



**Bamburi Supermarkets Limited v Gupta & 3 others (Environment & Land
Case 165 of 2021) [2022] KEELC 14783 (KLR) (9 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14783 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 165 OF 2021
SM KIBUNJA, J
NOVEMBER 9, 2022**

BETWEEN

BAMBURI SUPERMARKETS LIMITED PLAINTIFF

AND

RUPA GUPTA ALIAS RUPA BULBULI BOSE 1ST DEFENDANT

JABESS ODUOR 2ND DEFENDANT

**KENYA KAZI SECURITY SERVICES LIMITED (KK SECURITY
LIMITED) 3RD DEFENDANT**

**KHALID SALIM T/A KHALID SALIM & COMPANY
ADVOCATES 4TH DEFENDANT**

RULING

[Notices of motion dated the December 16, 2021 and March 2, 2022 by the 1st defendant and plaintiff respectively]

1. The 1st defendant moved the court through the notice of motion dated the December 16, 2021, seeking for orders that;
 - a. Pending the interpartes hearing and determination of the application, an order of injunction pending appeal be granted restraining the plaintiff by itself, servants and or agents from interfering with the 1st defendant's quiet and peaceful occupation, management and control of all that property known as L.R. NO. 3413/Section 1/mainland North, on which it is erected a building known as Gupta Complex.



- b. Pending the hearing of the appeal herein, an order of injunction be granted so as to restrain the plaintiff by itself, its servants and or agents from interfering with the 1st defendant's quiet and peaceful occupation, management and control of all that property known as L.R NO. 3413/Section 1/mainland North, on which it is erected a building known as Gupta Complex.
- c. That costs be provided for.

The application is based on the eight [8] grounds on its face, and supported by the affidavit sworn by Rupa Gupta alias Rupa Bulbuli Bose, on the 16th December 2021, inter alia deposing that the building on the property comprises of shops and apartments which are rented out, and her rights to manage the same was sustained in Mombasa Commercial Case No. E70 of 2021 which was filed before the instant suit; that the order of December 7, 2021 to the effect that the income received from the suit property be deposited in a joint escrow bank account will lead to confusion and negatively impact on the building as she will be without funds to manage the property.

2. The application is opposed by the plaintiff through the replying affidavit sworn by Kunj Gupta, a director with the plaintiff, who among others deposed that the 1st defendant is not the owner of the suit property, and has no rights to use and occupy it or to collect, receive or use the rent from the suit property; that the late Prem Gupta had only managed the suit property as a director, and not as a shareholder, of the plaintiff, which directorship ceased upon his demise, and could not have been inherited by the 1st defendant; that the 1st defendant's application dated the 23rd September 2021 for of the injunction order was dismissed, and her current application amounts to seeking the stay of the order of December 7, 2021 through the back door; that complying with the orders of 7th December 2021, will not render the appeal nugatory as the rental income is to be deposited in a joint account; that the orders of December 7, 2021 are not in conflict with the orders in HCCC No. E70 of 2021, as it had protected the plaintiff by restraining interference with its property and had not granted the 1st defendant any enforceable rights.
3. On its part, the plaintiff filed the notice of motion dated the March 2, 2022, among others seeking for orders that;
 - i. Rupa Gupta alias Rupa Bulbuli Bose, the 1st defendant, be committed to civil jail for six [6] months for disobeying the court's order of 7th December 2021.
 - ii. That paragraph 46 (d) (i) and (ii) of the ruling of December 7, 2021 be reviewed "by substituting thereof with an order that DK Real Estates Limited be and is hereby appointed to manage, run and collect rent from all the tenants occupying the property known as L.R No. 3413/section 1/Mainland North, on which is erected a building known as Gupta Complex pending hearing and determination of this suit." In the alternative to this prayer, the court be pleased to appoint any other real estate manager to manage, run and collect rent from all tenants in the suit property.
 - iii. That all tenants in the said property be ordered to pay to DK Real Estates Limited pending hearing and determination of the suit.
 - iv. The OCS Nyali Police Station to ensure compliance of the court order and that peace, law and order is maintained at all times the order will be in force.



- v. Costs be borne by the 1st defendant.

The application is based on the fifteen [15] grounds on its face and supported by the affidavit sworn by Varun Gupta, a director of the plaintiff, on the 2nd March 2022, in which he deposed to the following inter alia; that the 1st defendant's advocates have declined to execute the bank account opening documents forwarded to them by its counsel on the 31st January 2022 and 1st February 2022; that the 1st defendant has disobeyed the order of December 7, 2021 by;

- a. declining to provide detailed and comprehensive accounts and financial statements of rent income.
- b. continuing to collect and receive rent from, issue invoices and receipts to, the tenants in the suit property.
- c. occupying the suit property.
- d. permitting the 2nd defendant to occupy and rebrand shop no. 7 on the suit property.

