



**Kahingo v Sedco Consultants Company Limited (Environment and Land
Appeal E008 of 2022) [2023] KEELC 15837 (KLR) (2 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 15837 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT AND LAND APPEAL E008 OF 2022
FO NYAGAKA, J
MARCH 2, 2023**

BETWEEN

WILSON KARANJA KAHINGO APPELLANT

AND

SEDCO CONSULTANTS COMPANY LIMITED RESPONDENT

*(Being an Appeal arising out of the ruling and order of Hon V Karanja (Principal Magistrate)
in Kitale Chief Magistrate's Court ELC Case no E152 of 2021 delivered on April 27, 2022)*

JUDGMENT

dARGUMENTS

Introduction

1. The appellant who is the plaintiff in CMC ELC no E152 of 2021 lodged the suit by way of a Plaintiff on December 08, 2021. He also filed a Notice of Motion application dated December 03, 2021. In it, the appellant substantively sought an interlocutory injunction against the respondent/defendant restraining it from proceeding to levy unlawful distress or harassing him from the use of the demised premises known as L R no 3/341/Laini Moja Raia Road pending the hearing and determination of the suit.
2. In its ruling delivered on April 27, 2022, trial court dismissed the application for lacking merit.

The appeal

3. Aggrieved by that decision, the appellant filed his Memorandum of Appeal dated May 16, 2022 on May 17, 2022. He faulted the trial court for not holding that a *prima facie* case had been established for the following reasons:



- i. A unilateral variation of the express terms of contract between the parties was forbidden. To this extent, it was unlawful for the respondent to enhance the agreed rent.
 - ii. He had fulfilled his obligations as tenant by paying rent thereby placing the actions of the respondent untenable.
 - iii. The respondent's action of seeking levy to distress was contrary to the *Distress for Rent Act* as no rent arrears existed.
 - iv. The respondent had demanded for rent over L R no Block 2116/33/2 Kitale Cherangany Road that is not the suit property.
4. The appellant faulted the trial magistrate for failing to find that he had established that he will suffer irreparable harm that cannot be compensated by an award of damages. Finally, he opined that the trial court ought to have adopted the lower risk principle by maintaining the status quo if it was in doubt. He prayed that the appeal be allowed by setting aside the ruling and be substituted with an order allowing the said application. He further prayed for costs of the appeal and the application.

Hearing of the appeal

5. The appeal was heard on the basis of the parties' written submissions. The appellant's submissions dated January 17, 2023 and filed on that day maintained that he had established the principles for the grant of injunction.
6. Firstly, on whether the appellant had a *prima facie* case on the merits, he submitted that he had fulfilled his obligations as a tenant having paid the monthly rent of kshs 22,800.00 to date. He maintained that he was not in arrears to the tune of kshs 2,126,400.00 based on a monthly rent of kshs 122.800.00 as demanded by the respondent. Adding that the letter of demand was in respect to a property not the suit land, he cited several authorities to conclude that the respondent's actions amounted to an illegality. As such, he had established a merited case.
7. Next, the appellant submitted that as a lawful rent paying tenant, he had every right to be on the premises. Denying that right was tantamount to condemning him to take damages in lieu of his occupancy rights. He was thus exposed to suffer irreparable harm that could not be compensated by an award of damages.
8. Lastly, the appellant submitted that the balance of convenience tilted towards his favor. The greater justice was to issue status quo orders rather than denying the injunction.
9. The respondent's submissions similarly dated January 17, 2023 and filed on that day lauded the trial magistrate's decision. It was submitted that the respondent is an estate management agent tasked with management, maintenance and collection of rent over the landlord's properties including the suit property over L R no 2116/33/2 Kitale Cherangany Road where the appellant demises. It thus clarified that the appellant is not an occupant or tenant over L R no 3/341/Laini Moja Raia Road. The respondent submitted that the appellant failed to adduce evidence including a tenancy agreement to show that he is a tenant over L R no 3/341/ Laini Moja Raia Road. On the contrary however, evidence of occupancy was established from the correspondence between the parties on L R no 2116/33/2 Kitale Cheangany road.
10. The respondent dismissed the deposit slips relied upon by the appellant for the reasons that pursuant to Nairobi High Court Civil Suit no E148 of 2019, the respondent was by appointed order, placed to manage and collect rent in respect to Hasham Lalji Properties Limited, the landlord lessor and company under receivership since April, 2022. The appellant was notified of this order but in spite,



failed to comply to the extent that he was required to pay the respondent and not the landlord under receivership. The respondent then observed that the appellant failed to justify the rent amount as kshs 22,800.00 since he did not furnish a tenancy agreement.

