



REPUBLIC OF KENYA



**Salthouse v Maina (Petition E500 of 2024) [2024] KEHC 12009 (KLR)  
(Constitutional and Human Rights) (9 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12009 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
PETITION E500 OF 2024  
LN MUGAMBI, J  
OCTOBER 9, 2024**

**BETWEEN**

**JADE LOUISE SALTHOUSE ..... PETITIONER**

**AND**

**MARK MAINA ..... RESPONDENT**

**RULING**

**Introduction**

1. By a Notice of Motion application dated 25<sup>th</sup> September 2024, the Petitioner seeks:  
Ex-parte orders that pending the hearing and determination of this Application:
  - a. Spent.
  - b. An order do issue, directing the Respondent to immediately release the Applicant's Passport to the Officer Commanding Station, Ruai Police Station, who shall facilitate the safe delivery of the Passport to the Petitioner/Applicant or this Court before the 1<sup>st</sup> of October 2024 to enable her to make the appropriate flight bookings before expiration of her Travel Authorization on 23<sup>rd</sup> October 2024.
  - c. A declaration be made that the Petitioner/Applicant's fundamental rights as stated in the Petition herein were violated by the Respondent.
  - d. A declaration be made that the Respondent's action of gaining unjustified entry into the apartment amounted to a blatant violation of Article 31 of the [Constitution](#).



- e. A declaration be made that the forceful removal of the Petitioner/Applicant from the apartment and dragging her to the car for the purposes of making payments amounted to gross humiliation contrary to Article 28 of the *Constitution*.
- f. A declaration be made that the act of accosting the Petitioner/Applicant in the company of strangers with an aim to cause intimidation is a violation of Article 29 of the Constitution.
- g. A declaration be made that the seizure of the Petitioner/Applicant's Passport was illegal, unconstitutional and a violation of Articles 27, 28, 36, 39 and 40 of the *Constitution*.
- h. A declaration be made that the continued holding of the Petitioner/Applicant's Passport is unlawful and in breach of her rights under Articles 27, 28, 29, 39, and 40 of the *Constitution*.
- i. General damages be awarded for violation of the Petitioner/Applicant's fundamental rights and freedoms as guaranteed under the Constitution.
- j. Special damages be awarded to the Petitioner/Applicant to the tune of four million shillings (KES.4,000,000) for emotional and psychological torture, pain and suffering caused by the Respondent.
- k. Costs of this Application and the Petition herein be borne by the Respondent.
- l. Any other or further orders as this Court deems fit and appropriate be granted.

### **Petitioner' Case**

2. The Application is supported by the Petitioner's affidavit in support of even date and the grounds on the face of the Application.
3. The Petitioner states that she is a British Citizen who was scheduled to visit Kenya between 23<sup>rd</sup> July 2024 and 23<sup>rd</sup> October 2024. While in Nairobi, she booked a short – stay apartment with the Respondent through booking.com based at Utawala.
4. She avers that before occupying the apartment on 10<sup>th</sup> August 2024, she notified the Respondent that she would be staying there with a friend and a cat. Moreover that she intended to make the payments in three installments. She planned to stay at the apartment until 6<sup>th</sup> September 2024. The Respondent accepted the terms and rented her the apartment at a discounted rate of Ksh.2250 per night.
5. She made the first payment of Ksh.6825 via Mpesa on 10<sup>th</sup> August 2024. She asserts that before she made the second installment scheduled for 20<sup>th</sup> August 2024, the Respondent showed up at the apartment. In their presence, she deposited Ksh.10,000 to the Respondent's Mpesa account and indicated that the balance of Ksh.5000 would be paid once the Western Union transaction had been processed.
6. She claims that this to infuriate the Respondent who started to hurl insults at her in Kiswahili. She adds that when she tried to take medication to ease her anxiety at that moment, the Respondent denied her access to water. She asserts that the Respondent thereafter dragged her to his car and drove her to an ATM so that she can pay the outstanding balance of the second instalment.
7. She avers that on 21<sup>st</sup> August 2024, the Respondent arbitrarily raised the daily payments to Ksh. 2500. In addition, she claims that the Respondent forced her to surrender her passport to him and caused her to sign an agreement to that effect. The passport was to be held until the final instalment was paid.



