



**Agengo & another v Kituyi & 3 others (Petition E005 of 2023)
[2024] KEHC 2687 (KLR) (6 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2687 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
PETITION E005 OF 2023
REA OUGO, J
MARCH 6, 2024
IN THE MATTER OF A PETITION FOR ENFORCEMENT
OF FUNDAMENTAL RIGHTS AND FREEDOMS
AND
IN THE MATTER OF ARTICLES 29 AND 40 OF THE CONSTITUTION**

BETWEEN

**ALFRED AGENGO 1ST PETITIONER
BENITO HOTELS T/A TOURIST HOTEL BUNGOMA 2ND PETITIONER**

AND

**WILLIAM KITUYI 1ST RESPONDENT
CHASPAH KUNANIA ASHIUNDU 2ND RESPONDENT
ABEL MAKOKHA 3RD RESPONDENT
BENARD IJONO 4TH RESPONDENT**

RULING

1. This ruling relates to the Petitioners Notice of Motion dated 4th December 2023 brought under Articles 29 (c), Article 40 of the *Constitution* of Kenya and Rules 4, 23 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*. The petitioners seek the following reliefs:
 1. Spent
 2. Spent
 3. Spent



4. Spent
 5. That upon inter-parties hearing of this application conservatory order restraining the Respondents either by themselves, their agents, family members, relatives and or any other person acting under their instructions from trespassing, entering or otherwise interfering with the business operations at the 2nd petitioner's premises.
 6. That upon inter-parties hearing, this court be pleased to issue an order of injunction restraining the Respondents by themselves or by anyone claiming through them from blocking the petitioners' access to the business premises or interfering with the petitioners' business operations.
 7. Subject to periodic upward reviews as provided for in the Respondents Human Resource law, policies and manuals.
 8. That the costs of this application be provided for.
2. The application is supported by the affidavit of Alfred Agengo who deposed that he is the General Manager at the 2nd petitioner. It was averred that on 21st November 2023, they noted the presence of strangers/goons pretending to be guests looking for accommodation. The respondents acting in concert approached the receptionist under the guise that they were looking for accommodation but when they were asked to give out their particulars they declined and caused a fracas demanding that they must be given rooms. A large mob led by the respondents entered the hotel premises and caused mayhem, interrupting business and intimidating staff. The respondents through the use of visible firearms and other crude weapons proceeded to allocate themselves rooms at the hotel. The respondents have posted goons at the entrance of the Hotel making it impossible to access without risk to life and property. They harass and intimidate individuals associated with the Hotel and the intimidation has taken an ethnic dimension. The objective of the respondents is to destroy property, pillage, and lead to the closure of the business.
 3. The respondents despite being served with the application and the hearing notice failed to file their response or attend the application hearing. The petitioners' counsel made oral submissions arguing that they had established the grant of the orders sought in the application.

Analysis And Determination

4. Having considered the submissions, the only issue before the court is whether the applicant has demonstrated a case for the grant of conservatory and injunctive orders.
5. I will first consider whether the petitioners have established a case for the grant of interlocutory injunctive orders. I rely on the precedent set out in the case of *Giella v Cassman Brown* (1973) EA 358 in which the conditions for the grant of an interlocutory injunction were settled as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”
6. In this case, the 1st petitioner has a legal right to the property as established under Article 40 of the [Constitution](#) of Kenya 2010 and has proved ownership of the hotel by availing the CR12 and the



certificate of registration of change of particulars. It is not in dispute, as this was not challenged by the respondents that they occupy certain rooms within the hotel and have intimidated several hotel employees with the threat of weapons. The evidence from the affidavits reveal that the petitioners made reports to the Bungoma police station under OB reference number 107/22/2023 and OB No 02/21/2023. The respondent's occupation of the premises is forceful and without the consent of the petitioners. Interestingly, the affidavit of service further shows that all the respondents are currently inhabiting various rooms within the hotel and they have blocked the 1st petitioner's access to the hotel. I therefore find that the petitioners have shown that they have a *prima facie* case with a probability of success.

7. As to whether the petitioner will suffer irreparable injury/loss that cannot be compensated by an award of damages if the application for an injunction is not allowed, I am guided by the decision in *Nguruman Limited v Jan Bonde Nielsen & 2 others* CA No 77 of 2012 (eKLR 2014) where the court stated:

“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 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 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.”

