



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC CASE NO 664 OF 2017**

**JACARANDA PASTURES LIMITED.....PLAINTIFF/ RESPONDENT**

**VERSUS**

**LAWRENCE M. MBABU.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**OSCAR KOOME MBABU.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**RULING**

The matter for determination is the Notice of Motion Application dated **17<sup>th</sup> April 2020** by the Defendants/ Applicants seeking for orders that;

**1. THAT an order be issued herein restraining the Plaintiff/ Respondent herein and or its agents and servants from disconnecting water, removing sanitary water and sanitizers or otherwise interfering with the security arrangements and common lighting in the suit premises that is Apartment No. 1 Block M, No LR No. 4953 /1465, Thika Everdell apartments which are the premises occupied by the Applicants herein and their dependants pending further orders by this Honourable Court or the hearing of the suit.**

**2. THAT this Honourable Court be pleased to make any other or further orders as it may deem fit and just in respect to this Application as may meet ends of justice and safeguard public health and safety during this period of a global COVID 19 virus pandemic.**

**3. Costs of this Application be provided for.**

The Application is premised on the grounds that the Plaintiff/ Respondent is claiming some money from the Defendants/ Applicants which the Defendants/ Applicants have denied owing in respect of the purchase of the suit property. That the Defendants/ Applicants have been in occupation of the suit property since **2014**. Further that the parties are actively engaged in this Court, but that in the meantime the Plaintiff/ Respondent has maliciously engaged in activities that are intended to harass and intimidate the Defendants/ Applicants into submitting into their demands without resorting to the Court process. That the Plaintiff/ Respondent has been harassing the Defendants/ Applicants by wanton disconnection of water, removal of security services and not supplying the Applicants with water to enable their visitors and other persons to clean their hands with soap and sanitizers. Further that the apartment is within a compound of approximately 50 apartments and in the event of a break out of **COVID 19 virus** the same would spread rapidly within the compound and may affect other occupants. It was further contended that the Plaintiff/ Respondent has not produced any evidence of any claims that it may have against the Defendants/ Applicants over water and security as water is supplied by Thika Water and Sewerage Company Limited.

In his supporting Affidavit **Oscar Koome Mbabu**, reiterated the contents of the grounds in support of the Application and further averred that the government had directed all Public Water Companies not to disconnect water to the members of the public. That it is important that the Court grants the orders sought to ensure that the Plaintiff/ Respondent complies with the law.

The Application is opposed and the Plaintiff / Respondent swore a Replying Affidavit on **5<sup>th</sup> May 2020**, through its Director **Kiran Patel**, and averred that the Defendants/ Respondents accepted the Plaintiff's/ Respondent's offer to purchase the suit property on terms and conditions contained in the offer letter. He further averred that the Plaintiff/ Respondent gave the Defendants/ Respondents **vacant possession**, on **1<sup>st</sup> January 2015**, on account of the promise by the Defendants/ Respondents to pay the balance of the purchase price on or before **30<sup>th</sup> April 2015**. However, the Defendants/ Respondents have failed to pay the balance of the purchase price and therefore, they have had unlawful possession and enjoyment of the apartment, earning a monthly rental income of **Kshs. 35,000/=** in an outright breach of the terms and conditions of the offer letter.

He further averred that the Defendants/ Applicants have failed to pay the cumulative **service charge** and **water bills** associated with the suit property amounting to **Kshs.272, 497/97** and having wilfully refused to clear the outstanding amount and pay for the supply of services, the

Defendants/ Respondents are not entitled to the services sought. Further that he had been advised by his **Advocates** on record, which advise he believed to be true that the **Covid 19 Pandemic** does not warrant suspension of terms and conditions of tenancy as provided by law and contract including payment of service charge and water bills. It was his contention that the Plaintiff/ Respondent requires financial capacity in order to provide its tenants with proper sanitisation services and lack of payment of accruing charges would impede provisions of these charges. He further averred that he has been advised by his Advocate that he who comes to equity must come with clean hands.

