Ondimu t/a Elimu Academy v Kisii County Government & 4 others (Environment & Land Case 2 of 2022) [2022] KEELC 14697 (KLR) (7 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14697 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ENVIRONMENT & LAND CASE 2 OF 2022

JM ONYANGO, J

NOVEMBER 7, 2022

BETWEEN

HELLEN KWAMBOKA ONDIMU T/A ELIMU ACADEMY .... PLAINTIFF

AND

KISII COUNTY GOVERNMENT .... 1ST DEFENDANT

KISII COUNTY SECRETARY .... 2ND DEFENDANT

CEC, LANDS, HOUSING, PHYSICAL PLANNING AND URBAN DEVELOPMENT .... 3RD DEFENDANT

CHIEF OFFICER, LANDS, HOUSING, PHYSICAL PLANNING AND URBAN DEVELOPMENT .... 4TH DEFENDANT

DIRECTOR LANDS ADMINISTRATION .... 5TH DEFENDANT

RULING

Introduction

1. The plaintiff/applicant filed suit against the defendants/respondents *vide* a plaint dated March 7, 2022 seeking the following orders:

   a. A declaration that the plaintiff is the lawful and bona fide and registered owner of a parcel of land known as Kisii Municipality block iii/480 (hereinafter referred to as the suit property);

   b. An order of permanent injunction restraining the defendants/respondents either by themselves, agents, servants and/or any one claiming under the defendants from entering into, trespassing onto ,forcibly and/or otherwise gaining entry into the suit property, evicting or interfering with plaintiff's possession of the suit property;

   c. costs of the suit

2. Together with the plaint, the plaintiff filed a notice of motion application dated March 7, 2022 which is the subject of this ruling. In the said application applicant sought the following orders against the defendants/respondents:

   a. Spent

   b. Spent

   c. Spent

   d. Pending the hearing and determination of the suit this honourable court be pleased to issue an interim order of injunction restraining the defendant/respondents either by themselves, agents, servants employees and/or any one claiming under the defendants from evicting the plaintiff and students from the suit property or interfering with the normal learning of students at the plaintiff's school built on the suit property.

   e. Pending the hearing and determination of the suit herein, the honourable court be pleased to issue a temporary of injunction restraining the defendants/respondents either by themselves, agents, servants, employees and/or any one claiming under the defendants from entering into, trespassing onto, forcibly and/or otherwise gaining entry into the suit property, evicting or interfering with plaintiff's possession occupation and ownership of the suit property.

   f. In the alternative to prayers (d) and (e) above the honourable court be pleased to issue a conservatory order of injunction maintaining the status quo obtaining from the time of the filing of the suit preserving and protecting the plaintiff's peaceful occupation of the suit property together with the normal learning of students pending the hearing and determination of the suit.

   g. Costs of the suit

   h. Such further orders and reliefs as the court may deem fit and necessary to grant.

3. The application is anchored on the grounds set out on the face of it together with a supporting affidavit sworn by the applicant herein on March 7, 2022.

4. The applicant avers that she is the lawful owner of the suit property having acquired it from the defunct Gusii Municipality whose successor is the 1st defendant, *vide* a lease agreement dated June 30, 2010. The lease agreement was to run for a period of 5 years with effect from August 1, 2008. Subsequently, she applied for an extension of the lease for a period of 30 years *vide* letters dated June 5, 2011 and July 8, 2011.

5. Her renewal request was granted and a lease agreement was executed between her and respondents on July 26, 2011 extending the lease period for 30 years commencing from August 1, 2014. It was a further term of the lease agreement that the same shall be renewable for a further term.

6. She further averred that it was upon the aforesaid approval by the first respondent that she fenced the suit property and extensively developed it. She deponed that she has been in occupation of the suit property since 2008 and has been running a primary school therein which has been serving her clients excellently.

7. However, *vide* a letter dated February 22, 2022 she was served with a notice requiring her to vacate the suit property with effect from the date of receipt of the said letter on grounds that the lease agreement had expired 7 years earlier and thus she was occupying the suit property illegally.

8. She lamented that the said notice was issued in bad faith and with an ulterior motive as the lease period was yet to expire. She also lamented that the notice was served upon her without considering that the school had pupils who were commencing their national examinations (KCPE) on March 7, 2022.

