



**Gakui v Golden Gate Cargo Company Limited (Environment and Land Appeal E027 of 2023) [2025] KEELC 4158 (KLR) (27 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 4158 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E027 OF 2023**

**JA MOGENI, J  
MAY 27, 2025**

**BETWEEN**

**PHOEBE WANGUI GAKUI ..... APPELLANT**

**AND**

**GOLDEN GATE CARGO COMPANY LIMITED ..... RESPONDENT**

*(Being an appeal against the Ruling of Hon. Becky Cheloti Mulemia (PM) delivered on 23rd June, 2023 in the Chief Magistrates Court at Nairobi in MCOMMSU/E1291 of 2021)*

**JUDGMENT**

1. What is before the Court for determination is the Appellant’s Appeal filed by Phoebe Wangui Gakui against Respondent, Golden Gate Cargo Company Limited. The Appellant is aggrieved by the Ruling of the trial Court delivered on 23<sup>rd</sup> June 2023 in Nairobi CM’s MCOMMSU/E1291/2021.
2. Pursuant to leave granted by this Hon Court on 9/5/2024 to file the Appeal out of time, the Appellant vide a Memorandum of Appeal dated 5/10/2023 challenged the impugned Ruling on the following grounds;
  - i. The Learned Magistrate erred in law and in fact in taking into account irrelevant and extraneous factors.
  - ii. The Learned Magistrate erred in law and in fact in failing to evaluate the evidence tendered judiciously.
  - iii. The Learned Magistrate erred in law and in fact by failing to recognize and appreciate that there is no valid Lease Agreement in place between the parties herein.



- iv. The Learned Magistrate erred in law and in fact in ignoring and/or failing to consider the Appellant's Preliminary Objection, Replying and further Affidavit, relevant authorities, submissions and arguments.
  - v. In all the circumstances of the case, the Learned Magistrate failed to render justice to the Appellant.
  - vi. Other grounds and reasons to be adduced at the hearing hereof.
3. The Appellant seeks Orders THAT;
- a. This appeal be allowed.
  - b. The Ruling and Order of the Hon Becky Cheloti Mulemia dated and delivered at Nairobi on 23<sup>rd</sup> June 2023 in Nairobi MCOMMSU/E1291/2021 Golden Gate Co. Ltd vs Phoebe Wangui Gakui be set aside.
  - c. Such further or other reliefs as this Honorable Court may deem just and fit to grant in the circumstances of this Appeal.
  - d. The costs of this appeal be awarded to the Appellant.
3. A brief summary of facts is important.
4. The Respondent herein sued the Appellant in the trial Court vide a Complaint dated 20/9/2021. My perusal of the Complaint show that the instant parties entered into a Lease Agreement dated 21/2/2018 over land parcel known as LR Number 36/VIII/548 situate at Eastleigh (hereinafter referred to as the "suit property") which is owned by the Appellant.
5. An agent named Farah Ahmed Omar represented the Respondent in the said Lease Agreement which was to last a fixed term of five (5) years ending 31/5/2023. The parties agreed on a Lease Agreement markup covering different periods as follows: Kshs. 300,000/= for all the months between March 2018 and February 2020; Kshs. 400,000/= for the months between March 2020 and February 2022 and Kshs. 450,000/= for the months falling between March 2022 and May 2023.
6. On its part, the Respondent averred that it complied with its obligations under the Lease Agreement in particular duly paying up all rent monies. That despite the foregoing on 7/4/2021 the Appellant through the firm of Chege & Amp; Co. Advocates demanded a sum of Kshs. 7.5M as rent arrears from the Respondent.
7. In its response to the demand, the Respondent held internal meetings and through the resolutions made in the said meetings dated 15/3/2021, 1/4/2021 and 14/7/2021 contested the said demand and provided receipts of payments made thereto. The ultimate resolution was to the effect that the Respondent would only pay the Appellant Kshs. 2M in settlement of all rent arrears in dispute. At the same time the Respondent resolved that the Appellant and Respondents would both sign and have deposited a new lease in favor of the Respondent, only this time round there would be no agent to stand in a go between or to represent the Respondent.
8. However, the Respondent contended that the Appellant negated the said resolution and vide a letter dated 7/9/2021, she demanded payment of the Kshs. 2M arrears, an additional 3 months' deposit amount and her legal fees. That the Appellant went ahead to engage auctioneers to threaten the Respondent to yield to her demands necessitating the filing of the suit.



