Mbugua & 3 others v Turi Gardens Limited (Environment & Land Case E363 of 2024) [2024] KEELC 6853 (KLR) (14 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6853 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E363 OF 2024

JO MBOYA, J

OCTOBER 14, 2024

BETWEEN

ELIZABETH NYAWIRA MBUGUA ..... 1ST PLAINTIFF

SOPHIA WANJIRU MBUGUA ..... 2ND PLAINTIFF

JOHNSON KAGUA MBUGUA ..... 3RD PLAINTIFF

IAN WAHOME MBUGUA T/A MOWAKA AUTO CENTRE ..... 4TH PLAINTIFF

AND

TURI GARDENS LIMITED ..... DEFENDANT

RULING

1. The Plaintiffs/Applicants herein have approached the court vide Notice of Motion application dated the 2nd September 2024 brought pursuant to the provisions of Order 40 Rule 1 of the Civil Procedure Rules, 2010; Section 1A, 1Band 3A of the *Civil Procedure Act*; and in respect of which the Applicants have sought for the following reliefs;

    i. .....Spent.

    ii. .....Spent.

    iii. That this Honourable court be pleased to restrain the defendant from interfering with the Plaintiffs' enjoyment of the suit property LR. NO.1/1396 (Original Number 1/1395/1) until further orders of this Honourable court.

    iv. That this Honourable court be pleased to restrain the defendant from interfering with the Plaintiffs' enjoyment of the suit property LR. NO.1/1396 (Original Number 1/1395/1) pending the hearing and determination of this suit.

v. That the defendant be restrained by itself, its agents and servants from breaching its covenants under the lease dated 1" January. 2021 in respect of the suit property LR. NO. 1/1396 (Original Number 1/1395/1) pending the hearing and determination of this suit.

vi. That the defendant be restrained by itself, its servants and agents from entering the suit premises, the said LR. NO. 1/1396 (Original Number 1/1395/1) all being on the same, except when exercising its right of access under clause 4.9.1 of the lease dated 1" January. 2021 until further orders of this Honourable court or pending the hearing and determination of this application.

vii. That the defendant be restrained by itself, its servants and agents from evicting the Plaintiffs from the suit premises pending the hearing and determination of this suit.

viii. That the defendant be restrained by itself, its servants and agents from interfering with the Plaintiffs' running of their businesses namely: a carwash, mini barber shop, a yard for sale of motor vehicles, a café and offices on the suit premises, the said LR. NO. 1/1396 (Original Number 1/1395/1) pending the hearing and determination of this application.

ix. That the costs of this application be provided for.

2. The application is anchored on the grounds enumerated in the body thereof. Furthermore, the application is supported by two [2] affidavits, namely, the affidavit of Elizabeth Nyawira Mbugua sworn on 2nd September 2024 and the further affidavit of Ian Wahome Mbugua. In addition, the supporting and the Supplementary affidavit[s] contain various annexures including the lease agreement which was entered into and executed by the parties on the 1st January 2021.

3. Upon being served with the subject application and the attendant affidavit[s] the Defendant/ Respondent filed a replying affidavit sworn by one Dr. Samuel Thenya Maina and which is sworn on the 16th September 2024; and a supplementary affidavit sworn on 20th September 2024. Notably, the replying affidavit has exhibited a total of seven [7] annexures including extract[s] of whatsapp messages exchanged between the deponent and Elizabeth Nyawira Mbugua [1st Plaintiff/Applicant].

4. The application came up for hearing on the 25th September 2024 whereupon the advocates for the parties intimated to the court that the parties herein were engaged in negotiations in an endeavour to settle the dispute. In this regard, the advocates for the parties sought for sometime to discern whether a settlement would be forthcoming.

5. On the 3rd October, 2024, the parties returned to court and intimated to the court that the negotiations had not borne any fruit. In this regard, the parties sought for liberty to canvass and ventilate the application by way of written submissions.

6. Arising from the foregoing, the court proceeded to and circumscribed the timelines for the filing and exchange of written submissions. Suffice it to point out that the Plaintiffs/Applicants thereafter filed their written submissions dated the 6th October 2024; whereas the Defendant/Respondent filed written submissions dated the 9th October 2024.

7. For coherence, the two [2] sets of written submissions form part of the record of the court.

PARTIES'SUBMISSIONS:

a – APPLICANTS' SUBMISSIONS:

8. The Applicants filed written submissions dated the 6th October 2024 and wherein the Applicants have adopted the grounds contained at the foot of the application and furthermore reiterated the averments adverted to in the body of the supporting affidavit, as well as the supplementary affidavit.

