



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**

CIVIL SUIT  
134 OF 2007

**EDWARD T. KUNDU )**

**TOM W. ODANGA )**

**WILLIAM C. NATWATI (Suing  
for and on behalf of Kitale**

**Teachers Project))=====PLAINTIFFS/APPLICANTS**

**V E R S U S**

**SUSAN CHEPKURGAT ROBINSON ===== DEFENDANT/RESPONDENT**

**R U L I N G**

The plaintiffs moved the court by way of a chamber summons, which was expressed as having been brought pursuant to the provisions of Section 3A of the Civil Procedure Act, as read together with Order 39 Rules (1) and 2 of the Civil Procedure Rules.

Through this application, the plaintiffs seek orders to restrain the defendant from breaching, terminating or in any other manner interfering with the lease agreement dated 27/6/2004.

The plaintiffs also seek orders to restrain the defendant from letting out the suit property to any other tenant, other than the plaintiffs. The said suit property is said to be all that parcel of land known as L.R NO.6158/4, which is comprised in Grant No.11297097. It consists of land measuring 2.760 hectares, together with all the buildings and other developments thereon.

It was the plaintiff's case that on 27/6/07; they entered into a lease agreement with the defendant, in respect of the suit property. Pursuant to that lease agreement, the plaintiffs were to be given vacant possession of the suit property, which they were due to use for running a college known as Kitale Teachers College.

The plaintiffs did pay to the defendant, a sum of KShs.180, 000/=, as a deposit towards rent.

Having executed the lease agreement and also after paying the deposit, the plaintiffs set about advertising the college, with a view to getting students. Meanwhile, the plaintiffs also went about recruiting both teaching and non-teaching staff, in readiness for the opening of the college.

The plaintiffs say that the college was scheduled to open its gates on 26/9/2007.

However, before that could happen, the defendant is said to have served the plaintiffs with a letter purporting to terminate the lease agreement. The plaintiffs say that although the letter was dated 9/7/2007, it was only served upon them on 4/8/2007. Therefore, the plaintiffs expressed the view that the letter had been back – dated, by the defendant.

As at 25/9/2007, when the application was being canvassed, the plaintiffs had expected that the first students of Kitale Teachers College should have been admitted. However, that did not transpire, as the defendant failed to give to the plaintiffs, possession of the suit property.

Instead, the defendant is accused of commencing negotiations with a third party, with a view to leasing to the said third party, the suit property.

It was for that reason that the plaintiffs moved the court for the prohibitive injunctions, to stop the defendant from leasing the suit property to any other person, other than the plaintiffs. If anything, the plaintiffs ask this court to issue orders that would compel the defendant to hand over, the suit property, to the plaintiffs.

It is the plaintiffs submissions that the defendant does not have clean hands, as she was holding onto the deposit of KShs.180, 000/=, whilst at the same time depriving the plaintiffs of the suit property.

In response to the application the defendant first submitted that the application was incompetent and bad in law. Her reason for so saying was that the application ought to have been brought by way of a Notice of Motion, not a Chamber Summons, as had been done.

The defendant pointed out that the plaintiffs had brought an omnibus application, through which they sought both mandatory and prohibitory injunctions. Therefore, in the defendant's view, the application ought to have come by way of motion. But, as the application was brought by summons in chambers, the defendant asked the court to strike it out.

As the application herein was canvassed substantively, I will revert to the issue of its competence later. For now, I deem it prudent to delve into the rest of the substantive issues raised.

The first of those issues was the defendant's contention that the plaintiffs had failed to prove a prima facie case with a probability of success.

That argument was based on the defendant's perception, that the lease agreement which formed the foundation of the plaintiffs' case, was void. And why does the defendant consider it to be void?

In the first instance, the title to the suit property is said to be registered to two people, namely **SAFIA CHEBET ROBINSON** and **SUSAN CHEPKURGAT ROBINSON**. Therefore, the defendant submits that she, alone, could not have had legal capacity to execute a valid lease agreement in respect to the said property.

Secondly, the defendant submitted that the plaintiffs had failed to demonstrate to the court, that the Commissioner for Lands and the Land Control Board had given their consents to the lease which was to be given to the plaintiffs. The need for the said consent was said to have arisen from the Special Condition Numbered 3, in the Grant. That condition reads as follows; -

***“The Grantee shall not sell, transfer, sublet, charge or subdivide the land or any part thereof without prior written consent of the Commissioner of Land (Land Control Board)”***

A perusal of the Grant reveals that the suit property was granted by the President of the Republic of Kenya to Susan Chepkurgat Robinson, and Safia Chebet Robinson, as tenants in common.

Therefore, on a prima facie basis neither of the two tenants in common could execute a valid lease in respect of the suit property, in the absence of the other.

Secondly, on the basis of the special condition cited above, any subletting of the suit property could only be done after the Commissioner of Land had given his prior written consent thereto.

Therefore, in the absence of evidence that the Commissioner of Land had given his prior written consent to the lease which was to be given to the plaintiffs herein, the said lease would, on the face thereof, be unenforceable.

