



REPUBLIC OF KENYA



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**South Sea Services Limited v Mutiso (Appeal 68 of 2021)  
[2022] KEELC 15657 (KLR) (23 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 15657 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
APPEAL 68 OF 2021  
LL NAIKUNI, J  
NOVEMBER 23, 2022**

**BETWEEN**

**SOUTH SEA SERVICES LIMITED ..... APPELLANT**

**AND**

**AMOS K. MUTISO ..... RESPONDENT**

*(Being an Appeal from the Ruling of Hon. Francis Kyabi  
(Chief Magistrate) at CMCC (Mombasa) No. 864 of 2021)*

**JUDGMENT**

**Preliminaries**

1. This Judgment pertains to an appeal that was instituted before this Honorable Court by the Appellant – South Sea Services Limited - against the Respondent herein through a Memorandum of Appeal dated 8<sup>th</sup> October, 2021 and filed before this Court on 12<sup>th</sup> October, 2021.
2. On 21<sup>st</sup> June, 2022 the Appellant through the Law firm of Messrs. Marende Necheza & Company Advocates for the Appellant filed the 151 Pages Record of Appeal in support of the appeal against the ruling and order of the Honorable Chief Magistrate Francis Kyambia sitting at CMCC (Mombasa) No. 864 of 2021 delivered on 8<sup>th</sup> October 2021. Being aggrieved by the said decision, the Appellant instituted the appeal.
3. Upon service, the Respondents engaged the Law firm of Messrs. Munyiithya, Mutugi, Umara & Muzna Advocates to represent them in the appeal. On 9<sup>th</sup> May, 2022 the Records of appeal and the appeal were admitted and directions were taken pursuant to the provisions of Section 79B of the *Civil Procedure Act*, Cap. 21 and Order 42 Rules 11 and 13 of the *Civil Procedure Rules*, 2010. It was directed that the Appeal be disposed off by way of written submissions. Pursuant to that, the Appellant and the Respondent fully complied. Thereafter the highlighting of the written submissions by the Learned Counsels for both parties and the Honorable Court reserved a day to render this Judgement herein.



4. It is instructive to note that on 6<sup>th</sup> December, 2021 when the parties appeared before Court on a different matter being ELC (Mombasa) No. 207 of 2021, but of the same subject matter and parties to this appeal, in order to sustain consistency and avoid any conflict of interests, it became imperative for the court to provide a clear and practical directions as regards the management, preservation and administration of the subject matter being all that parcel of Land Known as Land Reference Numbers Mombasa/MS/Block 1/242 (Hereinafter referred to as “The Suit Property”). Indeed, on 14<sup>th</sup> December, 2021, this Honorable Court proceeded to formally provide the said direction which are on record. Being aggrieved by some of the directions, the Appellant filed a Notice of Motion Application dated 23<sup>rd</sup> December, 2021 brought under the provision of Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*, Cap. 21 and Order 40 Rule 7 of the *Civil Procedure Rules*, 2010 seeking for stay of execution, a review and/or variation of the said directions. On 9<sup>th</sup> May, 2022, the Honorable Court delivered a ruling on the matter and that settled the issues paving way for the hearing and final determination of this appeal.

