

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ELC LC NO. E057 OF 2024

ATULKUMAR RAMANBHAI PATEL
.....PLAINTIFF

VERSUS

KENYA RAILWAYS CORPORATION.....

DEFENDANT

RULING

A. Introduction

1. By a plaint dated 24.06.2024 the plaintiff sued the defendant seeking the following reliefs.
 - a) *An order for payment by the defendant of such sums as are found due upon the inquiry.*
 - b) *General damages for emotional distress, anxiety and psychological stress.*
 - c) *Costs of the suit.*
 - d) *Interest on a) above.*
 - e) *Any other just relief this honourable court deem fit to grant.*
2. The plaintiff pleaded that at all material times he was a lessee of the defendant on Mombasa/Block XIV/84 on which he was building is go downs for rental purposes when the defendants sued him *vide Mombasa HCCC No.202 of 2004 - Kenya Railways Corporation vs Atukumar Ramanbhai Patel* and obtained an

interim injunction restraining him from proceeding with further construction.

3. The plaintiff further pleaded that as a condition for granting the injunction the defendant filed an undertaking as to damages. It was further pleaded that the defendant said claimed was ultimately dismissed in 2021 thereby necessitating enforcement of the undertaking on the damages.
4. The nature and particulars of damages the plaintiff sought to recover against the defendant were pleaded in paragraph 10 and 11 of the plaint thus;

“10. By virtue of the said order of the said injunction, the existing structures on the suit property which the plaintiff put up at a cost kshs. 52,000,000/= has remained unattended to and unprotected for nearly twenty-three (23) years. As matters stand, the buildings have totally deteriorated and rendered useless. The same can only be salvaged through bringing down of the old structures and building and/or constructing the same a fresh.

11. In the premises by virtue of the making of the said order the plaintiff has suffered loss and damage, namely;

- i. The loss of the subject buildings which have fallen in a state of disrepair and have to brought down and built afresh as the same have been condemned.*

ii. <i>Loss of expected rental income assessed)</i>	Kshs (to be
iii. <i>Additional professional fees stated)</i>	Kshs(to be
iv. <i>Fees in respect of actuarial (RCL World) stated)</i>	Kshs (to be
v. <i>Loss assessor's fees (elite Africa Valuers Ltd stated)</i>	(Kshs to be
vi. <i>Structural Engineer's fees stated)</i>	(Kshs.(to be
vii. <i>Architectural express stated)</i>	(Kshs.(to be
<i>Total</i>	Kshs.3,675,000,000.00

B. Defendant's application for striking out

5. Vide a notice of motion dated 13.02.2025 filed pursuant to *Order 2 rule 15 (1) (a) (b), (c) (d) and Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B, 3A, of the Civil Procedure Act and all other enabling provisions of statutes*, the defendant sought the striking out of the plaintiff's suit for being an abuse of the court process. The application was based upon the ground set out on the face of the motion and the contents of the supporting affidavit sworn by Stanley Gitari on 13.02.2025.
6. The defendant pleaded that the plaintiff had previously filed *Mombasa HCCC No. 72 of 2021 (the first suit)* for enforcement of

the aforesaid undertaking but the same was struck out by the High Court. It was contended that the correct way of seeking enforcement of an undertaking as to damages is to file a formal application for inquire before the court in which the undertaking was given and not through a completely fresh suit.

7. It was this the defendant's case that the plaintiff had wrongly invoked the jurisdiction of the court and that the instant suit was an abuse of the court process.

C. Plaintiff's response

8. The plaintiff filed a replying affidavit sworn by Shida Gilbert Saro as holder of a power of attorney from the plaintiff. He conceded that the undertaking on damages was given in *Mombasa HCCC No. 2020 of 2004 (the primary suit)* but contended that this court was competent to entertain a fresh suit for its enforcement. It was contended that the primary suit was already concluded hence a claim for an inquiry as to damages could be filed in it.

9. The plaintiff asserted that it had a constitutional right to be heard on its claim for compensation and contended that a new suit could be filed for enforcement of an undertaking as to damages. The plaintiff revealed that it had filed an appeal against the order of by the High Court striking out its suit in first suit hence the defendant was precluded from referring to any matters pending in that appeal.

D. Directions on submissions

10. When the application was listed for directions it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file, exchange their respective submissions. The material on record shows that the defendants filed submissions dated 20.08.2025 but the plaintiff's submissions were not on record by the time of preparation of the ruling.

E. Issues for determination

11. The court has perused the defendant's notice of motion dated 13.02.2025, the plaintiff's replying affidavit in opposition thereto as well as the material on record. The court is of the view that the main questions for determination herein are as follows;

- a) *Whether the defendant has made out a case for striking out the suit.*
- b) *Who shall bear costs of the application.*

F. Analysis and determination

a) Whether the defendant had made out case for striking out the suit

12. The court has considered the material and submissions on record. Whereas the plaintiff contended that he had a right to file a fresh suit for enforcement of the undertaking given in the primary suit, the defendant contended otherwise. It was the defendant's case that the plaintiff could only seek enforcement of the undertaking or inquiry as to damages in the primary suit.
13. The defendant relied upon several authorities in support of its proposition that an undertaking as to damages given as a condition for granting an injunction in a civil suit can only be enforced in the suit in which the undertaking was given. The defendant relied, *inter alia*, upon the court of appeal decision in *West Kenya Sugar Company Limited vs Agriculture and Food Authority and Another (Civil Appeal E973 & E981 of 2023 (consolidated) 2025 KECA 527 (KLR) (21 March 2025) (Judgment)* and the case of *Ngurman Limited vs Jan Bonde Nielsen 2020*

KEHC 8655 (KLR). In the latter case it was held by the High Court that;