But, assuming for a moment that the plaintiffs were able to demonstrate that the Commissioner of Land was processing his consent to the lease (to the plaintiffs), it does appear that the plaintiffs would still be faced with a further hurdle. That hurdle comes in the form of Section 41 of the Registration of Titles Act and Section 107 of the Transfer of Property Act.

The reason for so saying is that the plaintiffs have made it clear that the lease was for a term of five years, commencing from 1/8/2007. That being the position, as pleaded by the plaintiffs themselves, it would appear that the provisions of Section 41 of the Registration of Titles Act came into play. That section reads as follows;

***“Any lease or agreement for a lease granted for a term not exceeding twelve months shall be valid without registration:***

***Provided that no right to purchase the land contained in any such lease or agreement shall be valid as against any subsequent purchaser of the land unless the lease or agreement be registered.”***

It is also to be noted that by virtue of Section 107 of the Transfer of Property Act;

***“A lease of immovable property from year to year, or for a term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument. . . .”***

Those statutory provisions do negate the submissions by the plaintiffs, to the effect that there was an implied monthly tenancy herein, on account of the fact that rents were payable monthly.

At any rate, the plaintiffs’ own pleading, with which they are bound, specifically states that the lease agreement was for a term of five years. Therefore, it could not also be construed as being a monthly tenancy.

As regards the plaintiffs’ contention that the defendant did back-date the letter terminating the lease agreement, the defendant conceded that the notice ought to have been dated 3/8/2007, instead of 9/7/2007. Although the defendant asserted that the error was no more than typographical, in my considered view, that explanation does not appear to hold water. However, as this ruling is on an interlocutory application, I wish to say no more on that issue for now.

The defendant submitted that the plaintiffs were a party to the illegality constituted in the execution of the lease agreement by one of two registered proprietors of the suit property. The said illegality was said to have extended to the fact that the lease had not been registered, and also to the fact that the Commissioner of Lands had not given his consent to the said lease.

The defendant relied on the case of ***HEPTULLA Vs NOORMOHAMED [1984] KLR 580***, as authority for the proposition that the court ought not to enforce the lease agreement, as it was an illegal contract.

First there is no doubt that in that case, the Court of Appeal restated the following dicta, which had earlier been spelt out by Lord Morris of Borth –y-Gest, in the case of *Mistry Amar Singh V. Kulubya [1963] E.A. 408 at page 414;*

***“Ex Turpi causa non ortur action. This old and well known legal maxim is founded in good sense and expresses clear and well recognized legal principle, which is not confided to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or a transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality, the court ought not to assist him.”***

Whereas, there is no doubt that the foregoing legal statement is accurate, I find nothing at this stage, from which to conclude that the lease agreement was illegal or that the plaintiffs were implicated in any illegality.

If anything, the person who knew that she had no legal capacity to enter into the lease, yet went ahead to do so, was the defendant. It is she who had the Grant, and therefore knew that any lease in respect of the suit property ought to have been signed by both her and her co-proprietor.

Also, because she was in possession of the Grant, it is the defendant who was well aware of the special conditions stipulated therein.

The plaintiff may have failed to carry out a diligent search against the title, before entering into negotiations for the lease. Such a lapse did not imply illegality.

It also needs to be said that there is a distinction between a contract that is void and that which is illegal. A contract is said to be void when it is not valid. That would mean that the ingredients which would validate it were not met. An example would be the lease agreement which ought to be registered after the Commissioner of Lands consents to it. If the Commissioner had not given his written consent, or if the lease was not registered, such a lease would be void.

However, in my understanding, the said lease would not, by virtue of lacking the requisite consent and registration, be deemed to be illegal.

Illegality connotes a breach of the law. For instance, if betting was, by law, outlawed, it would be illegal to enter into a contract for purposes of betting. It is such a contract that the court could not conceivably be asked to enforce.

In this case the plaintiffs submitted that if the reliefs sought were not granted, the students who have been admitted to the college, and the staff who have been recruited would have nowhere to go.

Obviously, that is a sad state of affairs. But in the same vein one must ask themselves why that situation has arisen. The plaintiffs blame it on the defendant, for seeking to terminate the lease. But the defendant points out that the plaintiffs had not yet obtained any licences from the Ministry of Education, for purposes of actualizing the college.

Whilst it may be true, as the plaintiffs say, that the exercise of licensing and registration of a college was a whole process, I find that by taking steps to recruit staff and to register students before securing all the necessary documentation for the registration and licencing of the college, the plaintiffs' took a risk. Of course, theirs may have been a calculated risk, but as at present this court does not have sufficient material to enable it determine whether or not the college would have moved forward if only the reliefs sought were granted.

Another issue pertains to the deposit of KShs.180, 000/=. The defendant insists that she has offered to

refund the whole sum. If that be the case, as the same was not denied by the plaintiffs, I find that the deposit cannot be a basis for holding that the defendant had come to court with unclean hands, as was submitted by the plaintiffs.

The defendant submitted that the suit property was meant only for use as the residence of the grantee. Therefore, in her contention, the property could only have been used as a college, if the plaintiffs had first secured a change of user of the premises.