### **The Appellant’s Case.**

5. This being an appeal, it is important to commence the proceedings from where it emanated from. Ideally, and from the filed pleadings herein, the Appellant herein instituted a suit against the Respondent being CMCC (Mombasa) No. 864 of 2021 *vide* a Complaint dated 8<sup>th</sup> June 2021. The said Complaint was filed together with a Notice of Motion application dated 8<sup>th</sup> June 2021 brought under a Certificate of Urgency premised under the provision of Order 40 Rule 2 and 2A of the *Civil Procedure Rules*, 2010 and the provisions of Sections 1A, 3, 3A of the *Civil Procedure Act*, Cap. 21 supported by an affidavit sworn by Rama Hamisi Bindo of the even date sought for the following orders from lower Court case:-
- a. That proclamation of distraint dated 2<sup>nd</sup> June, 2021 be nullified.
  - b. That the Respondent through his agent’s M/s Kithemu Auctioneers or any other person acting as such be restrained from attaching or removing any of the goods belonging to the Applicant and /or executing the proclamation of distress for rent dated 2<sup>nd</sup> June 2021 on the Applicant’s premises or otherwise interfering with the Applicant tenancy pending the hearing and determination of this application.
  - c. Costs of the application be provided for.
6. Upon service, the Respondent filed his Replying Affidavit and the trial Court gave directions that the matter be disposed off by written submissions. On 8<sup>th</sup> October 2021, having heard the application the Court delivered its dismissing it with costs awarded to the Respondent.
7. Being aggrieved by the said Ruling, the Appellant filed a Memorandum of Appeal dated 8<sup>th</sup> October 2021 sought for the following orders reproduced herein verbatim: -
- a. That the Appellant’s appeal be allowed in whole with cost to the Appellant
  - b. That ruling of the Learned Honorable Magistrate be set aside.
  - c. That this Honorable Court proceed to issue injunctive orders against the Respondent through his agent’s M/s Kithemu Auctioneers or any other person acting as such be restrained from attaching or removing any of the goods belonging to the Applicant and /or executing the proclamation of distress for rent on the Applicant’s premises or otherwise interfering with the Applicant’s tenancy pending hearing of the suit.



- d. That this Honorable Court be at liberty to grant any other order (s) it may deem fit in the circumstances.
- e. Costs of appeal be provided for.

### **The Respondent's Case**

8. On 7<sup>th</sup> July, 2021, the Respondent filed his detailed responses. He held that on 31<sup>st</sup> October, 2019, the Appellant and the Respondent entered into a Lease Agreement of the suit property for five (5) years at a monthly rent of Kenya Shillings One Hundred Thousand (Kshs. 100, 000.00). However, he deposed that from January, 2020 the Appellant defaulted in paying rent and this continued for over twenty (20) months. Being in breach of the said Lease Agreement, the Respondent together with the Co – Administrators on 30<sup>th</sup> April, 2021 issued the Appellant with a termination notice for the tenancy.
9. Despite of this, he deposed that the Appellant still failed to give vacant possession as a result the Respondent instructed his Advocates on record to engage the services of Messrs. Kithemu Auctioneers to levy distress for rent. It was as a result of this that the Appellant instituted this suit before the lower court and sought for the said injunction orders. He refuted that the Appellant had made any investment on the suit land and if at all there had been any investment done it was not worth a sum of Kenya Shillings Fifteen Million (Kshs. 15, 000, 000.00) as alleged. He stated that the Appellant had not been given any consent to incur any expenses nor undertake such investment of building permanent structures on the suit land. He denied the Appellant had any *Prima facie* case onto the suit property.
10. The Respondent held that the Appellant had pinned blame on the alleged feud between the Respondent and the sister. In response, the Respondent stated that the order mentioned in the Appellant's pleadings issued on 2<sup>nd</sup> October, 2020 in CMCC No. E98 of 2020 Southern Sea Services Limited v Pauline Mutiso" was a new discovery that he was not a party and was never heard on that application. The Respondent admitted that Pauline Mutiso was indeed a beneficiary of the estate and his sister. However, he deposed that she was not a legal Administratrix to the estate and therefore any arrangement between the Respondent and her tantamounted to intermeddling of the state of the deceased.

### **The Directions On Appeal**

11. Being an appeal from the Lower Court, the appeal was admitted and the Honorable Court provided directions on how to proceed on with the said Appeal under the provisions of Section 79 B of the [Civil Procedure Act](#), Cap. 21 and Order 42 Rules 11, 13, 16 and 17 of the [Civil Procedure Rules](#), 2010. It was agreed that the appeal be disposed off by way of written submissions.

### **The Submissions**

12. On 6<sup>th</sup> July, 2022 while both the Learned Counsels for the Appellant and the Respondent were present in Court, directions were taken to have the appeal be disposed of by way of written Submissions. Pursuant to that all parties fully complied with the stringent timelines and filed their submission. Thereafter, the Honorable Court reserved a date for the delivery of the Judgement accordingly.