8. Soon after on 28<sup>th</sup> August 2024, it is alleged that the Respondent once again showed up at the apartment and demanded she gets rid of the cat or pay a fine of Ksh.500 daily.
9. In light of these circumstances, she states that she elected to leave the apartment on 29<sup>th</sup> August 2024. As such, she paid Ksh.22, 500 for the days she had stayed at the apartment. She makes known that the Respondent demanded that she pay the full payment until 6<sup>th</sup> September 2024 as previously scheduled. She asserts that this was despite the Respondent's false advertisement on booking.com dated 27<sup>th</sup> August 2024 that the apartment was vacant, two days before the Petitioner had moved out of the apartment and stating that the Petitioner did not get to the apartment. It is noted that the Respondent refused to return her passport.
10. It is her case therefore, that the Respondent's actions are illegal, unfair, unreasonable, ultra vires and in direct violation of her rights. Her report to the Ruai police station did not bear any fruits. The Respondent has adamantly refused to hand over her passport. She adds that she is also not able to move freely within Kenya as she does not have identification. She is apprehensive that she will suffer irreparable injury and loss as a result of the Respondent's actions as her travel authorization in Kenya is set to lapse on 23<sup>rd</sup> October 2024.

### **Respondent's Case**

11. The Respondent filed a Replying Affidavit sworn on 26<sup>th</sup> September 2024 where he disclosed that he runs an air BnB business at Utawala on terms set out by Booking.com. He notes that as per the policy cancellation guidelines, a guest is charged the full price of reservation if they cancel after reservation. Further, pets are not allowed.
12. He confirmed that the Petitioner booked his apartment on Booking.com and made the payments stated in her affidavit. He states that when he discovered that the Petitioner was staying at the apartment with a cat, they agreed that the daily charge would be Ksh.2500.
13. He stated that the Petitioner appeared to have financial difficulties hence agreed that he would keep her passport until she full payment for her stay set to end 2<sup>nd</sup> September 2024. Nevertheless, the Petitioner left the apartment on 29<sup>th</sup> August 2024 without notice or paying the full balance due.
14. He thus reported the matter to the police on 2<sup>nd</sup> September 2024 vide OB No.17/2/9/2024. The Petitioner was summoned but maintained that she would only pay for the days that she had been in the apartment. He claims that the balance of Ksh.20,000 has not been paid to date.
15. He depones that he did not harass the Petitioner as alleged. In fact, he states that he drove the Petitioner to the ATM at her request and at his own cost. Equally, that she offered her passport willingly. He went on to suggest that the passport should be deposited in Court as security for the Ksh.20,000/-. He denied the claim for violation of rights and contended that the Petition and Application is misconceived, incompetent, bad in law and an abuse of the Court process.

### **Parties Submissions**

#### **Petitioner's Submissions**

16. The Petitioner filed submissions dated 30<sup>th</sup> September 2024 through William Karoki and Associates Advocates. Counsel identified the issues for determination as: whether a passport can be issued as collateral for a debt; whether the alleged agreement between the Petitioner and the Respondent is valid and whether the unlawful and illegal retention of the Petitioner's Passport constitutes a violation of the Petitioner's rights under Articles 27, 28, 29, and 39 of the Constitution.



17. The Petitioner submitted that a passport cannot be used as collateral as it belongs to the party's government and not themselves, in this case His Majesty's Government. Accordingly, to hold the same as collateral would be unlawful and unconscionable.
18. To buttress this point reliance was placed in Section 24 of the [Kenya Citizenship and Immigration Act](#) where it is provided as follows:
2. A passport or travel document issued under this Act shall remain the property of the Government of Kenya.
  3. Notwithstanding subsection (2), a passport validly issued under this Act must remain in the possession of its holder until such time as there is lawful cause for its withdrawal, suspension or confiscation.
19. On the second issue, the Petitioner submitted that the agreement between the Petitioner and Respondent was invalid as it was entered into under duress for, she could have been thrown out had she not complied. The Petitioner's argued that the consent was not therefore voluntary. Reliance was placed in [Madhubaper International Ltd & another v Kenya Commercial Bank Ltd & 2 others](#) [2003] eKLR where it was held that:
- “It is duress if a person, with the object of coercing another to pay money claimed from the other as a debt due under a contract, harasses the other with demands for payment, which, in respect of their frequency or the manner or occasion of making any such demand, or of any threat of publicity by which any demand is accompanied, are calculated to subject him or members of his family or household to alarm, distress or humiliation.....”
20. Similar dependence was placed in [Scott Vs Brown, Denning & McNab Company](#) (3) [1892] 2QB 724.
21. Finally, the Petitioner submitted that the Respondent's actions violated her rights under Articles 27, 28, 29 and 39 of the [Constitution](#). Reliance was placed in [Kenya Anti-Corruption Commission v Deepak Chamanlal Kamani & 4 others](#) [2014] eKLR where it was held that:
- “The right to personal liberty and freedom of movement guarantees the citizens, among other things, the right to leave and return to Kenya. To facilitate this, the Government issues passports to all its citizens because a passport is a necessary condition for travel abroad.”