That further, the 1st defendant has been issuing invoices with 16% V.A.T but failing remit the amount to Kenya Revenue Authority [KRA], thereby exposing the plaintiff to tax liability, and there is therefore need to have an independent estate manager appointed to professionally run and manage the suit property.

4. The application is opposed by the 1st defendant, through her replying affidavit sworn by Rupa Gupta on the 29th March 2022, inter alia deposing that it has been problematic to comply with the orders of 7th December 2021 due to the existence of another order issued in HCCC No. E070 of 2021 over the same property, which means compliance with either order amounts to disobedience of the other; that she was dissatisfied with the orders of December 7, 2021 and has filed an appeal, and an application for stay pending appeal; that as she has indicated her difficulties in complying with the court orders of 7th December 2021, she should not be held to be in contempt.
5. The court gave directions on the June 28, 2022 and July 18, 2022 that the above two applications be heard jointly through written submissions to be filed within the given timelines. The learned counsel for the 1st defendant fled two sets of submissions dated the February 11, 2022 and October 1, 2022 in respect of the applications dated the 16th December 2021 and 2nd March 2022 respectively. The learned counsel for the plaintiff file submissions dated the 25th July on the two applications.
6. The following are the issues for the court's determinations on the two applications;
 - a. Whether the 1st defendant has established a reasonable case for the injunction orders sought to be issued.
 - b. Whether the plaintiff has proved to the standard required that the 1st defendant has disobeyed the orders of the 7th December 2021, and if so, what sanction to issue.
 - c. Whether the plaintiff has made a reasonable case for review of the orders of December 7, 2021 in the terms proposed in the application.



- d. Who pays the costs in each of the applications.
7. The court has after considering the grounds on the two applications, affidavit evidence, submissions by counsel, superior courts decisions cited therein, and the record come to the following findings;
- a. That before going to the analysis of the facts in the two applications, it is important to start by setting out the orders in the ruling of the court delivered on the 7th December 2021. The orders from the signed copy of the said ruling in the record are as follows;
- “a) That the notice of motion dated August 19, 2021 by the plaintiff/applicant be and is hereby allowed.
- b) That the notice of motion application dated the August 23, 2021 by the defendant/applicants is found to be unmeritorious and hence dismissed.
- c) That grounds of opposition dated September 27, 2021 by the 4th defendant is found to be unmeritorious and hence be and is hereby dismissed.
- d) That the notice of motion application dated the September 7, 2021 by the plaintiff/applicant be and is hereby stayed awaiting the outcome of these orders made today – 7th December 2021 save on the fulfillment of the following conditions:-
- i. All the rental income collected and received from the proceeds of the suit land from the months of July 31st onwards to be deposited in joint escrow bank account of the law firms of Messrs. Oluga & Company Advocates, Messrs. Martin Tindi & Company Advocates and Messrs. Oruenjo, Kibet & Khalid Advocates within the next 14 days from today.
- ii. These account holders/signatories to be empowered to run, manage and operate the said afore accounts on the day to day operations and settlement of overheads unlawful (sic) the matter is heard and determined.
- iii. The 1st defendant, by herself agents and servants to provide this court with a detailed and comprehensive accounts and financial statements of all the rental income collected and received from the month of July 31st to date within the next thirty (30) days.
- e. that the parties are advised if possible to withdraw all the court cases pending in all the other courts over the same subject matter, the same to be consolidated save to state;-
- i. The HCCC (Mombasa) No. 070/2021 which is distinctly and solely on the fraudulent and irregular matters of shares onto the plaintiff's property to



continue being heard to its logical conclusions accordingly.

