



REPUBLIC OF KENYA



**Kenya Ports Authority & another v Akaba Investments Ltd. & 8 others (Environment & Land Case 282 of 2018) [2023] KEELC 19073 (KLR) (3 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19073 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 282 OF 2018**

**LL NAIKUNI, J**

**JULY 3, 2023**

**BETWEEN**

**KENYA PORTS AUTHORITY ..... 1<sup>ST</sup> PLAINTIFF**

**KENYA PORTS AUTHORITY PENSION SCHEME (SUING THROUGH ITS  
REGISTERED TRUSTEES) ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**AKABA INVESTMENTS LTD. .... 1<sup>ST</sup> DEFENDANT**

**KEMO CONTRACTORS LTD. .... 2<sup>ND</sup> DEFENDANT**

**HASSAN ABUBAKAR ..... 3<sup>RD</sup> DEFENDANT**

**SAMUEL KIPCHUMBA T/A ..... INVESTMENTS ..... 4<sup>TH</sup> DEFENDANT**

**HILLARY OSODO T/A HIRIRA ENTERPRISES ..... 5<sup>TH</sup> DEFENDANT**

**ABUBAKAR KISILO & SHABAN ISMAIL T/A. SHABAN BLUE  
ENTERPRISES ..... 6<sup>TH</sup> DEFENDANT**

**THE NATIONAL LAND COMMISSION ..... 7<sup>TH</sup> DEFENDANT**

**THE LAND REGISTRAR ..... 8<sup>TH</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL ..... 9<sup>TH</sup> DEFENDANT**

**RULING**

**I. Introduction**

1. What is before the honorable court for its determination is the notice of motion application dated February 10, 2023 moved by Akaba Investments Limited – the 1<sup>st</sup> defendant s/applicants. The application was brought under the provision of article 159 (2) (d) of *the Constitution* of Kenya 2010,



Order 51 Rules 1 and 3 of the Civil Procedure Rules 2010 and under sections 1A, 1B and 3A and 63 (c) of the Civil Procedure Act cap 21;

## II. The 1<sup>st</sup> Defendant/Applicant case

2. The 1<sup>st</sup> Defendant/Applicant sought for the following orders: -
  - a. Spent;
  - b. That pending hearing and determination of this Application a temporary order of injunction do issue restraining the 1<sup>st</sup> and 2<sup>nd</sup> respondents whether by themselves or their representatives, servants, agents and/or assigns from howsoever interfering in any way and by developing, demolishing and constructing on Plots Mombasa/Block XXIII/227, Mombasa/Block XXIII/228, Mombasa/Block XXIII/229 and Mombasa/Block XXIII/230
  - c. Pending hearing and determination of this suit a temporary order of injunction do issue restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondents whether by themselves or their representatives, servants, agents and/or assigns from howsoever interfering in any way and by developing, demolishing and constructing on Plots Mombasa/Block XXIII/227, Mombasa/Block XXIII/228, Mombasa/Block XXIII/229 and Mombasa/Block XXIII/230
  - d. That this honorable court be pleased to declare that the respondent have illegally demolished the perimeter wall on the 1<sup>st</sup> defendants/applicants property and the Plaintiffs/Respondents to pay the demolition damages as per the assessment by the valuer provided for in teh valuation as filed in this application.
  - e. That costs of this application be provided for.
  - f. That court do grant any other relief as it may deem fit and just to grant
3. The application was based on the grounds, testimonial facts and the 14 paragraphs supporting affidavit sworn by Abdul Basit Swaleh and dated even date together with three (3) annexures annexed and marked as "AS - 01 to 03" thereof. He averred as follows: -
  - a. He was a Director of the 1<sup>st</sup> defendant/applicant herein, an adult of sound mind conversant with the facts of this case and hence competent to swear this Affidavit.
  - b. The company on March 27, 2022 legally and procedurally purchased a transfer of lease at a valid consideration of the following titles for the:-
    - i. Mombasa/Block XXIII/227 from Hassan Abubakar for a sum of Kenya Shillings Seven Hundred & Fifty Thousand (Kshs. 750,000/=)
    - ii. Mombasa/Block XXIII/228 from Samuel Kipchumba for a sum of Kenya Shillings Seven Hundred & Fifty Thousand (Kshs. 750,000/=);
    - iii. Mombasa/Block XXIII/229 from Hillary Osodo for a sum of Kenya Shillings Seven Hundred & Fifty Thousand (Kshs. 750,000/=)
    - iv. Mombasa/Block XXIII/230 from Abubakar Kisito and Shabaan Ismail for a sum of Kenya Shillings Seven Hundred & Fifty Thousand (Kshs. 750,000/=).
  - c. At that time of Purchase there was no dispute over the ownership of the parcels of land. In so far as their due diligence the aforementioned properties were created as a result of the sub-division of a larger property by the Commissioner for land and were registered in the names



of the former owners who were the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants and the company had no reason to doubt the ownership to the properties.