### **Respondent's Submissions**

22. The Respondent filed submissions through Gicheha Kamau and Company Advocates on 30<sup>th</sup> September, 2024.
23. It was submitted that the principles that guide Courts on such applications were established in the case of [Giela v Casman Brown & Co. LTD](#) 1973 EA 358 as follows:
- “Firstly, that the applicant must show a prima facie case with the probability of success; secondly, such an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury; thirdly, when the court is in doubt, it will decide the application on a balance of convenience”.
24. Like dependence was placed in [Kenya Commercial Finance Co. Ltd -v- Afraba Education Society](#) (2001) 1 EA 86 at pg 89 and [Mrao Ltd v First American Bank of Kenya Ltd & 2 others](#) [2003] eKLR.



25. In this regard, Counsel submitted that the Petitioner was well aware of the Policy Guidelines before she made her booking with the Respondent. Evidently, he noted that she was yet to pay this amount and therefore her case cannot be deemed to be genuine as she is in breach of the policy terms.
26. Additionally, the Respondent submitted that Courts cannot purport to re-write a contract on behalf of the contracting parties and thus the Petitioner remains bound by the terms of the engagement which she voluntarily entered into.
27. The Respondent further argued that there would not be any irreparable harm as alleged as the Petitioner has enough time to pay the balance of the payment before 23<sup>rd</sup> October 2024.
28. On the release of the passport to the Petitioner, it was argued that that is tantamount to determining the matter conclusively yet it is at the interim stage. This in turn would prejudice the Respondent who would not receive the owed amount. For this reason, Counsel argued that the Application had not met the threshold for grant of the interim orders and so should be dismissed.

### **Analysis and Determination**

29. It is my considered view that the issue that arises for determination is:

Whether this Court should issue the orders sought in the Application dated 25<sup>th</sup> September 2024.

30. The nature of interim orders was discussed in [\*Hezron Kamau Gichuru v Kianjoya Enterprises Ltd & another\* \[2022\] eKLR](#) as follows:

- “ 52. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the judicial decision of *Giella v Cassman Brown* (1973) EA 358. This position has been reiterated in numerous decisions from Kenyan courts and more particularly in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* CA No.77 of 2012 (2014) eKLR where the Court of Appeal held that:

" in an interlocutory injunction application the Applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.

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 states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”.

53. Consequently, the Plaintiff ought to, first, establish a prima facie case. The plaintiff/Applicant submitted that they have established a prima facie case and relied on the judicial decision of *Mrao Ltd v First American Bank of Kenya Ltd*



(2003) eKLR in which the Court of Appeal gave a determination on a prima facie case. The court stated 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 legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

....

55. Secondly, The Plaintiff has to demonstrate that irreparable injury will be occasioned to them if an order of temporary injunction is not granted. The judicial decision of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) eKLR provides an explanation for what is meant by irreparable injury and it states;

" Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.

....

58. Thirdly, the Plaintiffs have to demonstrate that the balance of convenience tilts in their favour. In the case of *Pius Kipchirchir Kogo Vs Frank Kimeli Tenai* (2018) eKLR which defined the concept of balance of convenience as:

" The meaning of balance of convenience will favour of the Plaintiff is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.

In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting".

59. In the case of *Paul Gitonga Wanjau v Gathuthis Tea Factor Company Ltd & 2 others* (2016) eKLR, the court dealing with the issue of balance of convenience expressed itself thus:-

" Where any doubt exists as to the Applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining



whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies.”

31. On the other hand, a permanent injunction was discussed as follows in *Kenya Power & Lighting Co. Limited v Sheriff Molana Habib* [2018] eKLR:

“8. ...A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected.

9. A permanent injunction is different from a temporary/interim injunction since a temporary injunction is only meant to be in force for a specified time or until the issuance of further orders from the court. Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the parties.”

32. Correspondingly, the Court of Appeal in *Lucy Wangui Gachara v Minudi Okemba Lore* (2015) eKLR guided as follows:

“It has been stated time and again that although the court has jurisdiction to grant a mandatory injunction at the interlocutory stage, such injunction should not be granted, absent special circumstances or only in the clearest of cases. The circumspection with which the court approaches the matter is informed by the fact that the grant of a mandatory injunction amounts to determination of the issues in dispute in a summary manner. In addition, the parties are put in an awkward situation should the court, after hearing the suit, ultimately decide that there was no basis for the mandatory injunction at the interlocutory stage.”

33. The superior Court went on to state that:

“Among the special circumstances that may justify the grant of a mandatory injunction at interlocutory stage is where the injunction involves a simple act that could be easily reversed or remedied should the court find otherwise after trial; the defendant has accelerated the development that the plaintiff seeks to retrain, with the intention of defeating the plaintiff’s claim or where the defendant is otherwise bent on stealing a match on the plaintiff.