9. It was her contention that the notice to immediately vacate the premises before the lease period expires had the effect of depriving her of her rights and/or interests over the suit property. It was her contention that she would suffer irreparable loss if the application was not allowed pending the hearing and determination of the suit. She thus urged the court to allow the application.

10. It was her further contention that the actions of the respondent amounted to breach of a contract as well as a violation of her constitutional rights under article 31, 40, and 47 of the *constitution* of Kenya 2010.

11. The 1st to 5th respondents responded to the application *vide* a replying affidavit sworn by Mr Fredrick C Maranga, the director of land administration, Kisii county the 5th respondent herein on April 22, 2022. In his affidavit Mr Fredrick C. Maranga averred that the plaintiff and the defunct gusii municipality entered into a lease agreement commencing on the October 1, 2008 to August 1, 2013 whereby the applicant was required to pay an annual rent of Kshs 400,000/=. The lease period was later extended for a further period of 30 years commencing August 1, 2013 wherein the applicant was expected to pay a yearly rent of Kshs 800,000. The applicant was expected to pay a sum of Kshs 4,000,0000 being advance payment of rent for a period of 5 years as outlined in clause one (1) of the lease agreement.

12. It was Mr Fredrick C. Maranga averment that on February 22, 2022, the respondent issued a notice to the applicant requiring her to vacate the suit property due to applicants incessant breach of the terms of the lease agreement especially clause one which required her to pay rent for the suit property. However, the said notice was withdrawn on March 21, 2022 unconditionally *vide* a letter served upon the applicants advocate.

13. He further deponed that the notice to vacate which formed the substratum of the suit having been withdrawn the suit should be withdrawn. He however contended that plaintiffs were bound by the terms of the lease agreement which they have continuously violated by failure to pay an outstanding rent arrears amounting to Kshs 2,342,060,943.07 from the year 2009 to 2013 and Kshs 60,817,808.12 from the year 2013 to 2021.

14. Mr Maranga deponed that through a letter dated April 7, 2022, the respondent issued a 14 days' notice to the applicants demanding the payment of rent arrears and interest thereof. The respondents also communicated their intention to exercise their powers under clause 5(a) of the lease agreement that authorized them to re-enter into the suit land in the event that the applicant's failed to pay rent or service charge for a period of 30 days after becoming payable or when the applicant was in breach of any covenants in the lease agreement.

15. He contended that the applicant ought to comply with the terms of the lease agreement and should not seek the protection of the court for the blatant breach of the lease agreement between her and the respondents.

16. It was his contention that it was the applicant's duty to pay the rent owed to the respondents and she should not seek to enjoy interim orders of this court while she is in breach of the terms of the lease agreement. He further contended that the only reason why the applicant wanted to enjoy the interim orders she was seeking in this application after the termination notice had been withdrawn was to prevent the respondents from exercising their rights under the lease agreement.

17. Mr Maranga concluded by averring that as a result of the blatant breach of the terms of the lease agreement, the respondents were of the view that the lease agreement between the parties is no longer tenable and hence the respondents have through the invocation of clause 5(a) of the lease agreement issued a 14 days' notice for the applicant to vacate the suit property.

18. In response to the respondents' replying affidavit, the applicant filed a further affidavit sworn on May 12, 2022 in which she vehemently denied the respondents' claim that she owed them rent arrears. She averred that the letter dated March 21, 2021 purporting to withdraw the termination notice dated February 22, 2022 from the respondent was a ploy by the respondents to clean up their mess after being served with her application on March 8, 2022.

19. She contended that by withdrawing the termination notice, the respondents were only trying to reverse the situation in a bid to correct their mistake and the court should not allow them to do so.

20. The applicant lamented that the respondents went ahead to devise a new scheme of evicting her from the suit property in the name of effecting certain clauses of the lease agreement *vide* a letter date April 8, 2022.

21. In her bid to prove that she had complied with the terms of the agreement the applicant attached receipts for payment of rent issued to her by the 1st respondent for the period for which the respondents claimed she had not complied.

22. She averred that upon the expiry of the lease for the period 2008 to 2013 she applied for an extension of the lease. She explained that for such extension to be granted by the respondent, it was a pre-requisite that she clears the outstanding rent which she did before the said extension was approved.

