



Orako Evans Oduor t/a Joint Basevana Enterprises Limited v Jeofrick N. Muinde t/a Kimu Auctioneers & another (Environment and Land Appeal 47 of 2023) [2024] KEELC 1764 (KLR) (9 April 2024) (Ruling)

Neutral citation: [2024] KEELC 1764 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL 47 OF 2023
GMA ONGONDO, J
APRIL 9, 2024**

BETWEEN

ORAKO EVANS ODUOR T/A JOINT BASEVANA ENTERPRISES LIMITED APPLICANT

AND

JEOFRICK N. MUINDE T/A KIMU AUCTIONEERS 1ST RESPONDENT

ERNEST BIN AMITO 2ND RESPONDENT

RULING

1. The applicant through Quinter Adoyo and Company Advocates filed an application by way of a Notice of Motion dated 16th November 2023 seeking the orders infra;
 - a. Spent
 - b. Spent
 - c. That upon hearing of this Application inter partes, an order of injunction do issue restraining the respondents and/or their agents, proxies, persons acting under their authority and/or instructions from undertaking any activity on the subject matter until the appeal is heard and determined on merits.
 - d. That the costs of this application be provided for.
2. The application is based on the grounds on the face of it and the applicant's supporting affidavit of 14 paragraphs sworn on even date and a letter dated 28th September 2023 marked as "OEO-001" annexed to the affidavit. The applicant averred, inter alia, that the respondents have threatened to levy on the 2nd distress for rent as discerned in the letter which is unjustified since the same touch on the essence of the appeal. Also, the application is based on the grounds, inter alia;



- a. That during the purported and illegal distress for rent, the Respondents carried away all tools of trade of the Applicants, leaving the structures only, and the applicants have not carried on any business for more than one year now.
 - b. That seeing as the 1st distress was an act of breach of contract for lease of land between the Applicants and the 2nd Respondent herein, it is highly unconscionable and against the interest of justice to threaten a second distress, wherefore this Application should be allowed with costs.
 - c. That the threats to levy on the 2nd distress for rent is unjustified since they touch on the essence of the appeal.
3. The 2nd respondent/applicant through Aluoch Odera and Nyauke and Company Advocates, responded to the application by the following grounds of opposition dated 28th November 2023;
 - a. This court has no original jurisdiction to deal with matters of distress for rent.
 - b. The application thus offends the law.
 4. On 8th February 2024, the court directed that the application be heard by written submissions.
 5. By the applicant's submissions dated 22nd February 2024, reference is made to the application inclusive of the orders sought therein and that jurisdiction was contested in Homa Bay CMC 089 of 2022 and it is the same subject of this appeal. That thus, status quo be maintained until the appeal is determined. That in any event, the court can award costs for any loss suffered by the appellant.
 6. In the submissions dated 9th January 2024, counsel for the respondent raised the issue of jurisdiction of the magistrate's court over the present dispute and urged the court to dismiss the application with costs. Counsel submitted that the Business Premises Rent Tribunal and not the magistrate's court, is the first port of call to challenge the purported pending distress arising from lease agreement.
 7. On 26th February 2024, Mr Jack Otieno instructed by Quinter Adoyo for the applicant sought to rely on the submissions dated 22nd February 2024 and didn't intend to highlight the same.
 8. On the said date, Mr. S. Nyauke learned counsel for the appellant/respondent relied on the submissions dated 9th January 2024 and orally submitted that the court is confronted with five questions for determination namely;
 - a. Is lease of land like in this case forming a tenancy within the purview of Chapter 301 Laws of Kenya?
 - b. Whether the leave herein is for 5 years or more.
 - c. Is it is controlled or not in the meaning with cap 301 Laws of Kenya?
 - d. Whether there is an exist clause provided under the said Act.
 - e. Whether the subordinate has jurisdiction over this dispute or not.
 9. I have taken into account the application, the grounds of opposition, the rival submissions in entirety. So, has the applicant established that he is entitled to orders sought in the application?
 10. It is noteworthy that temporary injunction sought in the application is provided for under Order 40 of the *Civil Procedure Rules*, 2010. Moreover, the triple principles governing injunctive relief, inter alia, establishment of the applicant's case only at a prima facie level, are codified by authoritative pronouncements in the precedents including the celebrated case of Giellav Cassman Brown Co. Ltd (1973) EA 358.



11. As regards the said principles, in *Nguruman Ltdv Jean Bonde Nielsen* (2014) eKLR, the Court of Appeal observed as follows;

“These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent.....”
12. This court is mandated to grant interim preservation orders of the subject matter of this appeal pursuant to section 13 (7) (a) of the *Environment and Land Court Act*, 2015 (2011).
13. Besides, paragraphs 7 and 9 herein above refer to the distress for rent in question in relation to the Business Premises Tribunal established under the *Landlord and Tenant (Shops, Hotels and Catering Establishments Act* Chapter 301 Laws of Kenya. Article 159 (1) of *the Constitution* of Kenya 2010 reads;

“Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.”
14. Clearly, the issue of jurisdiction of the trial court in respect of the instant dispute is raised in the grounds of appeal and the replying affidavit in opposition thereto. This court is quite conscious of the definition of the term “Jurisdiction” in Halsbury’s Laws of England (4th Edition) Volume 9 at page 350.
15. In the case of Samuel Kamau Macharia and another v Kenya Commercial Bank Ltd and others (2012) KLR, the Supreme Court of Kenya held thus;

“A court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law.....”
16. It is trite that the court may grant interlocutory orders to preserve the property in question and maintain status quo over it ; see *Hutchings Biemer Ltdv Barclays Bank Ltd & 2 others* (2006) eKLR.
17. The court has the powers to order maintenance of status quo over the property in question until the matter is determined or terminated; see *Ogada v Mollin* (2009) KLR 620.
18. The revelation from the material presented before this court is that the issues, in particular, jurisdiction of the trial court, is greatly contested in the application and main appeal. It must be noted that learned counsel for the filed submissions dated on 20th November 2023 in respect of this appeal and stated that the subordinate court lacked jurisdiction over the suit.
19. A fortiori, the order that is merited in this application is the interim preservation of the suit property, title number Kanyada/Kotieno/Katuma ‘A’/2991 until the hearing and determination of this appeal on merit in lieu of a temporary injunctive relief in the terms sought by the applicant. The respondents will not take any further steps to enforce the 2nd distress for rent against the applicant until the appeal is heard and determined.
20. Costs of the application to abide the outcome of the present appeal.
21. Orders accordingly.

DATED AND DELIVERED AT HOMA BAY THIS 9TH DAY OF APRIL 2024.

G.M. A ONG’ONDO

JUDGE

PRESENT;



- a. Mrs. Nyauke learned counsel counsel for the appellant.
- b. Respondent.
- c. Court Assistant, Mutiva.

