



**Mussani v Rama Homes Limited (Environment and Land Miscellaneous Application E173 of 2021) [2022] KEELC 2496 (KLR) (10 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2496 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E173 OF 2021**

**JA MOGENI, J**

**MAY 10, 2022**

**BETWEEN**

**NARGIS ISMAEL ALIMOHAMED MUSSANI ..... APPLICANT**

**AND**

**RAMA HOMES LIMITED ..... RESPONDENT**

**RULING**

1. This Court is called upon to determine two applications. Each of the parties have applications as follows:-
  - a. A miscellaneous suit filed vide a Chamber Summons Application dated 23/09/2021 by the Applicant and is brought under the provisions of Section 7 of the *Arbitration Act*, Sections 1A, 1B and 3A of the *Civil Procedure Act* and all other enabling provisions of the Law. The Applicant is seeking for the following Orders:
    1. Spent.
    2. That this Honorable Court be pleased to issue an order of injunction restraining the Defendant from transferring two Units in Jumeirah Heights Apartments each valued at Kenya Shillings Seventeen Million (Kshs. 17,000,000.00/=) and Kenya Shillings Sixteen Million (Kshs. 16,000,000.00/=) situated in the suit property known as Land Reference Number 209/5273 (I.R Number 14866) pending the hearing and determination of this application.
    3. That this Honorable Court be pleased to issue an order of injunction restraining the Defendant from transferring two Units in Jumeirah Heights Apartments each valued at Kenya Shillings Seventeen Million (Kshs. 17,000,000.00/-) and Kenya Shillings Sixteen Million (Kshs. 16,000,000.00/=) situated in the suit properties known as Land



Reference Number 209/5273 (I.R. Number 14866) pending referral of the disputes herein to arbitration and determination thereof.

4. That the cost of this application be awarded to the Plaintiff/Applicant.
- b. The second Chamber Summons Application dated 5/11/2021 was filed under the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act, Order 40 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the Law. The Applicant is seeking for the following Orders:
  - A. Spent.
  - B. That a temporary injunction be issued against the Defendant/Respondent, its servants or agents from harassing, evicting the Plaintiff/ Applicant's Tenants, encroaching into, alienating and terminating the Plaintiff/Applicant's Tenants' tenancies or leases and or in any way dealing with or interfering with the quiet possession and enjoyment of the Plaintiff/Applicant's Tenants over all that premises erected on Land Reference Number 209/5273 (I.R. Number 14866) situate in Nairobi City County ("The Property") pending the hearing and determination of this application.
  - C. That a temporary injunction be issued against the Defendant/Respondent, its servants or agents from harassing, evicting the Plaintiff/ Applicant, encroaching into, alienating and terminating the Plaintiff/Applicant's tenancy or lease and or in any way dealing with or interfering with the quiet possession and enjoyment of the Plaintiff/Applicant over all that premises erected on Land Reference Number 209/5273 (I.R. Number 14866) situate in Nairobi City County ("The Property") pending the hearing and determination of the suit filed herein.
  - D. That the cost of this application be provided for.
2. The grounds are on the face of both applications dated 23/09/2021 and 5/11/2021 and are listed as in paragraph A-G and A-J respectively. I do not need to reproduce them here.
3. The application dated 23/09/2021 is supported by the affidavit sworn by Nargis Ismael Alimohamed Mussani, the Plaintiff/Applicant herein sworn on 23/09/2021 and the application dated 5/11/2021 is supported by the affidavit sworn by Nargis Ismael Alimohamed Mussani, the Plaintiff/Applicant herein, sworn on 5/11/2021.
4. Both Applications are opposed. There is a Replying Affidavit sworn by Eric Muia, Legal Officer at the Defendant/Respondent Company on 17/11/2021. There is also a Notice of Preliminary Objection by the Respondent dated 10/12/2021. The grounds of the Respondent's Preliminary Objection were as follows: -
  1. That the Respondent invokes Order 1 Rules 3 and 10 sub rule (2) and Order 2 Rule 15 Sub rule (1) (a) (b) and (d) of the Civil Procedure Rules 2010 as the foundation of this Preliminary Objection.
  2. That the Respondent herein is improperly enjoined as a party to this Application.
  3. That the Applicant vide a Deed of ovation dated 13<sup>th</sup> January 2021 agreed that the Nominee (Kasha Properties Limited), to take over all the rights and obligations of the Respondent under the Agreement for Sale dated 16<sup>th</sup> December 2019.
  4. That the Respondent is thus an unnecessary party to this Application.



