



**Farah & 25 others v Mega Wholesalers Limited & another (Environment & Land Case E026 of 2023) [2024] KEELC 70 (KLR) (16 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 70 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E026 OF 2023**

**MD MWANGI, J  
JANUARY 16, 2024**

**BETWEEN**

**BASHIR FARAH ..... 1<sup>ST</sup> PLAINTIFF**  
**MUHYADIN RAGE ..... 2<sup>ND</sup> PLAINTIFF**  
**FATUMA WARDERE ..... 3<sup>RD</sup> PLAINTIFF**  
**HAWA SAID ..... 4<sup>TH</sup> PLAINTIFF**  
**RUN JAMA ..... 5<sup>TH</sup> PLAINTIFF**  
**FATUMA DIRIE ..... 6<sup>TH</sup> PLAINTIFF**  
**DAHABO MOHAMED ..... 7<sup>TH</sup> PLAINTIFF**  
**HASSAN HAJL ..... 8<sup>TH</sup> PLAINTIFF**  
**MOHAMED ADAN ..... 9<sup>TH</sup> PLAINTIFF**  
**TAHLIL HERSL ..... 10<sup>TH</sup> PLAINTIFF**  
**MOHAMED ABDULLAHI ..... 11<sup>TH</sup> PLAINTIFF**  
**LIBAN OSOBLE ..... 12<sup>TH</sup> PLAINTIFF**  
**ABDULQADIR AHMED ..... 13<sup>TH</sup> PLAINTIFF**  
**YAHYA ABDI NOOR ..... 14<sup>TH</sup> PLAINTIFF**  
**OMAR ALI NOOR ..... 15<sup>TH</sup> PLAINTIFF**  
**RUQIYA SHEIKH MOHAMED ..... 16<sup>TH</sup> PLAINTIFF**  
**NURTO KHANYARE ..... 17<sup>TH</sup> PLAINTIFF**  
**SHARIFO SHEIKH MOHAMED ..... 18<sup>TH</sup> PLAINTIFF**  
**SHEMSIDIN MOHAMED ..... 19<sup>TH</sup> PLAINTIFF**



**SALIM MOHAMED OMAR ..... 20<sup>TH</sup> PLAINTIFF**  
**ABDISALAM HAJI AHMED ..... 21<sup>ST</sup> PLAINTIFF**  
**ALI SALAT HALONE ..... 22<sup>ND</sup> PLAINTIFF**  
**ABDULHAMED ADAN ..... 23<sup>RD</sup> PLAINTIFF**  
**AMINA HASHI FARAH ..... 24<sup>TH</sup> PLAINTIFF**  
**HUSSEIN NUNI IBRAHIM ..... 25<sup>TH</sup> PLAINTIFF**  
**ZAHRA MOHAMED MAHADLE ..... 26<sup>TH</sup> PLAINTIFF**

**AND**

**MEGA WHOLESALERS LIMITED ..... 1<sup>ST</sup> DEFENDANT**  
**HIMA PRODUCTS ENTERPRISES LIMITED ..... 2<sup>ND</sup> DEFENDANT**

## **RULING**

(In respect of the Notice of Motion application dated 30th March 2023 and 31st January 2023)

### **Introduction**

1. The Plaintiffs/Applicants herein are tenants of a Shopping Mall Known as ‘Untied Textile Shopping Mall’ situated on LR. No. 36/VII/401 at Eastleigh within Nairobi City County, hereinafter referred to as ‘the suit property’. The Plaintiffs aver that they enjoy fifteen (15) years’ leases in the suit property and in accordance with the agreements entered into with HIMA Products Enterprises Limited, the 2<sup>nd</sup> Defendant/Respondent herein who was the owner of the suit property at the material time, i.e. year 2015. The suit property has since changed ownership. The 1<sup>st</sup> Defendant, Mega Wholesalers Limited is now the registered owner of the suit property.
2. In the application of 30<sup>th</sup> January 2023, the Plaintiffs/Applicants seek interim orders of injunction restraining the Defendants, their servants, officers, employees and or agents from harassing, evicting the Plaintiffs/Applicants, encroaching into, transferring, alienating and terminating the Plaintiffs/Applicants’ tenancies or leases and or in any way dealing with or interfering with their quiet possession and enjoyment over all the shops erected on the suit property.
3. The Plaintiffs asserted that in the year 2016, they entered into lease agreements with the 2<sup>nd</sup> Defendant for a term of fifteen (15) years commencing 1<sup>st</sup> September 2016 and terminating on 30<sup>th</sup> September 2031. The said leases were between the Plaintiffs and the 2<sup>nd</sup> Defendant, its assigns and successors. On the strength of the long-term leases, the Plaintiffs invested heavily in the refurbishment of their respective shops within the suit property and have invested stock worth millions of shillings. They further insist that they have been dutifully paying rent as and when it falls due.
4. The Plaintiffs further alleged that on 30<sup>th</sup> December 2022, the 1<sup>st</sup> Defendant served them with an eviction order of even date issued by the BPRT and sought to evict them from the suit property on account of failure to pay rent. They reiterate that they pay rent as per their respective lease agreements and adhere to the stipulations therein. They deny breaching any material term in the lease.