23. She also averred that it was a pre-requisite that a 5 year advance rent of Kshs 4,000,000 be paid before the execution of the lease agreement which amount she paid to the 1st respondent who acknowledged receipt of the same. She averred that on July 13, 2019, she received a letter from the respondents through the department of revenue management directorate of revenue, claiming for rent arrears amounting to Kshs 376,000. She contended that those were the only rent arrears that were due as at that date and that she cleared the same and was issued with payment receipts by the respondents which she attached as exhibits.

24. She contended further that during the years 2020 and 2021 the covid-19 period affected her business as schools were closed by the Ministry of Education and thus she was unable to raise any income to enable her pay the rent. She deponed that she was forced to write a letter to the respondents requesting for a rent waiver. The said letter was received by the Chief Financing Officer but was not responded to.

25. She further deponed that the respondents did not issue her with an invoice requesting her to effect payment of the rent which was a clear indication that they had allowed her waiver request. Moreover, she revealed that the 1st respondent who is the lessor in the lease agreement issued her with a business permit for the years 2020 and 2021 during the covid-19 pandemic which gave her the impression that the waiver had been allowed by the respondents.

26. It was her averment that clause 5(d) of the lease agreement dated July 26, 2011, allowed parties to invoke force majeure to shield them from the consequences of any liability occasioned from impossibilities of performance of a contract for events beyond their control like the covid-19 pandemic.

27. She averred that after normalcy returned, she prepared cheques in favour of the 1st respondent effecting payment for the rent due for the period 2020 to 2021. She contended that as at March 24, 2022, the rent payment request served upon her by the respondent indicated that the outstanding rent was Kshs

24,000. She contended that according to the lease agreement, the Kshs 24,000 being the rent balance for the year 2022, the same should be due on August 1, 2022.

28. She lamented that despite this court issuing interim orders on March 9, 2022 which were served upon the respondents, they went ahead and issued her with a termination notice on April 8, 2022 that required her to move from the suit property within 14 days. She argued that the respondents ought to have approached this court to vacate the interim orders before issuing the termination notice on April 8, 2022 and their failure to do so amounted to an abuse of the court process. She urged the court not to condone such contemptuous actions by allowing her application.

29. In response to the further affidavit, the 5th respondent filed a supplementary affidavit sworn by Mr Maranga on June 13, 2022 wherein he averred that prior to the lease agreement between the parties the suit property was a community center. The same was converted by the applicant into a school (Elimu Academy).

30. He averred that even after the said conversion some stalls still remained on the suit property which the applicant had leased to various tenants. He contended that some of the payment receipts she had attached were for the stalls on the suit property that were not related to the lease agreement. He for instance claimed that the applicant made certain payments on June 25, 2021 which were not in relation to the lease agreement but to the stalls.

31. The 5th respondent averred that the applicant had through the documents attached to the further affidavit admitted that she breached the terms of the lease agreement by defaulting in payment of rent for the years 2019, 2020 and 2021 and only made such payments in May 2022. He averred that on May 6, 2022 she forwarded 2 cheques of Kshs 800,000 each as rent for the years, 2020 and 2021 in an effort to sanitize her claim and clear the rent arrears owed to the 1st respondent for the said periods.

32. According to him, the late payment of the rent for three years made on May 6, 2022 was a clear indication that the respondents were justified in making their intentions to exercise their right under clause 5 (b) of the lease agreement dated July 26, 2011 clear.

33. Mr Maranga further, deponed that the lease between the plaintiff and the Gusii county council was not properly handed over to the devolved unit being the Kisii county government, the 1st respondent herein and thus on February 22, 2022 the respondent issued a notice to the applicant specifically for being in breach of the terms of the agreement by failing to pay rent.

34. He reiterated that the applicant defaulted in payment of rent for more than 2 years and only made payment for the same after a demand had been made. This was a clear indication that she was in breach of the terms of contract and therefore the court should allow the respondents to execute their right under clause 5(b) of the lease agreement.

35. He argued that the court did not have jurisdiction to protect a party who had breached the terms of an agreement she willingly entered into as this would amount protecting her breach which is an affront to justice and against public policy.

36. It was his further contention that issuing the orders sought would amount to the court re-writing the agreement entered into between the parties.

37. The 5th respondent scoffed at the applicant's assertion that prejudice would be occasioned to the children's right to education as this had nothing to do with the 1st respondent's legitimate actions of executing its rights under the lease agreement which the applicant willingly entered into.