The special condition endorsed on the Grant stipulates that;

***“ the land shall be used for Agricultural purposes and Residence for the Grantee.”***

While being fully aware of that condition, the defendant negotiated with the plaintiffs, for the lease of the suit property, which she knew was to be used

***“ for purposes of undertaking small projects like holding tutitioning classes. . .”***

That is what she said in her affidavits sworn on 28/8/2007 and 14/9/2007, respectively.

Yet, in the same vein, the defendant had written to the Principal of Kitale Teachers' College, on or about 14/7/07, as follows;

***“ THE PRINCIPAL,***

***KITALE TEACHERS' COLLEGE,***

***P.O. BOX 1996,***

***KITALE.***

***Dear Sir/Madam,***

***RE: COVER LETTER FOR ROBINSON'S ACADEMY TEACHING STAFF***

***Following the takeover of Robinson's Secondary School by Kitale Teachers Training College and therefore the closure of Robinson's Secondary School.***

*I would like to request the following teachers who have been teaching in this school for the last six (6) months be absorbed by your institution according to the provisions of the labour laws of Kenya and or on humanitarian grounds.*

From my reading of that letter, it appears not only that the defendant knew that the plaintiffs wanted to utilize the suit property as a college, but more significantly, that even prior to the premises being converted into a college, the same had been used as a secondary school.

On the basis of the material so far made available to this court, I think that the issue of change of user is no more than a smokescreen. The defendant certainly does not win any accolades for honesty, in that respect.

At this point, I will revert to the issue of the procedures adopted in bringing this application.

In the case of ***JAMES BUNDI TENGEYA & ANOTHER V ASSISTANT PUBLIC TRUSTEE ELDORET, ELDORET HCCC. NO.15 OF 2005,*** the court held that mandatory injunctions are issued with reluctance, and only in special circumstances.

In this case, if the relief was granted, the court would also have granted one of the substantive reliefs

prayed for in the Plaintiff.

In the case of QUALITRON LIMITED V SHABAN SWEDI, MOMBASA H.C.C.C NO.83 OF 2003, the learned judge quoted with approval, the following words of Megarry J. in Shepard Homes Ltd V Sandham [1970] 3 ALL. E.R 402 at 412;

***“ Third, on motion, as contrasted with the trial, the court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case the court must inter alia feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction.”***

In that case, the application for a mandatory injunction was brought by motion, unlike in this case. Secondly, I find no high degree of assurance that if a mandatory injunction was granted herein, I would, at the trial, feel that such a relief had been rightly granted. I say so because it does appear, as earlier discussed herein, that the lease agreement is more likely than not to be found to be void.

In the case of REV. EMMANUEL PALONYANG & OTHERS VS. PR. JULIUS MURGOR & OTHERS, KITALE H.C.C.C. NO.92 of 2007, I analyzed various authorities and then concluded as follows;

***“ In a nutshell, mandatory injunctions are not dealt with under Order 39 of the Civil Procedure Rules.***

***Therefore as they are not so provided for under that or any other provision in the Civil Procedure Rules, the plaintiff should have moved the court pursuant to Order 50 rule 1 of the Civil Procedure Rules. And, the application would have been by motion on notice, brought under sections 3 and 3A of the Civil Procedure Act.”***

I also did hold that when a party brings an omnibus application, such as is the case here, such an application ought to be by way of motion. It should not be brought by summons.

In the circumstances, I find that the application before me is incompetent. It ought therefore to have been struck out.

However, as the parties also argued the substantive application, I need to make findings on the merit thereof.

In the case of AIKMAN V MUCHUKI [1984] KLR 353 the Court of Appeal said as follows, at page 359;

***“ Those who flout the law by infringing the rightful title of others, and brazenly admit it, ought to be restrained by injunction. If I am adding a new dimension for the grant of an interlocutory injunction, be it so.***

***Equity will not assist law – breakers.”***

The plaintiffs invited me to find guidance from that authority. And I wish to assure them that I am guided accordingly.

But then, the plaintiffs did not demonstrate to the court which law had been broken by the defendant, and how.

The plaintiffs also relied on the case of PAMELA AKINYI AWOUR & ANOTHER VS BARCLAYS BANK OF KENYA & 2 OTHERS, MILIMANI H.C.C.C. NO.64/2001 for the proposition that;

**“It is now well settled that in few special circumstances, a court can grant mandatory injunctions,” at the**

interlocutory stage of proceedings.

About that, there can be no doubt. However, in this case, the plaintiffs have not demonstrated any special circumstances to warrant the award of an interlocutory mandatory injunction. I say so because the defendant and her co-proprietor of the suit property have already signed a lease with a third party, Rev. Marksen Wafula Masinde. The said lease has already received the written consent of the Commissioner of Lands, in fulfillment of one of the special conditions of the Grant. The lease is also said to have already been presented for registration.

Furthermore, the third party is said to have already taken possession of the suit property.

In those circumstances, the application would appear to have already been overtaken by events.

For all those reasons, the application is without merit. It is therefore dismissed with costs.

Dated and Delivered at Kitale, this 17<sup>th</sup> day of October, 2007.

**FRED A. OCHIENG**

**JUDGE**