



REPUBLIC OF KENYA



The Zambezi Hospital Limited v Njiiri & 3 others (Environment & Land Case E033 of 2022) [2022] KEELC 2380 (KLR) (23 June 2022) (Ruling)

Neutral citation: [2022] KEELC 2380 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E033 OF 2022
LC KOMINGOI, J
JUNE 23, 2022**

BETWEEN

THE ZAMBEZI HOSPITAL LIMITED PLAINTIFF

AND

RUTH NYAMBURA NJIIRI 1ST DEFENDANT

HOME FIRST PROPERTY CONSULTANTS 2ND DEFENDANT

PYRAMID AUCTIONEERS 3RD DEFENDANT

DENNIS WAFULA 4TH DEFENDANT

RULING

1. This is the notice of motion dated February 3, 2022 brought under section 12 (2) (7) of the [Environment and Land Court Act](#) No 19 of 2011 and Order 40 Rule 1 of the [Civil Procedure Rules](#).
2. It seeks orders:-
 1. Spent.
 2. Spent.
 3. Spent.
 4. That pending the hearing and determination of this suit, a mandatory order of injunction does issue commanding the defendants to forthwith remove all padlocks placed at, grant unrestricted and unconditional access to and or restore the Plaintiff back into the premises known as The Zambezi Hospital, situated at South C, Mai Mahiu/Thogoto road, Nairobi.



5. That pending the hearing and determination of the suit, a mandatory order of injunction does issue directed to the defendants to forthwith return to the plaintiff all the hospital medical equipment and or tools of trade carried away or attached a the premises known as The Zambezi Hospital situated in South C, Mai Mahiu/Thogoto Road, Nairobi.
 6. That an order of injunction does issue restraining the Defendants whether by themselves their servants and or agents from levying distress for rent or in any other way interfering with the Plaintiff's quiet possession in all that property known as The Zambezi Hospital situated in South C, Mai Mahiu/Thogoto Road, Nairobi.
 7. That costs of the application be provided for.
3. The grounds are on the face of the application and are set out in paragraphs (a to (h).
 4. The Application is supported by the affidavit sworn by Dr. Geoffrey Z. Mutuma, a director of the Plaintiff on the February 3, 2022.
 5. The Application is opposed. There is a replying affidavit sworn by the 1st and 2nd defendants/ respondents on the March 23, 2022.
 6. The 3rd and 4th defendants/respondents did not file any response.
 7. On the March 28, 2022 the court with the consent of the parties directed that the notice of motion be canvassed by way of written submissions.
 8. I have considered the notice of motion and the affidavit in support. I have considered the response thereto, the written submissions 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. Does it meet the threshold for grant of mandatory injunction?
 - iii. Who should bear costs of this application?
 9. By a lease agreement dated March 20, 2021, the plaintiff leased the premises from the 1st Defendant at a monthly rent of Kshs.230,000/- with effect from March 2021, but with a grace period of two months (March and April) for purposes of undertaking fit-out works.
 10. Pursuant to the said lease agreement the plaintiff took possession and undertook renovations and fit-out works including erecting a modern operating theatre.
 11. In his affidavit in support Dr. Geoffrey Z. Mutuma deponed that the defendants chased away the plaintiff's staff who were attending to patients and locked up the premises. It is his averment that they also carried away and or attached hospital equipment which are tools of trade.
 12. The 1st and the 2nd defendants/respondents on the other hand contend that the plaintiff is in rent arrears and that is why the 2nd defendant levied distress. It is further their case that the plaintiff/applicant has not proved the alleged loss of income amounting to Kshs.1,500,000/-.
 13. 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 v Cassman Brown & Co Ltd* [1973] EA 358. In the case of [*Mrao Ltd v 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.