"The Principles and guidance applicable to the procedure and practice of undertaking as to damages were aptly summarized by Neill LJ., in Cheltenham and Gloucester BS v Ricketts and Others [1993] 4 All ER 276 as follows:

- 1) *Save in special cases an undertaking as to damages is the price which the person asking for an interlocutory injunction has to pay for its grant. The court cannot compel an applicant to give an undertaking but it can refuse to grant an injunction unless he does.*
- 2) *The undertaking, though described as an undertaking as to damages, does not found any cause of action. It does, however, enable the party enjoined to apply to the court for compensation if it is subsequently established that the interlocutory injunction should not have been granted.*
- 3) *The undertaking is not given to the party_ enjoined but to the court.*
- 4) *In a case where it is determined that the injunction should not have been granted the undertaking is likely to be enforced, though the court retains a discretion not to do so.*
- 5) *The time at which the court should determine whether or not the interlocutory injunction should have been granted will vary from case to case. It is important to underline the fact that the question whether the undertaking should be*

enforced is a separate question from the question whether the injunction should be discharged or continued.

- 6) *In many cases injunctions will remain in being until the trial and in such cases the propriety of its original grant and the question of the enforcement of the undertaking will not be considered before the conclusion of the trial.....*
- 7) *Where an interlocutory injunction is discharged before the trial the court at the time of discharge is faced with a number of possibilities. (a) The court can determine forthwith that the undertaking as to damages should be enforced and can proceed at once to make an assessment of the damages. It seems Probable that it will only be in rare cases that the court can take this course because the relevant evidence of damages is unlikely to be available.. . (b) The court may determine that the undertaking should be enforced but then direct an inquiry as to damages in which issues of causation and quantum will have to be considered. It is likely that the order will include directions as to pleadings and discovery in the inquiry . . (c) The court can adjourn the application for enforcement of the undertaking to the trial or further orders. (d) The court can determine forthwith that the undertaking is not to be enforced."*

14. In *West Kenya Sugar Company* case it was held, *inter alia*, that;

"The learned Judge in the above matter set out steps to be followed before damages can be awarded in a suit for enforcement of an undertaking. First, it must be

ascertained that there was in fact an undertaking to pay damages in the event that it is found that an ELC LC E057 OF 2024 Page 9 of 12 order of injunction, or as in this case, a stay, ought not to have been made. Once that is ascertained, the Court, whether in the same suit (where for example, an undertaking is given in civil proceedings) or in a separate suit (where the undertaking is given in judicial review proceedings such as in this case) then proceeds to determine whether or not the order of stay or injunction ought not to have been made. It is only upon making the finding that the order ought not to have been made that an inquiry as to the quantum of damages is entered into."

15. The plaintiff relied essentially on an extract of precedents from Buffer & Leake & Jacobs Precedents of pleadings for the proposition that it was perfectly in order for a party to initiate a new suit for enforcement of an undertaking given in a civil suit. The court is not persuaded that it should depart from local authorities including one from the Court of Appeal of Kenya in favour of the templates found in precedents of pleadings.
16. The court is of the view that the plaintiff is not entitled in the circumstances of the case to initiate a fresh suit for enforcement of an undertaking as to damages filed in the primary suit. The mere fact that the primary suit is long concluded is not necessity

a bar to enforcement of an undertaking as to damages otherwise a mischievous plaintiff might evade being held into account by simply withdrawing the original suit thereby leaving the injured defendant without a remedy.

17. The court has noted that the plaintiff's suit not only seeks enforcement of the undertaking given in the primary suit but also seeks general damages for emotional distress, anxiety and psychological stress. It would appear that the plaintiff was simply giving a cosmetic facelift to his claim to make appear as if it is founded on something more than the undertaking given by the defendant in the primary suit. The court is enjoined to consider the substance of the claim rather than the form in which it is presented.
18. The court is of the view that there is a greater reason why the plaintiff's suit ought to be struck out as being an abuse of the court process. It is clear from the material on record that the High Court struck out the first suit on two grounds. First, that an inquiry as to damages or enforcement of an undertaking could only be undertaken in the original action. Second, that the High Court had no jurisdiction to entertain the suit.

19. The plaintiff had revealed that he filed an appeal against the decision of the High Court both on account of jurisdiction and the proper forum for enforcement of the undertaking. The plaintiff has further indicated that the said appeal is still pending. The court is of the view that by filing the instant suit during the pendency of the said appeal, the plaintiff is guilty of abuse of the court process. Suppose the plaintiff's appeal were to ultimately be successful, then what would be the fate of the instant suit were to be struck out and the plaintiff appeals to the Court of Appeal would not there be two appeals dealing with the issue of what is the right or proper forum for enforcement of an undertaking?

b) Who shall bear costs of the application

20. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the *proviso* to *Section 27 of the Civil Procedure Act (Cap 21)*. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons -vs- Twentsche Overseas Trading Co. Ltd [1967] EA 287*. The court finds no good reason why the successful party should not be awarded costs of

the action. As such, the defendant shall be awarded costs of the application. In the same vain, the defendant shall also be entitled to costs of the suit.

G. Conclusion and disposal orders

21. The upshot of the foregoing is that the court finds merit in the defendant's application dated 13.02.20225. as a consequence, it makes the following orders for disposal thereof;

a. The plaintiff's suit is hereby struck with costs for being an abuse of the court process.

b. The defendant is hereby awarded costs of the application.

It is so ordered.

Ruling dated and signed at Mombasa and delivered virtually via Microsoft Teams on this **4th day of December, 2025.**

.....

Y. M. ANGIMA

JUDGE

In the presence of:

Court Assistant Gillian

No appearance for plaintiff

Mr. Mbabu for defendant

ORIGINAL