



Katsran Logistics Limited v ATC Kenya Operations Limited (Environment & Land Case 50 of 2021) [2022] KEELC 2505 (KLR) (19 July 2022) (Ruling)

Neutral citation: [2022] KEELC 2505 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 50 OF 2021**

**MAO ODENY, J
JULY 19, 2022**

BETWEEN

KATSRAN LOGISTICS LIMITED APPLICANT

AND

ATC KENYA OPERATIONS LIMITED RESPONDENT

RULING

1. This ruling is in respect of a Notice of Motion dated 13th May 2021 by the Plaintiff/Applicant seeking the following orders: -
 - a) Spent.
 - b) Spent.
 - c) That pending the hearing and determination of the suit, an order be issued directing the Respondent to deposit in this court, as security, an amount commensurate to the decretal sum sought by the Plaintiff/Applicant and/or other amounts as the Court may direct.
 - d) That the Honourable Court be pleased to issue a permanent injunction directing the Respondent/defendant to demolish and /or remove the said telecommunication signal tower which had been erected on the Plaintiff/applicant's parcel of land and cause the affected section of the land to be restored and rehabilitated to its initial state.
 - e) That the Honourable Court be pleased to order the Respondent/Defendant to remit all the due rent for eleven (11) years owed to the Applicant/plaintiff since the erection of the said communication tower at or around the year 2010.
 - f) That the Honourable Court be pleased to order the OCS Malindi Police Station be ordered to enforce and/or supervise implementation of Order 4 above.



- g) That the costs of this Application be borne by the Respondent/Defendant.
2. The Applicant relied on the grounds on the face of the application and the supporting affidavit by Henry Mutua Katambo, the Plaintiff's Managing Director sworn on 13th May 2021 where he deponed that the Plaintiff is the registered proprietor of all that land known as Title No. Chembe/Kibabamche/390 (the suit property).
 3. That sometime in the year 2010, the Defendant unlawfully and without any authority of the Plaintiff, erected a telecommunication signal tower on the suit property and that the Plaintiff's attempts to resolve the issue amicably have only been met with diversionary tactics from the Defendant.
 4. The Defendant opposed the application vide a Replying Affidavit sworn on 2nd November 2021 by Mark Lavi, its Legal Manager wherein he deposed that the Defendant entered into a lease agreement on 21st March 2016 with the owner of land title No. Chembe/Kibabamche/210 to build a telecommunications tower thereon to improve telecommunication connectivity within the area whereby the Defendant has paid rent to the said lessor as per the lease terms.
 5. According to the deponent, the Defendant was ready to vacate the premises when it realized that there was a dispute over the land but the Plaintiff has since denied the Defendant entry thus frustrating their moving out.
 6. Counsel agreed to canvas the application vide written submissions which were duly filed.

Plaintiff's Submissions

7. Counsel relied on the principles for grant of injunctions as were set out in the case of *Giella v Cassman Brown & Co. Limited* [1973] E.A 358 and under Order 40 Rule 1 of the Civil Procedure Rules. Further counsel relied on the cases of *Mrao Limited v First American Bank of Kenya Limited & 2 others*; and *Central Bank of Kenya & another v Uhuru Highway Development LTD & 4 others*, and submitted that the Plaintiff had established a prima facie case with a high chance of success.
8. It was Mr. Barongo's submission that the Plaintiff will suffer irreparable loss should the Defendant be allowed to continue with its activities on the suit land which loss cannot be adequately compensated by way of damages and cited the case of *Tritex Industries Limited & 3 others v National Housing Corporation & Anor* [2014] eKLR.
9. Counsel also stated that the balance of convenience tilts in favour of the Plaintiff having demonstrated that it is the registered proprietor of the suit property and relied on the case of *Meru H.C.C.C. No. 12 of 2010: Thomas Mungiria & 9 others v Joseph Mutuma & 4 others*.
10. On the issue as to whether the Defendant should deposit security, counsel submitted that the two properties mentioned herein are adjacent to each other and as per the Land Registrar's report the said signal tower is erected on the Plaintiff's suit property. That the Defendant has been deriving financial gain thereon and it ought to deposit the security equivalent to the mesne profits.
11. Mr. Barongo submitted that the Defendant/Respondent to deposit in this court, an amount commensurate to the prevailing commercial rates from lease of land to erect communication masts within the larger Malindi Sub-County and that the quantification of such monies can be based on rates admitted as being offered by the Defendant/Respondent to other lessees, subject to annual escalation rates.
12. It was counsel's contention that the Defendant/Respondent has been paying Kenya Shillings Two Hundred and Fifty Thousand (Kshs. 250,000/-) per year whereas the prevailing rates are Kenya



Shillings Four Hundred Thousand (Kshs. 400,000) and prayed that the Defendant/Respondent to deposit to this Honourable Court security amounts of Kenya Shillings Four Million only (Kshs. 4,000,000/-), being the average annual lease fees for ten (10) years.

13. Counsel cited the cases of *Republic v Rosemary Wairimu Munene, Ex parte applicant v Ibururu Dairy Farmers Cooperative Society* [2014] eKLR and *Peter Muriuki Ngure v Equity Bank (K) Limited* [2018] eKLR in support of the argument that costs should follow the event and urged the court to allow the application as prayed.

