



Consolidated Timbers Limited v Safe Energy Limited (Environment and Land Appeal E064 of 2025) [2025] KEELC 5679 (KLR) (31 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5679 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E064 OF 2025**

**JG KEMEI, J
JULY 31, 2025**

BETWEEN

CONSOLIDATED TIMBERS LIMITED APPELLANT

AND

SAFE ENERGY LIMITED RESPONDENT

RULING

1. This is an appeal arising from the interlocutory determination of an application for injunctive orders in the Ruling and orders of the Chief Magistrates Court Milimani Commercial Court – Hon M A Otindo issued on 7/3/25 and 20/3/25.
2. The Appellant and the Respondent enjoy a landlord -tenant relationship vide a lease agreement dated the 19/8/2019 for a period of 6 years from 1/7/2019. The obligations and rights of the parties are governed by the said lease.
3. In the lower Court the Appellant (Defendant) was sued by the Respondent (plaintiff) for inter alia a permanent injunction restraining it from entering, trespassing taking possession evicting the Respondent or leasing the premises to a third party, general damages for trespass and costs. It was the case of the Plaintiff that despite not owning any rent arrears the Defendant had instructed an auctioneer to levy distress for rent against the Plaintiff for the recovery of Kshs 7.4 Million.
4. The Defendant denied the case of the Plaintiff and in its counterclaim averred that it is owed rent in the sum of Kshs 17.9 Million for which it sought its recovery. That it is as a result of the default in payment of rent that the Defendant instructed an auctioneer to levy distress for the rent that triggered the filing of the suit.
5. Simultaneously with the filing of the suit, the plaintiff filed an application dated the 11/12/24 seeking temporary orders of injunction against the Defendant.



6. Upon hearing and determining the application the trial Court rendered itself as follows;
 - “ 1. That pending the hearing and determination of this suit, is hereby pleased to ensure an order of temporary injunction restraining the Defendants/ Respondents, whether by themselves, their agents, employees, servants and/ or any persons acting on their authority or instructions from attaching the goods of the applicant, entering, trespassing, taking possession or evicting the applicant, leasing to a third party or otherwise interfering with the applicant’s use, possession and occupation of the suit property.
 2. The costs shall be in the cause.”
7. Aggrieved by the above orders the Appellant moved this Court on appeal vide the Memorandum of appeal dated the 27/3/25 on the grounds;
 - a. That the Honourable Magistrate erred in law and in fact by granting the Respondent blanket/ unconditional injunctive orders which not only violated its statutory right to recover rent arrears under Section 3 (1) of the Distress for the Rent Act (Cap.293), but also restrained its right to recover subsequent rent from the Respondent, in clear violation of its constitutionally protected right to property under Article 40 (1) of *the Constitution*.
 - b. That the Honourable Magistrate erred in law and in fact by basing her determinations on unproven allegations of one Abdulaziz Mohamed contained in paragraphs 10,11,12 and 13, of his further affidavit sworn on 18th February 2025 (ant/ filed outside the timelines she had given on 29th January 2025 for filing the same and which was also not served upon the advocates for the Appellant) and paragraphs 4,5, and 6 of the said deponent’s affidavit in support of the Notice of Motion dated 19th March 2025, in clear violation of the contractual terms contained in the lease and Appellant’s right to a fair hearing, without establishing any basis for taking such drastic actions.
 - c. That the Honourable Magistrate erred in law and in fact by deviating from the well-established doctrine of stare decisis, which in the circumstances of the case before her dictated that “a Court cannot be the refuge of a tenant who fails to meet his principal obligation of paying rent as and when it becomes due”.
 - d. That the Honourable Magistrate failed to consider the impact of her drastic orders on the right of the Appellant to fair hearing and enjoyment of its rightful return from its investment in the demised premises.
8. Consequently, the Appellant prays: -
 - a. That the ruling and orders issued by the Honourable Magistrate, Hon. M. A. Otindo (MS) on 7th March, 2025 and 20th March, 2025, respectively, be varied and/or set aside and the Appellant be permitted to proceed with execution of distress for rent arrears and collection of subsequent rent from the Respondent pursuant to the provisions of Section 3 (1) of the *Distress for Rent Act* (Cap.293) and the lease dated 19th August, 2019.
 - b. The costs of this Appeal and the application in the Subordinate Court be borne by the Respondent.
9. On the 6/5/25 Learned counsel for the parties took directions and elected to canvass the application by way of written submissions. Except for the Appellant the Respondent failed to comply.



10. Relying on the decision of the Court in *Mweru Hotel Holdings Limited Vs Lake Basin Development Authority & 2 others* (2023) the Learned Counsel submitted that the Learned Magistrate erred in confirming injunctive orders which restrained the Appellant from exercising its statutory right to recover the rent arrears from the Respondent thereby granting refuge to the respondent, the result of which the Appellant could not recover the rent which is in arrears and subsequent rent. That to the extent that the rent could not be recovered the property rights of the Appellant were violated.
11. Further the Appellant submitted that it is aggrieved by the orders of the learned Magistrate issued on the 20/3/2025 which orders were issued *ex parte* without any service whatsoever on the Appellant thus denying the Appellant the right to be heard. That the orders of 7/3/25 and 20/3/25 had the effect of depriving the Appellant its right to rental income from its investments.
12. It was submitted that following the issuance of the orders of 20/3/25 the Respondent procured a large contingent of police officers who gave protection as they carried away proclaimed goods chattels and machinery from the demised premises thus assisting the Respondent to evade meeting its obligations as to the payment of rent.