- d. The plaintiffs/respondents instituted this suit together with a notice of motion application dated December 4, 2018 seeking for injunctive orders against the 1<sup>st</sup> and 2<sup>nd</sup> defendants. The orders were issued on March 14, 2019 restraining the defendants from developing or constructing on the properties pending the hearing and determination of the suit.
  - e. On or about the months of January and February, 2023, the defendants noted that the perimeter wall constructed on the parcel No. Mombasa/Block XXIII/227 was being brought down as seen from the photographs annexed thereto.
  - f. Upon inquiry, it came to their attention that the plaintiff/applicants were the ones demolishing the perimeter wall. Pending the determination of the suit, the Defendant were the legal holders of the titles of properties Mombasa/Block XXIII/227, Mombasa/Block XXIII/228, Mombasa/Block XXIII/229, Mombasa/Block XXIII/230 and hence any action by the plaintiffs/respondents amounted to trespass on the property.
  - g. The plaintiff/respondents approached this court seeking protection from the Interference of the Property by the defendants/applicants and were in turn causing the interference on the property themselves by demolishing the perimeter wall.
  - h. Since the pendency of this suit, the Company had suffered great financial loses as the business was at a halt due to the interim orders granted. Further since the injunctive orders were granted by this court the plaintiffs/respondents had taken no action in preserving the place and had since been a dwelling area for drug users and other unknown persons as the same did not belong to them.
  - i. The issue of ownership of the suit properties was subject to dispute before the court thus no party ought to carry out any activities on the premises including the plaintiffs/respondents herein and held that they had no right over the property as the title deed was with the defendants/applicants.
  - j. The company had been suffering and continued to suffer due to the action of the plaintiffs/applicants and act of demolishing of the property when the suit was ongoing as insulting and abrasive to the court process. The defendants/applicants urged that the status quo and the sanctity of the title to be maintained pending the hearing and determination of this suit and the orders as sought.
4. It's instructive to note that the 1<sup>st</sup> defendant/applicant moved court under Certificate of Urgency on February 15, 2023 to prosecute this notice of motion application. They were directed they serve the Respondents while the status quo to be maintained before the suit was filed. Despite of the plaintiff/respondent granted an opportunity to their replies none was worth coming. Indeed, on June 13, 2023 the Plaintiffs/Applicants informed court having filed grounds of opposition under the provisions of Order 51 Rule 14 of the [Civil Procedure Rules](#) 2010. None has been placed on file. Ideally, it would be correct to hold that the Notice of Motion application by the 1<sup>st</sup> Defendant has not been opposed as per the provisions of Order 51 Rule 14 of [Civil Procedure Rules](#) which court will be looking at in a more critical way herein below.

### III. Submissions.

5. On June 21, 2023 both the Learned Counsels M/s. Essejee Advocate for the 1<sup>st</sup> defendant/applicant and Mr. Ndambuki Advocate holding brief for Mr. Wafula Advocate for the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs/



respondents opted to submit orally with regard to the notice of motion application dated February 10, 2023. They executed their duty diligently. Pursuant to that the court reserved July 3, 2023 as the date to deliver its Ruling particularly taking notice that the full trial of the matter was slated for July 5, 2023 accordingly.

#### **A. The oral submissions by the 1<sup>st</sup> Defendant**

6. M/s. Essejee Advocate for the 1<sup>st</sup> defendant orally submitted briefly. She was relying on the supporting and further affidavit. The counsel averred that they were seeking for injunction orders against the plaintiff/respondent from having any dealing with the suit properties. The counsel submitted that the filing of the application was necessitated by the conduct by the plaintiffs and the need to preserve the suit property.

Additionally, the Leaned Counsel also sought to be granted for damages after the demolition of the perimeter wall which she strongly held were caused by the plaintiff/respondent from the information they gathered and the photographs they displayed in their affidavits

7. The Learned Counsel submitted that the parcels were registered in the names of the defendants/applicants as they held the title deeds which were protected under the Provisions of section 26 (1) of the [Land Registration Act](#), No. 3 of 2012. Hence, to her it was unfair for the plaintiffs/applicants to have proceeded to demolish the perimeter wall after they obtained injunction orders by the plaintiff/respondent. She urged court to allow the Notice of Motion application as prayed.

