



**Jihan Freighters Limited v Kenya Railways Corporation (Environment & Land  
Petition E013 of 2023) [2024] KEELC 6508 (KLR) (9 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6508 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND PETITION E013 OF 2023  
SM KIBUNJA, J  
OCTOBER 9, 2024**

**BETWEEN**

**JIHAN FREIGHTERS LIMITED ..... PETITIONER**

**AND**

**KENYA RAILWAYS CORPORATION ..... RESPONDENT**

**RULING**

**(Notice of motion 6th November 2023)**

1. Vide a notice of motion dated 6th November 2023, the petitioner sought for the following orders:

1. “Spent.
2. Spent.
3. Pending hearing and determination of the Petition, an order of injunction be issued restraining the respondent, its agents, servants or workmen from in any way interfering or preventing the petitioner’s access, occupation and operations from the Kenya Railways Goodshed measuring 35,167 square feet situate along Machakos Road, Mombasa Railway Station which is referred to as BC – Mombasa Goodsshead [Part] – Mombasa Railway Station.
5. That costs of this Application be in the cause.”

The application is based on the seven (7) grounds on its face and supported by the affidavit Abdalla Salim Omar Abubakar, director, sworn on 6th November 2023, in which he inter alia deposed that the petitioner is a tenant of the respondent for a period of nine years from 1st June, 2022, at the agreed rental amount of Kshs. 4,800,000 per annum, plus 16% VAT, (Kshs.192,000) per month. There was a clause that the petitioner pay a security deposit of Kshs 1,200,000. There was a further clause that the lease was subject to renewal for a negotiated period upon expiry. That the petitioner has improved the suit property with the knowledge



of the respondent. That the respondent has been raising rental invoices subject to VAT, but failed to do so in the months of October and November 2023. That through a letter dated 24th January 2023, the respondent terminated the tenancy on the reason that the Government of Kenya required space to facilitate movement and storage logistics of fertilizer from the port of Mombasa by rail for distribution to farmers. That the petitioner declined to comply, and another termination notice was sent vide a letter dated 14th July 2023 citing reasons that the petitioner had changed the usage of the suit property, and had sub-leased it and demanded that the petitioner vacates on or before 13th August 2023. Once again, the petitioner did not comply which resulted in the respondent entering the suit property on 3rd November 2023, and evicting the petitioner and locking the gates. That the closure of the suit property has resulted in paralysis of the petitioner's operations and loss of employment.

2. The respondent opposed the application through the replying affidavit that was filed by Mark Murkomen, Security Services Manager, sworn on 24th November 2023, inter alia deposing that the application is an abuse of court process; that in the letter of offer to petitioner was a clause that the suit property was limited to Commercial-Cargo/Goods storage only, but the petitioner used the suit property to sell Tuk tuks among other vehicles, thereby substantially breaching the tenancy agreement; that the petitioner also breached the agreement by sub-letting the premises to third parties, and carrying out construction works without the respondent's consent; that due to the material breaches, the respondent terminated the tenancy agreement vide a notice dated 14th July 2023, for reasons of change of user of the suit property, subletting the same without consent and failure to provide at least 15,000 metric tonnes of cargo per month for rail haulage; that the respondent did not evict the petitioner, but voluntarily began vacating the suit property sometime on 27<sup>th</sup> October 2023; that the petitioner has not tendered evidence that the respondent evicted them, and the application should be dismissed.
3. The petitioner filed a further affidavit sworn by the same Abdalla Salim Omar Abubakar, director, on 13th December 2023, inter alia deposing that the allegation that the petitioner was using the suit property as a car bazaar was not true, and that photographs attached by the respondent in their replying showing tuktuks were not taken from the leased premises, and that the petitioner is ready for the court to do a site visit to confirm the correct position; that the petitioner had involved the respondent when they did construction works on the suit property, and attached evidence of a letter of approval from one Patrick Nzomo; the assistant manager property administration of the respondent in the coast region, dated 27th September 2022; that the petitioner pointed out that the two termination notices did not contain construction works without the consent of the respondent as one of the reasons; that the said termination notices are null and void for reasons that the lease was for a term of nine years from 1st June 2022 to 30th May 2029; that there was no term giving parties the right to terminate the lease for any reason; that they have been paying rent and fulfilled all the conditions of lease; that the respondent should not have issued termination notices, but instead ought to have commenced action in a court for the recovery of the suit property at least a month after serving the notice.
4. The court issued directions on 6<sup>th</sup> December 2023, but only the learned counsel for the petitioner filed their submissions dated the 5<sup>th</sup> January 2024 that the court has considered.
5. The following are the issues for the court's determinations on the petitioner's application dated 6<sup>th</sup> November 2024:
  - a. Whether the petitioner has met the threshold for temporary injunction order sought to be issued at this interlocutory stage.
  - b. Who pays the costs?



