



Gobind Enterprises Limited v Temple (Environment & Land Case E048 of 2022) [2022] KEELC 3095 (KLR) (30 June 2022) (Ruling)

Neutral citation: [2022] KEELC 3095 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E048 OF 2022
LC KOMINGOI, J
JUNE 30, 2022**

BETWEEN

GOBIND ENTERPRISES LIMITED APPLICANT

AND

SIRI GURDWARA BAZAAR (SIKH TEMPLE RESPONDENT

RULING

1. This is the notice of motion dated February 10, 2022 brought under sections 1A, 1B and 3A of the [Civil Procedure Act](#), Cap 21 Laws of Kenya, and Order 51 rule 1 of the [Civil Procedure Rules](#) 2010 and all other enabling provisions of the law.
2. It seeks orders:-
 1. Spent.
 2. Spent.
 3. That a temporary injunction do issue restraining the defendant/respondent either by themselves and or agents from in any way whatsoever interfering with the peace and quiet enjoyment of the plaintiff/applicant and/or evicting the plaintiff/applicant from the suit premises known as LR 2x9/6xx8 situated at Hombe/Juja Road Nairobi pending the determination of the main suit.
 4. Spent.
 5. That a temporary injunction do issue restraining the defendant/respondent either by themselves and or agents from in any way whatsoever from in any way whatsoever from advertising for sale, selling, alienating or disposing off the suit premises known as LR NO 2x9/6xx8 situated at Hombe/Juja Road Nairobi pending the determination of the main suit.



6. That an order be made compelling the defendant/respondent to offer the plaintiff/applicant the first option to buy and in the alternative without prejudice to the above if the defendant/respondent decides not to sell the suit premises known as LR 2x9/6xx8 situated at Hombe/Juja Road Nairobi an order be made compelling the defendant/respondent to renew the lease between them and the plaintiff/applicant.
 7. That OCS Pangani police station does ensure compliance with the afore stated orders.
 8. That this Honourable Court be pleased to issue such further orders or directions as it deems fit in the circumstances.
 9. Costs be in the cause.
3. The application is supported by the affidavit of Kuldip Singh, one of the directors of the plaintiff/applicant, sworn on the February 10, 2022 and a further affidavit sworn on the April 1, 2022.
 4. The application is opposed. There is a replying affidavit by Amrik Singh Chhaja Singh Singh one of the trustees of the defendant/respondent on the March 2, 2022.
 5. On the March 8, 2022, the court with the consent of the parties directed that the notice of motion be canvassed by way of written submissions.

The Plaintiff's/Applicant's submissions

6. They are dated April 4, 2022. The plaintiff/applicant and the defendant/respondent entered into a lease agreement dated November 1, 2016 in respect of the suit premises. The lease was for 5 years 3 months at a monthly rent of Kshs 180,000/- payable on the 1st day of each month.
7. It was also agreed that the plaintiff/applicant through Gobind Enterprises Limited would ran a school known as Guru Nanak Academy on the said premises. On January 14, 2022 the defendant's/respondent's advocates M/S N K Mugo & Company Advocates wrote a letter to the plaintiff/applicant asking them to hand over vacant possession of the premises by January 31, 2022.
8. That under clause 3(h), it was agreed that the lessee shall notify the lessor of their desire to renew the lease at least 10 months before the expiry of the lease term and the lessor and the lessee to reach an agreement of the same at least 6 months before the expiry of the lease term but if such agreement shall not be reached between the lessor and the lessee within the aforesaid period of (6) months, then the lessee shall be entitled to withdraw the notice of its desire to obtain a further lease.
9. The plaintiff/applicant raises three issues for determination:-
 - i. Whether the plaintiff/applicant has met the threshold for grant of the orders sought.
 - ii. Whether the plaintiff/applicant's application dated February 10, 2022 is merited.
 - iii. Whether the plaintiff/applicant has met the threshold for grant of an interlocutory mandatory injunction.
10. The plaintiff submits that the plaintiff/applicant has established a *prima facie case*. It has put forward the cases of *Giella vs Cassman Brown & Co Ltd* [1973] EA 358; *Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125.
11. The defendant/respondent is in breach of the lease agreement dated November 1, 2016 by giving intent to sell the suit property to a third party without giving the plaintiff/applicant the first option to buy as stipulated in the lease agreement.