- ii. The ELC No. 165/2021 which distinctly and solely in matters of ownership and title of the suit land to be fixed for hearing within the next ninety (90) days from this date on priority basis.
 - iii. There be a mention of ELC No. 165/2021 on 1st February 2022 for pre-trial conference sessions under order 11 of the Civil Procedure Rules and case management and taking an appropriate hearing date.
 - iv. That each party to bear their own costs of the application hereof.”
- a. That prior the above orders being issued, the court had earlier on the 19th August 2021 granted interim injunctive orders against the defendants in respect of the plaintiff’s application of that same date. The court later heard the parties’ counsel on the August 25, 2021, on among others, whether the interim orders should be discharged in view of the orders in HCCC No. E070 of 2021. The court arrived at a finding inter alia that this suit was properly before this court, and was dealing with ownership of the land issue while the High Court one dealt with entirely commercial issues. The counsel for the parties were again heard on the September 29, 2021 and on the October 19, 2021 before the ruling subject matter of the two applications, was delivered on the 7th December 2021.
 - b. That the net effect of the orders of the December 7, 2021 was to ensure the rental income emanating from the disputed suit property was safeguarded in an escrow bank account, in the joint names of the parties’ advocates, with the responsibility to run, manage and operate the day to day operations of the account and settling overheads, pending the hearing and determination of the matter(suit). This, contrary to the 1st defendant’s claim, would ensure rental income collected or received over the time would be available for the court to give directions on the party or parties entitled to the same at the conclusion of the suit or appeal.
 - c. That complying with the orders of December 7, 2021 would not in any way make the 1st defendant’s pending appeal nugatory, but would indeed ensure the rental income has been accounted for during that period, for release to the party or parties that are successful in the claim of entitlement to the suit property. There is therefore nothing before the court to suggest that the 1st defendant would likely suffer substantial loss if the injunction orders sought are not issued. That though the 1st defendant filed her application without unreasonable delay, she has not made any offer for security for the due performance of the decree as required under order 42 rule 6 (2) of the *Civil Procedure Rules*.
 - d. Upon finding that the 1st defendant’s notice of motion dated the December 16, 2021 is therefore without merit, it follows that she should pay the plaintiff’s costs in the application in accordance with section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya.
 - e. That from the affidavit evidence of both the 1st defendant and the plaintiff, in respect of the plaintiff’s notice of motion dated the 2nd March 2022, it is not in doubt that the 1st defendant knew of the existence and import of the orders of December 7, 2021. It is further not disputed that the 1st defendant has not complied, or made any attempts to comply, with the said orders.



The 1st defendant's claim that she was unable to comply with the orders because doing so would amount to disobeying the orders issued earlier in HCCC No. E070 of 2021 is merely an excuse and has no basis. The orders in the High Court case had been brought to the attention of this court during the hearings preceding the ruling of the 7th December 2021, and the court made a finding that the issues therein were different from those in this matter. That finding has not been overturned on appeal, and or reviewed. This court has had occasion to deal with almost a similar situation in the case of Paul Gathingu Gachie Versus Cabinet Secretary for Land & Physical Planning, Eldoret J. R. No. 4 of 2019, where the respondent was making excuses for failure or inability to comply with a court order, and after analyzing the facts and the various decisions of the superior courts particularized therein, the court came to a finding that the party was in contempt and was sanctioned. Having considered the above, the court therefore finds that the plaintiff herein has proved to the standard required, of above balance of probability, that the 1st defendant has disobeyed the court orders of 7th December 2021, and should be sanctioned. The 1st defendant has not shown any willingness to comply with the orders or any remorse for failing or declining to comply.

- f. That on the application for review of the orders of December 7, 2021 so as to appoint DK Real Estates Limited or any other real estate management company to manage the suit property, the court finds no reasonable basis have been presented to support such a move. In any case, the orders of 7th December 2021 clothed the signatories of the escrow bank account that was to be opened with powers "to run, manage and operate the said afore accounts on the day to day operations and settlement of overheads unlawful [sic] the matter is heard and determined." This clearly shows they would have powers, just like that of a real estate entity, in the running and management of the suit property. The court finds no reasonable basis of interfering with the orders before they are even implemented.
 - g. That as the actions of the 1st defendant of declining or neglecting to comply with the orders of the 7th December 2021 are the ones that led the plaintiff to file the notice of motion dated the 2nd March 2022, then under section 27 of the Civil Procedure Act, she should pay the costs to the successful party.
8. Flowing from above, the court finds and orders as follows;
- a. That the 1st defendant's notice of motion dated the December 16, 2021 is without merit and is hereby dismissed with costs.
 - b. That the plaintiff's notice of motion dated the March 2, 2022 has merit in respect of first prayer and the 1st defendant is found to be in contempt of the court orders of 7th December 2021. The court therefore directs as follows;
 - i. That the 1st defendant is given an opportunity to comply with the orders of December 7, 2021 within the next fourteen (14) days.
 - ii. That should the 1st defendant fail or decline to comply with the said orders, she is to pay a fine of Kshs.500,000.00 (five hundred thousands) to be paid within thirty (30) days from today, and in default warrant for her arrest to issue, committing her to serve three (3) months imprisonment.
 - iii. The 1st defendant will also pay the plaintiff's costs in the application.
- Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 9th DAY OF NOVEMBER 2022.

S.M. Kibunja, J.



ELC MOMBASA

IN THE PRESENCE OF;

PLAINTIFF

.....
**

DEFENDANTS

.....
COUNSEL

.....
WILSON .. COURT ASSISTANT.

S.M. KIBUNJA, J.

ELC MOMBASA.

