



**Owili v Achola (Cause E368 of 2024) [2024] KEELRC 2212 (KLR) (18 September 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2212 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE E368 OF 2024**  
**JK GAKERI, J**  
**SEPTEMBER 18, 2024**

**BETWEEN**

**JACOB OWILI ..... CLAIMANT**

**AND**

**KOHATH ACHOLA ..... RESPONDENT**

**RULING**

1. Before the Court for determination is the Claimant’s Notice of Motion dated May 29, 2024 filed under Certificate of Urgency seeking orders that:-
  1. Spent.
  2. Spent.
  3. Spent.
  4. Spent.
  5. Pending the hearing and determination of the suit, the Court be pleased to issue a temporary injunction restraining the Respondent whether by their servants, agents, employees, advocates or otherwise howsoever from selling, removing, transferring, disposing or charging or in any manner interfering with the parcel of land Ngong/Ngong 12948.
  6. In alternative to (4), the Honourable Court be pleased to issue an Order compelling the Respondent to deposit a security in sum of Kshs.5,000,000/= in the Honourable Court or by bond or bank guarantee issued by a reputable bank carrying on business in Kenya pending hearing and determination of this suit.
  7. Costs of this application.
  8. Any other relief that the Court may deem fit.



2. The Notice of Motion is expressed under the provisions of Article 159 of the *Constitution* of Kenya and provisions of the *Civil Procedure Act* as well as those of the *Civil Procedure Rules* and is based on the grounds set forth on its face and the Supporting Affidavit sworn by Jacob Owili on 29<sup>th</sup> May, 2024 who deposes that he was employed by the Respondent as a Caretaker of the Respondent's property Ngong/ Ngong 12948 in 2003 alongside his wife as a house cleaner at Kshs.4,500/= which rose to Kshs.8,000/= inclusive of present salary and money for payment of water bills, purchase of tools, equipment and cleaning materials for general maintenance of the property and Kshs.2,000/= for the wife as house cleaner.
3. That the Respondent is a resident of the United Kingdom (UK) and visited once or twice a year and would pay in cash and no house guard was employed and did not take leave.
4. The affiant deposes that on 25<sup>th</sup> April, 2024, he received a message from one Daniel Yongo Achola, the Respondent's brother to attend a meeting at an advocate's office who requested him to sign a document as acknowledgment of receipt of salary arrears for the remainder of the year of Kshs.104,000.00, an ordinary occurrence as salary was paid annually or through agents.
5. That his teenage daughter read out the document to him and it was a termination of lease in 7 days from the date of receipt of the letter.
6. That the Respondent had taken advantage of the Claimant's limited education and inability to read to trick him into signing the eviction notice which he understood as salary acknowledgment.
7. That the affiant's family resides in the staff quarters where they have lived for 21 years.
8. That the Claimant is apprehensive that the Respondent could dispose of the property and had no known assets for attachment if a judgment is entered against him.
9. That the Claimant stands to suffer prejudice and the security is recoverable.

### **Respondent's case**

10. By a Replying Affidavit sworn by Mr. Kohath Jenge Achola on June 3, 2024, the affiant deposes that the Claimant's Notice of Motion is an abuse of the process of the Court and consists of misrepresentation, and distortion of material facts to mislead the Court and denies having employed the Claimant in respect of property Ngong/Ngong/12948 which is jointly owned by 3 persons and he cannot make any decision alone.
11. That the Claimant's brother, a mason helped in the construction of the house in 2003 and was given a 2 bedroomed make shift house used as a store to reside in one of the rooms.
12. That the mason introduced the Claimant to the affiant and he allowed them to use the house as construction proceeded but after completion of the house, the Claimant requested to stay on as he scouted for other opportunities.
13. That Mr. Daniel Yongo Achola and one Obadiah Achola often secured the services of cleaning companies to maintain the property and its environs and the Claimant paid for water and electricity as he was using them.
14. The affiant deposes that he is a Citizen of Kenya and the UK and frequents both countries and has relied on private guards but for the Claimant's toxicity and frustrating them forcing them to quit.