12. The plaintiff/applicant will suffer irreparable harm if these orders are not granted as it runs a school known as Guru Nanak Academy on the suit premises which has a student population of over 110 students in different classes ranging from nursery to high school. The students will be left stranded if the plaintiff/applicant is evicted and the staff members will be rendered jobless and destitute.
13. The balance of convenience tilts in favour of the plaintiff/applicant as it has not breached the terms of the said lease. It is upto date with the rent payment. It has put forward the cases of *Nguruman Ltd vs Jan Bonde Nielsen & 2 Others* [2014] Eklr; *Njenga vs Njenga* [1991] KLR 401. It prays that the orders be granted as plaintiff/applicant has met the threshold for grant of the orders sought.
14. The plaintiff further submits that failure to state order 40 of the *Civil Procedure Rules*, 2010 is a mere technicality which can easily be remedied as it does not affect the facts in issue. It has relied in Article 159(2) (d) of the *Constitution* and the cases of *Microsoft Corporation vs Mitusimi Computer Garage Ltd* [2001] 2 EA 460; *Peeraj General Trading & Contracting Company Limited (Kenya) vs Mumias Sugar Company Limited* [2016] e KLR. The defendant/respondent has not shown what prejudice it would suffer by the said omission.
15. The plaintiff/applicant has demonstrated the existence of exceptional circumstances, to warrant the grant of a mandatory injunction. There is a likelihood that the defendant/respondent will sell the suit premises to a third party if these orders are not granted. It prays that the application be allowed.

The Defendant's/Respondent's Submissions

16. They are dated March 25, 2022. It raises one issue for determination; whether the notice of motion dated February 10, 2022 is merited.
17. The plaintiff/applicant has not invoked the specific provision that is order 40 of the *Civil Procedure Rules* 2010 but instead invoked the inherent jurisdiction of this honourable court under section 3A of the *Civil Procedure Act*. It has put forward the case of *Julius Ntogaithi Methang'athia & 4 Others vs District Land Adjudication & Settlement Officer Meru North (Nyambene) District & 3 Others* [2000] e KLR.
18. It is an express requirement that the suit in which a temporary injunction is sought must be one for restraining the defendant from committing a breach of contract or committing a tort complained of. The plaintiff/applicant's prayer in the plaint dated February 10, 2022 does not pray for any relief in the nature of a permanent injunction. It has put forward the cases of *Sunrise Properties Limited vs Fifty Investments Ltd & Another* [2007] e KLR; *Haile Selassie Libara Muhalia vs Murang'a Properties Ltd & Another* [2007] e KLR. The plaintiff's/applicant's application is incompetent as the failure to anchor the interlocutory orders sought in the plaint disentitles the plaintiff/applicant to the reliefs sought in the application.
19. The plaintiff/applicant has not established any right which said right has been infringed. The lease agreement dated November 1, 2016 was terminated by effluxion of time on January 31, 2022. The present application cannot be sustained in law as there is no legal and/or contractual basis upon which the plaintiff/applicant can continue occupying the suit premises. Clause 3(g), (h) and (i) of the lease agreement was specific on how the lease was renewable and the plaintiff/applicant first right in case of sale.
20. Parties are bound by their agreement. It has put forward the case of *National Bank of Kenya vs Pipelastik Samkolit (K) Ltd & Another* [2001] e KLR.