### **The Written and Oral Submissions by the Appellant.**

13. On 25<sup>th</sup> July, 2022, the Counsels for the Appellant the Law firm of Messrs. Marende, Necheza & Company Advocates filed their written submissions date 22<sup>nd</sup> July 2022. Mr. Ondieki Advocate for the Appellant submitted that the Appellant's had been running a business of eatery and entertainment. The Respondent was his landlord at all material times. The Covid-19 pandemic struck and Appellant



had to close down business. The Appellant received a letter from the firm of Agnes & Matthew Advocates informing him to pay rent to one Pauline Kanini Mutiso a beneficiary of the Estate of Gabriel Mutiso Manda. The ongoing tussle between Respondent and Pauline Kanini Mutiso left the Appellant stranded as to who to pay rent as they provided different accounts. It was Mr. Ondieki's submission that the Respondent and his sister later filed another suit being "ELC 207 (OS) of 2021 - Amos K Mutiso & Another v South Seas Services" in which they purported to have sold the suit property.

14. Eventually, the Honorable Court consolidated the two matters whereby the Appellant made claims that the loss of business suffered was more than the rent claimed and Appellant ought to be given first priority to purchase the building being the tenant. Mr Ondieki Advocate submitted that the Learned Magistrate never applied the principles set out in the cases of "*Giella v Cassman Brown & Company Limited* (1973) E A 358" and "*Paul Gitonga Wanjau v Gathuthi Tea Factory Company Limited & 2 others* [2016] eKLR. It was submitted that the Appellant raised triable issues specifically with regards to who was to be paid rent; the Appellant's investment of more than Kenya Shillings Fifteen Million (Kshs. 15,000,000.00). based these two issues, his contention was that the Learned Magistrate ought to grant the Appellant injunctive orders. Additionally, the Counsel submitted that Appellant had already deposited security worth double the value of the alleged rent arrears and in addition to having filed a Counter Claim in the sister file in Civil case ELC 207 (OS) of 2021 and for these reasons, they prayed for the appeal to be allowed.

#### **The Written & oral Submission by the Respondent**

15. On 14<sup>th</sup> July 2022, the Learned Counsels for the Respondent the Law firm of Messrs. Munyithya, Mutugi, Umara & Muzna and Company Advocates filed their written submissions dated 14<sup>th</sup> July 2022. Mr. Munyithya Advocate submitted that Appellant had not established a *Prima facie* case on the basis of having admitted to failing to meet the obligations on payment of the rent. Reliance was placed on "*Mrao v First Bank of Kenya Limited & 2 Others* [2003] KLR 125".

Mr Munyithya submitted that the Appellant had not made any improvements worth over a sum of Kenya Shillings Ten Million (Kshs. 10,000,000.00) as alleged and if at there had been any such expenses incurred, then they had failed to seek consent from the Respondent to do so.

16. It was the Counsels' submissions that the Magistrate properly applied the principle laid down in the case of:- "*Geilla v Cassan Brown (Supra)*". The Counsel place much reliance on the case of:- "*Villas Kubindi & Another v Peter Muturi Muigai & Another* (2014) eKLR where the Court declined to grant temporary injunction orders in a case Respondent averred was similar to this one.

#### **The Issues for Determination**

17. I have had a chance of taking into account all the filed pleadings, both oral and written submissions, several cited authorities by the parties pertaining to this Appeal against the Ruling of the Lower Court and the relevant provisions of the *Constitution* of Kenya and the statutes. In order to reach an informed, just and fair decision in this appeal, Court has framed the following three issues for its determination. These are:-
  - a. Whether the Appeal instituted by the Appellant through the Memorandum of Appeal against the Respondent challenging the Ruling by the trial Court delivered on 8<sup>th</sup> October, 2021 has any merit.



- b. Whether the Injunctive orders sought by the Appellant restraining the Respondent from taking any action on the suit property pending the hearing and determination of the suit meets the threshold of granting the said orders.
- c. Whether the parties are entitled to the reliefs sought.
- d. Who will bear the Costs of the appeal?

### **Analysis And Determination**

#### **Whether the Appeal instituted by the Appellant through the Memorandum of Appeal against the Respondent challenging the Ruling by the trial Court delivered on 8<sup>th</sup> October, 2021 has any merit.**

18. Whenever it comes to any filed appeal, the duty of the Appellate Court is well articulated in various cases by Courts as shall be demonstrated herein. In the case of:- "*Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, where the Court stated thus:-

‘This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re - assess and analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way

19. In another famous case of: "*Selle & Another v Associated Motor Boat Co. Ltd. & Others* (1968) EA 123 in the Courts provided guidelines the same issue as follows:-

“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif v Ali Mohamed Sholan* (1955), 22 EACA 270).

