



Acouth & another v Jasch Holdings Limited & another (Environment & Land Case E397 of 2021) [2022] KEELC 3322 (KLR) (9 June 2022) (Ruling)

Neutral citation: [2022] KEELC 3322 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E397 OF 2021**

LC KOMINGOI, J

JUNE 9, 2022

BETWEEN

KUR PAUL KUOL ACOUTH 1ST APPLICANT

CHAN ANDREA MOK CHAN 2ND APPLICANT

AND

JASCH HOLDINGS LIMITED 1ST RESPONDENT

MARKEM LIMITED 2ND RESPONDENT

RULING

1. This is the notice of motion dated 10th November 2021 brought under section 1A, 1B, 3, 3A and 63 of the [Civil Procedure Act](#), order 40 rule 1, 2 and 4 of the [Civil Procedure Rules](#).
2. It seeks for orders:-
 1. Spent.
 2. Spent.
 3. That a prohibitory injunction be and is hereby issued against the 1st defendant/respondent either by themselves, their servants, agents, or representatives from alienating and/or disposing of the plaintiffs’ proclaimed or otherwise, by way of public auction or any other way pending the hearing and determination of this suit.
 4. Spent.
 5. That a prohibitory injunction be and is hereby issued against the 1st defendant/respondent either by themselves, their servants, agents, or representatives from distressing for any rent and/or licence fees from the plaintiffs/applicants pending the hearing and determination of this suit.



6. Spent.
 7. That a prohibitory injunction be and is hereby issued against the 1st and 2nd respondents either by themselves, their servants, or their agents from disrupting the peaceful and quiet possession of the applicants and/or their families pending the hearing and determination of this suit.
 8. Spent.
 9. That a prohibitory injunction be and is hereby issued against the respondent either by themselves, their servants, representatives, or their agents from demanding or claiming any sums from the applicants pending the hearing and determination of this suit.
 10. That the plaintiffs/applicants in this matter be awarded the costs of this application.
3. The grounds are on the face of the application and are set out in paragraphs 1 to 5.
 4. The application is supported by the affidavit sworn by Chan Andrea Mok Chan, the 2nd plaintiff/applicant on the November 10, 2021.
 5. The application is opposed. There is a replying affidavit sworn by James Njuguna Ngururi, a director of the 1st defendant/respondent, on the November 30, 2021.
 6. On the December 2, 2021, the court with the consent of the parties directed that the notice of motion be canvassed by way of written submissions.
 7. It is the plaintiffs/applicants' submission that they entered into sale agreements with the 2nd defendant/respondent for the purchase of the Apartments. They have annexed the payment slips to the supporting affidavit. It is further their submission that they have acquired proprietary rights over the Apartments. That they have established a prima facie case with a probability of success.
 8. The plaintiffs/applicants submit that the 1st defendant/respondent has already instructed auctioneers to levy distress and that they will suffer irreparable loss and damage if these orders are not granted. They have put forward the case of *Pius Kipchirchir Kogo vs Frank Kimeli Tenai* [2018] eKLR.
 9. That they are likely to suffer loss which cannot be compensated by an award of damages as their families reside on the suit premises.
 10. The balance of convenience tilts in favour of the plaintiffs/applicants. They have put forward the case of *Bryan Chebii Kipkoeh vs Barnabas Tuitoek Bargaroria & another* [2019] eKLR. They pray that the application be allowed with costs.
 11. The defendants/respondents on the other hand submit that the plaintiffs/applicants have not established a prima facie case with any chance of success.
 12. That the plaintiffs/applicants moved into the apartments with no authority and/or permission from the 1st defendant/respondent. They have put forward the case of *Rajan Shah t/a Rajan S Shah & Partners Bipin P. Shah* [2016] e KLR.
 13. That by virtue of the letter dated April 17, 2018, which letter cancelled the long overdue transactions, the 1st and 2nd Plaintiffs continued to occupy the suit premises illegally thus culpable of paying mesne profits.
 14. It is further their submission that the purchase agreements stood terminated on account of the omission by the plaintiffs to fulfil their contractual obligations in the sale and purchase transactions.



15. The two agreements produced allegedly between the 2nd defendant and the plaintiffs are highly contested by the 1st defendant. They have put forward the case of *Giella vs Cassman Brown & Co. Ltd* [1973] EA 358. The plaintiffs have failed to prove that they had a written agreements with the 1st defendant. They have failed to establish a prima facie case with a probability of success.
16. The plaintiffs cannot claim to suffer irreparable injury where no contract exists between them and the 1st defendant. they have put forward the cases of *Kitur and another vs Standard Chartered Bank & 2 others* [2002] 1klr 630; *Wild Living Company Ltd vs Varizone Ltd* [2019] e KLR. They pray that the application be dismissed with costs.
17. I have considered the pleadings, the notice of motion, the affidavit in support and he annexures. I have also considered the affidavits in response, the written submissions and the authorities cited. The issues for determination are:-
 - i. Whether the plaintiffs/applicants' application meet the threshold for grant of temporary injunction.
 - ii. Who should bear costs of this application?
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. In the case of *Kenleb Cons Ltd vs New Gatitut Services 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”.
20. The plaintiffs/applicants herein have demonstrated that they are in occupation of the suit premises pursuant to sale agreements between them and the 2nd defendant. I find that they have established a prima facie case with probabilities of success at the trial.
21. It is not in dispute that the 1st defendant/respondent has instructed Icon Auctioneers to levy distress.
22. I find that the plaintiffs/applicants deserve this court's protection. They stand to lose the suit properties as well as their personal properties which stand to be attached if these orders are not granted.
23. In conclusion, I find merit in this application and the same is allowed. I grant the orders sought namely:-
 - a. That a prohibitory injunction be and is hereby issued against the 1st defendant/respondent either by themselves, their servants, agents, or representatives from alienating and/or disposing of the plaintiffs' property proclaimed or otherwise, by way of public auction or any other way pending the hearing and determination of this suit.
 - b. That a prohibitory injunction be and is hereby issued against the 1st defendant/respondent either by themselves, their servants, agents, or representatives from distressing for any rent and/or licence fees from the plaintiffs/applicants pending the hearing and determination of this suit.



- c. That a prohibitory injunction be and is hereby issued against the 1st and 2nd respondents either by themselves, their servants, or their agents from disrupting the peaceful and quiet possession of the applicants and/or their families pending the hearing and determination of this suit.
- d. That a prohibitory injunction be and is hereby issued against the respondent either by themselves, their servants, representatives, or their agents from demanding or claiming any sums from the applicants pending the hearing and determination of this suit.
- e. The costs of this application do abide the outcome of the main suit.

It is so ordered.

DATED, SIGNED AND DELIVERED NAIROBI THIS 9TH DAY OF JUNE 2022.

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L. KOMINGOI

JUDGE

In the presence of:-

Ms Kinyanjui for Mr. Munyuga for the Plaintiffs

Mr. Mbakaya for Mr. Muchemi for the 1st Defendant

No appearance for the 2nd Defendant

Steve - Court Assistant