#### **B. The oral Submissions by the Plaintiff/Respondent**

8. Mr. Ndambuki Advocate for the plaintiffs submitted by stating that there existed an injunction orders already granted by this court on February 27, 2019 and issued on March 14, 2019 in favour of the plaintiffs. The orders were still in force as they had been vacated, set aside and/or varied by any one. The defendant application was made in bad light pursuant to the Provisions of Order 40 Rule 7 of [Civil Procedure Rules](#). He observed that the Defendant has only filed a Defence which was full of sham and mere denials and without any Counter Claim for damages from the alleged demolition of the perimeter wall by the Plaintiffs/Applicants.
9. The learned Counsel held that their Defence had not discharged any of their right had been infringed. Indeed, parties were bound by their pleadings. To him he held that the 1<sup>st</sup> defendant approached court in unclean hands and hence the intention of the Notice of Motion application was to delay the hearing of the case. He urged court to dismiss the Notice of Motion application with costs.

#### **IV. Analysis and Determination**

10. I have keenly perused and assessed the Notice of Motion application dated February 10, 2023 by the 1<sup>st</sup> defendant herein. The oral submissions by the parties the provisions of the [Constitution](#) of Kenya 2010 and the statutes. In order to attain a just and fair and reasonable decision hereof the honorable court has drawn the following issues for its determination.
  - a. Whether the notice of motion application dated February 10, 2023 by the 1<sup>st</sup> defendant/respondent has any merit.
  - b. Whether the parties herein are entitled to the orders sought.
  - c. Who will bear the costs of the application?



**Issue No. (a) Whether the Notice of Motion application dated February 10, 2023 by the 1<sup>st</sup> Defendant/Respondent has any merit.**

11. Under this sub-heading the 1<sup>st</sup> defendant/applicant herein has sought to be granted orders of injunction against the plaintiff/respondent seeking to restrain them from interfering with the suit properties. From the onset I wish to state a few issues of great importance towards declaring whether this application has merit or not. The main substratum in this application is on whether to grant or not to do so the injunction orders. This matter will be deliberated on in depth herein below. In the meantime, let the court decipher on the validity and merit of the filed application.
12. Firstly, from the filed pleadings there exists a land dispute of the suit property between the plaintiff and the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants/applicants. Indeed, the matter is slated for full trial on July 5, 2023. However, what triggered the 1<sup>st</sup> defendant/applicant to have filed this case was that on or about the months of January, and February, 2023 the defendant noted that the perimeter wall constructed on the parcel No. Mombasa/Block XXIII/227 was being brought down as seen from the annexed photographs. Further upon conducting inquiry, not clear from which source it came to their attention that it was the plaintiffs/respondents who were behind the alleged demolition yet they defendants were the holders of the title deeds.
13. Secondly, it's not in any dispute that there is already in existence an injunction order granted by this court on February 27, 2019 and order issued on March 14, 2019 in favour of the plaintiffs/respondents. Hence, one wonders why would the applicant be seeking for yet another order of similar nature even if its to cause for the preservation of the suit property. In my view, this is unnecessary and a wrong approach to say the very least.
14. Thirdly, despite of the plaintiffs/respondents having been served with the Notice of Motion application dated February 10, 2023, decided to ignore, neglect and/or failed to respond to it as required by law order 51 Rule 14 of the Civil Procedure Rules. Order 51 Rule 14 (1) holds: -
  - “(1) Any respondent who wishes to oppose any application may file any one or a combination of the:-
    - a. A notice of Preliminary Objection and/or
    - b. Replying Affidavit; and/or
    - c. A Statement of Grounds of opposition.
  - (2) The said documents in sub-Rule (1) and (2) and a list of authorities, if any shall be filed and served on the applicant not less than (3) clear days before the date of hearing.
  - (3) Any Applicant upon whom a Replying Affidavit or statements of grounds of opposition has been served Under Sub-Rule (1) may, with the leave of the court, file a supplementary affidavit.
  - (4) If a Respondent fails to file to comply with the sub-Rule (1) and (2) the application may be heard ex-parte.”
15. Critically speaking then the application should stand unopposed as clearly the plaintiff/respondent failed to comply and/or oblige with the directions of the court or requirements of law which are couched in mandatory terms. In saying so, I have sought solace from several decisions- Civil Appeal



No. 71 of 2017 – “*MNM v NWK* (2019) eKLR, and ELC No 72/2019 *Moses Kimaiyo Kipsang v Geoffrey Kiprotich Kirui & others*.”

It goes without saying the plaintiffs/respondent despite the opportunity granted to them but failed to oblige with the requirement of the law. But nonetheless, this court is not satisfied that this application which is defective in all fronts has any merit whatsoever. It must fail.