21. The plaintiff/applicant has failed to make full and frank disclosure of relevant facts to the just determination of the instant application and suit. It is currently in rent arrears which has necessitated recovery proceedings by the defendant/respondent.
22. The plaintiff/applicant has failed to demonstrate that it will suffer irreparable loss if these orders are not granted. The plaintiff/applicant was aware of the expiry of the lease and cannot overstay illegally in the suit premises against the wishes of the defendant/respondent under the cover of the school it runs in the suit premises.
23. The balance of convenience tilts in favour of the defendant/respondent as there is no material placed before this court that the inconvenience caused to the plaintiff/applicant would be greater than that which may be caused to the defendant/respondent.
24. The considerations for granting interlocutory mandatory injunctions is well stated in the cases of *Kenya Breweries Ltd & Another vs Washington O. Okeyo* [2002] e KLR; *Nation Media Group & 2 Others vs John Haron Mwangi* [2014] e KLR; *Sbariff Abdi Hassan vs Nadhif Jama Adan* [2006] e KLR. The plaintiff/applicant has not demonstrated the existence of any special circumstances. It prays that the prayer for mandatory injunction be disallowed.
25. It prays that the notice of motion dated February 10, 2022 be found to be unmerited and be dismissed with costs to the defendant/respondent.
26. I have considered the notice of motion and the affidavits in support, I have considered the response thereto, the written submission's and the authorities cited. The issues for determination are:-
 - i. Whether the plaintiff's/applicant's application meets the threshold for grant of temporary injunction.
 - ii. Has it satisfied the requirements for grant of interlocutory mandatory injunction?
 - iii. Is the application competent before this court.
 - iv. Who should bear costs of this application?
27. In an application for injunction the onus is on the applicant 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.
28. It is the plaintiff's/applicant's case that the defendant/respondent has breached the terms of the lease agreement dated November 1, 2016. That under clause 3(g) it was to be given an option to renew the lease for a further period of 5 years 3 months at a new rent to be negotiated between the lessee and the lessor. Secondly, that the plaintiff/applicant was to be given the first option to purchase the suit property under clause 3(h)(i). It is its case that it was shocked to learn through social media that the defendant/respondent intended to sell the suit property to a third party.
29. The defendant/respondent on the other hand states that the lease agreement expired on January 31, 2022 and the plaintiff/applicant has no basis to continue occupying the premises. Further that the plaintiff/applicant has failed to make full and frank disclosure of the facts herein; that it is in rent arrears which necessitated to recovery proceedings by the defendant/respondent.



30. In paragraph 11 of the affidavit of Amrik Singh Chhaja Singh Singh, one of the trustees of the defendant/respondent he deposes:-

“That a material non disclosure by the plaintiff/applicant is the fact that it had initially before the termination of the lease breached the terms of the said lease by falling in rent arrears amounting to Kshs 8,230,000/-.”

In paragraph 12 he deposes;

“That when the defendant/respondent exercised its right to recovery by levying distress for rent against the plaintiff/applicant, the plaintiff/applicant swiftly moved to court vide Milimani CMCC No 3143 of 2019; Gobind Enterprises vs Pritam Singh Pannue & Others being trustees of Siri Gurdwara (Sikh Temple) stopping the said distress. Annexed hereto and marked as ASC-1 are the pleadings in the said *Milimani CMCC No 3143 of 2019*”

I find that the above averments were not controverted by the Plaintiff/Applicant.

31. In paragraph 25 of the further affidavit the plaintiff/applicant’s director states that the plaintiff/applicant is upto date with the rent. A look at the deposit slips annexed show that they are for Kshs 200,000 in compliance to a consent entered into in *Milimani CMCC 3143 of 2019*. The Plaintiff/Applicant has failed to demonstrate that it is upto date in the rent payment.