15. That the Claimant had liberty to work anywhere he wished to earn a better living and has been working in Ngong and paid wages and was neither a caretaker nor a guard as he was a security guard somewhere in Lang'ata.
16. That he was not entitled to leave as he was not an employee and never received any cash as salary.
17. That the affiant is unaware of who Christine Murunga is.
18. The affiant depones that on August 1, 2017, the Claimant informed him that his daughter at Rae Girls Secondary School was in fees arrears and requested for help and the sum of Kshs.18,815.98 was sent to one Dr. Mary Felly Achola to send to the Claimant via Money Gram and the Claimant did not reimburse and he indicated that he was a farmer.
19. That the Claimant sustained injuries from a well-known neighbour after he trespassed his property and a fight ensued but did not report to the police or seek compensation.
20. That in 2023 after the co-owners resolved to lease the property, the Claimant frustrated the affiant's niece from accessing the premises which led to the registration of a Power of Attorney in favour of Mr. Daniel Yongo Achola to secure a tenant for the property and secured a tenant ready to pay Kshs.50,000/= per month and 2 months deposit and when requested to vacate the premises, the Claimant tabulated his expenses of upto Kshs.100,000/= and the sum of Kshs.3,200/= prepared as water and electricity and accepted Kshs.104,000/= and signed on 25<sup>th</sup> April, 2024 and was to vacate in 10 days but refused to do so claiming adverse possession on a portion of the property and is now a trespasser and is desirous of forcefully remaining on the premises and his application lacks merits.
21. The affiant further depones that he is a man of means, a prominent business in the UK with blossoming income earnings and fixed assets and thus able to pay should the Claimant win the suit.
22. That the Claimant has not furnished evidence of any intended sale of the property and any order halting any dealing with the property would jeopardize the operations of the co-owners.

#### **Claimant's submissions**

23. By August 12, 2024 when the Court retired to prepare this ruling, the Applicant had not filed submissions.

#### **Respondent's submissions**

24. As to whether the Claimant has established the requisites of temporary injunction, counsel submits that the applicant has not adduced evidence of any employment relationship between him and the Respondent and only helped his brother in the construction of the house in 2003 and he was neither an employee nor an independent contractor.
25. Reliance was made on the decision in *Mrao Ltd v First American Bank of Kenya & 2 others* (2003) eKLR on the meaning of a prima facie case as well the decision in *Ongoya v Shioling Supermarket Ltd* (2022) eKLR on reliance on secondary documents to prove employment.
26. Decisions in *Benjamin Joseph Omusamia v Upperhill Springs Restaurant* (2022) eKLR and *Jones N. Anunga V Master Quick Col Services Ltd (2021)* eKLR were also cited on the place of independent contractors among other decisions.
27. Counsel further urges that the Claimant was seeking an equitable relief with unclean hands as he is untruthful on the employment relationship to submit that no prima facie case has been shown.



28. On irreparable harm, counsel submits that the Claimant had not proved the harm he stood to lose if the injunction is denied.
29. That provision of security arises in cases of stay of execution.
30. On balance of convenience, counsel urges that the same is not in favour of the Claimant and the application ought to be dismissed.
31. Reliance is made on the Court of Appeal decision in *The Clerk, Nakuru County Assembly & 2 others v Kenneth Odongo & others* (2022) (unreported).