11. Instead of furnishing a tenancy agreement, the appellant brought before this court a court order issued by Okwany J in Nairobi High Court Civil Suit no E148 of 2019 on June 21, 2022. It was opined that those orders were inapplicable herein as the appeal arises out of a ruling delivered on April 27, 2022. Thus, the court ought to restrict itself to the issues canvassed at the impugned ruling. Secondly, the ruling of June 21, 2022 was not in force when the rent of 2021 was due. Finally, the appellant failed to adduce evidence in support of the allegation that he has paid rent up to date.
12. The respondent continued that the appellant failed to comply with the orders of February 10, 2020 issued in Nairobi High Court Civil Suit no E148 of 2019 directing him, amongst a pool of other tenants of the lessor, to pay rent to the respondent. It submitted that it was a court appointed estate agent directed to collect rent and did not thus enhance rent as alleged. It was further resubmitted that the distress for rent was lawful. They issued a demand which appellant failed to establish that he was not in arrears. It continued that at some point, the appellant yielded the premises in L R no 2116/33/2 Kitale Cherangany Road and regained it back. This action affirmed occupancy in L R No. 2116/33/2 Kitale Cherangany Road.
13. Based on the above, the respondent concluded that the appellant had not established a *prima facie* case with chances of success. On the second sequential element for consideration to grant of injunction, the respondent submitted that since rent is a liquidated sum, he could be compensated by an award of damages. Thus, the harm if any was not irreparable. On the last element, it submitted that the balance of convenience tilted in favor of denying rather than granting the injunction. Finally, the respondent submitted that the appellant being aware of the respondent's role continues to act unlawfully and in disobedience of court orders set out in Nairobi High Court Civil Suit no E148 of 2019. For these reasons, he was undeserving of any equitable relief as he did not approach the court with clean hands. It prayed that the Appeal be dismissed with costs.

Analysis and Determination

14. I have considered the appeal, the parties' rival written submissions, the relevant law, the proceedings at trial and the impugned decision. The appeal emanates from a court's discretionary power regarding injunctive relief as set out in order 40 of the [Civil Procedure Rules](#).
15. As a first appellate court, I remind myself that this court will not normally interfere with the exercise of discretion unless exercised injudiciously. [See *Kiriisa vs Attorney General & another* [1990 - 1994] EA 244]. Madan JA (as he then was) in *United India Insurance Company Limited vs East African Underwriters (Kenya) Limited* [1985] EA 898 held:

“The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting as at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of consideration of which he should have taken account of; or fifthly, that his decision albeit a discretionary one is plainly wrong.”



16. The principles set out for the grant of injunction were set out in the celebrated case of *Giella vs Cassman Brown & Company Limited* (1973) EA 358 as follows:
 - a. An applicant must show a *prima facie* case with a probability of success;
 - b. An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury.
 - c. When the court is in doubt, it will decide the application on the balance of convenience.
17. In its ruling, the trial court stated that a *prima facie* case had not been established because the occupancy of the appellant's tenancy could not be determined at that juncture. It opined that the issue could only be canvassed by way of a full trial. The Court of Appeal in *Mrao Limited vs First American Bank of Kenya Limited & 2 others* [2003] eKLR defined the meaning of *prima facie* in the following terms:

“So what is a *prima facie* case? I would say 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 right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
18. Going by that definition, it is incumbent upon the applicant to establish that from the scanty facts before the court, a manifest right has or is in the process of infringement calling for an explanation from the adversary.
19. In the present case, the appellant at trial stated that the respondent unlawfully distressed for rent over L R no 3/341/Laini Moja Raia Road. He stated that he had lawfully paid his rent and as such, the respondent acted unlawfully. In rebuttal, the respondent stated that its actions were lawful. It clarified that the appellant does not occupy that premises but instead is in rent arrears as a tenant in L R no 2116/33/2 Kitale Cherangany road. He observed that the tenant failed to furnish a tenancy agreement justifying the allegations. In the circumstances, he had not established a *prima facie* case.
20. A cursory perusal of the application does not disclose or justify the allegations laid out by the appellant. Indeed, he has not backed up his allegations by way of supporting documents. He failed to furnish a tenancy/lease agreement that would have given the court a clearer picture of the terms agreed upon and whether indeed as alleged, those terms were varied. In summary, the appellant failed to lay a basis as to his allegations in the manner set out in section 107, 108 and 109 of the *Evidence Act*. For these reasons, I find that a *prima facie* case had not been established by the appellant.
21. Did the appellant stand to suffer irreparable harm that could not be compensated by an award of damages? The trial court in answering in the negative stated that the appellant failed to demonstrate he stood to suffer. He was still a tenant and once proprietorship was determined at a full trial, he would adequately be compensated in damages.
22. The appellant seeks to injunct the respondent from levying distress. He urges this court to intervene and prevent the respondent from collecting rent. It is instructive to note that the injunction being sought is for recovery of rent arrears. Rent is a liquidated sum. I agree with the holding of the trial court when it stated that if indeed the rent was excessively or unlawful collected, the respondent will compensate the appellant by way of damages. I thus hold that damages would be an adequate remedy in the event that the appellant is successful.
23. Since the first two (2) limbs have not been established to required standard of proof, I find that this court needs not determine whether the balance of convenience titles in favor of the injunction. In view



of the foregoing, I find that the appellant's appeal lacks merit and it is hereby dismissed with costs. I further direct that the matter be placed before the trial court on March 09, 2023 to confirm compliance with pre-trial directions.

24. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 2ND
DAY OF MARCH 2023**

HON DR *IUR* FRED NYAGAKA

JUDGE, ELC KITALE LAW COURTS