20. The Court of Appeal for East Africa took the same position in the case of "*Peters v Sunday Post Limited* [1958] EA 424 where Sir Kenneth O’Connor stated as follows:

‘It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the



exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in *Watt v Thomas* (1), [1947] AC 484.

“My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.”

### **Brief facts**

19. Before embarking into the analysis of the framed issues herein, it is significant that the Court ventures briefly onto the facts leading to this appeal. From the filed pleadings, on 8<sup>th</sup> June, 2021 the Appellant instituted this suit against the Respondent before the lower Court *vide* a Complaint dated 8<sup>th</sup> June, 2021. The said Complaint was together with a Notice of Motion application seeking for injunctive orders restraining the Respondent through their agents, Messrs. Kithemu Auctioneers from attaching or removing any of the goods belonging to the Appellant and/or executing the proclamation of distress for rent dated 2<sup>nd</sup> June, 2021 on the Appellant’s premises. From the pleadings, the Appellant was incorporated as a limited liability Company and tenant to the suit premises since the 31<sup>st</sup> October, 2019 when it entered into a lease agreement with the Respondent for five (5) years at a monthly rent of Kenya Shillings One Hundred Thousand (Kshs. 100, 000.00). The Appellant stated that they were operating a business of eatery and entertainment which provided them with income such as wages to their employees and monthly rent.
20. The suit property was owned by the Respondent. The Respondent was the duly appointed Legal Administrator of the Estate of Gabriel Mutiso Maadna (The Deceased) the registered owner to the suit property. The Appellant held that it had been paying rent regularly until the advent and/or outbreak of the Covid – 19 where it started experiencing some difficulties in paying rent due to the stringent restrictions placed by the Government (read the Ministry of Health). They further held that they had invested intensively onto the premises by building and other structures worth a sum of Kenya Shillings Fifteen Million (Kshs. 15, 000, 000.00). They had suffered immense losses and damages arising from the harassment and closure of the business. They averred that at around 2<sup>nd</sup> June, 2021 its goods were



proclaimed by the Respondent through the afore mentioned Auctioneers. He held that in the course of time it appeared to be some confusion and dispute within the family on where the rent should remitted.

21. The Respondent filed his responses holding that from January, 2021 the Appellant defaulted in paying rent and this continued for over twenty (20) months. Being in breach of the said Lease Agreement, the Respondent together with the Co – Administrators on 30<sup>th</sup> April, 2021 issued the Appellant with a termination notice for the tenancy. However, the Appellant still failed to give vacant possession as a result the Respondent instructed his Advocates on record to engage the services of Messrs. Kithemu Auctioneers to levy distress for rent. It was a result of this that the Appellant instituted this suit before the lower court and sought for the said injunction orders. The application was heard and Court delivered its ruling dismissing it which is the basis of this Appeal. That is adequate on the brief facts of the case.
22. From the filed appeal, the Appellant herein raised two pertinent issues in the Memorandum of Appeal which the Lower Court ought to have considered but for some reason or other failed to do so. These were whether the Appellant had indeed invested in the suit property by building permanent structures worth over Kenya Shillings Fifteen Million (Kshs. 15,000,000/=) and the existence of family feud between the Respondent and the sister which caused confusion as it left the Appellant at cross roads as to whom to remit the rent to.
23. Taking that the said Ruling found on pages 148 to 150 of the Bundle of Appeal and which forms the pith and substance of the matter, it is critical that the Court reproduces verbatim some crucial parts of it. The Learned Magistrate stated thus:-

“.....On whether the Plaintiff has established a *Prima facie* case, it is not in dispute that the Plaintiff is in rent arrears. Under the *Distress for rent Act*, the Landlord’s remedy to recover any rent arrears is a common law remedy .....it is clear in this case that there are rent arrears a fact which the Defendant has not refuted. The Defendant cannot therefore argue that it has *Prima facie* case as the right by the Defendant to distress for rent is only remedy available to the Plaintiff. In any case the *Distress for Rent Act* provides for remedy if the distress turns out to be unlawful. As such the Defendant cannot say it shall suffer irreparable injury which cannot be compensated by an award of damages. Having stated so, I find that the Plaintiff has not met the threshold for the grant of the orders sought. Even when we look at the balance of convenience the same tilts in favour of the Defendant.....”