5. The Plaintiffs categorically state that the BPRT has no jurisdiction to adjudicate disputes arising from a fifteen (15) year lease. Its jurisdiction is limited under Section 2(1) of the [Landlord Tenant \(Shops, Hotels and Catering Establishments\) Act](#).
6. In the application of 31<sup>st</sup> January 2023, the Plaintiffs seek two main orders, namely:-
  - a. That pending the hearing and determination of this suit, this Court, in exercise of its supervisory jurisdiction under Article 165 (6) and (7) of the [Constitution](#), be pleased to issue an Order staying the execution of eviction orders issued by the Business Premises Rent Tribunal in BPRT Cause No. 1227 of 2022 on 27th January 2022.
  - b. That this Honourable Court be pleased to exercise its Constitutional and supervisory powers under Article 165 (6) and (7) of the [Constitution](#) by calling for the entire court file and records of BPRT Cause No. 1227 of 2022 and examine the entire record, proceedings and orders therein for purposes of satisfying itself as to the legality and procedural propriety of the same and to make such order as shall deem fit in order to uphold the dignity of this court.
7. The Plaintiffs explained that the filing of the application of 31<sup>st</sup> January 2023 was prompted by the fact of the 1<sup>st</sup> Defendant/Respondent obtaining eviction orders in the Business Premises Rent Tribunal (BPRT) with an intention of using the said orders to evict the Plaintiff/Applicants in spite of the fact that they were not parties in the said case and further that the BPRT does not have the jurisdiction to determine the dispute between them and the Defendants. The Plaintiffs/Applicants argued that they could not pursue the option of an appeal against the orders issued by the BPRT since they were not parties in that case before the BPRT. They opted to file this suit.
8. The Plaintiffs pleaded that since the threat of eviction was eminent, they stood to suffer irreparable loss. They conduct their diverse businesses from the suit property for which they had cumulatively paid the sum of Kshs.60 million to the 2<sup>nd</sup> Defendant/Respondent, as goodwill at the commencement of their leases.
9. The 1<sup>st</sup> Defendant in response to the Plaintiffs' applications asserts its exclusive ownership rights over the suit property. It asserts that it is the sole registered owner of the suit property. It avers that it purchased the suit through a private treaty with the Kenya Commercial Bank Limited and the 2<sup>nd</sup> Defendant.
10. To enable it meet its financial obligations, the 1<sup>st</sup> Defendant states that it resolved to demolish the building currently erected on the suit property and put up a more profitable structure. That is what informed its notices to the tenants therein. It subsequently obtained orders from the BPRT for vacant possession of the suit property.
11. The 1<sup>st</sup> Respondent denies receiving any rent from the Plaintiffs. It alleges that the purported leases relied on by the Plaintiffs are fictitious as they were never signed by the 2<sup>nd</sup> Defendant. It therefore denies having any tenancy relationship with the Plaintiffs.
12. It is the 1<sup>st</sup> Defendant's case that it cannot be forced to acknowledge leases it was not privy to and which were not disclosed to it. The 1<sup>st</sup> Defendant insists that the Plaintiffs/Applicants herein fully participated in the proceedings before the BPRT and were accorded the right to be heard.
13. In summary, the 1<sup>st</sup> Defendant affirms that the Plaintiffs/Applicants have not demonstrated any rights deserving of the orders sought for the reasons that:-
  - a. The leases are disputed.