6. The court has after considering the grounds on the application, affidavit evidence filed, submissions by learned counsel for the petitioner, superior court decisions cited thereon, come to the following conclusions:

- a. The principles guiding the courts when considering whether an applicant deserves temporary order of injunction to be issued in their favour, were laid out in the case of *Giella v Cassman Brown* (1973) EA 358, and were reiterated in the case of *Nguruman Limited v 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 to b, by showing that the balance of convenience is in his favour.”

The above are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent.

- b. It is established that all the above three conditions are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially to succeed. In the case of *Mrao Ltd v First American Bank Of Kenya Ltd* (2003) eKLR the Court of Appeal pronounced itself on what constitutes a prima facie case, and stated that:

“... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

It is not in dispute that the petitioner herein was at all material time a tenant of the respondent. It is also not in dispute that the petitioner is no longer using the premises as it has been evicted. The manner of the petitioner’s eviction is however in dispute. The petitioner’s position is that it was forced out of the premises, while the respondent posit that the petitioner vacated voluntarily. In the premises, I find the petitioner has prima facie established a case against the respondent.

- c. In the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) eKLR the court stated as follows on irreparable loss;

“..... irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.”

In the instant situation, the petitioner’s eviction has already happened, and its operations have been paralyzed, impacting negatively on its finances and employees. The court granted the petitioner temporary injunction in terms of prayer (2) on 14<sup>th</sup> November 2023, that was extended on 6<sup>th</sup> December 2024 and 29<sup>th</sup> May 2024, but to date the respondent has not placed the petitioner back into the premises. The injury the petitioner is likely to continue suffering if the order sought is not granted, is irreparable injury, and would negatively and greatly impact on its employees.



- d. The last principle of balance of convenience was described in *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) eKLR which defined the concept of balance of convenience as:

“The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favour of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiff's to show that the inconvenience caused to them be greater than that which may be caused to the defendant's inconvenience be equal, it is the plaintiff who suffer.

In other words, the plaintiff have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater which is likely to arise from granting”

The petitioner is a private company which has already been evicted from the demised premises under unclear circumstances, while on the other hand the respondent is a parastatal which is of great public importance.

- e. That while the damages suffered or likely to be suffered by the petitioner may be compensated by the respondent should this court find in favour of the petitioner, and as it appears from the affidavits filed in the pending application dated 5th August 2024, also before this court, that there is no activity taking place on the suit property, then it does not make any economic sense to continue inconveniencing the petitioner while the suit premises sits idle. The balance of convenience tilts in favour of issuing the order, and in so doing, help in reducing the damages that the respondent, and by extension the public, is likely to be condemned to pay should the petitioner succeed, in the petition.
- f. Costs abide the outcome in a suit as per section 27 of the *Civil Procedure Act* Chapter 21 of Laws of Kenya, unless where otherwise ordered for good reasons. In this instance, I find it just that the costs abide the outcome of the petition.
7. Flowing from the foregoing, the court finds and orders as follows:
- a. That the notice of motion dated 6<sup>th</sup> November 2023 has merit and is hereby allowed in terms of prayer (3).
- b. Costs to be borne by the respondent.

Orders accordingly.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 9<sup>TH</sup> DAY OF OCTOBER 2024.**

**S. M. Kibunja, J.**

**ELC MOMBASA.**

In the presence of:

Petitioner : Mr. Salim for Abubakar

Respondent : Mr. Mbabu

Court Assistant– Leakey.



S. M. Kibunja, J.