From a quick perusal of the above, it is plain and clear that the Learned Magistrate exclusively concentrated on the allegation on the failure to meet rent obligations by the Appellant, a sum of Kenya Shillings One Hundred Thousand (Kshs. One Hundred Thousand (Kshs. 100,000.00). On the contrary, the Learned Magistrate overlooked the two other substantive issues raised from the filed pleading by the Appellant had raised in his Notice of Motion dated 8<sup>th</sup> June 2021. In particular the issue of the Appellant’s investment in the suit property worth over a sum of Kenya Shillings Fifteen Million (Kshs. 15,000,000/=) and the existence of the family feud between the Respondent and the sister which left the Appellant at odds as to whom to pay rent to were never addressed at all. As it shall be seen here below this was a travesty of justice. In my view, that these two issues raised herein are weighty and triable, to have been considered. In the given circumstances, therefore, I hold that the Appeal has merit and hence it should be allowed as prayed.



**Whether the Injunctive orders sought by the Appellant retraining the Respondent from taking any action on the suit property pending the hearing and determination of the suit meets the threshold of granting the said orders.**

24. Under this sub – heading and from the facts of the instant case, the Court has a duty to consider to grant the temporary order or not. It is now well established that the principles to be considered when granting an injunction orders are well captured in the “*Locus Classicus*” case of: “*Giella v Cassman (Supra)*” where the court provided thus;

“ 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.”

25. In the case of: “*Mrao Limited v First American Bank of Kenya Limited* (2003) eKLR, the Court of Appeal elaborated on what a “*Prima facie*” case entailed as stated herein:-

“ .... A *prima facie* case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right. It is a case which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for all explanation from the latter.....”.

26. So far, this Court has already been in a position to flesh out the two broad issues for consideration in this appeal. On the first issue, the Appellant averred having made substantive investments on the suit land. However, in a direct rebuttal, it has been the position by the Respondent that he never consented to the improvements. The existence of the family feud has been evident. The Appellant’s records, show that it was furnished with a letter dated 13<sup>th</sup> November 2021, from Advocates of one Pauline Kanini Mutiso who claimed that she was the beneficiary of the Estate of Gabriel Mutiso and directed Appellant to deposit rent to her *vide* her Advocates from the month of October 2019. The lease agreement provided however shows that the lease contract was between the Appellant and Defendant. The Respondent’s position was that the lease agreement was between the Administrator of the Estate / landlord and the Appellant and Ms. Pauline was not privy to the contract. Perusal of the grant dated 20<sup>th</sup> April 2011, showed that the administration of the Estate was issued to the Respondent and Beatrice Silu Mutiso. But clearly the lease agreement dated 31<sup>st</sup> October 2019 is between the Appellant and the Respondent only.

27. In conclusion, therefore, and as shall be stated herein below, I find that the Appellant has raised “a *Prima facie*” case with a probability of success and with a probability of success. The Appellant has also demonstrated that it will suffer irreparable damage if said orders are not granted as it stands to have its business lost and property auctioned if said orders are not granted.

**Whether the parties are entitled to the reliefs sought.**

28. Under this sub – heading, the Court holds that there is no doubt that the Appellant filed an application seeking to be granted interim/injunction orders. However, from the face value and plain reading of the ruling, it clear that while declining to grant the interim orders, the Magistrate based his reasoning and addressed himself onto an application in the nature seeking Mandatory injunction orders. Unlike Temporary Injunction which are granted only to be in force for a specified time or until the issuance of



further orders from Court, Permanent Injunction are rather different, in that they are perpetual and issued after a Suit has been heard and finally determined.