On the other hand, the court will not grant a mandatory injunction if the damage feared by the plaintiff is trivial, or where the detriment that the mandatory injunction would inflict is disproportionate to the benefit it would confer. We would also add that, save in the clearest of cases, the right of the parties to a fair and proper hearing of their dispute, entailing calling and cross-examination of witnesses must not be sacrificed or substituted by a summary hearing.

Persuasive judicial pronouncements by Indian courts have also affirmed that great circumspection is called for before awarding a mandatory injunction at interlocutory stage. In *Bharat Petroleum Corp Ltd v. Haro Chand Sachdeva*, AIR 2003, Gupta, J. of the Delhi High Court observed as follows:

“While Courts power to grant temporary mandatory injunction on interlocutory application cannot be disputed, but such temporary mandatory injunctions have to be issued only in rare cases where there are compelling circumstances and where the injury complained of is immediate and pressing and is likely to cause extreme hardship. If a mandatory injunction has to be granted at all on interlocutory application, it is granted only to restore status quo and not to establish a new state of things.

Earlier in *Nandan Pictures Ltd. v Art Pictures Ltd & Others*, AIR 1956, CAL 428, Chakravarti, CJ. of the High Court of Calcutta set out, in the following passage, the rather limited scope in which a mandatory injunction is available at the interlocutory stage:

“At the same time, I may point out what the accepted principles have been and what has been, according to the reported cases, the practice of the Courts. It would appear that if a mandatory injunction is granted at all on an interlocutory application, it is granted only to restore the status quo and not granted to establish a new state of things, differing from the state, which existed at the date when the suit was instituted. The one case in which a mandatory injunction is issued on an interlocutory application is where, with notice of the institution of the plaintiff’s suit and the prayer made in it for an injunction to restrain the doing of a certain act, the defendant does that act and thereby alters the factual basis upon which the plaintiff claimed his relief. An injunction issues in such a case in order that the defendant cannot take advantage of his own act and defeat the suit by saying that the old cause of action no longer survived and a new cause of action for a new type of suit had arisen. When such is found to be the position, the Court grants a mandatory injunction even on an interlocutory application, directing the defendant to undo what he has done with notice of the plaintiff’s suit and the claim therein and thereby compels him to restore the position which existed at the date of the suit.”

34. The Petitioner in this Application fundamentally seeks to have her passport released by the Respondent, a declaration of violation of her constitutional rights and damages. Grant of this orders was opposed to by the Respondent who was of the view that the orders would determine the matter conclusively at the interlocutory stage. In the Respondent’s view, seeking a permanent relief at an interlocutory stage will be injurious to him.



35. The Petitioner is a foreigner scheduled to stay in the Country between 23<sup>rd</sup> July 2024 to 23<sup>rd</sup> October 2024. She cannot exit the Country when her Passport is in the hands of the Respondent. Other than travelling out of the Country, she also needs to use it for her movement within the country.
36. An agreement to hold another person's passport in the circumstances above is unconscionable and against the public policy. It curtails her freedom of movement. There is a definite legal injury which the Court must act quickly and redress. I am persuaded that failure to issue the interim ex parte interim order for the release of the passport will cause the Petitioner irreparable harm compared to the Respondent who can easily be compensated if the disputed payment is found due to him as the exact amount can be ascertained.
37. However, considering that the Petitioner is a foreigner who is about to leave the jurisdiction of this Court, the Respondent's stake ought to be protected too as it may be difficult to recover whatever he claims is due if the Petitioner leaves and is out of reach of this Court's jurisdiction even if the Court finally finds that indeed the Respondent was entitled to payment of Kshs. 20,000/= which he alleges the Petitioner owes. It would thus be necessary to fashion an appropriate order that would take care of that eventuality.
38. As to the rest of the prayers sought by the Petitioner upon the hearing of the application inter-parte, my assessment is that they comprise various declarations and an award of special and general damages in the nature of final orders and are incapable of being granted at this stage and must await the trial of the Petition on merits.
39. In the final analysis, I make the orders in the following terms:
1. That the Respondent shall surrender the passport of the Petitioner to the Deputy Registrar of this Court not later than 14/10/2023.
  2. The Deputy Registrar shall not release the passport to the Petitioner unless she has confirmed that the Petitioner has deposited a sum of Kshs. 20,000/- with the Court.
  3. The said sum of Kshs. 20,000/- deposited by the Petitioner is meant to safeguard the Respondent's interest pending the hearing and determination of this Petition and may go either way once the petition is determined.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 9TH OCTOBER, 2024.**

.....

**L N MUGAMBI**

JUDGE