5. That the Respondent's rights and obligations under the Agreement for Sale dated 16<sup>th</sup> December 2019 having begun extinguished by the Deed of Novation dated 13<sup>th</sup> January 2021, there is no cause of action accruing from the Respondent in favor of the Applicant.
  6. That, consequently, the Application is scandalous, frivolous, vexatious and an abuse of the Court process.
5. On 18/11/2021 and on 22/2/2022, the Court directed that the Preliminary Objection be canvassed together with both the Applications by way of written submissions. The parties submitted and a Ruling date was reserved.
  6. The Applicant filed its submissions in regard to the Applications dated 23/09/2021, 5/11/2021 and the Preliminary Objection dated 10/12/2021. The Applicant's submissions are dated 1/03/2022 and filed on 3/03/2022. The Respondent also filed their Submissions in regard to the Applications dated 23/09/2021, 5/11/2021 and their Preliminary Objection dated 10/12/2021. The Respondent's Submissions are dated 17/03/2022 and filed on the even date.
  7. The Court has now carefully read and considered the Notice of Preliminary Objection dated 10/12/2021 and the Applications dated 23/09/2021 and 5/11/2021 respectively, counsels' written submissions and the Pleadings in general and finds that the issues for determination are whether the Notice of Preliminary Objection is merited and whether the Applicant's Applications are merited.

**i. Whether the Notice of Preliminary Objection is merited**

8. I stand guided by the dictum of Sir Charles Newbold in the case of *Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd* (1969) EA 696, where His Lordship expressed himself as follows: -
 

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which objection point may dispose the suit”

Further the Court stated:-

“A preliminary objection raises a pure point to law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.
9. That being the case, the Court has considered the six (6) grounds raised by the Respondent. Basically, the Respondent contends that he is improperly enjoined. The Court notes that in a proceeding, only right parties should be joined. This question of joinder is most apt dealt with at this stage, except, I decree when it is raised without proper basis. A conscientious decision should be made by carefully looking at the provisions of the law against the issues at hand before the issue could be raised.
10. It is the Respondent's case that the two applications are a case of misjoinder which begets the point that there is no cause of action against the Respondent. They state that the respondent's rights in the sale argument dated 16/12/2019 was extinguished by the deed of novation dated 13/01/2021 and in its place Kasha properties assumed all rights and obligations of the sale agreement.
11. The Respondent has not in my view demonstrated that they are improperly joined or that there is no cause of action against them. Whether the suit herein discloses no reasonable cause of action can only be determined after the Honourable court has heard parties by the way of viva voce evidence in which case it calls for evidence to be tendered. I do not see how the Respondent would possibly be



able to demonstrate that it is improperly joined without filing an affidavit and/or making reference to other evidence to show that and if that happens, that would remove the matter from the purview of a preliminary objection as it would then cease to be a pure point of law as was decided in the case of Mukisa Biscuits Manufacturing Co. Ltd (supra).

12. In any case, on the issue of misjoinder, Order 1 Rule 9 of the Civil Procedure Rules provides:

“Rule 9. No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

Rule 10. (1) .....

(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

13. The Court of Appeal in William Kiprono Towett & 1597 others -vs- Farmland Aviation Ltd & 2 Others (2016) eKLR held that:

“...Most critically Order 1 Rule 9 of the Civil Procedure Rules (2010) makes it abundantly clear that misjoinder or non-joinder of parties cannot be a ground to defeat a suit. We reproduce the same hereunder: No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”

14. I have considered the pleadings, the submissions and the authorities therein and find that the preliminary objection lacks merit and is therefore dismissed with costs to the Applicant.

#### **ii. Whether the Applicant’s Applications dated 23/09/2021 and 5/11/2021 are merited.**

15. The Court has now carefully read and considered the Application and the applicant’s written submissions and the issue for determination is whether the Applicant is entitled to the orders sought.

16. The first application is the Plaintiffs’ Notice of Motion dated 23/09/2021 and filed in Court on 24/09/2021. The second application is the Chamber Summons Application dated 5/11/2021 and filed in Court on the even date. Both applications are seeking interim measures of protection against the Respondent.

17. It is the Applicant’s case that the Respondent’s directors are intent to transfer the two units in the Suit property and as such the Applicant seeks to secure himself against any attempt on the part of the Respondent to defeat the execution of any decree that may be passed in the intended arbitration. He claims that the Respondent failed to deliver to the Applicant the registered sub-leases for the two units after he duly performed his obligations under the Agreement of sale dated 16/12/2019. The applicant avers that he has adequately performed his obligations under the contract and as such craves the protection of the court pending the referral of the dispute to arbitration.