9. In addition, learned counsel for the Applicants has thereafter proceeded to and highlighted four [4] salient issues for consideration and determination by the court. Firstly, learned counsel for the Applicants has submitted that the Applicants herein duly entered into and executed a lease agreement with the Defendant/Respondent. In particular, it has been contended that the lease agreement was reduced into writing and same is dated the 1st January 2021.

10. On the other hand, learned counsel for the Applicants has submitted that the lease agreement, which was executed on the 1st January 2021 was for a duration of five years three months. Besides, it has been posited that the lease agreement contained a clause namely clause 5.3 wherein the Defendant covenanted that the Applicants shall enjoy the entire term of the lease entered into and executed.

11. Based on the fact that the Applicants entered into and executed a lease agreement, which fact is not in dispute, learned counsel for the Applicants has therefore submitted that the Applicants are indeed entitled to partake of and benefit from the interest [Estates] arising from the lease agreement.

12. Nevertheless, learned counsel for the Applicants has submitted that despite the existence of the lease agreement, the Defendant herein generated and issued a notice dated the 26th July 2024 and wherein the Defendant/Respondent demanded that the Applicants vacate and hand over vacant possession of the demised premises.

13. According to learned counsel for the Applicants, the impugned notice issued by the Defendant/Respondent is intended to breach and violate the terms of the lease agreement. In this regard, it has therefore been contended that the impugned actions which are complained of would constitute a breach of contract.

14. In the premises, learned counsel for the Applicants has therefore submitted that taking into account the contents of the lease agreement as well as the contents of the demand notice by the Defendant/Respondent herein, the Applicants have raised and demonstrated a prima facie case with probability of success. To this end, learned counsel for the Applicants has invited the court to protect that the Applicants legal rights as underpinned vide clause 5.3 of the lease agreement.

15. Secondly, learned counsel for the Applicants has submitted that even though the lease agreement was not registered, the mere fact of non-registration does not defeat the rights and interests which have vested in the Applicants. To this end, learned counsel for the Applicants has cited and referenced the provisions of Section 36[2] of the *Land Registration Act*, 2012.

16. Thirdly, learned counsel for the Applicants has submitted that the lease agreement entered into and executed between the Applicants and the Defendant/Respondent did not contain a clause for termination. In this regard, learned counsel posited that in the absence of a clause for termination of the lease, it then means that the lease in question can only terminate upon the expiration of the lease term.

17. On the contrary, learned counsel for the Applicants has submitted that any endeavour to terminate the lease agreement in a manner contrary to the terms thereof would thus constitute a breach of contract. Consequently, it has been contended that the contents of the impugned demand notice dated the 26th

July 2024 by the Defendant/Respondent is thus intended to breach the contract and hence the court ought to intervene.

18. In support of the submissions that any endeavour to terminate the lease agreement prior to the expiration of the period stipulated thereunder constitutes breach of contract, learned counsel for the Applicants has cited and referenced the decision in the case of Chimanlal Megjinaya Shah & Another v Oxford University Press [EA LTD] [2007]eKLR.

19. Fourthly, learned counsel for the Applicants has submitted that the substratum/ gravamen of the application herein is intended to protect and preserve the legal rights flowing from and attendant to the lease agreement. In this regard, it has been posited that if the court does not issue the injunction, then the substratum of the suit would stand defeated.

20. Furthermore, learned counsel for the Applicants has invited the court to take cognizance of the import and tenor of the doctrine of Lis pendens and thereafter to preserve the substratum of the suit.

21. In support of the legal implications of the doctrine of Lis pendens, learned counsel for the Applicants has cited and referenced the decision in the case of *FESTUS OGADA v HANS MOLLIN (CIVIL APPEAL NO. 100 of 2007*) [2009] KECA 409 (KLR) (20 January 2009).

22. Premised on the foregoing submissions, learned counsel for the Applicants has therefore contended that the Applicants have demonstrated the requisite ingredients, including the existence of a prima facie case, to warrant the grant of the orders of temporary injunction pending the hearing and determination of the suit.

b – RESPONDENT'S SUBMISSIONS:

23. The Respondent filed written submissions dated the 9th October 2024 and wherein same [Respondent] has reiterated the contents of the replying affidavit sworn on the 16th September 2024 and the supplementary affidavit sworn on the 20th September 2024, respectively.