9. The Appellant resisted the Respondent's suit by filing a Statement of Defence and Counter claim dated 18/2/2022. In her Defence, she admitted that she is the registered owner of the suit property which she leased to Farah Ahmed Omar by way of a Lease dated 21/2/18. She averred that the Respondent is a stranger to the said Lease Agreement and thus it is estopped from claiming any proprietary interests over the suit property. In the Counter claim the Appellant accused the Respondent of trespassing on the suit land and in the main suit, prayed for orders of mandatory injunction to compel the Respondent to vacate the suit land and in default an order of eviction to issue.
10. Contemporaneously the Respondent filed a Notice of Motion of even date seeking a temporary injunction restraining the Appellant from interfering with the suit land pending the hearing and determination of the Application. The Appellant opposed the Application through her Replying Affidavit sworn on 10/11/2021. The trial Court granted interim injunction and mandamus orders against the Appellant on 21/9/2021 as shown at page 596 of the Record of Appeal.
11. Relevant to this Appeal, the Respondent again filed a further Application dated 13/3/2023 seeking a temporary injunction against the Appellant from interfering with the Respondent's quiet enjoyment of the suit land pending the hearing and determination of the main suit. The gist of the Application inter alia was that the Respondent is the registered lessee occupying the warehouse operating cargo business on the suit land pursuant to a Lease Agreement dated 21/2/2021; that the period of the Leases was a fixed term of 5 years 3 months thus an uncontrolled tenancy under the Laws of Kenya; that the tenancy relationship between the parties is governed by the implied conditions under Section 55(1)(a) of the Land Act and that the Respondent was pained by the Appellant's interference of its use of the suit land despite the interim injunction in place.
12. The Appellant objected to the Motion through a Replying Affidavit sworn on 18/4/2023. She deposed that the Respondent's prayer for quiet enjoyment of the suit land was not merited since the Respondent did not have a valid Lease Agreement in place in its favor. That Farah Ahmed Omar was the lawful tenant and, in any event, the Appellant's move to distress for rent arrears was in pursuance of a Clause in the Lease Agreement signed by herself and Mr. Farah.
13. The Application was canvassed by way of written submissions.
14. In allowing the said Application on 23/6/2023, the trial Court in a 2-page Ruling ordered as follows;
  - i. "That the Defendant/Respondent is hereby restrained either by herself, her servants, agents and/or employees from harassing, intimidating and/or in any manner howsoever from interfering and/or interrupting without lawful cause with the Plaintiff/Applicant quiet possession, use and enjoyment of the leased premises being the cargo warehouse business located on Land Reference Number 36/VIII/548 situate in Nairobi County pending the hearing and determination of this suit.
  - ii. That the Defendant/Respondent is hereby restrained by herself, her servants, Agents or anyone authorized by her claiming under her from in any manner or otherwise howsoever subjecting the Plaintiff/Applicant their servants or agents to nay harassment with the intention thereby of breaching the Applicant's right to quiet possession, use and enjoyment of the leased premises or any part thereof and/or in any manner to occasion the frustration or termination of the fixed commercial tenancy enjoyed by the Plaintiff/Applicant over the eased suit premises pending the hearing and determination of this suit.
  - iii. That the Defendant/Respondent is hereby restrained by herself, her servants, agents or anyone authorized by her claiming under her from in any manner or otherwise howsoever levying distress for rent and attachment/repossession of the Plaintiff/Applicant's properties in the



warehouse on Land Reference Number 36/VIII/548 situate in Nairobi County pending the hearing and determination of this suit.

