



REPUBLIC OF KENYA



**Maina & another v Nairobi City County & another (Environment & Land
Case E167 of 2021) [2022] KEELC 2294 (KLR) (12 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2294 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E167 OF 2021**

LC KOMINGOI, J

MAY 12, 2022

BETWEEN

BENSON GATONYE MAINA 1ST PLAINTIFF

WILSON MUTITU MBUGU 2ND PLAINTIFF

AND

NAIROBI CITY COUNTY 1ST DEFENDANT

NAIROBI METROPOLITAN SERVICES 2ND DEFENDANT

RULING

1. This is the Notice of Motion application dated 19th May 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. It seeks 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 Otc Jack & Jill 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 application are on the face of the motion. It is supported by the 1st Plaintiff's/Applicant's affidavit sworn on 19th May 2021. He deponed that he is the duly elected chairman of friends of Central Ward Hakika Self Help Group, and that the Plaintiffs /Applicants through the business name of the self-help group are responsible for the management and operation of the Otc Jack & Jill toilets pursuant to a management agreement dated 5th October 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 Plaintiff also swore the supplementary affidavit on 2nd November 2021.
5. The 1st Defendant opposed the application by way of the replying affidavit sworn on 24th June 2021 by Abwao Eric Odhiambo, the 1st Defendant's County Solicitor. He admitted that it entered into the management agreement dated October 1, 2018 because it had capacity to do so. He further deponed that through a deed of transfer between the Respondents executed on February 25, 2020 and gazetted under Gazette Notice No.1609, duties of management of public toilets were transferred to the 2nd Defendant.
6. In response, the 2nd Defendant filed a Notice of preliminary objection dated November 9, 2021, 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 10th November 2021, the court with the 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 Plaintiff's/Applicant's Submissions

8. They are dated 14th February 2022. Counsel for the Applicants raised the following issues for determination:-
 - a) Whether the preliminary objection is merited.
 - b) Whether the Applicant has satisfied the threshold for issuance of interim injunctive reliefs sought in the application dated 19th May 2021.
9. The Applicants' counsel submitted that the occupation, use and management of the suit premises was granted to the Applicants by the authorized agents of the 1st Defendant/Respondent and the court has a broad jurisdiction under Article 162(2) (i) of *the Constitution* to hear and determine disputes relating to the environment, use, occupation and title to land. It relied on the case of *Ecotact Limited t/a Iko Toilets v Nairobi City County* [2018] e KLR.



10. He also submitted that the Applicants had met the principles for issuance of injunctive reliefs as set by the court in *Giela v Cassman Brown & Co. Ltd* [1975] EA 558. He added that they established a prima facie case as 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 loss 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/Respondent's submissions.

11. They are dated 18th February 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 3 year term which was entered into on 1st October 2018, expired on 4th October 2021 and it has not been renewed. He relied on the case of *Julius K. Atunga v Naumy Jebyegon Kemboi* [2014] e KLR to submit that since the subject matter of the suit no longer exists, this matter cannot proceed.

The 2nd Defendant's submissions.

12. They are dated 22nd November 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...”

13. 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.

14. 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) e KLR.



15. 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 Plaintiff Plaintiffs/Applicants application meets the threshold for grant of temporary injunction.
 - (iii) Who should bear costs of this application?
16. The Plaintiffs/Applicants seek a permanent injunction to protect the toilet management contract entered with the 1st Defendant before lapse of contractual obligations. 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.
17. 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 supra), it is important to 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 contracts 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. Therefore, the preliminary objection has no merit.
18. In an application for injunction the onus is on the Application to satisfy the court that it should grant an injunction. The principles were laid down in the precedent setting case of *Giella vs Cassman Brown & Co. Ltd* [1973] EA 358. In the case of *Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125, The Court of Appeal stated what amounts to a prima facie case. I am guided by the above authorities.
19. The Plaintiffs sought a temporary injunction. The principles for grant of injunctions are enunciated in *Giella Versus Cassman Brown* (1973) EA358 and as 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”.
20. I find that the Plaintiffs have established a prima facie case. They have a contract dated 5th October 2018 between Central Ward Hakika Self Help Group and the 1st Defendant. The term of the toilet management contract is 4 years. It is still valid.
21. The Plaintiffs have also demonstrated that they have heavily invested in the management contract and have established that there is continued harassment by the 1st Defendant. The 1st Defendant argued that it transferred functions relating to management of the contract to the 2nd Defendant thus it does not have control. The Plaintiffs have established a case for grant of the orders against the Defendants.



I'm guided by this decision of the court in *Ecotact Limited t/a Iko Toilets v Nairobi City County* [2018] e KLR.

22. In conclusion, I find merit in this application and I grant the orders sought namely:-

(a) That a temporary injunction is hereby issued restraining the Defendants/Respondents whether by themselves, their officers, agents, or anybody claiming any right or interest through them from closing, entering, occupying, dealing, developing, transferring, leasing, granting any other person the right to run and/or occupy or in any way interfere with the Plaintiffs/Applicants management of OTC Jack & Jill Toilets pending the hearing and determination of this suit.

(b) That the OCS Kamukunji Police Station do ensure compliance of the orders in (a) above.

(c) That the costs of this application 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

Mr. Swanya Ogeto for the 1st Defendant

No appearance for the 2nd Defendant

Steve - Court Assistant