24. Furthermore, learned counsel for the Respondent has thereafter raised, highlighted and canvassed four [4] salient issues for consideration and determination by the court. Firstly, learned counsel for the Respondent has submitted that even though the Applicants and the Respondent entered into a lease agreement, the lease agreement under reference contained a clause which allowed the Respondent to terminate the lease where a sale of the suit property was envisaged by the Respondent. In particular, learned counsel for the Respondent has cited and referenced clause 5.4 of the lease agreement dated the 1st January 2021.

25. To the extent that the lease agreement provided a window for termination where a sale of the property was envisaged, learned counsel for the Respondent has submitted that the Respondent was therefore within the contractual terms of the lease agreement to issue the letter dated the 26th July 2024.

26. In addition, learned counsel for the Respondent has submitted that taking into account clauses 5.3 as read together 5.4 of the lease agreement, it is evident that the Applicants herein have neither established nor demonstrated a prima facie case, which is an essential precondition to the grant of an order of temporary injunction.

27. Secondly, learned counsel for the Respondent has submitted that the Applicants herein have neither established nor demonstrated any evidence of irreparable loss arising, in the event that the orders of temporary injunction are not granted. In any event, it has been posited that the Applicants have equally not highlighted the kind or nature of irreparable loss in the supporting affidavits.

28. Additionally, learned counsel for the Respondent has submitted that the loss, if any, that the Applicants herein may suffer, if the orders of temporary injunction are not granted are ascertainable, quantifiable and thus compensable in monetary terms. In this regard, it has been submitted that where the loss to be suffered is quantifiable and thus compensable in monetary terms, then an order of temporary injunction ought not to issue or be granted.

29. Furthermore, learned counsel for the Respondent has submitted that the only loss the Applicants herein are likely to suffer is the loss relating to the costs of relocation and moving away from the suit property, which costs it is contended the Responded has agreed to shoulder.

30. In short, learned counsel for the Respondent has submitted that in the absence of evidence of irreparable loss, the Applicants herein are not entitled to an order of temporary injunction in the manner sought or at all.

31. Thirdly, learned counsel for the Respondent has submitted that the balance of convenience tilts against the Applicants herein. In particular, learned counsel for the Respondent has submitted that the Applicants herein had hitherto agreed to relocate from the suit property only for same to retract the initial understanding which had been reached with the Respondent.

32. Additionally, learned counsel for the Respondent has submitted that the Respondent herein has been forced and/or constrained to sell the suit property in an endeavour to salvage a different property, namely, L.R No. Nairobi/Block 19/213 situated within Kilimani Area in Nairobi, which property is the subject of foreclosure by a chargee. In this regard, the Respondent has posited that the sale of the suit property is intended to help the Defendant to mitigate losses that may accrue if the other property is disposed of by the bank.

33. Other than the foregoing, learned counsel for the Respondent has also submitted that the Respondent herein has since procured and obtained a purchaser for the suit property. Furthermore, it has been contended that the Respondent has since entered into and executed a sale agreement with a purchaser, who is not a party to the instant suit.

34. Finally, learned counsel for the Respondent has submitted that if the orders of injunction are granted, the sale agreement which has already been entered into and perfected between the Respondent and the purchaser would be frustrated. In this regard, the Respondent herein shall thus be exposed to suffer undue prejudice and inconvenience.

35. In a nutshell, learned counsel for the Respondent has submitted that the kind of prejudice and inconvenience that would be suffered by the Defendant/ Respondent far out ways the inconvenience to be suffered by the Applicants herein.

36. In support of the foregoing submission, learned counsel for the Respondent has cited and referenced the decision in Giella v Cassman Brown & Co Ltd [1973] EA 358 and Waithaka v Industrial & Commercial Development Corporation [2001]eKLR.

37. Based on the foregoing submissions, learned counsel for the Respondent has therefore implored the court to find and hold that the Applicants herein have neither established nor proved the requisite conditions to warrant the grant of an order of temporary injunction. In this regard, the Respondent has sought that the application be dismissed with costs.

ISSUES FOR DETERMINATION:

38. Having reviewed the application and the response thereto and upon consideration of the written submissions filed on behalf of the respective parties, the following issues do emerge [crystalise] and are thus worthy of determination;

    i. Whether the Applicants have established and demonstrated a prima facie case with probability of success.

    ii. Whether the Applicants have tendered and placed before the court evidence of irreparable loss, if any to be suffered or otherwise.

    iii. In whose favour does the balance of convenience tilts.