### **Analysis**

32. Before delving into the issues for determination, it is essential to contextualize the instant application which is the second in a span of not less than 2 weeks both filed under Certificate of Urgency.
33. The 1<sup>st</sup> application dated May 16, 2024 came up for directions on May 17, 2024 and the Court directed that service be effected and responded to within 4 days and inter partes hearing on May 23, 2024 on which date the Respondent was absent and the Court directed counsel for the Claimant to serve the Respondent via his last known address in 2 days as previous service had been on WhatsApp yet counsel had a postal address registered in Kenya and no interim orders were made.
34. Before counsel could report to the Court on whether service had been effected, for further directions, she filed the instant application which came up for directions on 5<sup>th</sup> June, 2024 and no interim Orders were made. Service and response within 10 days and further directions on disposal were issued on July 9, 2024.
35. On July 9, 2024, it became clear to the Court that counsel for the Claimant had abandoned the earlier application perhaps because all the reliefs sought were only sustainable pending the hearing and determination of the application as opposed to the suit and none had been granted.
36. Moreover, other than the restraint against the impending eviction, the two applications are substantively the same as they relate to provision of security and restraining the Respondent from dealing in his property in any manner other than leasing the same.
37. The singular issue for determination is whether the Claimant's Notice of Motion is merited.
38. To answer this question fully, it behooves the Court to determine whether the Claimant has fulfilled the requirements of a temporary injunction and whether the Claimant has made a case for the provision of security by the Respondent pending the hearing and determination of the suit.
39. Needless to belabour, the question as to whether or not to grant an interlocutory injunction involves the exercise of judicial discretion as held in *Abel Salim & others V Okong'o and others* (1976) KLR 42 at page 48.
40. Concerning the threshold for the issuance of a temporary injunction, the celebrated rendition of the Court of Appeal in *Giella V Cassman Brown Co. Ltd* is the homeport thus;

“First, the applicant must show a prima facie case with 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 the application on a balance of convenience (*E.A Industries Ltd V Trufoods* (1972) EA 420.”

41. As regards prima facie case, the sentiments of the Court of Appeal in *Mrao Ltd V First American Bank of Kenya Ltd & 2 others* (*Supra*) are instructive that;

“ A Prima facie case in a civil application includes but not confined to “genuine and arguable case.” It is 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.”
42. The pith and substance of the applicant’s case is that he was an employee of the Respondent since 2003 and alleges that he was unlawfully and unfairly terminated from employment by the Claimant and claims underpayment for 21 years compensation among other reliefs including severance pay, leave and overtime allowances.
43. The Claimant has filed a single sheet of Mpesa statement and photocopied handwritten notes from the Ngong Sub-district Hospital.
44. Similarly, the Respondent has filed a copy of the Title Deed to property Ngong/Ngong 12948, copy of the school fee payment form from Rae Girls Secondary School demanding fees balance for Mollyne Akinyi Odhiambo, copy of cash transfer form, the handwritten notes from the Ngong-Sub district Hospital and a print out of an MPesa message of Kshs.104,000/= received by the Claimant on 25<sup>th</sup> April, 2024.
45. The documents availed by the parties demonstrate that the Claimant and the Respondent have dealt with each other in the past and money has changed hands between them and as the documents do not tell the true nature of their relationship and why money changed hands, the lingering facts can only be ascertained at the hearing.
46. In sum, the Court is persuaded that the Claimant has an arguable case, a prima facie case.
47. See also *Nguruman Ltd V Jan Bonde Nielsen & 2 others* (2014) eKLR on the elements of prima facie case and *Habib Bank AG Zurich V Eugene Marion Yakub* CA No. 43 of 1982 on probability of success.
48. Concerning irreparable harm or injury, the Claimant deposes that he is apprehensive that Respondent is likely to dispose of his property which would leave him with no assets for attachment in the event the instant suit was decided in his favour and unless the Court intervenes, he will suffer irreparable loss.
49. Regrettably, the Claimant does not particularize the nature or character of the injury which he stands to suffer if an injunction is not granted.
50. More significantly, however, the Claimant’s claim dated 16<sup>th</sup> May, 2024 is grounded exclusively on monetary awards, compensation and costs.
51. Guided by the sentiments of the Court of Appeal in *Nguruman Ltd V Jan Bonde Nielsen & 2 others* (*Supra*) on the threshold of irreparable injury, the Court is satisfied that the Claimant has failed to prove that he stands to suffer irreparable loss or loss that cannot be adequately compensated by monies counted.
52. See also *Halsbury’s Law of England* 3<sup>rd</sup> Edition Vol. 21 paragraph 739 at 352.
53. In sum, the Claimant has failed to prove the second requirement for the grant of a temporary injunction.