38. He contended that the applicant did not have any justification for failure to pay rent as required by the agreement and that her excuse that the covid-19 pandemic was to blame was inauthentic and derisory.

39. The court directed that the application be canvassed by way of written submissions and both parties filed their submissions.

Issues for Determination

40. Having considered the application together with all the documentary evidence attached, the response by respondents thereto together with the documentary evidence supplied as well as the written submissions filed by the parties, I deduce that the sole issue for determination is whether applicant has met the requirements for grant of interim orders of injunction pending the hearing and determination of the main suit.

Analysis and Determination

41. The principles applicable in an application for injunction were laid down in the celebrated case of *Giella v Cassman Brown & Co Ltd* [1973] EA 358 where the court held that in order to qualify for an injunction:-

    i. First the applicant must show a *prima facie* case with a probability of success.

    ii. Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable harm which would not be adequately compensated by an award of damages.

    iii. Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.

42. The first issue for determination is whether the applicant has established that he has a *prima facie* case with a probability of success.

43. A prima facie case was defined by the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* (2003) eKLR as follows;

> " 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 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."

44. In the instant suit, it is not in dispute that applicant and the respondents entered into a lease agreement for a period of 30 years with effect from August 1, 2013. This was an extension of an earlier 5 -year lease which commenced from August 1, 2008 to August 2021. It is also not in dispute that the applicant has been in occupation of the suit property since 2008 and that he has been running a school business therein since then.

45. It is also in dispute that the 5th respondent had through a letter dated February 22, 2022 issued a termination notice upon the applicant on grounds that the lease agreement between her and the 1st respondent had expired 7 years ago.

46. Furthermore, it is not an issue of contestation that the court issued an order on March 8, 2022 to maintain the status quo obtaining at the time of filing this suit preserving the plaintiff's peaceful occupation of the suit property pending the inter partes hearing which have not been vacated to date.

47. However, the respondents upon being served with the order on March 9, 2021 wrote another letter to the applicant dated March 21, 2021 withdrawing the termination notice unconditionally. According to the 5th respondent, the withdrawal of the notice dated 22nd February that had formed the substratum of the suit meant that suit ought to have been withdrawn.

48. The 5th respondent through a letter dated April 7, 2022 issued a fresh termination notice requiring the applicant to vacate the suit property within 30 days on grounds that she had breached clause 5(d) of the lease agreement by failing to pay outstanding rent arrears that had accumulated to close to Kshs 2.5 billion from the August 1, 2008 when the first lease agreement signed by the parties was meant to commence.

49. The applicant protested the said move by the respondent to issue a fresh termination notice and termed it an abuse of the court process and against the doctrine of *lis pendens* given that the same came against the backdrop of a conservatory order issued by this court on March 8, 2022. That notwithstanding, the applicant in a bid to establish that she was not indebted to the respondents to the extent they had claimed demonstrated that she was upto date in her payment of rent.

50. She however acknowledged that between the years 2020 and 2021 she was unable to pay rent due to the covid-19 an action she argues amounted to force majeure as set out in the lease agreement. It was her contention that in her letter dated April 20, 2020 she sought a rent waiver given that she was unable to pay the rent owing to the fact that the Ministry of Education had closed schools indefinitely. According to her, the said letter was not responded to. She avers that during that period of time she was never issued with any invoice by the respondent but she was duly issued with business permits by the said respondents. She argued that the fact that she was given business permits by the respondents for the two years lulled her into thinking that the respondents had accepted her request for a rent waiver.

51. However, she averred that when normalcy returned, she made payments to the respondents which payments have been acknowledged and thus she has no outstanding rent.

52. On the other hand, the 5th respondent maintains that the applicant is still indebted to them. They respondents argue that the admission by the applicant that she failed to pay rent for a period of two years and only paid it in May, 2022 was a clear indication that the respondent is justified to exercise its powers under the lease agreement and evict the applicant from the suit property.

53. From the above analysis of the facts of this case, it is clear that applicant has been able to establish that she holds a lease over the suit property which is the subject matter of the suit and has been in occupation of the same since 2008. She has been able to establish that the lease agreements entered between the parties have been in place since 2008 when she took possession of the suit property and she had peacefully occupied the suit property until the February 22, 2022 when the respondent issued a notice to terminate the lease, an action she intends to challenge at the main hearing of this suit.