**Issue No. (b) Whether the parties herein are entitled to the orders sought.**

16. Be that as it may, the English have a saying that two wrongs do not make a right. In saying this, the court has taken critical cognizance that the issues before it. The court is being requested to Grant injunction orders by the 1<sup>st</sup> defendant/applicant. Injunctions are governed by the provisions of order 40 (1), (2) and (3). Order 40, Rule 1 provides:-

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.

17. The principles applicable in an application for an injunction were laid out in the celebrated case of “*Giella v Cassman Brown & Co Ltd* (1973) EA 358, where it was stated:-

“First an applicant must show a *prima facie* case with a probability of success, secondly 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. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

18. The three conditions set out in *Giella (supra)*, need all to be present in an application for court to be persuaded to exercise its discretion to grant an order of interlocutory injunction. This was set out by the Court of Appeal in the case of:- *Nguruman Limited* (*supra*), thus:-

“These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Limited v Afraba Education Society* [2001] Vol. 1 EA 86. 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. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration.



The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between”.

19. In dealing with the first condition of “prima facie case, the honorable court guided by the definition melted down in the case of “[Mrao Limited v First American Bank of Kenya Ltd & 2 others](#) (2003) KLR 125,. Its stated thus:-

“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”. Page 8

That “...a *prima facie* case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.”

20. However, based on the legal principles set out from the above decisions and applying them directly to the instant case, the court fails to see why it should proceed to consider the three (3) purposes here as otherwise it will end being a pure academic exercise altogether. In saying so, I have based my arguments from the following reasons.

Firstly, there already exists an injunctive orders granted to the plaintiffs/respondents. It trite law that there can never exist to identical orders over the same subject matter. See the decision of Misc. Civil Appl No 32 of 2012 [Republic of Kenya v Attorney General & another Ex-Parte Kensington International Ltd. & another](#) (2015) eKLR.

21. Secondly, I fully concur with the Learned Counsel for the plaintiff/respondent to the effect that the best option available for the defendant/applicant would have been to invoke the Provisions of Order 40 Rule 3 and 7 of the [Civil Procedure Rules](#) 2010. Order 40 Rule 3 holds:-

“In case of disobedience of the breach of any such terms the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached and may also order such person to be detained in prison for a term not exceeding six (6) months unless in the meantime the court directs his release.

Order 40 (7) holds

“Any order for an injunction may be discharged or varied or set aside by the court on application made thereto by any party dissatisfied with such order.

Despite of this clear, plain and simple provisions of the law the 1<sup>st</sup> defendant/applicant instead decided to approach the court through the Provisions of Order 51 Rules 1 and 3 of the [Civil Procedure Rules](#) 2010. By this ground alone, the orders of injunction sought cannot be granted and hence the application must fail.

### **Issue No. c). Who will bear the cost of the application**

22. The issue of costs is at the discretion of the court. Costs mean an award that a party is granted at the conclusion of any legal action or proceedings in any litigation. The proviso of section 27(1) of the [Civil Procedure Act](#) cap 21 holds that costs follow the events. By events it means the results or outcome in any legal action.



23. In the instant case, the 1<sup>st</sup> defendant/applicant has failed to prosecute its application. Nonetheless, taking that the Plaintiffs/Respondents likewise failed to oppose the application hence letting it proceed unopposed. Therefore, in the given circumstances, none of the parties will be entitled to costs.

#### **V. Conclusion and findings**

24. Having conducted such an elaborate analysis to the framed issues herein, the honorable court now guided by the principles of preponderance of probabilities make the following orders.
- a. That the notice of motion application dated February 10, 2023 be and is hereby found to be non-meritorious and hence dismissed with no orders to costs.
  - b. That the temporary injunction orders granted by this court on February 27, 2019 and issued on March 14, 2019 in favour of the plaintiffs/applicants to be still in force.
  - c. That the status quo to be maintained as it is for purposes of preserving the suit property.
  - d. That the hearing date of this case to remain intact on July 5, 2023 without fail.
  - e. That each party to bear their own costs of the application.

It Is So Ordered Accordingly.

**RULING DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 3<sup>RD</sup> DAY OF JULY 2023.**

.....  
**HON. JUSTICE L. L. NAIKUNI, (JUDGE)**  
**ENVIRONMENT AND LAND COURT AT**  
**MOMBASA**

Ruling delivered in the presence of:

- a. M/s. Yumna, the Court Assistant.
- b. No appearance for the Plaintiff/Respondent.
- c. No appearance for the 1<sup>st</sup> Defendants/Applicant.
- d. No appearance for the 2<sup>nd</sup> to 9<sup>th</sup> Defendants.

