



**Okadale Commodities Ltd v Sazit Company Ltd & 2 others (Environment & Land Case E015 of 2023) [2024] KEELC 415 (KLR) (18 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 415 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE E015 OF 2023**

**LL NAIKUNI, J  
JANUARY 18, 2024**

**BETWEEN**

**OKADALE COMMODITIES LTD ..... PLAINTIFF**

**AND**

**SAZIT COMPANY LTD ..... 1<sup>ST</sup> DEFENDANT**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 2<sup>ND</sup>  
DEFENDANT**

**DEPARTMENT OF LAND, HOUSING AND PHYSICAL PLANNING, COUNTY  
GOVERNMENT OF MOMBASA ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

**I. Introduction**

1. On 17.1.2024 this matter came up before court for the hearing of an application dated 7<sup>th</sup> September, 2023 in accordance with the cause list for the day. During the prosecution by the Learned Counsel particularly Mr. Kibara Advocate for the 1<sup>st</sup> Defendant, the Courts attention was drawn to four (4) pending applications all filed at the behest of the Plaintiff/Applicant and apparently all of them seeking for Interim Injunctive Orders against the Defendants from causing any construction of six story building onto the suit land- Plot No. 22992/I/MN Nyali along Moyne drive within the County of Mombasa.
2. The Honorable Court Learned that the Plaintiff moved court on 7<sup>th</sup> September, 2023 seeking injunctive orders and which were granted on 12<sup>th</sup> September, 2023. Thereafter the other subsequent applications were dated (b) 27<sup>th</sup> November, 2023 which appeared before Hon. Lady Justice Matheka (c) dated 28<sup>th</sup> November, 2023 which appeared before Hon. Justice Kibunja and finally (d) dated 6<sup>th</sup> December, 2023 which appeared before Hon. Lady Justice Matheka in order.



3. As far as the Learned Counsel was concerned what would be pending was the application dated 7<sup>th</sup> September, 2023.
4. What would have led the Plaintiff to file other subsequent application that the 3 others was all in a bid to rectify an inadvertent error caused for failure to personally appear in court on 8<sup>th</sup> November 2023 as required by law. Nonetheless, without getting into matter of conjuncture, the court wishes to trace the evolvement of these matters in a chronological manner as herein below:-
5. The Issues at hand – Essentially, the main issues at hand are found to be contained in the Notice of Motion dated dated 7.9.2023. Therefore, its important for the court to fully appreciate it. The Plaintiff filed the application under Certificate of urgency. The Honorable Court granted Prayers 2 and 3 of the application in order to preserve the suit property. in essence the orders No. 6 and 7 read as follows:-

Order No. 6: That in the meantime in order to preserve the suit property this Application be and is hereby Certified urgent

Prayer /Order 7: That a temporary injunction be and is hereby issued restraining the 1<sup>st</sup> Defendant by itself, its servants and/or agents from continuing with the development on all that parcel of land known Plot No. 229992/I/MN, Nyali along Moyne Drive Mombasa County in respect of which it has obtained approval to construct what it refers to as six storey residential building which development are being undertaken pursuant to the 2<sup>nd</sup> Defendant's decision granting license No. EIA/PSR/23223 to the 1<sup>st</sup> Defendant until 8<sup>th</sup> November, 2023 where the same will be subject of review depending on the emerging circumstances by then whatsoever (Emphasis is mine)

6. Ideally, the Honorable Court was persuaded that there was need to preserve the suit property awaiting the hearing and final determination of the application dated 7.9.2023. However, there was a disclaimer in that at the ex - parte stage, that come the 8<sup>th</sup> November, 2023 should the court have been informed otherwise, for instance that the facts presented by the Plaintiff/Applicant be controverted by the Defendant or a Contrary opinion be presented the court then would have unfettered discretion to set aside, vary and/or discharge the granted Interim Orders pursuant to the provisions of Order 40 Rule 7 of the [Civil Procedure Code](#) which held:-

“Any order for an Injunction MAY be discharged or varied or set aside by the Court on application made thereto by any party dissatisfied with such order”.

7. Now, the par material issue was that come the 8<sup>th</sup> November, 2023 several things happened. Firstly, it's on record the Plaintiff/Applicant and Advocate was absent. He holds that the never thought he court was sitting having proceeded on annual leave. That is a fact that nor withstanding all maters particularly those with interim orders are attended to nonetheless by the court.

Secondly, the matter was placed before Hon. Justice Kibunja who though had the Judicial Power to have dealt with the matter in whichever way –either by extending the orders or discharging them but instead he opted for a more diplomatic soft landing. The good judge ordered as follows:-

“The other counsel is absent. This is an ELC -3 matter and we have told the court is on leave. We could have a date next term. Further mention on 17.1.2024. Notice to be served”.

8. My understanding is that the orders of 12<sup>th</sup> September, 2023 remained untouched. They were intact. For whatever reason, when the Learned Counsel for Plaintiffs/Applicants Learned about the proceedings in court and also saw that the 1<sup>st</sup> Defendant had commenced construction, he panicked.



I can imagine the pressure he was under from all quarters including his client. He opted into filing of multiplicity of applications being one on one dated 27<sup>th</sup> November, 2023, 28<sup>th</sup> November, 2023 and 6<sup>th</sup> December, 2023 all seeking similar injunctive orders.