- iv. That status quo be maintained pending the hearing and determination of this suit.
  - v. The costs of this Application to be in the cause.”
15. It is the above orders that aggrieved the Appellant triggering the instant appeal.

### **Analysis & Determination**

16. As a first Appellate Court, this Court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, before drawing a conclusion from that analysis. The Court has however to bear in mind the fact that it did not have an opportunity to see and hear the witnesses first hand. This duty is enunciated by Section 78 of the *Civil Procedure Act* which espouses the role of a first Appellate Court which is to: ‘... re-evaluate, reassess and re-analyze the extracts of the record and draw its own conclusions.’
17. Additionally, that duty has been affirmed in numerous decisions of the Superior Courts. Notably in the case of *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was pronounced thus: “... this Court is not bound necessarily to accept the findings of fact by the Court below. An appeal to this 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 ....”

### **Issues for Determination**

18. In my view the germane issues for determination are;
- i. Whether the Appeal is merited?
  - ii. Who bears costs?
19. Having outlined the background of the Appeal in extenso in the preceding paragraphs, I now proceed to the gist of the Appeal.

### **Whether the Appeal is merited?**

20. In the impugned brief Ruling the trial Court determined that the Application before it raised triable issues and proceeded to allow it. The Appellant inter alia decries that the trial Court’s error in failing to evaluate the evidence before it and to render justice to the Appellant and in particular failing to appreciate that there was no valid Lease between the parties herein.
21. The gravamen of the Respondent’s Application dated 13/3/2023 inter alia was that the Respondent is the lawful registered lessee of the suit property pursuant to a Lease Agreement dated 21/2/2021. However, in the Supporting Affidavit the deponent Abdullahi Adan Ali, the Respondent’s Director averred (para.2) that the Lease Agreement is dated 21/1/2018 annexure ‘AAA 2’. See page 602 of the Record of Appeal. Nevertheless, under para. 5 of the Affidavit the deponent referred to Lease Agreement dated 21/2/2021 entered with the Appellant for a term of 5 years and 3 months. A reading of the lengthy Supporting Affidavit shows that the Respondent did not adduce any evidence of registration of the Lease Agreement (either for the 2018 or 2021 Agreement) fortifying its rights as the registered lessee as deponed. To that end the Appellant was accused of interfering with the



Respondent's quiet enjoyment of the suit property through auctioneers and goons who threatened and harassed the Respondent.

22. Refuting the authenticity of the aforesaid Lease Agreement(s), the Appellant filed her Replying Affidavit sworn on 18/4/2023 - at page 630 of the Record of Appeal. She contended that the Respondent was contradicting itself by citing two different Lease Agreements dated 21/2/2018 and on the other hand 21/3/21 (sic.) and that there was no existing Lease Agreement between the parties. Further that her move to distress for rent was properly done in light of unpaid rent arrears.
23. In an Application for temporary injunction, the guiding law is found in Order 40 Rule 1 of the Civil Procedure Rules which states;

“Cases in which temporary injunction may be granted [Order 40, rule 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, 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.”

24. Further an Applicant must satisfy the conditions set out in the leading case of *Giella vs Cassman Brown* (1973) EA 358. This position has been reiterated in numerous decisions from Kenyan Courts and more particularly in the case of *Nguruman Limited versus Jan Bonde Nielsen & 2 others* [CA No.77 of 2012](#) (2014) eKLR where the Court of Appeal held that;

“In an interlocutory injunction Application, the Applicant has to satisfy the triple requirements to

- a. establishes his case only at a prima facie level,
- b. demonstrates irreparable injury if a temporary injunction is not granted and
- c. ally any doubts as by showing that the balance of convenience is in his favour.”

25. These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the Applicant is expected to surmount sequentially.
26. It is not enough for a party to merely state that it has a prima facie case. That alone will not bring it within the ambit of a prima facie case as required by law. See the case of *Stek Cosmetics Limited v Family Bank Limited & Another* [2020] eKLR. An applicant bears the burden of proving a prima facie case in its favor. An applicant must show that its right is being violated or is likely to be violated by the rival party which would shift the burden onto the latter to explain or rebut the Applicant's claim.