54. As regards the balance of convenience or inconvenience, the Court is guided by the sentiments of the Court in *Byran Chebii Kipkoech V Barnabas Tuitoek Bargoria & another* (2019) eKLR that;
- “ . . . In other words, the plaintiffs have to show that the comparative mischief from which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it.”
55. In the instant application, the Claimant has not demonstrated that the balance of convenience is tilted in his favour.
56. In the upshot, it is the finding of the Court that the Claimant has failed to prove that a temporary injunction is merited.
57. On provision of security, Order 26 of the *Civil Procedure Rules* provides that;
1. In any suit the court may order that security for the whole or any part of the costs of any defendant or third, or subsequent party be given by any other party.
  2. If an application for security for costs is made before a defence is filed, there shall be filed with the application an Affidavit setting out defence the grounds of the defence together with a statement of the deponent’s belief in the truth of the facts alleged.
  3. . . .
  4. . . .
  5. . . .
  6. Where security by payment has been ordered, the party ordered to pay may make payment to a bank or reputable financial institution in the joint names of himself and the defendant or in the names of their advocates when advocates are acting.
58. Judicial authority is consistent that in an application for security for costs, it is the onus of the Applicant to prove that the Respondent will not be in a position to pay the costs.
59. In addition, the applicant must establish absence of good faith that would make an order for security reasonable. See *Gatirau Peter Munya V Dickson Mwenda Gitbinji & 2 others* (2014) eKLR.
60. In *Shah V Shah* (1982) KLR 95, it was held that although security was generally required from plaintiff’s resident outside the Court’s jurisdiction, a Court had discretion which must be exercised judicially and reasonably in determining whether or not to grant the order.
61. See also *Kibiwott & 4 others V The Registered Trustees of Monastery of Victory* Nakuru HCCC No. 146 of 2004 cited in *Garsus Pasaulis V Systemedia Technologies Ltd* (2022) eKLR.
62. In the instant suit, the burden of proof lies on the Claimant/Applicant whose main argument is that the Respondent has been and remains a resident of the UK and visited Kenya once or twice a year, evidence the Respondent has not rebutted by any document despite averring that he visits both countries of citizenship in equal measure.
63. Relatedly, although the Respondent has registered a Power of Attorney in favour of his brother, Mr. Daniel Yongo Achola, the suit is against the Respondent, a citizen and resident of the UK, Kenyan Citizenship notwithstanding.



64. Puzzlingly, the Respondent makes no reference to when he last viewed the property in question or met the Claimant.
65. Although the Respondent depones that he is a man of means, and a prominent business with blossoming earnings and fixed assets, he has not demonstrated which assets or where they are located or the earnings, to assuage the Claimant's apprehension.
66. Finally, the Claimant's apprehension that the Respondent had no other known assets capable of being attached, if the case was decided in the Claimant's favour is essential in making the determination.
67. The totality of the foregoing is that the circumstances of the instant case make it reasonable for the Respondent to provide security pending the hearing and determination of the suit as a sign of good faith on account that he is resident outside the Court's jurisdiction.
68. It is, however, unclear to the Court how the sum of Kshs.5,000,000/= prayed for by the Claimant was arrived at.  
The amount lacks supportive evidence.
69. In the circumstances, the Respondent shall deposit the sum of Kshs.600,000/= in an interest earning account in a reputable bank in Kenya jointly opened and operated by the counsels for the parties or provide a bank guarantee of a similar amount within 30 days from the date of this ruling.
70. There shall be no orders as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 18<sup>TH</sup> DAY OF SEPTEMBER 2024.**

**DR. JACOB GAKERI**

**JUDGE\***

**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 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. 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. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**