ANALYSIS AND DETERMINATION:

ISSUE NUMBER 1

Whether the Applicants has established and demonstrated a prima facie case with probability of success.

39. The Applicants herein have contended that same entered into and executed a lease agreement with the Respondent pertaining to and concerning L.R No. 1/1396 [original number 1/1395/1] hereinafter referred to as the suit property. Furthermore, it has been posited that the lease agreement under reference was reduced into writing and executed by the parties.

40. Additionally, the Applicants have posited that the lease agreement, which was duly executed by the parties was for a fixed term, namely, 5 years 3 months commencing on the 1st January 2021.

41. The Applicants have further stated that arising from the lease agreement same [Applicants] entered upon the demised property and established thereon a number of businesses including a car wash; mini barber shop; a yard for sale of motor vehicles and a cafe and offices used by the Applicants to manage their other business.

42. Be that as it may, the Applicants have contended that despite the fact that the lease agreement had a fixed term without any clause for termination, the Respondent herein has since generated a letter dated the 26th July 2024 and wherein the Defendant is seeking to have the Applicants vacate the suit property.

43. Based on the foregoing, the Applicants have contended that the impugned letter dated the 26th July 2024 is intended to breach and violate the rights and interests of the Applicants which are duly protected vide the lease agreement.

44. In the circumstances, the Applicants posit that the threat at the foot of the impugned letter creates and establishes a prima facie case with probability of success.

45. On its part, the Respondent contends that the lease agreement contains clause 5.4 which allowed the Respondent to issue a notice for termination of the lease in the event a sale of the suit property was envisaged. In this regard, the Respondent posits that the property in question is now the subject of a sale and based on the intended sale same [Respondent] duly notified the Applicants.

46. What I hear the Respondent to be stating is to the effect that clause 5.4 of the lease agreement entered into and executed on the 1st January 2021, allows the Respondent to terminate the lease agreement/ contract in the even that a sale of the suit property was envisaged.

47. Having reviewed the rival submissions, I beg to state that there are appears to arguable issues at the foot of the dispute herein, which issues can only be interrogated and investigated during a plenary hearing.

Suffice it to point out that the arguable issues herein establish and demonstrate a prima facie case in favour of the Plaintiffs/Applicants.

48. On the other hand, it is also not lost on the court that having entered into and executed the lease agreement dated the 1st January 2021, the Applicants herein acquired and accrued interests [estates] in respect of the suit property. However, the scope and extent of the interest [estate] acquired over the suit property on the basis of the lease agreement can similarly, be ascertained during the plenary hearing.

49. Arising from the foregoing, I come to the conclusion that based on the pleadings, the facts and the law, the Applicants herein have duly established and proved the existence of a prima facie case with probability of success.

50. To this end, it suffices to cite and reference, the holding in the case of Mrao Ltd v First American Bank of Kenya Ltd& 2 others[2003] eKLR, where the Court of Appeal defined the meaning of a prima facie case.

51. For coherence, the Court of Appeal stated as hereunder:

> " a prima facie case in a Civil application includes but is not confined to a genuine and arguable case. It is a case which on the material presented before the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed on by the opposite party as to call for an explanation or rebuttal from the latter."

52. In addition, the meaning and import of prima facie case was re-visited in the case of Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR, where the court held as hereunder;

> " Prima facie" is a Latin phrase for "at first sight", whose legal meaning and application has been the subject of varying interpretation by courts in many jurisdictions. Phrases like "a serious question to be tried", "a question which is not vexatious or frivolous", "an arguable case" have been adopted to describe the burden imposed on the applicant to demonstrate the existence of prima facie case. The leading English House of Lords case of the American Cyanamid Co. Ethicon Ltd [1975] AC 396 is a case in point. The meaning of "prima facie case", in our view, should not be too much stretched to land in the loss of real purpose. The standard of prima facie case has been applied in this jurisdiction for over 55 years, at least in criminal cases, since the decision in Ramanlal Trambaklal Hatt V. Republic [1957] E.A. 332.

53. Consequently and in the premises, my answer to issue number one is therefore to the effect that the Applicants have indeed demonstrated the existence of a prima facie case with probability of success.

ISSUE NUMBER 2

Whether the Applicants have tendered and placed before the court evidence of irreparable loss, if any to be suffered or otherwise.