The Defendants/Applicants through **Oscar Koome**, filed a further Affidavit on **6<sup>th</sup> May 2020**, and averred that they have always been willing to reconcile the account with the Plaintiff/ Respondent and if it is determined that there are any monies due to them, then they are willing to settle the amount immediately. He further contended that the water bill as at **March 2020** stood at **Kshs. 101,497.97** and on **18<sup>th</sup> March 2020**, they paid a sum of **Kshs. 100,000** which cleared the water bill, before they came to Court and the balance of **Kshs. 1,497.97**, was water bill for March. Therefore, the Plaintiff/ Respondent has no basis for disconnecting the water. He further averred that the Plaintiff/ Respondent has never demanded service charge from them, until this year. He further averred that there has been no attempt to explain the service charge, but rather the Plaintiff/ Respondent has just annexed figure. That they paid **Kshs. 100,000/=** as a sign of good faith and that they have come to Court with clean hands. Therefore he contended that the Plaintiff/ Respondent acted irresponsibly.

The Plaintiff/ Respondent through **Kiran Patel** swore a further Affidavit on **21<sup>st</sup> May 2020**, and averred that **Thika Water and Sewerage Company Limited Supplies** to it and in turn it supplies to its individual tenants and therefore the Plaintiff was within its rights to stop supply of water to the Defendants. He further averred that the Defendants/Applicants have accrued Service charge of **Kshs.272,497/97** and the Plaintiff/ Applicant is unable to offer any occupational services without payment of the arrears. It was his contention that the water bill and service charge are well elaborated and within the knowledge of the Defendants/ Applicants and that the charges are payable on a monthly basis. Further that the Plaintiff/ Applicant has sought for service charge in its Plaint and that the Defendants/ Applicants had been given sufficient and adequate time to remedy their failure by clearing the arrears. It was his contention that the Application is a flimsy attempt by the Defendants/ Applicants to obtain orders to continue enjoying occupational services without discharging their obligation or payment which will unfairly burden the Plaintiff with the task of providing the services.

The Application was canvassed by way of written submissions which the Court has now carefully read and considered and renders itself as follows.

It is not in doubt that the Defendants/ Applicants are seeking for orders restraining the Plaintiff/ Respondent from disconnecting water, removing sanitary towels and interfering with the security arrangements and common lighting in the suit property. Further the Defendants/ Applicants have contended that they have a dispute in Court in which they are disputing the amounts the Plaintiff/ Respondent are alleging that they owe them. It was further their contention that the Plaintiff/ Respondent's actions are posing a health risk to them and their neighbours at large. It is the Defendants/Applicants contention however that the Plaintiff/Respondent did not furnish them with how they arrived at the figures with regards to service charge and that therefore the same is **also** in dispute.

However the Plaintiff/ Respondent has averred that the Defendants/ Applicants have accrued the service charge of **Kshs. 272, 497.97** and thus the Plaintiff/ Respondent is unable to offer any occupational services to the Defendants without payment of the arrears. The Plaintiff/ Respondent has also submitted that the Plaintiff/ Applicant has sought for a mandatory injunction and therefore the prayers are to compel the Plaintiff/ respondent to restore the mentioned services and therefore the Applicants have not met the threshold for grant of the orders sought.

The Black's Law Dictionary Free Online Legal Dictionary 2<sup>nd</sup> Edition defines a temporary Injunction as;

***“The name for a preliminary restraining order stopping a person from carrying out an action until the court has made a decision.”***

It is evident that the Defendants/ Applicants have sought for orders restraining the Plaintiff/Respondent from disconnecting water and interfering with their use of the security arrangement pending the hearing of the suit. It is the Court's considered view that the Defendants/ Applicants are therefore seeking for temporary injunction orders.

In determining whether or not to grant temporary injunctive orders, the Court is guided by the principles as set out in the case of **Giella ... Vs... Cassman Brown Co Ltd (1973)EA 358**, which principles are further elaborated in other Judicial decisions. These principles are:-

***“The conditions for granting a temporary injunction in East Africa are well known and these are: First, the 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 might 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. See also E.A Industries ..Vs...Trufoods (1972) EA 420.”***

A **prima-facie** case was described in the case of **Mrao Ltd...Vs...First American Bank of Kenya Ltd & Others (2003)KLR**, to mean:-

***“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.”***

It is not in doubt that the Defendants/ Applicants are the owners of the suit property. Though the Plaintiff/ Respondent has averred that they are in arrears of the suit property together with the service charges, these are contentious matters that in the Court's considered view cannot be determined at this juncture. It is therefore not in doubt that the Defendants/ Applicants have an interest over the suit property. The Plaintiff/ Respondent has not denied disconnecting the water and interfering with the security arrangement and common lighting of the suit property. It therefore means that the Defendant's rights over the suit property have allegedly been interfered with and the Court thus holds

and finds that the Applicant have established a **prima facie** case with chances of success.