32. Clause 3(g) of the lease agreement provides that:-

“The lessor agrees to give an option to renew the lease to the lessee for further period of five years and three months at a new rent to be negotiated between the lessor and the lessee”

Clause 3 (h) provides that:-

“PROVIDED ALWAYS that the lessee notify the lessor of their desire to renew the lease at least ten (10) months before the expiry of the lease term AND the lessor and the lessee to reach an agreement of the same at least six (6) months before the expiry of the lease term BUT if such agreement shall not be reached between the lessor and the lessee within the aforesaid period six (6) months, then the lessee shall be entitled to withdraw the notice of its desire to obtain a further lease and shall therefore be at liberty to terminate all negotiations with regard to such further lease.”

Clause 3(i) provides that:-

“In case the lessor decide to sell the premises before the expiry of this lease he shall offer first option to buy to the lessee on mutually agreeable terms and conditions and in case of disagreement the lessor may sell the premises to a third party subject to full protection and validity of the provisions of this lease.”

33. It is the defendant’s/applicant’s case that the plaintiff/applicant knew that clause 3(g) (h) (i) were specific on how the lease was to be renewed and the plaintiff/applicant first right in case of sale. The plaintiff/applicant has failed to demonstrate that it went through the steps as set out in the provisions of the lease agreement.

34. From the foregoing undisputed facts, I find that the plaintiff/applicant has failed to establish a prima facie case with a probability of success at the trial.



35. It is not in doubt that the lease has since expired. I find that the plaintiff/applicant has failed to demonstrate that it stands to suffer irreparable loss that cannot be compensated by an award of damages if these orders are not granted. In the case of *Kenleb Cons Ltd vs New Gatititu Service Station Ltd & Another* [1990] KLR 557 Bosire J (as he then was) held that:-

“to succeed in an application for injunction an applicant must not only make a frank and full disclosure of all relevant facts to the just determination of the application but must also show that he has a right, legal or equitable, which requires protection by injunction”.

36. I find that the plaintiff/applicant has failed to demonstrate that it deserves this court’s protection.

37. I also find that the balance of convenience tilts in favour of the defendant/respondent who is the owner of the suit premises.

38. The consideration for granting interlocutory mandatory injunction was set out in the case of *Kenya breweries Ltd & Another v Washington O. Okeyo* [2002] e KLR where the Court of Appeal stated:-

“The test whether to grant a mandatory injunction or not is correctly stated in *Vol.24 Halsbury’s Laws of England 4th Edition Paragraph 948* which read:-

‘A mandatory injunction can be granted on an interlocutory application as well as a the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a match on the plaintiffs...(a mandatory injunction will be granted on an interlocutory application’.

39. Similarly in *Nation Media Group & 2 Others vs John Harun Mwau* [2014] e KLR the Court of Appeal held thus:-

“It is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstance....A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrated as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases”.

Going by the above authorities, I agree with the defendant’s/respondents submissions that the plaintiff/applicant has failed to demonstrate that there exist special circumstances to warrant he court to grant these orders.

40. I note that the notice of motion sought under section 1A, 1B and 3A of the *Civil Procedure Act* (Cap 21 Laws of Kenya). Order 51 rule 1 of the *Civil Procedure Rules* the plaintiff/applicant failed to quote the correct provision which is Order 40 of the *Civil Procedure Rules*, 2010

41. No explanation has been given. The application was drawn by an advocate hence there is no excuse. The plaintiff/applicant cannot hide under Article 159 (2) (d) of *the Constitution* to ignore specific provision of the *Civil Procedure Rules*. I find this application to be incompetent. I rely on the case of *Sunrise Properties Ltd vs Fifty Investments Ltd & Another* [2007] e KLR.

42. In conclusion, I find no merit in this application and the same is dismissed with costs to the defendant/respondent.

It is so ordered.



DATED, SIGNED AND DELIVERED NAIROBI THIS 30TH DAY OF JUNE 2022.

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L. KOMINGOI

JUDGE

In the presence of:-Ms Owora for Mr. Churchill Midwa advocate for the Plaintiff

Mr. Ondiek advocate for the Defendant

Steve - Court Assistant

