



REPUBLIC OF KENYA



KENYA LAW
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**Mati v Athman & another (Environment & Land Case
E34 of 2022) [2022] KEELC 2931 (KLR) (29 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2931 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E34 OF 2022
NA MATHEKA, J
JUNE 29, 2022**

BETWEEN

DOUGLAS KILONZO MATI PLAINTIFF

AND

ARAFAT ABDALLA ATHMAN 1ST DEFENDANT

**SIRAJI MABONGA WAWIRE T/A MUSIKOMA AUCTIONEERS 2ND
DEFENDANT**

RULING

1. The application is dated March 29, 2022 and is brought under sections 1(A), 1(B), 3A and 63 of the [Civil Procedure Act](#), order 40 rule 2 and order 51 rules 1 to 3 of the [Civil Procedure Rules](#), 2010 seeking the following orders;
 1. That the matter be certified urgent and service be dispensed with at the first instance.
 2. That there be a temporary injunction order restraining respondents by themselves, their agents, servants, employees, proxies and/or any person claiming under them from advertising for sale, disposing, auctioning, alienating, selling, transferring, trading on and/or interfering in any manner with the applicant's property carted away on the May 26, 2021 pending the hearing and determination of this application.
 3. That the 1st respondent be restrained by way of temporary injunction order restraining the 1st respondent by himself, his agents, servants, employees, proxies and/or any person claiming under him from conducting any business enterprise in any manner whatsoever on the business premises known as Peleleza Bar along Mwinayi Babu Road, in Likoni, Mombasa County pending the hearing and determination of this application.



4. That a qualified valuer appointed by the applicant herein be granted unlimited access and authority of the court to carry out a detailed valuation of the business premises known as Peleleza Bar along Mwinyi Babu Road, in Likoni, Mombasa County with assistance of the OCS Likoni Police Station, Mombasa or such other officer as directed by the honourable court and file his report within 30 days of such order.
 5. That the 1st respondent be restrained by way of temporary injunction order restraining the 1st respondents by himself, his agents, servants, employees, proxies and/or any person claiming under him from conducting any business enterprise in any manner whatsoever on the business premises known as Peleleza Bar along Mwinyi Babu Road, in Likoni, Mombasa County until the hearing and determination of the Suit herein.
 6. That the 2nd respondents herein, his agents, servants, employees, proxies and/or any person claiming under him be ordered to return all the goods proclaimed belonging to the plaintiff pending the hearing and determination of this application.
 7. That the respondents, their agents and/or servants produce to court the original proclamation form addressing rent dated May 25, 2021, the inventory of all the goods carted away and/or in the alternative account for the same as they form the subject matter of the suit hereof pending the hearing and determination of this application.
 8. That this honourable court do issue any other orders it deems fit to grant in the interest of justice.
 9. That the cost of this application be provided for.
2. It is based on the grounds that the respondents locked out the tenant from his business premises and his goods so as to effectively denying him any access thereto without any court order and occasioning the plaintiff to move to the Business Premises Rent Tribunal vide Cause Number 138 of 2021, the tribunal orders were disobeyed culminating with the extinction of the landlord tenant relationship herein. The respondents have not obeyed the court orders in the tribunal nor has the tribunal exercised its mandate in the best interest of the tenant. The 1st and 2nd respondent have unlawfully evicted the applicant herein under the guise of distressing for rent which acts are illegal and unjustified in totality. The 1st respondent had not issued the plaintiff/applicant with any notice to terminate the lease and if any has been issued the same is defective for non-service and/or not in compliance with the Law. That the applicant herein has incurred immense loss and damages having invested over Kshs 8.5Million that was to be recovered over the 20 years lease that he had signed with the 1st respondent.
 3. This court has considered the application and the supporting affidavit. The respondents were served but did not file any response. This court has perused the pleadings and indeed find that it is the applicant's claim that he moved to the Business Premises Rent Tribunal vide Cause Number 138 of 2021, the tribunal orders were disobeyed culminating with the extinction of the landlord tenant relationship herein. The respondents have not obeyed the court orders in the tribunal nor has the tribunal exercised its mandate in the best interest of the tenant. The 1st and 2nd respondent have unlawfully evicted the applicant herein under the guise of distressing for rent which acts are illegal and unjustified in totality. If that is so then why has the plaintiff moved to this court and has not sought to enforce the order with the tribunal. It is admitted that the plaintiff has already been evicted from the said premises.
 4. The law governing the granting of interlocutory injunction is set out under order 40(1) (a) and (b) of the *Civil Procedure Rules* 2010 which provides that: -



Where in any suit it is proved by affidavit or otherwise—

- (a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or [Rev. 2012] Civil Procedure cap 21 [Subsidiary] C17 – 165;
 - (b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further."
5. The conditions for consideration in granting an injunction were settled in the case of *Giella v Cassman Brown & Company Limited* [1973] E A 358, where the court expressed itself on the condition's that a party must satisfy for the court to grant an interlocutory injunction as follows: -
- . Firstly, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."
6. The test for granting of an interlocutory injunction was considered in the *American Cyanamid Co v Ethicom Limited* [1975] A AER 504 where three elements were noted to be of great importance namely: -
- i. There must be a serious/fair issue to be tried,
 - ii. Damages are not an adequate remedy,
 - iii. The balance of convenience lies in favour of granting or refusing the application.
7. The important consideration before granting a temporary injunction under order 40 of the *Civil Procedure Rules* is the proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose the property, the court is in such a situation enjoined to grant a temporary injunction to restrain such acts. In the instant case the plaintiff/applicant states that in the Business Premises Rent Tribunal vide Cause Number 138 of 2021, the tribunal orders were disobeyed culminating with the extinction of the landlord tenant relationship herein. The 1st and 2nd respondent have unlawfully evicted the applicant herein under the guise of distressing for rent which acts are illegal and unjustified. That the premises has since been leased to a different owner hence the jurisdiction of the tribunal had ceased. The question which arises is whether the application meets the threshold set for the granting of orders of temporary injunction.
8. In *Mrao Ltd v First American Bank of Kenya and 2 others*, [2003] KLR 125 which was cited in *Moses C Mubia Njoroge & 2 Others v Jane W Lesaloi and 5 others*, [2014] eKLR, the court held that;
- . A *prima facie* case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later".



9. In the case of *Kenleb Cons Ltd v New Gatitu Service Station Ltd & another*, [1990] eKLR the court held that;

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

10. I find that the plaintiff/applicant has not established a *prima facie* case at this stage to warrant an interlocutory injunction. I find that this application is not merited and I dismiss it. Costs to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 29TH DAY OF JUNE 2022.

N A MATHEKA

JUDGE