18. It is also the Applicant’s case that they have tenants occupying the two units in the suit property and that they have been paying monthly rent to the Applicant until October 2021 when the Respondent



- threatened to evict them. The Applicant avers that the Respondents have on several occasions, threatened to evict the said tenants and evicted one out of the two on or about 29/10/2021. The Applicant contends that if the orders sought are not granted, they will suffer irreparable loss and damage at the hands of the Respondent.
19. I have considered the Agreement of sale dated 16/12/2019 which is subject of this suit. The same provides in paragraph 15.3 that in the event of a dispute it should be referred to arbitration and that any aggrieved party may seek for preliminary interim injunction in court pending the award of the arbitrator. However, the Applicant has not demonstrated that he has initiated the arbitration process or rather the parties are yet to refer this matter to arbitration.
  20. As rightly submitted by the Applicant, Section 7 of the Arbitration Act, 1995 bestows upon the High Court the powers to grant interim measures of protection to a party to or contemplating instituting arbitral proceedings.
  21. In this suit, the Applicant has sought interim measures of protection pending arbitration. It is common ground that the parties entered into an agreement of sale dated 16/12/2019. in respect of the suit property. It is also common ground that the agreement had an arbitration clause. It is the Applicant's allegation that a dispute has arisen between the parties with regard to the completion of the said agreement of sale. The Respondent has on the other hand alleged and maintains that he has been improperly enjoined in the suit and that there is no cause of action against him.
  22. In Safaricom Limited v Ocean View Beach Hotel Limited & 2 others [2010] eKLR that was cited by the Applicant in his submission, the Court of Appeal (Nyamu J.A) stated that the factors to be considered by the court before issuing an order of interim measure of protection pending arbitration are as follows:
    1. The existence of an arbitration agreement.
    2. Whether the subject matter of arbitration is under threat.
    3. The appropriate measure of protection after an assessment of the merits of the application.
    4. The period for which the measure is to be given.
  23. As I have mentioned above, the fact that there was an arbitration agreement between the parties is not disputed. The issue as to whether the Respondent failed to deliver to the Applicant the registered sub-leases for the two units after he duly performed his obligations under the Agreement is not for this Court to determine. That is an issue for the arbitral tribunal. On whether the subject matter of arbitration is under threat, I am in agreement with the Applicant that that is the case. Since the Respondent entered into a contract with the Applicant, the Respondent has already evicted one of the Applicant's tenants. There is no guarantee that they will not evict the other remaining tenant during the pendency of the arbitral proceedings.
  24. I am of the view that it is necessary to preserve the status quo pending the outcome of the intended arbitration. It is necessary that the subject matter of this suit is preserved pending the intended arbitration. On the interim protection to grant, the only order I have to amend is from the Application dated 5/11/2021, order A and B noting that one tenant has already been evicted, therefore part of the orders has been overtaken by events.
  25. From the foregoing reasons, the Applicant's Applications dated 23/09/2021 and 5/11/2021 succeed in part. In a synopsis, the following are the orders granted by this Court in relation to the two applications:
    1. The Plaintiff's Chamber Summons dated 23/09/2021 is allowed in the following terms: -



- a. An order of injunction be and is hereby issued restraining the Defendant from transferring two Units in Jumeirah Heights Apartments each valued at Kenya Shillings Seventeen Million (Kshs. 17,000,000.00/-) and Kenya Shillings Sixteen Million (Kshs. 16,000,000.00/=) situated in the suit properties known as Land Reference Number 209/5273 (I.R Number 14866) pending referral of the disputes herein to arbitration and determination thereof.
  - b. I award costs of this Application to the Plaintiff/Applicant.
2. The Plaintiff's Chamber Summons dated 5/11/2021 is allowed in the following terms: -
    - a. A temporary injunction be and is hereby issued against the Defendant/Respondent, its servants or agents from harassing, evicting the Plaintiff/ Applicant other tenant, encroaching into, alienating and terminating the Plaintiff/Applicant's tenancy or lease and or in any way dealing with or interfering with the quiet possession and enjoyment of the Plaintiff/Applicant over all that premises erected on Land Reference Number 209/5273 (I.R Number 14866) situate in Nairobi City County ("The Property") pending the hearing and determination of the suit filed herein.
    - b. I award costs of this Application to the Plaintiff/Applicant.
  3. The Respondent's Notice of Preliminary Objection dated 10/12/2021 is dismissed with costs to the Applicant.

**It is so ordered.**

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF MAY 2022.**

**MOGENI J**

**JUDGE**

IN THE PRESENCE OF:

Ms. Abok for the Plaintiff/Applicant

N/A for the Defendant/Respondent

Vincent Owuor Court Assistant

**MOGENI J**

**JUDGE**

