Al Abeid (As Trustee for and on Behalf of Abeid Awsgar Abeid, Arwa Abeid & Amira Abeid) v Goldstone Apartments Amangement Limited & 2 others (Environment and Land Appeal E008 of 2024) [2025] KEELC 7376 (KLR) (29 October 2025) (Judgment)

Neutral citation: [2025] KEELC 7376 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND APPEAL E008 OF 2024

SM KIBUNJA, J

OCTOBER 29, 2025

BETWEEN

WAHIDA SAID AL ABEID (AS TRUSTEE FOR AND ON BEHALF OF ABEID AWSGAR ABEID, ARWA ABEID & AMIRA ABEID) ..... APPELLANT

AND

GOLDSTONE APARTMENTS AMANGEMENT LIMITED .... 1ST RESPONDENT

GSTTPROPERTY MANAGEMENT LIMITED ..... 2ND RESPONDENT

MOHAMED SWALEH ..... 3RD RESPONDENT

JUDGMENT

1. The appellant being dissatisfied with the ruling of Hon. G. Sogomo, PM, delivered on 13th September 2024 in Mombasa MCCC E372 of 2024 filed this appeal through the memorandum of appeal dated 20th September 2024, raising nine (9) grounds which the court has reduced into the following four (4) grounds:

    1. That the learned magistrate erred in law by holding that a failure to file a further affidavit to the 3rd respondent's replying affidavit rendered the allegations in the replying affidavit uncontroverted.

    2. That the learned magistrate erred in fact and law in failing to consider the appellant's submissions specifically in reference to the minutes which were not signed and which he did not sign; no resolutions were extracted, and no notice of the meeting was served upon him.

    3. The learned magistrate erred in law and fact by purporting to vary the terms of a registered lease on basis of the unsigned minutes, by raising the service charge from Kshs.10,000 to

Kshs,12,000 per month, without there being a signed agreement to vary the terms of the sublease.

4. The learned magistrate erred in law by wrongly using the doctrine of estoppel and arriving at a conclusion not supported by evidence in dismissing the application dated 21st March 2024.

The appellant sought for the appeal to be allowed, the ruling of 13th September 2024 to be substituted with an order allowing the application dated 24th July 2024, and for costs of the appeal.

2. The court admitted the appeal on the 12th June 2025, and directed the parties to file and exchange submissions within 21 days each. The learned counsel for the appellant and the respondents filed their submissions dated 29th July 2025 and 25th July 2025 respectively, which the court has considered.

3. The issues raised for determinations by the court are as follows:

a. Whether the learned trial magistrate failed to consider the appellant's submissions.

b. Whether the failure to file a further affidavit meant the facts in the replying affidavit were uncontroverted.

c. Whether the learned trial magistrate misapplied the doctrine of estoppel.

d. Whether the learned trial magistrate erred in law and facts by relying on the minutes to vary the service charge from Kshs.10,000 to Kshs.12,000.

e. Whether the appellant had met the threshold for a temporary injunction sought in the application dated 21st March 2024.

f. Who bears the costs of the appeal?

4. The court has carefully considered the grounds on the memorandum of appeal, submissions by the two learned counsel, superior court decisions cited thereon and come to the following determinations:

a. The copy of the ruling delivered on 13th September 2024 at the first paragraph, headed "introduction", indicated the application subject matter was dated 24th July 2024. However, at the last paragraph headed "disposition", the learned trial magistrate referred to the application dated 21st March 2024, that he proceeded to dismiss with costs. I have perused the record of appeal and it is clear the subject matter of the ruling delivered on 13th September 2024 was the notice of motion dated 21st March 2024, and the reference to the other date was inadvertent.

b. The said application sought an injunctive order restraining the respondents, their servants or agents from terminating provision of services stated in the lease agreement dated 17th January 2020 pending hearing of the main suit. This was after the 2nd and 3rd respondents served notices dated 7th and 8th March 2024. In the afore mentioned ruling, the learned trial magistrate held that failure by the plaintiff to file a further affidavit joining issues, and controverting the minutes alluded to in the replying affidavit sworn by the 3rd respondent on 12th April 2024, forced the court to construe that the minutes are uncontroverted. It was the learned trial magistrate's further holding that appellant is estopped from denying the 2nd respondent as an agent of the landlord, after having annexed two receipts dated 10th December 2021 and 10th July 2022 that were issued by the 2nd respondent to his affidavit. The learned magistrate also faulted the appellant for misleading the court by stating that he has on several occasions overpaid service charge when in actual fact, he is an arrears and therefore, not entitled to equity.

c. When it comes to appeals this court is reminded that and give reasons if found that they should not. See the decision in the case of Abok James Odera T/A A.J Odera & Associates versus John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR. if the findings reached by the learned trial magistrate should stand evidence as asserted by the parties on record, and to establish the task at hand is to reappraise, reassess and re-analyse the

d. It is undoubted that the notice of motion subject matter of the impugned ruling dated 13th September 2024, was an interlocutory application for injunctive orders pending hearing of the main suit, which I take to mean the main suit is yet to be determined. A quick perusal of the plaint in the trial court shows that the plaintiff seeks for a declaration that the appellant has overpaid service charge by Kshs.390,000; permanent injunction against the respondents and their servants or agents. The court will therefore limits itself to the issues raised in the said temporary injunction application and any determinations herein should not be construed or be taken as a determination of any of the issues to be determined in the main suit that is pending before the trial court. That as courts are not expected to make final determinations on questions of law and facts at interlocutory stages, like the hearing of the injunctive application dated 21st March 2024, it was therefore erroneous for the learned trial magistrate to hold that the appellant was in arrears of service charge at the interlocutory stage when that issue remains the main issue for determination in the main suit, which was yet to be heard. Likewise, it is misleading for the appellant to allege that the learned trial magistrate had through the ruling of 13th September 2024, varied the service charge payable from Kshs.10,000 to Kshs.12,000 per month, when the it is clear to all and sundry, that the trial court only dismissed the application with costs.