9. On 27<sup>th</sup> November, 2023, this court through my sister Hon. Justice Matheka ordered that the status quo to be maintained without elaborating the actual meaning of it. Hence, this lacuna generated issues of interpretation. On the one part, interpreting it to mean – the construction to continue while on the other hand the orders of this court of 12.9.2023 to be sustained. This was a total mix up.
10. I am not devoid of the several shortcomings and draw backs arising from this proceedings including the failure to fully comply with orders of the court, failure to attend court by the Plaintiff and Advocate on 8<sup>th</sup> November, 2023 as ordered to defend the orders.
11. Be that as it may this being a land matter and its emotive dimensions, I hold that the mistake of the Counsel by Plaintiff should not be visited upon the client. I am guided by the legal ration from a myriad of cases including “*Gideon Mose Onchwati –Versus- Kenya Oil Company Limited & Another* (2017) eKLR cited the case of “*Shah –Versus- Mbogo* (1967) EA 166 and court held:-

“Although it is an elementary principle of our legal system that a litigant who is represented by an Advocate is bound by the acts and omissions of the Advocates in the course of representation in applying that Principle, court must exercise care to avoid abuse of the system and or unjust or ridiculous results. A litigant ought not bear the consequences of the Advocates default unless the litigant is privy to the default or the default results from failure on the part of the Litigant to give the Advocate due instructions”

I wish to refer you to the other cases bearing the same legal ratio being those of: ”Belinda Mural & 9 Others - Versus – Amos Wainaina (1978)”; “*Joseph Wekesa Tulula –Versus Hilda Wanjiru Tulula* ELC 52/2013). In all such given circumstances, the Honourable Court is inclined to overlook these mistakes supposedly caused by an Advocate.

12. Additionally, as stated above based on the Provisions of Order 40 Rule 7 of the Civil Procedure Code, notwithstanding of the absence of the Counsel for the Plaintiff – M/s. Kinuva holding brief for Mr. Kibara Advocate for 1<sup>st</sup> Defendant the only Counsel present never applied seeking to have the Interim orders set aside, varied nor discharged. She was comfortable and rightfully so on only serving the mention date for 17.1.2024 neither did the court see it fit to make any other orders to the contrary.
13. Therefore, based on the jurisdictional powers vested in this court under the Provisions of Article 159 (1) and (2) of the *Constitution* of Kenya 2010, Sections 3 and 13 of the *Environment and Land Court Act*. No. 19 of 2011 and Section 1010 of the *Land Registration Act* of 2012 and Section 150 of the *Land Act* of 2012, I hold that the Interim Orders granted by this court on 12<sup>th</sup> September, 2023 are still in force to date as they have never been vacated unless otherwise stated.

## II. Direction

14. I have taken full cognizance of the sentiments expressed by Mr. Kibara Advocate to the effect that this matter involved a project where the developer has and continues to incur colossal financial resources. For this very reason there will be great need to expedite it. Hence, based on this observation I proceed to direct as follows.
  1. That the Interim Injunction orders granted on 12<sup>th</sup> September, 2023 be and is hereby extended until the Notice of Motion application dated 7<sup>th</sup> September, 2023 is heard and finally determined.



2. That all the other three (3) Notice of Motion Applicants dated 27<sup>th</sup> November, 2023, 28<sup>th</sup> November, 2023 and 6<sup>th</sup> December, 2023 respectively pending before this court no value added be and are hereby expunged and removed from record with no orders to costs as they serve no purpose whatsoever in these proceedings.
3. That the Notice of Motion application dated 7<sup>th</sup> September, 2023 by the Plaintiff/Applicant and the Preliminary Objection dated 25<sup>th</sup> October, 2023 by the 3<sup>rd</sup> Defendants be disposed off Simultaneously by way of written submissions as follows:-
  - a. The Plaintiff/Applicant granted 7 days to file and serve further Affidavit and written submissions to both the Notice of Motion Application dated 7<sup>th</sup> September, 2023 and the Preliminary Objection dated 25<sup>th</sup> October, 2023.
  - b. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants granted 7 days leave to file and serve Replies and written submissions.
  - c. The matter be fixed for “Inter Parte” (Highlighting of Submissions – 10 minutes each – on 5<sup>th</sup> February, 2024 and a Ruling to be delivered on 20<sup>th</sup> February, 2024.

It is so ordered accordingly.

**RULING DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS SIGNED AND DATED AT MOMBASA THIS 18<sup>TH</sup> DAY OF JANUARY 2024.**

.....

**HON. MR. JUSTICE L.L. NAIKUNI  
ENVIRONMENT AND LAND COURT  
MOMBASA.**

Ruling delivered In the presence of:-

- a. M/s. Yumna – the Court Assistant.
- b. Mr. Gathu Advocate for the Plaintiff/Applicant.
- c. Mr. Njuguna Advocate Holding brief for Mr. Kibara Advocate for the 1<sup>st</sup> Defendant.
- d. Non-appearance for the 2<sup>nd</sup> Defendant.
- e. Mr. Tajbhai Advocate for the 3<sup>rd</sup> Defendant