14. It is the plaintiff's/applicants case that the defendants/respondents acted illegally by first attaching the goods or tools of trade and evicting the Plaintiff from the suit premises.
15. I agree with the plaintiff's/applicant's submission that the defendants/respondents have not disputed that the Auctioneer chased away hospital staff and locked the suit premises. This amounts to an eviction.
16. The auctioneer did not file a response to confirm whether he had obtained an order of the court to enable him to carry out the eviction. In the absence of any confirmation, I find that the said act of eviction was illegal and unlawful.
17. In the case of *Ripples Ltd v Kamau Mucuba* HCCC No 4522 of 1992, it was held that:-

“That land lord should only take one course against the defaulting tenant i.e either to distrain for rent or institute an eviction for forfeiture of the lease/tenancy and repossession. Here the defendant/respondent (sic) took both reliefs to his benefit. It cannot be. The law does not permit it and this court cannot allow it”.
18. It is not in dispute that the Plaintiff operates a hospital. It goes without saying that almost all items and or goods inside a hospital are tools of trade. In the case of *Victoria Pumps Ltd v KPA & 4 others* [2015] e KLR, the court held thus:-

“From the pleadings it is apparent that the applicant carried on the suit premises the business of Bar and Restaurant and as a lodge house. If that be true, and it has not been contested, then fridges, TVs, tables, chairs bed and mattress are tools of trade necessary for the plaintiff trade and are thus except and immune against distress under section (16) (1) g of the Distress for Rent Act as well as section 44(1) of the Civil Procedure Act.... I find that the distress upon the goods I consider tools of trade, the existence of a tenancy whose termination is the subject of litigation at the Business Premises Rent Tribunal and allegations that distress is being employed to evict the Applicant and thus terminate the tenancy, present a *prima facie* case and therefore the first test has been established in the affirmative”.

I find that the plaintiff/applicant has established a prima facie with a probability of success at the trial.
19. I also find that the plaintiff/applicant has demonstrated that it shall suffer irreparable loss which cannot be compensated by an award of damages. I agree with counsel for the Plaintiff's submissions that a continued closure of the hospital may point to the fact that the plaintiff may never attract patients at all.
20. In the case of *Kenleb Cons Ltd v 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”.

I find that the plaintiff/applicant has demonstrated that it deserves this court's protection.
21. I am also of the view that the balance of convenience tilts in favour of the plaintiff/applicant which had undertaken all modifications of the suit premises in order to operate it as a hospital.



22. Having found that the eviction was unlawful and that the goods distrained are tools of trade, I find that this is a clear case capable of being decided at once. In the case of *Kenya Breweries Ltd & another v Washington O. Okeyo* [2002] e KLR the Court of Appeal stated as follows:-

“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 reads:-“A mandatory injunction can be granted on an interlocutory application as well as at 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 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”.

23. I find that the plaintiff/applicant deserves orders of mandatory injunction in order to regain possession of the suit premises. The plaintiff/applicant is directed to make proposals to the 1st defendant on how to clear the rent arrears.

24. In conclusion, I find merit in this application and the same is allowed in the following terms.

- a. That pending the hearing and determination of this suit, a mandatory order of injunction does issue compelling the defendants to forthwith remove all padlocks placed at the main gate, grant unrestricted and unconditional access to and or restore the Plaintiff back into the premises known as The Zambezi Hospital, situated at South C, Mai Mahiu/Thogoto road, Nairobi.
- b. That pending the hearing and determination of the suit, a mandatory order of injunction does issue directing the defendants to forthwith return to the plaintiff all the hospital medical equipment and or tools of trade carried away or attached a the premises known as The Zambezi Hospital situated in South C, Mai Mahiu/Thogoto Road, Nairobi.
- c. That an order of injunction is hereby issued restraining the defendants whether by themselves their servants and or agents from levying distress for rent or in any other way interfering with the Plaintiff’s quiet possession in all that property known as The Zambezi Hospital situated in South C, Mai Mahiu/Thogoto Road, Nairobi pending the hearing and determination of this suit.
- d. That costs of this application do abide the outcome of the main suit.

It is so ordered.

DATED, SIGNED AND DELIVERED NAIROBI THIS 23RD DAY OF JUNE 2022.

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L. KOMINGOI

JUDGE

In the presence of:-

Mr. E. Mutua for the Plaintiff

No appearance for the Defendants

Steve - Court Assistant