54. Having found and held that the Applicants herein have established the existence of a prima facie case, the law requires that I therefore venture forward and discern whether or not the Applicants have also proved the likelihood of irreparable loss arising.

55. Put differently, proof and establishment of a prima facie case with a probability of success by itself, does not propel the Applicant to partake of an order of temporary injunction.

56. For good measure, proof and demonstration of a prima facie case is a precursor and/or one step towards partaking of an order of temporary injunction. However, once an Applicant establishes a prima facie

case, same [Applicants] must surmount the next hurdle, namely proof of irreparable loss. Instructively, irreparable loss constitutes the cornerstone to the grant of an order of temporary injunction.

57. What constitutes irreparable loss was elaborated in the case of Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR, where the court stated and observed as hereunder;

> On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages.
>
> An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.

58. Likewise, the scope and extent of what constitutes irreparable loss was also highlighted in the case of Vivo Energy v Maloba Petrol Station & Another [2015]eKLR, where the court held as hereunder;

> GIELLA V CASSMAN BROWN & CO LTD (supra) stipulates that an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages.
>
> "In NGURUMAN LIMITED V. JAN BONDE NIELSEN & 2 OTHERS (supra), this Court stated as follows on irreparable injury or damage:
>
> "On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."
>
> SUBPARA
>
> We have not seen anything on record, with respect, that would suggest that damages could not have been an adequate remedy, particularly in view of Mr. Maloba's insistence that he was ready, able and willing to pay any money that may be found to be due and owing to Total from him. On the contrary, Total's loss and damage, if any, could be easily calculated and quantified to a cent.

59. Duly guided by the ratio decidendi in the decision [supra], it is now appropriate to revert back to the subject matter and to consider whether the Applicants herein have demonstrated the likelihood of irreparable loss accruing unless the orders of temporary injunction is granted. To start with, the Applicants herein contends that unless the orders of temporary injunction are granted, same [Applicants] shall be exposed to eviction from the demised premises prior to and before expiration of the term of the lease agreement.

60. On the other hand, it has also been contended that the removal and relocation of the business from the suit property shall also involve costs and expenses. Besides, there is also a contention that the Applicants shall suffer loss of business and attendant income.

61. On the other hand, the Respondent herein has posited that when same [Respondent] was confronted with foreclosure of a property situate at Kilimani within Nairobi, same [Respondent] sought to sell and dispose of the suit property in an endeavour to salvage the other property which is stated to be valuable.

62. In addition, the Respondent has posited that same entered into various discussions which the Applicants wherein the Respondent undertook to shoulder and/or settle the costs of relocating the Applicants from the suit property.

63. Other than the foregoing, the Respondent has also contended that the losses if any, that the Applicants would suffer are ascertainable and quantifiable. Besides, it has also been posited that insofar as the losses are ascertainable and quantifiable, same [losses] are thus compensable in monetary terms.

64. Having considered the rival positions adverted to and taken by the parties, I hold the humble view that the losses that the Applicants herein may suffer and/or accrue including the damages flowing from breach of the contract as well as the costs of relocating the business are losses which are ascertainable, quantifiable and thus compensable in monetary terms.

65. There is no gainsaying that where a party to a contract resort to actions or omissions that culminate into breach of contract in the manner contended herein, then the innocent party is at liberty to pursue recompense in damages. For good measure, this is my understanding of the decision referenced by learned counsel for the Plaintiff, namely, Chimanlal Megjinaya Shah & Another v Oxford University Press [EA] LTD [2007]eKLR.

66. To the extent that the damages and the losses that the Applicants may suffer arising from the breach and violation of the lease agreement are measurable and compensable in monetary terms, it then means that the Applicants herein are not entitled to an order of temporary injunction.

67. To buttress the foregoing exposition of the law, I beg to cite and reference the decision in the case of Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86, where the court stated and held thus;

> " If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage.

ISSUE NUMBER 3

In whose favour does the balance of convenience tilts.

68. Having found and held that the Applicants herein have not demonstrated irreparable loss, it would have been sufficient to terminate the ruling and bring the matter to a close. However, it is appropriate to venture forward and consider the balance of connivence.

69. As pertains to the balance of convenience, I beg to highlight the position taken by the Respondent that upon the Respondent's sister company being served with a statutory notice by the chargee, the Respondent herein formed an opinion that it would be apposite to sell and dispose of the suit property.

