RULING

1. The plaintiffs/applicants filed the notice of motion application dated May 18, 2021. It is brought under article 40 of *the Constitution* of Kenya (2010) under section 1A, 3A, & B of the *Civil Procedure Act*, order 40 of the *Civil Procedure Rules* (2010) and other enabling laws.
2. The applicants seek orders:-
 - a. Spent.
 - b. Spent.
 - c. That an order of temporary injunction be and is hereby issued restraining the defendants/respondents herein acting through themselves, their officers, elected leaders, agents, affiliate youth groups or anybody claiming any right or interest through them from closing, entering, occupying, dealing, developing, transfer, leasing/granting to any other person the right to run and/or occupy or in any way interfere with the Applicant's management of the Haile Selassie Roundabout MM8 toilet, pending the hearing and determination of the main suit.
 - d. That the officer commanding station(OCS) Kamukunji Police station do ensure compliance of the above orders.



- e. That this Honourable court be pleased to condemn the respondents to pay costs of this application.
3. The grounds in support of the motion are set out on its face. The application is also supported by the affidavit of the 2nd plaintiff/applicant sworn on May 18, 2021. He deponed that he is the duly elected chairman of friends of Muthurwa Self Help Group/project and that the plaintiffs /applicants through the business name of the self-help group are responsible for the management and operation of the Haile Selassie Roundabout MM8 toilet pursuant to a management agreement dated October 1, 2018 between the self-help group and the 1st defendant.
4. He further deponed that the self-help group members have been harassed, intimidated and arrested by the 2nd respondent's officers, agents and servants despite being in possession of valid management agreements and licenses permitting them to run the ablution block.

The 1st Defendant's response

5. The 1st defendant/respondent opposed the application vide the replying affidavit sworn on June 24, 2021 by Abwao Eric Odhiambo, the 1st defendant's County Solicitor. He admitted that the 1st defendant entered into a management agreement with the applicants on October 1, 2018 as it had the capacity to do so being the one in control of the public toilet at the time. He further submitted that through a deed of transfer between the Respondents executed on February 25, 2020 and gazette under Gazette Notice No.1609, duties of management of public toilets were transferred to the 2nd defendant.

The 2nd Defendant's response

6. In response, the 2nd defendant filed a Notice of preliminary objection dated 9th September 202, raising grounds:-
 - a. This suit contravenes the provisions of article 162(2) (b) of *the Constitution* and section 13 of the *Environment and Land Court Act*.
 - b. This Honourable Court does not have jurisdiction to hear and determine this suit.
 - c. The dispute before this Honourable Court is purely contractual which falls within the jurisdiction of the High Court and not the Environment and Land.
7. On the November 10, 2021 the court with consent of the parties directed that the preliminary objection and the notice of motion be heard together, the court also directed that parties do file and exchange written submissions.

The Applicants' submissions

8. They are dated February 14, 2022. Counsel for the applicants submitted that the Applicants had met the principles for issuance of injunctive reliefs as set by the court in *Giella v Cassman Brown* [1975] EA 558. He added that they established a prima facie case elucidated in *Mrao Limited v First American Bank of Kenya Limited* [2003] e KLR since there exists a management contract giving the applicants the right to use and occupy the suit premises. He also submitted that that the Applicants will suffer including loss of property they have heavily invested in if the orders are not granted. He relied on the case of *Ecotact Limited t/a Iko Toilets v Nairobi City County* [2018] e KLR.



The 1st Defendant's submissions

9. They are dated February 18, 2022. Counsel for the 1st Respondent submitted that a management contract between the parties is the subject matter of the suit. He added that the said contract was for a three (3) year term which was entered into on October 1, 2018, expired on October 4, 2021 and it has not been renewed. He relied on the case of *Julius K. Atunga v Naumy Jebyegon Kemboi* [2014] eKLR to submit that since the subject matter of the suit no longer exists, this matter cannot proceed.