The second limb that the Defendants/ Applicants must establish is that they will suffer irreparable harm that cannot be compensated by way of damages. 'Irreparable loss' was described in the case of **Paul Gitonga Wanjau...Vs...Gathuthi Tea Factory Co. Ltd & 2 Others, Nyeri HCC No.28 of 2015**, as ***simply injury or harm that cannot be compensated by damages and would be continuous.***

The injury which the Defendants/ Applicants are complaining of relates to the disconnection of water and interference with their security arrangement. In the Case of **Niaz Mohammed Janmohammed ...Vs... Commissioner for Lands & 4 Others (1996) eKLR**, the Court held that:-

***“It is no answer to the prayer sought, that the Applicant may be compensated in damages. No amount of money can compensate the infringement of such right or atone for transgression against the law, if this turns out to have been the case. These considerations alone would entitle the Applicant to the grant of the orders sought”.***

Equally in this case, the Court finds that if the Applicants' rights are infringed, no amount of money can compensate such infringement. This is so more so as the issues relate to their health and security. The Court acknowledges that the Plaintiff/ Respondent has contended that the Defendants/ Applicants have not been upto date with the payment of their service charge. The Court has perused the sale agreement annexed to the Plaintiff/ Respondent's Complaint and notes that there was no specific amount that was indicated to cater for the service charge. It would therefore be difficult to ascertain how much exactly the Plaintiff is owed. However, it is not in doubt that whatever damages the Plaintiff/ Respondent will suffer is quantifiable and while the injuries that the Defendants/Applicants may suffer if they are to succeed cannot be compensated by way of damages. The injury likely to be suffered by the Plaintiff/Respondent can in the Court's considered view be compensated by way of Damages.

Therefore the Court finds that the Applicant has established that it is likely to suffer irreparable loss and/or injury which cannot be adequately compensated by an award of damages.

On the third limb of *if the Court is in doubt then it ought to determine the matter on the balance of convenience*, the Court finds that it is not in doubt and therefore finds that the balance of convenience tilts in favour of maintaining the status quo. Status quo is that which existed before the wrongful act.

Further in the case **Paul Gitonga Wanjau ...Vs... Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR**, the court dealing with the issue on 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 injury 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 on convenience lies.***

Therefore, this court finds and holds that the Notice of Motion Application dated **17<sup>th</sup> April 2020**, brought by the Defendants/Applicants is **merited** and the same is allowed in terms of prayer **No. 2** of the said Application.

The Defendants/ Applicants had urged the Court to make orders that it may meet the ends of justice. From the Sale agreement or the documentation provided before this Court, it is unclear how the service charge has been arrived at this point. However it is not in doubt that the Defendants/ Applicants have an obligation to pay their water bills and the service charge. Therefore, the Court finds and holds that the Defendants/ Applicants should pay their water bill and service charge as required and the parties should come to a consensus as to the minimum payable service charge in the interim.

Costs shall be in the cause.

It is so ordered.

***Dated, signed and Delivered at Thika this 1<sup>st</sup> day of October, 2020***

**L. GACHERU**

**JUDGE**

**1/10/2020**

**Court Assistant - Lucy**

**ORDER**

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by

His Lordship, the Chief Justice on **15<sup>th</sup> March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

**With Consent of and virtual appearance via video conference – Microsoft Teams Platform**

**M/s Tabuti holding brief for Mr. Masese for the Plaintiff/Respondent**

**No Appearance for the 1<sup>st</sup> Defendant/Applicant**

**No Appearance for the 2<sup>nd</sup> Defendant/Applicant**

**L. GACHERU**

**JUDGE**

**1/10/2020**