54. The applicant has also been able to establish that there is imminent danger that she will be evicted from the suit property before this application is heard and determined unless an injunction is issued by this honourable court. This is demonstrated by the fact that the respondents in total disregard of the interim conservatory orders issued by this court on March 8, 2022, proceeded to issue a fresh termination notice on April 7, 2022 threatening to evict the applicant from the suit property on account of outstanding rent arrears amounting to approximately Kshs 2.5 Billion.

55. If the respondents held the view that this suit had been rendered moot as a result of their withdrawal of the said notice dated February 22, 2022 which they claim formed the substratum of this suit, they had adequate time to move the court appropriately to have the interim orders vacated. Having failed

to move the court to vacate the said orders, the said orders remained in force and bound all the parties because they were not issued in vain.

56. Although counsel for the respondents informed the court about the withdrawal of the termination notice on March 22, 2022, it is on record that on the same day the interim orders were extended to the next mention date. Informing the court that the termination notice dated March 22, 2022 had been withdrawn was not enough, counsel ought to have requested the court to vacate the orders if he wanted his clients to issue a fresh termination notice.

57. It is not in dispute that there are contested issues like the alleged breach the lease agreements by both parties, the alleged default in the payment of the rent to the tune claimed be respondent in the impugned termination notice dated April 7, 2022 and the justifiability of the termination of lease agreement which will require a full hearing before the court renders its decision. This court is aware that at the interlocutory stage, it is not required to make any definitive conclusion on the matters that are in controversy.

58. In saying so I am guided by the decision in the case of *Mbuthia v Jimba Credit Finance Corporation Ltd* (1988) eKLR where the court held that;

> "In an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the parties' cases."

59. Similarly, the court in the case of *Edwin Kamau Muniu v Barclays Bank of Kenya Ltd* Nbi HCCC No 1118 of 2002, the court held that;

> "In an interlocutory application, the court is not required to determine the very issues which will be canvassed at the trial with finality. All the court is entitled at this stage is whether the Applicant is entitled to an injunction sought on the usual criteria."

60. In the case of *Virginia Edith Wambui v Joash Ochieng Ougo* civil appeal No 3 of 1987 eKLR, the Court of Appeal held that;

> "The general principle which has been applied by this court is that where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided on a trial."

61. It is therefore my finding that the applicant has established a *prima facie* case with a probability of success.

62. The second issue as to whether the applicant will suffer irreparable harm which cannot be adequately compensated by award of damages. In order to prove irreparable loss the applicant is required to demonstrate that if the application is not allowed she is likely to suffer a harm that cannot be quantified in monetary terms. The Court of Appeal in *Nguruman Limited v Jan Bonde Nielsen & 2 others* (2014) eKLR held that: -

> "On the second factor, 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 facie*, 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 stand 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."

63. Learned counsel for the applicant submitted that applicant runs a school on the suit property known as Elimu Academy that hosts between 850-950 innocent children and between 700 to 900 parents and/or guardians pay school fees for the children in the said school. He submitted further that the said pupils and parents would greatly be prejudiced if this application was not allowed. It was his contention that the applicant would suffer great financial loss given that she has heavily invested in the suit premises. He added that there was a real likelihood that the respondents would lease the premises to other third parties if the termination notice was allowed to take effect.

64. The above submissions by counsel fortified by the observation of the court that the applicant has established that she faces imminent eviction from the suit property is sufficient to demonstrate that the applicant stands to suffer irreparable harm that cannot be compensated by way of damages if this application is not allowed.

65. On the third issue of balance of convenience, this court is called upon to weigh the hardship that shall be borne by the applicant if the court refuses to grant the injunction, against the hardship that shall borne by the respondents if the court grants the injunction.

66. Looking at the evidence presented by the parties herein, I find that scales of justice tilt in favor of maintaining the status quo currently obtaining on the suit property. The respondents have made it clear that they are determined to evict the applicant on an account of an alleged breach of the lease agreement which as I have earlier stated can only be determined after a full hearing.

67. In light of the foregoing, I find and hold that the applicant has met the threshold for the grant of a temporary injunction. Consequently, the application dated March 7, 2022 is allowed as prayed pending the hearing and determination of this suit.

68. The costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 7TH DAY OF NOVEMBER, 2022.

....

J.M ONYANGO

JUDGE