The 2nd Defendant's submissions

10. They are dated November 22, 2021. Counsel for the 2nd defendant submitted that this suit offends the jurisdiction of this court provided under article 162(2) (b) of *the Constitution* as read with section 13 of the *Environment and Land Court Act*. He further submitted that the cause of action in this matter is breach of a management contract and as such, there is no dispute on land or the use of land. He put forward the case of *Co-operative Bank Limited Vs. Patrick Kangethe Njuguna & 5 others* (2017) eKLR wherein the court explains contracts that fall within the jurisdiction of the ELC as follows:-

“Furthermore, the jurisdiction of the ELC to deal with disputes relating to contracts under Section 13 of the ELC Act ought to be understood within the context of the court’s jurisdiction to deal with disputes connected to use of land as discussed herein above. Such contracts, in our view, ought to be incidental to the use of land; they do not include mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court...”

11. He also put forward the case of *Suzanne Butler & 4 Others v Redhill Investments & another* [2017] eKLR where when faced with the question of whether a matter fell under the High Court or the ELC, the court stated:-

“...Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse. Ordinarily, the pleadings give the Court sufficient glimpse to examine the transaction to determine whether sale of land or other services was the predominant purpose of the contract. This test accords with what other Courts have done and therefore lends predictability to the issue.”

It was his submission that the predominant purpose of the transaction in dispute was management of the public toilets which is not predominantly for land and as such, if the predominant purpose test is applied, this suit does not fall within the jurisdiction of the ELC Court.

12. He pointed out that the high court has previously adjudicated over similar matters filed being *Sinai Vision Limited & another v Nairobi County Government & another* (2018) eKLR and *Gregory Kitonga Wambua & 2 others v County Government of Kiambu* (2019) eKLR
13. I have considered the preliminary objection and the notice of motion together with the affidavit in support. I have also considered the affidavit in response, the written submissions and the authorities cited. The issues for determination are:-
- i. Whether the preliminary objection is merited.
 - ii. Whether the plaintiffs’/applicants’ application meets the threshold for grant of temporary injunction.



- iii. Who should bear costs of this application?
14. The plaintiffs/applicants seek a permanent injunction to protect the toilet management contract entered with the 1st defendant before lapse of contractual duties. The applicants are apprehensive that there will be an unauthorized takeover of management of the toilets and other persons will be granted toilet management contracts in their place.
15. In view of the court of appeal's explanation on contracts that fall within this court's jurisdiction in Co-operative Bank of Kenya Ltd and Patrick Kangethe Njuguna and five others (2017) eKLR, the court should look at the context of the toilet management contracts in dispute herein. In my view, they relate to use of land as contemplated by section 13 of the ELC Act. It is the contract permitting the plaintiff's /applicants to use the suit land. The contract substantially concerns use of land. They are not in my view mere commercial contracts as claimed by the 2nd defendant. The 2nd defendant's preliminary objection has no merit.
16. On whether the applicants are entitled to the prayers sought, the principles for grant of injunctions are enunciated in *Giella Versus Cassman Brown* (1973) EA358 and were reiterated by the Court of Appeal in the case of Nguruman Limited v Jan Bonde Nielsen & 2 others CA No.77 of 2012 (2014) eKLR where the Court held that:-
- “in an interlocutory injunction application the applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour. These are the three pillars on which rests the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”.
17. Further, in Mrao Ltd v First American Bank of Kenya Ltd (2003) e KLR the Court of Appeal gave a determination on a prima facie case. The court stated that:-
- “... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
18. I note that as per the contract dated October 1, 2018 between Friends of Muthurwa and the 1st respondent, the term of the toilet management contract was for three (3) years. It therefore expired on October 2, 2021 and there is no evidence that the contract was renewed. Therefore, the applicants have no legal right capable of being infringed.
19. In conclusion, I find no merit in this application and the same is dismissed. The costs do abide the outcome of the main suit.

It is so ordered.

DATED, SIGNED AND DELIVERED NAIROBI THIS 12TH DAY OF MAY 2022.

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L. KOMINGOI

JUDGE

In the presence of:-



No appearance for the Plaintiffs/Applicants

Mr. Swanya Ogeto for the 1st Defendant/Respondent

No appearance for the 2nd Defendant/Respondent

Steve - Court Assistant