70. Additionally, the Respondent posited that having formed the opinion that it was apposite to sell the suit property same [Respondent] through its director approached the 1st Applicant with an offer to purchase the suit property. However, the 1st Applicant herein reverted and intimated that same [1st Applicant] was not in a position to purchase the suit property.

71. Arising from the position taken by the 1st Applicant, the Respondent contends that same was constrained to search for other buyers. In this regard, the Respondent posits that same has since procured and obtained a buyer for the suit property. Furthermore, the Respondent has averred that same has since entered into and executed a sale agreement with the purchaser.

72. From the foregoing position, it has been contended that if the orders of injunction are granted, the intended sale of the suit property will be frustrated and by extension the Respondent will stand to lose the property which is threatened with foreclosure.

73. In the circumstances, the Respondent contends that the extent of prejudice and inconvenience that is likely to befall the Respondent is grater than the prejudice, if any, that the Applicants would suffer.

74. According to the Respondent, the balance of convenience tilts in favour of not granting the temporary injunction.

75. On the other hand, I beg to point out that the Applicants herein have neither adverted to nor addressed the question of balance of convenience. However, it is not lost on the court that the Applicants have adverted to and canvassed the doctrine of Lis pendens.

76. The circumstance beforehand brings to the fore the competing interests of the Applicants on one end, and the Respondent on the other hand. However, there is no gainsaying that by virtue of being the registered owner of the suit property, the Respondent herein accrues certain proprietary rights which ought to be vindicated. [See the decision on the case of Mohanson Kenya Ltd v The Registrar of Titles & Another [2017]eKLR, paragraphs 17 and 18 thereof].

77. To my mind, where the rights of a leasee conflicts with the rights of the registered proprietor, like in the instant case, the pendulum tilts more in favour of the registered proprietor, namely, the Respondent and not otherwise. In any event, it is the Respondent herein who will suffer greater prejudice and grave inconvenience in the obtaining circumstances.

78. Before departing from the issue of balance of convenience, I beg to adopt and reiterate the holding of the court in the case of Pius Kipchirchir Kogo v Frank Kimeli Tenai (Environment & Land Case 221 of 2017) [2018] KEELC 2424 (KLR) (29 June 2018) (Ruling), where the court stated as hereunder;

> The court should issue an injunction where the balance of convenience is in favor of the plaintiff and not where the balance is in favor of the opposite party. 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 favor 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 plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants.

> Should the inconvenience be equal, it is the plaintiffs who suffer. In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it.

79. In my humble view, if the determination of the matter herein was to depend on the balance of convenience, I would have determined same in favour of the Respondent.

80. Nevertheless, it is worthy to recall that whilst dealing with issue number two [2] namely, irreparable loss, I found and held that the Applicants had not demonstrated same. To this end, the question of balance of convenience was therefore rendered superfluous.

FINAL DISPOSITION:

81. Flowing from the discussion [highlighted in the body of the ruling], I come to the conclusion that the Applicants herein have neither established nor proved the requisite ingredients to underpin the grant of an order of temporary injunction either in the manner sought or at all.

82. Nevertheless, it is not lost on this court that the Applicants may be [I mean, maybe] exposed to incur damages [sic] on account of breach of contract and costs of relocation. In this regard, even though the court is not disposed to grant temporary injunction, there is need for the Defendant to provide some level of undertaking as to damages.

83. In the premises, the final orders that commend themselves to the court are as hereunder;

i. The Application dated the 2nd September 2024 be and is hereby dismissed.

ii. Costs of the application shall abide the outcome of the main suit.

iii. Nevertheless, the Defendant/Respondent herein shall deposit the sum of kes.2, 500, 000/= only, in an escrow account in the name of the advocates for the respective parties and same will be deposited within 30 days from the date hereof.

iv. The deposit in terms of clause [iii] shall be utilized by the Applicants on account of relocation expenses and in this case, the monies shall be available to the Applicants at their instance.

v. Furthermore, the Defendant/Respondent shall execute an undertaking as to damages that may arise and/or flow from the breach of the contract.

vi. The undertaking as to payment of damages in terms to [v] shall be executed and filed with the deputy registrar within 30 days from the date hereof.

84. It is so ordered

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF OCTOBER 2024.

OGUTTU MBOYA

JUDGE.

In the Presence of;

Benson - Court Assistant

Dr. Kamau Kuria SC for the Plaintiffs/Applicants

Mr. Miller & Ms. Winnie Wamboi for the Defendants/Respondent.