Analysis and determination

13. Having considered, the appeal, the memorandum of appeal and the written submissions placed before the court, in my considered view the only issue for determination is whether the appeal is merited. Put differently whether the orders of the Court should be set aside and or varied.
14. The background of the appeal has been laid out in the preceding paras in this Ruling and in my view will not serve any purpose to regurgitate the same.
15. I shall therefore proceed to determine the appeal bearing in mind that this being a first appeal, it is the duty of the Court to review the evidence adduced before the lower Court and satisfy itself that the decision was well-founded. In *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:

“...this Court is not bound necessarily to accept the findings of fact by the Court below. An appeal to this Court ... is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”
16. Whether or not the Court will interfere with the decision of the trial Court will be guided by the principles set out in the case of *Mbogo & Another vs Shah* [1968] EA where the Court held as follows;

“an appellate Court will not interfere with the exercise of the trial courts discretion unless it is satisfied that the Court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous or unless it is manifest from the case as a whole that the Court has been clearly wrong in the exercise of judicial discretion and that as a result there has been injustice.”



17. The purpose of a temporary injunction as stated in Order 40 Rule 1 of the Civil Procedure Rules, 2010 is to stay and prevent the wasting, damaging, alienation, the sale, removal or disposition of the suit property. The Order provides that;

“ 1. 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 Respondents 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 Respondents 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”.

18. The principles that guide the Court in determining an application of such nature are found in the celebrated case of *Giella vs Cassman Brown & Co Ltd* [1973] EA 358 as follows: -

- a. First the Applicant must show a prima facie case with a probability of success.
- b. Secondly an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable harm which would not be adequately compensated by an award of damages.
- c. Thirdly, if the Court is in doubt, it will decide an application on a balance of convenience.

19. Has the Applicant established a prima facie case with a probability of success? A prima facie case was defined by the Court of Appeal in *Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others* (2003) eKLR as follows: -

“ a prima facie case in a civil application includes but is 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 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.”

20. On the question of prima facie, it is the appellants case that the Respondent owes it rent payments in the sum of Kshs 17.9 Million. The Respondent on the other hand contended that it owes no rent arrears at all. That in any event the parties vide an oral agreement agreed that since the premises were uninhabitable the rent payable was halted. That the premises had been in disuse since May 2024 as the drainage malfunctioned to the extent that the Respondent was exposed to raw sewage that infiltrated the premises. That despite informing the Appellant of the situation, nothing was done to repair the sewer. Though these averments conjure two diametrical opposing positions, the Court can deduce that indeed there is a dispute on how much rent is due. There appears to have been repairs issues that may have affected the premises leading to delay and or an agreement on non-payment of rent.

21. The lease agreement of the parties contains the rights and obligations of the parties. As long as the Respondent continued to pay rent the Appellant was obligated to give peaceful and quiet possession



- of the demised premises. The Appellant has submitted that it has a right to distress for rent under the *Distress for rent Act*. That may be so . But in the absence of a clear picture of the quantum of rent owing what could the Appellant be distressing?
22. It is trite that in determining an application for interlocutory injunction like the one before the trial Court, the Court is not required to make final findings of contested facts as the Court should only weigh the relative strength of the party's cases. See the case of Mbuthia Vs Jimba credit Corporation Ltd (1988) eKLR
 23. Having said that, the Appellant submitted that the Respondent took full advantage of the orders of 20/3/25 to remove the proclaimed goods chattels and machinery from the demised premises. If indeed the Respondent has moved out of the premises what purpose will the setting aside of the temporary orders of injunction serve? It is not clear to the court.
 24. All in all, the Court finds no reason to interfere with the reasoning of the trial magistrate as far as the granting of the interim injunction orders to serve the preservation of the substratum of the suit is concerned. It is not lost on the Court that the Appellant too has a claim awaiting determination in the trial court.
 25. At the core of this dispute is the payment of outstanding rent, if any and therefore no irreparable harm was founded. Moreso, because any harm if founded is quantifiable in monetary terms hence no injunction ought to be granted solely on this ground.
 26. Finally, the balance of convenience in my considered view is that I find no grounds to interfere with the decision of the trial court.
 27. Final orders for disposal
 - a. Consequently, the appeal is unmerited.
 - b. The appeal was uncontroverted therefore I make no orders as to costs.
 28. It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 31ST DAY OF JULY, 2025 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered Online in the presence of:

Mr Omuga for the Appellant

Ms Amwama HB for Mr Kiprof

CA – Ms Yvette