Defendant's Submissions

14. Counsel also submitted on the principles for grant of injunctions and stated that the principles must be considered sequentially as was held in the cases of *Kenya Commercial Finance Co. LTD v Afraba Education Society* [2001] 1 EA and in *Export Processing Zones Authority v Kapa Oil Refineries Limited & 6 others* [2014] eKLR.
15. Counsel submitted that the Plaintiff had failed to establish a prima facie case as there is a dispute on the ownership of the Suit Property which is pending determination before this Honorable Court in Judicial Review No. 3 of 2021, a suit that the Plaintiff has failed to disclose and deliberately concealed from the Court. That in absence of clarity as to who the owner of the Suit Property is, the Plaintiff cannot claim to have established a prima facie case against the Defendant. Further that no evidence has been placed before the court to show that the Plaintiff would suffer irreparable injury if an order of injunction is not granted.
16. On the issue of whose side the balance of convenience tilts, Ms Okuta submitted that the balance of convenience tilts in favour of the Defendant on the following reasons: -
 - a) The Defendant has a valid Lease with the owner of the land and is therefore within its rights to utilize the Suit Property in accordance with the Lease agreement.
 - b) There is a dispute on the ownership of the Suit Property which is pending determination before this Honorable Court in Judicial Review No. 3 of 2021. The Plaintiff cannot therefore claim rights of proprietorship of the Suit Property while it is unclear who the owner of the Suit Property is.
 - c) The Defendant has since vacated the premises. That the issuance of the injunction would be moot, and the Court would be issuing orders in vain.
 - d) That the Defendant was designated as a critical infrastructure owner under the Computer Misuse and Cyber Crimes Act, which designation effectively recognizes that the assets are essential to the security and economic well-being of the public and the effective functioning of government. That the issuance of such an injunction would be counterproductive to the interests of the public.
17. Counsel further submitted that the Defendant has heavily invested in putting up the signal tower and cited the case of *Kenya Power & Lighting Co. Ltd v Sheriff Molana Habib* [2018] eKLR, whereby she stated that a permanent injunction cannot be granted at an interlocutory stage but upon hearing of a suit as it fully determines the rights of the parties.
18. On whether the Plaintiff is entitled to an order for security, counsel submitted that such an order could only be granted where it is proved that a party would be unable to pay the sums claimed and such proof was not placed before this court.



Counsel cited the case of *Keystone Bank Limited & 4 others v I&M Holdings Limited & another* [2017] eKLR and *Tuffsteel Limited v Boleyn Magic Wall Panel Limited* [2020] eKLR and urged the court to dismiss the application with costs.

Analysis and Determination

19. The issue for determination is whether the Plaintiff has established a prima facie case to entitle it to a grant of an order of injunction, whether the Defendant should be ordered to deposit security an amount commensurate with the decretal amount sought by the Plaintiff and whether the Defendant should be ordered to remit all rent due for 11 years.
20. The law that governs applications for grant of interlocutory injunctions is anchored under Order 40 Rule 1 of the *Civil Procedure Rules*, 2010 which provides as follows: -
 1. 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
 - 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,
21. 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 orders.
22. The Plaintiff has sought for a temporary and permanent injunction in the same breath. One is for a temporary injunction restraining the Defendant from meddling, interfering with the suit land and another one a permanent injunction directing the Defendant to demolish and or remove the telecommunication signal tower on the suit land.
23. I notice that, that is the same prayer that the Plaintiff has sought for in the Plaintiff for a permanent injunction for removal of the telecommunication signal tower erected upon the suit property. If the court grants this order of a permanent injunction, then it shall have determined the case at an interlocutory stage.
24. The court can issue mandatory injunctions at an interlocutory stage but an Applicant in addition, to establishing the existence of a prima facie case, must establish the existence of special circumstances and prove his case on a standard higher than the standard in prohibitory injunctions as was held in the case of *Kenya Breweries Ltd & Another v Washington O. Okeya* [2002] eKLR, the Court of Appeal stated as follows on mandatory injunctions: -

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”



25. In the present case, the Plaintiff has not established any special circumstances to warrant the granting of a mandatory injunction at this stage. In any case, the purpose of interlocutory injunctions is to preserve the substratum of the suit property and the case.
26. Courts do not grant orders in vain, the Defendant has deponed that it has since vacated the premises when it realized that there was a dispute on ownership of the suit property which is pending before this court. The Defendant's also stated that they wanted to move but they have been denied access by the Plaintiff. It is the Plaintiff's word against the Defendant's on which position is the correct one.
27. On whether the Plaintiff is entitled to an order for security of the 'decretal sum', it was the Plaintiff's contention that since the Defendant has been utilizing the suit property without making any payments, it should therefore deposit a security amount equivalent to the mesne profits amounting to Kshs. 4,000,000/-. There was no basis on how the Plaintiff arrived at this amount and taking into account that the Defendant entered into a lease agreement with the purported owner of parcel No. 210 of which it has been paying rent. The issue of ownership of the suit parcel of land is pending for determination before the court hence I cannot jump the gun and order for payment of rent yet that is what shall be determined upon hearing the case. The same therefore fails.
28. The issue of remittance of rent for 11 years to the Plaintiff is mute at this stage as for the court to determine whether the Defendant owes the Plaintiff any rent, other main issues have to be determined upon hearing of the main suit.
29. I have considered the application, the submissions by counsel and find that the application lacks merit and therefore dismissed with costs to the Defendant.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 19TH DAY OF JULY, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