8. The 1st petitioner is the General Manager of the tourist hotel and the respondents have denied him entry into the establishment. Similarly, the respondents' threats to the hotel's employees have led to some of the employees quitting their jobs having been targeted by the respondents. The hotel is therefore operating without its manager and the petitioners stand the risk of losing more employees if the respondents are allowed to continue blocking the petitioner's access to the premises and intimidate its workers. There is also the danger that the respondents may act on their threats and use real force against the petitioners and their employees. The petitioner as the owner of the establishment is currently not enjoying his ownership rights as he has been kicked out of the hotel. Accordingly, the petitioner has established that they will suffer irreparable loss or injury if the application for an injunction is not granted at this stage.
9. It is my view therefore that the balance of convenience tilts in favour of the petitioners who stand to lose control over their property and a massive resignation from their employees that will cause a real crisis in the operation of the business. There is a real danger that the respondent may inflict harm on the petitioner if allowed to continue with their occupation.
10. The applicants have sought a conservatory order restraining the Respondents from entering the hotel premises. It is therefore crucial to understand the definition of a conservatory order. The Court in Nairobi Civil Appeal 151 of 2011 *Invesco Assurance Co. Ltd v MW (Minor suing thro' next friend and mother (HW))* [2016] eKLR defined a conservatory order as follows:

“5. A conservatory order is a judicial remedy granted by the court by way of an undertaking that no action of any kind is taken to preserve the subject until the motion of the suit is heard. It is an order of status quo for the preservation of the subject matter.”



11. The Supreme Court in the case of *Gitirau Peter Munya v Dickson Mwenda Kithinji & 2 others*, Supreme Court Application No 5 of 2014 3 stated:

“Conservatory Orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay.”

12. The principles to be considered for the grant of conservatory orders were well enumerated in the case of *Wilson Kaberia Nkunja v The Magistrate and Judges Vetting Board & others* Nairobi High Court Constitutional Petition No 154 of 2016 (2016) eKLR where the Court summarized the principles as follows:

- a. An applicant must demonstrate that he has a *prima facie* case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the *Constitution*.
- b. Whether, if a conservatory order is not granted, the petition alleging violation of, or threat of violation of rights will be rendered nugatory; and
- c. The public interest must be considered before grant of a conservatory order.

13. In this case, it is my finding in paragraph 7 above that the petitioner has demonstrated that they have a *prima facie* case with a likelihood of success. There is a real danger that the petitioners will suffer prejudice as a result of the threatened violation of the *Constitution*. The petitioners have therefore proved their case on this first limb.

14. The application is about the violation of the petitioners’ right to property and the right to freedom and security of the person against the respondents who have forcibly occupied the petitioners’ hotel and continue to threaten their staff. The respondents’ actions have reduced the hotel’s usability and the petitioner’s proprietary rights have been diminished. In essence, conservatory orders will not be pursued to safeguard private rights; instead, proprietary interests and associated land rights are most effectively maintained through interlocutory injunctions granted by the court under Order 40 of the *Civil Procedure Rules, 2010* (see *Coral Pearl Executive Apartments Limited & another v County Government of Mombasa & 2 others* (Constitutional Petition 32 of 2021) [2022] KEELC 3000 (KLR) (18 May 2022) (Ruling)). The grant of conservatory rights demands consideration of public interest. ‘Public interest’ is defined by the *Black’s Law Dictionary* 10th Edition at page 1425 as: -

The general welfare of a populace considered as warranting recognition and protection. Something in which the public as a whole has stake especially in something that justifies government regulation.

15. In this case, the application before the court does not meet the public interest threshold for the granting of conservatory orders.
16. The above analysis shows that the Petitioners have laid a basis for the grant of the injunctive order sought in the application. The petitioners are granted prayer 6 of the application. An order of injunction is hereby issued restraining the respondents by themselves or by anyone claiming through them from blocking the petitioners’ access to the business premises or interfering with the petitioners’ business operations. The petitioners shall set down the petition for hearing within the next 21 days



from the date of this ruling. The injunctive order shall be in force pending the hearing of the petition. The matter is to be mentioned on a given date in court to confirm that the petitioners have served the respondents with all the required documents to enable them to file a response and to take directions.

17. Costs shall be in the cause.

DATED, SIGNED, AND DELIVERED AT BUNGOMA THIS 6TH DAY OF MARCH 2024.

R.E. OUGO

JUDGE

In the presence of:

Mr. Anditi For the Petitioners- Present

Respondents - All Absent

Ms Wilkister C/A