e. In considering whether the appellant had met the threshold for issuing of injunctive relief sought, the court refers to the case of Giella versus Casman Brown (1973) EA 358 where it was stated as follows:

> " First 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 be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."
>
> Also, in the case of Nguruman Limited versus Jan Bonde Nielsen & 2 Others [2014] eKLR the Court of Appeal held as follows:
>
> " These are the three pillars on which rests 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. See Kenya Commercial Finance Co. Limited - Versus – Afraha Education Society [2001] Vol. 1 EA 86. 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 is 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. The existence

of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between".

f. A prima facie case was held by the Court of Appeal in the Nguruman case [supra] as follows:

> " We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."

Further, in the case of Mbuthia versus Jimba credit Corporation Limited (1988) KLR 1, the court held that:

> " In an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the party's cases."

g. Having given due considerations to the affidavit evidence presented to the trial court, I find the appellant's application for injunctive relief had merit as under the lease agreement dated 17th January 2020, the service charge payable was "Kshs.10,000/= per quarter (revisable annually)." The appellant had annexed multiple receipts and according to the notice dated 7th March 2024, he was allegedly in arrears for February and March 2024, which could be probable, as the suit before the trial court was filed on 20th March 2024. The appellant had therefore established a prima facie case for the injunctive order sought to be issued, even without considering whether the minutes of 23rd November 2023 are valid or not.

h. I have perused the submissions filed in respect of the application before the trial court, and on irreparable damages, the appellant claimed that their security and health are at risk since the services provided are security, water, garbage collection and cleaning. On the principle of balance of convenience, the court refers to the case of Pius Kipchirchir Kogo versus Frank Kimeli Tenai [2018] eKLR where it was defined 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".

Having considered the facts presented and the applicable law, including superior court decisions, I find the inconvenience to be suffered will probably be more on the appellant than on the respondents.

i. However, the lease agreement ought to be respected by all parties to it. Needless to say, the appellant cannot continue to enjoy services without paying the service charge. Of course, the amount of the service payable is disputed, and will wait to be settled through the main suit's trial. The court is aware that when considering the appellant's application dated 25th September 2024 on the 9th October 2024, it granted a conditional order of injunction in terms of prayer (2) pending the inter parties hearing and determination of the notice of motion. That during the subsequent mention of 19th November 2024, the court directed the appellant to continue paying service charge as it becomes due by depositing Kshs.12,000 per month in the escrow account, which order was confirmed in the ruling delivered on 12th February 2025. I am of the view that the interests of both parties will continue to be protected if that order remains in force pending the hearing and determination of the main suit pending before the lower court.

j. Clause 3(a)(i) of the sub-lease agreement dated 17th January 2020, annexed to the appellant's affidavit clearly provided that:

> " All disputes and questions whatsoever which shall arise between the parties hereto touching this sub-lease or the construction or application thereof or any clause or thing herein contained or the rights or liabilities of any party under this sub-lease shall be referred to the decision of a single Arbitrator to be appointed in accordance with the provisions of the *Arbitration Act* or any Act amending or repealing the same. The decision of such Arbitrator shall be final, conclusive and binding on the parties."

k. Pursuant to sections 19 & 20 of the *Environment and Land Court Act* No. 19 of 2011 and sections 1A & 1B of the *Civil Procedure Act*, chapter 21 of Laws of Kenya, and Article 159(2) (c) & (d) of *the Constitution*, it is only fair and just that the dispute between the parties be referred to arbitration for determination in obedience to the express terms of the parties' sub-lease. Accordingly, the court also directs that the suit pending before the trial court be stayed pending the outcome of the arbitration.

l. On whether the appellant was a registered trust or not, it is not an issue to be considered in the said application. In any case, whether or not the appellant was a trustee or not, his name is on the lease and thus has locus standi, unless otherwise proved.

m. Under section 27 of the *Civil Procedure Act*, chapter 21 of Laws of Kenya which provides that costs follow the event unless where there is good reason to depart from the rule, in this instant I find the costs of this appeal abide the outcome of the arbitration notwithstanding the fact that the appellant is successful in this appeal.

1. From the foregoing conclusions, the court finds merit on the appeal and orders as follows:

a. The appeal is allowed and the ruling delivered on 13th September 2024, is hereby set aside and substituted with an order granting the injunction order sought in the application dated 21st March 2024, subject to the following conditions:

   i. That the appellant to continue paying service charge as it becomes due by depositing Kshs.12,000 per month in the escrow account, as ordered in the ruling delivered on 12th February 2025.

   ii. That the dispute between the parties herein be referred to arbitration for determination in obedience to the express terms of Clause 3(a)(i) of the parties' sub-lease dated 17th January 2020.

   iii. That there be a stay of proceedings of the suit pending before the trial court to await the outcome of the arbitration.

b. That the costs of this appeal abide the outcome of the arbitration notwithstanding the fact that the appellant is successful in his appeal.

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 29TH DAY OF OCTOBER 2025.

S. M. Kibunja, J.

ELC MOMBASA.

In The Presence Of:

Appellant : M/s Nanjala for Wameyo.

Respondents : M/s Achieng.

Kalekye-court Assistant.