29. The orders in the nature of permanent Injunction fully determines the right of the Parties before the Court and is normally meant to perpetually restrain the commission of an act by the Defendant in order for the rights of the Plaintiff to be protected. This Court has the powers to grant the Permanent Injunction under Sections 1A, 3 & 3 A of the Civil Procedure Code if it feels the right of a Party has been fringed, violated and/or threatened as the Court cannot just seat, wait and watch under these given circumstances.
30. It's the effect of the order that matter as opposed to it mere positive working which makes it mandatory. The circumstances under which the Court would grant a Mandatory Injunction was well stated out by the Court of Appeal in the Case of "Malier Unissa Karim v Edward Oluoch Odumbe (2015) eKLR as follows:-

“The test for granting a Mandatory Injunction is different from that enunciated in the “*Giella v Cassman Brown* case which is the *locus classicus* case of Prohibitory Injunctions. The threshold in Mandatory is higher than the case of Prohibitory Injunction and the Court of Appeal in the case of “*Kenya Breweries Ltd-Vs- Washington Okeyo* (2002) EA 109” had the occasion to discuss and consider the principles that govern the grant of a Mandatory Injunction was correctly stated in Vol. 24 Halsbury Laws of England 4<sup>th</sup> Edition Paragraph 948 which states as follows:-

“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, it 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 attempts to steal a match on the Plaintiff, a Mandatory Injunction will be granted on an Interlocutory application”.

31. Thus, my quick reading of the ruling by the Learned Magistrate is that it was not based on these principles. The Court seemed to have overestimated itself by rapidly jumping the gun and arriving at some conclusion to wit that the Appellant was in rental arrears. To me this was an issue which could only be determined during a full trial through adducing of empirical documentary evidence. It was too early to have arrived at that conclusion.
32. Further, as stated severally, I have also noted that the Court never addressed itself on other pertinent issues such as the Appellants alleged investment and family feud and only considered that Appellant had admitted to not paying rent because of the advent of the global Covid 19/ Corona pandemic that hit the world in the year 2020 and 2021. Pursuant to that the Government of Kenya through the Ministry of health placed several stringent restrictions which included maintaining social distance, wearing of masks, staying and work from home and applying sanitizers. It will be noted that a lot of business establishments particularly the hospitality industries were closed down and hence drastically affected their business and employment of their workers. It was such a difficult time to everyone. It is my view that these are triable issues which ought to be considered based on the principles of natural justice, Equity and Conscience during the full trial. It is my opinion that the two issues overlooked by the trial Court are triable issues.



33. Furthermore, what would cause the Applicant irrecoverable damage and he is not in a financial position to compensate the applicant. The Court of Appeal case of:- “Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR held that,

“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

34. Having addressed my mind to the facts and evidence before me and in light of the guiding principles in the grant of an injunction, as stated in the case of “Nguruman (Supra)”. Once again, I am persuaded and reiterate that that the Appellant has a “*Prima facie*” case based on the expressly stipulated from the terms and conditions of the duly executed Lease agreement between the parties. Additionally, it stands to suffer irreparable damage that cannot be adequately compensated by an award of damages. The Appellant claims to have invested substantially on to the suit land a tune of Kenya Shillings Fifteen Million (Kshs. 15, 000, 000.). Although, with due respect the Respondent has queried on whether the Appellant had the consent to do so, but that is a matter of evidential facts and conjecture which the lower Court needs to spend a little bit of time on. I find that the monetary damages cannot be a substitute for the loss that may face the applicant, on this front the court is persuaded.

35. On the issue of the balance of convenience, in the given circumstances, I strongly hold that the same tilts in favour of the Appellant who has articulated their rights having been violated by the Respondent from the closure of the business, harassment, effect of the Covid – 19 and family feud leading to numerous Court cases and confusion on rental collection and management. In addition to the issues raised hereof, it’s in the interest of justice for court to secure and preserve the suit land until the case is heard and determined on merit. Securing the suit land will be done by invoking the provision of Section 68 of the Land Registration Act 2012, No. 3 of the 2012. The Honorable Court will do so by causing an inhibition be registered against any dealings taking place over the suit land until the suit is heard and determined. In the case of “Dorcas Muthoni & 2 others v Michael Ireri Ngari (2016)eKLR”, the court held that, *inter alia*:-

“An order of inhibition issued under Section 68 of the Land Registration Act is similar to an order of prohibitory injunction which bars the registered owner of the property under dispute from registering any transaction over the said property until further orders or until the suit in which the said property is a subject is disposed off. The court issuing such an order must be satisfied that the applicant has good grounds to warrant the issuance of such an order because, like an interlocutory injunction, such an order preserves the property in dispute pending trial.”

