



Pizza O. Limited t/a Osteria Restaurant v Viola Limited & another (Civil Suit 3 of 2022) [2023] KEHC 21295 (KLR) (11 July 2023) (Ruling)

Neutral citation: [2023] KEHC 21295 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL SUIT 3 OF 2022
SM GITHINJI, J
JULY 11, 2023**

BETWEEN

PIZZA O. LIMITED T/A OSTERIA RESTAURANT PLAINTIFF

AND

VIOLA LIMITED 1ST DEFENDANT

FRANCESCA DURANTI 2ND DEFENDANT

RULING

1. Before this Court for determination is the Plaintiff's Notice of Motion application dated April 11, 2022 and brought under Sections 1A, 1B, and 3A of the [Civil Procedure Act](#); and Order 40 of the [Civil Procedure Rules](#). The Plaintiff seeks the following orders; -
 - a. Spent.
 - b. That this honourable court be pleased to issue an injunction against the Defendants by themselves, their agents or servants or otherwise howsoever, to permanently bar and stay the threatened sale by auction of the Plaintiffs' property that the Defendants have illegally distressed and/or detained at the suit premises until the inter partes hearing and determination of this suit.
 - c. Spent.
 - d. That in the alternative the court be pleased to issue an access order to enable the Plaintiff enter the suit premises (Portion No 1009 Malindi Title No. CR 11988) and collect his property as per the inventory annexed to this application. Further, that the OCS Malindi to oversee and/or supervise the process of the Plaintiff collecting his property from the suit premises.
 - e. Spent.



- f. Spent.
 - g. That costs of this application be borne by the Defendants/respondents.
 - h. Any other order that this honourable court deems fit to meet the ends of justice.
2. The application is premised on the grounds on its face and the supporting affidavit of Maurizio Corti, the Plaintiff's director, sworn on April 11, 2022. The genesis of this dispute is a lease agreement dated February 1, 2013 between the Plaintiff and 1st Defendant herein. The Plaintiff leased to the 1st Defendant's premises situate on land portion No 1009 Malindi, CR 11988 for purposes of putting up a restaurant which the Plaintiff has since operated while paying rent to the 2nd Defendant. That sometime on November 29, 2021, the Defendants without any notice, forcibly and illegally evicted the Plaintiff from the premises for rent arrears pleaded at Kshs 251,600/- while taking possession of the Plaintiff's property for auction. To the Plaintiff, the property in distress is worth more than the rent arrears thus causing them great loss and loss of business reputation.
 3. The Defendants opposed the application. They filed a Replying Affidavit sworn on May 13, 2022 by the 2nd Defendant who deposed that the application is an abuse of the court process since it has been overtaken by events. She stated that the Plaintiff voluntarily vacated the premises on the night of November 29, 2021 leaving unpaid rent and utility bills. She added that the injunction order could not issue since a new lease was issued to another company not a party to this suit.
 4. The 2nd Defendant further deposed that the Plaintiff failed to maintain the premises causing the Defendants to incur renovation costs of Kshs 2,465,928/-, an amount which the Plaintiff has since neglected to settle. She added that the Plaintiff collected their account books on February 4, 2022 as evidenced by the annexed correspondence between the parties.
 5. Further, the 2nd Defendant deposed that due process for recovery of rent arrears was followed and the auction carried out on January 26, 2022. She exhibited copies of the notification of sale, gazette letter and cheque for the proceeds of sale from Swiftway auctioneers.
 6. The application was canvassed by way of written submissions which I have carefully perused. I find that the following issues arise for determination; -
 1. Whether the Plaintiff has met the criteria for grant of an injunction.
 2. Whether the application is overtaken by events.
 7. The law governing granting of interlocutory injunctions is set out under order 40(1) (a) and (b) of the *Civil Procedure Rules* 2010 which provides that: -
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.

8. The conditions for consideration in granting an injunction were settled in the celebrated case of *Giella v Cassman Brown & Company Limited* [1973] EA 358 where the court expressed itself on the conditions that a party must satisfy for the court to grant an interlocutory injunction as follows: -

“Firstly, 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 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.”

9. Further, in *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR the court opined as follows; -

“...these are the three pillars on which rest 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... 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 are 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.”

10. The question which therefore arises is whether the Plaintiff herein has laid out a case to warrant this court grant an injunction against the Defendant. The Court of Appeal in *Moses C. Mubia Njoroge & 2 others v Jane W Lesaloi and 5 others*, [2014] eKLR, defined a prima facie case as follows;

“A *Prima facie* case in a civil application includes but 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 there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.

11. From the above definition, it is clear that a prima facie case means more than an arguable case, and in which the evidence must show an infringement of a right or the probability of success of the Plaintiff’s case at the trial.

12. In the present case, the Plaintiff is seeking an equitable remedy to protect their alleged right to stop the proclaimed and attached items from being sold by the Auctioneer on behalf of the respondent. It must first be noted that the auction sought to be stopped was conducted on January 26, 2022. There is therefore nothing to be stopped. The essence of the sought injunction was to restrain the respondent from selling or interfering with the Plaintiff’s items under proclamation or attachment. In any event, the Defendants were well within their rights



to distress for rent that had become due. In the case of Cyo Owaya v George Hannigton Zephania Aduda T/a Aduda Auctioneers & Another [2007] the Court of Appeal held:

“Thus, in looking into what constitutes illegality of distress for rent, we must not only consider our laws, but must also consider what in England would be considered an illegality in the levy of distress. In Halsbury’s Laws of England, 4th Edition Volume 13 paragraph 368 it is stated:

“368. Circumstance in which distress is illegal

An illegal distress is one which is wrongful at the very outset, that is to say either where there was no right to distrain or where a wrongful act was committed at the beginning of the levy invalidating all subsequent proceedings.

The following are instances of illegal distress; a distress by a landlord after he has parted with his reversion; a distress by a person in whom the reversion is not vested; a distress when no rent is in arrear; or for a claim or debt which is not rent; as a payment for the hire of chartels; a distress made after a valid tender of rent has been made; a second distress for the same rent; a distress off the premises or on the highway; a distress in the night that is between sunset and sunrise a distress levied or proceeded contrary to the law of Distress.....”

13. I therefore apply this test in favour of the respondent to the effect that the Plaintiff is not entitled to an injunction.
14. The Plaintiff admitted being in arrears of the rent. In my view, the distress that was carried out together with the sale of the items distressed was lawful. The Defendant’s right to distrain accrued when the Plaintiff fell into arrears. Indeed, the Plaintiff did not substantiate on any illegality in the process for distress. In the circumstances, I am not convinced that the Plaintiff has established a *prima facie* case warranting granting of an injunction.
15. Having failed to establish a *prima facie* case and irreparable injury, the balance of convenience need no consideration. As already pronounced the Plaintiff’s proclaimed items were auctioned. I agree with the Defendant’s argument that the orders sought cannot be issued. They have been overtaken by events.
16. The upshot is that the notice of motion dated April 11, 2022 is dismissed with costs to the respondent.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 11TH DAY OF JULY, 2023.

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S.M. GITHINJI

JUDGE

In the Presence of; -

1. Miss Metto holding brief for Miss Chepkwony for Defendant/Respondent

2. Ms Aoko for Plaintiff/Applicant.

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S.M. GITHINJI



JUDGE

11.7.2023