27. Besides, it is trite that if a prima facie case is not established, then irreparable injury and balance of convenience need no consideration. This position was echoed by the Court of Appeal in the case of Nguruman (supra) and later in Moses Kibiego Yator v Eco-Bank Kenya Limited & 2 Others [2019] eKLR.
28. The grant or refusal of an order of temporary injunction is within the discretion of the trial Court to be considered in accordance with the law and relevant precedents. This is therefore an Appeal against the exercise of that discretion by the Trial Magistrate in granting the order of temporary injunction. In determining this Appeal, therefore, this Court will be guided by the general principles which apply when an Appellate Court may interfere with the discretionary jurisdiction of the trial Court. These were set out in the case of Mbogo & Another -v- Shah 1968 E.A. 93.
29. On such interference, the Supreme Court of Kenya has pronounced itself on the applicable criteria in the case of Apungu Arthur Kibira v Independent Electoral and Commission Boundaries & 3 Others [2019] eKLR.
30. Having set out the above, the question that comes to mind is whether the trial Court rightly exercised its discretion in granting a temporary injunction as sought by the Respondent. It is trite that he who alleges must prove. See Section 107 of the Evidence Act.
31. The Respondent having pleaded that it was the registered lessee of the suit property pursuant to a Lease Agreement, it bore the burden to prove the said allegation which was expressly opposed by the Appellant. The mere act of attaching Lease Agreements does not demonstrate occupation and possession which the Respondent accused the Appellant of unlawfully interfering with. The Court of Appeal in the case of Munyu Maina v Hiram Gathiha Maina [2013] eKLR emphasized that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. That it is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.
32. In addition, the Court of Appeal in Mega Garment Limited v Mistry Jadva Parbat & Co. (Epz) Limited [2016] KECA 172 (KLR) the Appellate Court discussed the status of an unregistered lease and stated as follows:

“The time-honoured decision of this Court in Bachelors Bakery Ltd –v- Westlands Securities Ltd (1982) KLR 366 which has been followed in a long line of subsequent decisions elucidates the status of an unregistered lease. It reiterates and confirms the firmly settled law, first that a lease for immovable property for a term exceeding one year can only be made by a registered instrument; that a document merely creating a right to obtain another document, like the one in this dispute, does not require to be registered to be enforceable; that such an agreement is valid inter partes even in the absence of registration, but gives no protection against the rights of third parties.”
33. That exposition of the law hold true in this case. A reading of the impugned Ruling does not show the trial Court's analysis and determination of this critical issue of existence or not of a valid Lease Agreement between the parties noting that such existence of Lease Agreement had a bearing in establishing a prima facie case. I therefore am of the view that the trial Court ought to have satisfied itself of the parties' competing interests if any, in the suit property before grant the assailed interim orders.



34. Guided by the Court of Appeal decision in *Celestine Ann King & 4 Others v Said Hassan Mwatsumiro & 5 Others* [2020] eKLR on interference of discretion on the basis of failure to take into account relevant matters before reaching the trial Court's findings, in my opinion this Appeal is a ripe case for this Court to interfere with the impugned Ruling. The first issue is thus answered in the affirmative.

**Who bears costs?**

35. Section 27(1) of the *Civil Procedure Act* provides that generally costs follow the event. The Supreme Court in the case of *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others* [2014] eKLR detailed the parameters for consideration in applying the general rule that costs follow event.

36. Accordingly, having reached the conclusion that the Appeal is merited, thus the Appeal is therefore allowed with costs to the Appellant. The suit be remitted to the trial Court for hearing and final determination before another Court other than Hon Becky Cheloti Mulemia.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 27<sup>TH</sup> DAY OF MAY 2025 VIA MICROSOFT TEAMS.**

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**MOGENI J**

**JUDGE**

In the presence of:

Appellant – Absent

Respondent - Absent

Mr. Melita – Court Assistant

**COURT**

The Court being satisfied that parties were served delivered the Judgment on 27/05/2025 at 10.40am.