36. Finally, based on the above issues, I discern that the Lower Court needs to critically have an overview and consideration but not limited to the factors and issues:-
- a. Was there a lease agreement entered for the suit property” What were the stipulated terms and conditions enshrined thereof;



- b. Were the Appellant and the Respondents adhering to their obligation of the afore stated lease agreement? To what extent? Was there any breach? Was the Appellant indeed in rent arrears as alleged?
- c. Were there any legal draw backs or short – comings that inhibited, or prevented faced by the parties from the smooth adherence to the Lease agreement eg the Covid – 19 global pandemic and the Government restrictions to business; family feuds, the effect of other suits filed in Court over the same subject matter and so forth?
- d. Did the Appellant undertake any investment onto the suit land? To what extend and under what express or implied arrangements? Does the Counter Claim by the Appellant have any basis? Was there need to preserve the property pending the hearing and determination of the suit?
- e. Did the Appellant undergo any sufferings, losses, and/or damages arising from the failure to stick to the terms and conditions of the Lease Agreement?

### **Who will bear the Costs of the appeal?**

37. It is trite law that Costs are a matter of Court’s discretion. The Court in “*Republic v Rosemary Wairimu Munene, Ex-Parte Applicant v Ihururu Dairy Farmers Co-operative Society Limited*” this court held as follows:

The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.

38. In the instant case, taking that this matter is still at the very toddler stage pending full hearing and determination, its just fair and reasonable that the costs be in the cause.

### **Conclusion & Disposition.**

39. Consequently, having conducted an indepth analysis of the framed issues from this Appeal herein, the Honorable Court is persuaded that the Appellant has established its case on preponderance of probability and the appeal succeeds. For avoidance of doubt, the Court proceeds to grant following orders:
  - a. That the Appeal filed by the Appellant through a Memorandum of Appeal dated 8<sup>th</sup> October, 2021 be and is hereby allowed with costs to be in the cause.
  - b. That the ruling of the Learned Honorable Magistrate delivered and dated 8<sup>th</sup> October 20021 in CMCC No. 864 of 2021 be and is hereby set aside.
  - c. That the matter be mention on 18<sup>th</sup> January, 2023 before the Chief Magistrate (Mombasa) for taking directions on the further hearing of the case.
  - d. That an injunctive order by this Honorable Court be and is hereby issued against the Respondent by themselves, their servants, personal assigns and through his agents M/s Kithemu Auctioneers or any other person acting as such be restrained from attaching or removing any of the goods belonging to the Applicant and /or executing the proclamation



of distress for rent on the Applicant's premises or otherwise interfering with the Applicant's tenancy pending hearing of the suit before the Lower Court.

- e. That an order be and is hereby made that Certificate of Title deed for the Appellant deposited as security in ELC Court be moved to be deposited in the Lower Court pending hearing and determination of the suit.
- f. That in order be and is hereby made for the Appellant herein to deposit a sum of Kenya Shillings One Million (Kshs. 1, 000, 000.00) in a joint escrow account by the Law firms of Messrs. Marende Necheza & Company Advocates for the Appellant and Messrs. Munyithya, Mutugi, Umara & Muzna Company Advocates for the Respondent to cater for the outstanding rent and/or as further security within the next thirty (30) days from this date until the hearing and determination of the suit by the trial Court.
- g. That the Costs of the appeal to be in the cause.

It Is Ordered Accordingly.

**JUDGEMENT DELIVERED, SIGNED AND DATED AT MOMBASA THIS 23<sup>RD</sup> OF NOVEMBER 2022**

**HON. JUSTICE MR. L.L NAIKUNI, (JUDGE),**

**ENVIRONMENT & LAND COURT AT  
MOMBASA**

In the presence of:-

- a. M/s. Yumna, the Court Assistant.
- b. Mr. Shimaka Advocate for the Appellant.
- c. M/s. Jean Advocate holding brief for Mr. Munyithia Advocate for the Respondent.