- b. The Applicants do not pay rent to the 1<sup>st</sup> Respondent.
  - c. The Applicants have no relationship with the 1<sup>st</sup> Respondent.
  - d. The Applicants cannot force a tenancy relationship once notices have been issued in law.
  - e. The 1<sup>st</sup> Respondent has obligations with ABSA that it must meet.
  - f. The 1<sup>st</sup> Respondent duly issued notices in law.
  - g. The Applicants have a remedy in law, if at all, which can be compensated.
  - h. The 1<sup>st</sup> Respondent is the registered owner of the property and must not be tied to terms it is not privy to and which have been denied.
  - i. The 1<sup>st</sup> Respondent opposes the orders sought.
14. On its part, the 2<sup>nd</sup> Defendant too opposed the Plaintiffs' applications vide the replying affidavit of Mohamed Ibrahim Kuriow. In the said affidavit the 2<sup>nd</sup> Defendant denied ownership of the suit property; having sold it to the 1<sup>st</sup> Defendant.
  15. The 2<sup>nd</sup> Defendant while conceding to 'some form of arrangement' with the Plaintiffs denied signing or authorizing the signing of the leases relied upon by the Plaintiffs. The leases, according to the 2<sup>nd</sup> Defendant were to be entered into subject to certain terms which the Plaintiffs/Applicants failed to meet.
  16. The 2<sup>nd</sup> Respondent too alleged that the law firm of Ahmednasir Abdullahi Advocates LLP, that is now acting for the Plaintiffs/Applicants had represented it in the transaction and there was apparent conflict of interest. The 2<sup>nd</sup> Respondent prayed for the striking out of the documents/pleadings filed by the said law firm on behalf of the Plaintiffs as there was clear conflict of interests.
  17. The 2<sup>nd</sup> Respondent reiterated that it had no proprietary rights or control over the suit property. Accordingly, there was no cause of action against it.
  18. The Plaintiffs filed a further affidavit sworn by Hassan Haji, the 8<sup>th</sup> Plaintiff on his own behalf and on behalf of the other Plaintiffs. The deponent affirmed that the same Director (of the sworn 2<sup>nd</sup> Defendant company) who had signed the agreement ('AMA 2') was the same one who had signed the lease agreements. The lease agreements were signed by both parties.
  19. On representation, the deponent was categorical that the 2<sup>nd</sup> Respondent was represented by the law firm of Githui & Partners Advocates. He attached correspondences from the said law firm as evidence of the same.
  20. The deponent reiterated that upon a sale of a property, any pre-existing lessee's rights are assigned to the new proprietor of the subject property in question. The 1<sup>st</sup> Respondent therefore, upon purchasing the suit property assumed the pre-existing contractual liabilities and obligations of the 2<sup>nd</sup> Respondent in respect of the lease agreement.

### **Court's Directions**

21. The court's directions were that the two applications be canvassed together and by way of written submissions. All the parties complied and the court has had an opportunity to read through the submissions. Parties further highlighted their submissions before the court on 21<sup>st</sup> November 2023.



The proceedings of that day form part of the record of this court. I need not replicate them in this ruling.

### Issues for Determination

22. Having considered the two applications and the responses by the Defendants as well as the submissions by the parties, the sole issue for Determination is whether the Plaintiffs' application are merited. The issue raised by the 2<sup>nd</sup> Defendant on representation by the law firm of Ahmednasir Abdullahi Advocates LLP, was sufficiently responded to. In any event, the 2<sup>nd</sup> Defendant had not made any application for the court to determine.

### Analysis and Determination

23. In making this ruling, I am conscious of two realities. The first one is that what is before me are interlocutory applications. Accordingly, I am not called upon to make any conclusive or definite findings of fact or law at this stage of the proceedings.
24. Ringera J. (as he then was) in the case of *Airland Tours and Travel Limited vs National Industrial Credit Bank*, Nairobi (Milimani) HCCC 1234 of 2002, observed that in any interlocutory application, the court is not required to make any conclusive or definitive findings of fact or law; most certainly not on the basis of contradictory affidavit evidence or disputed proportions of the law.
25. The Court of Appeal in the case of *Nguruman Limited vs Jan Bonde Nielsen & 2 others* (2014) 2020 eKLR while affirming the above position stated that;-

“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.”

26. The second reality is that the Plaintiffs' case herein is pending hearing. At this stage therefore, I should be careful not to make any comments or findings or express opinions on the substantive issues in dispute in order not to prejudice the hearing. I will therefore be deliberately economical with my words.
27. That said, and having carefully analyzed the Plaintiffs' application and the affidavit evidence in support therefore, and the submissions made before me, I am satisfied that the Plaintiffs have demonstrated a *prima facie case*. It is common ground, at least on the part of the Plaintiffs and the 2<sup>nd</sup> Defendant that the Plaintiffs were indeed tenants in the suit property.
28. There is an implied term in any lease agreement that the transfer of a leased property unless contrary intention is explicitly stated, the obligations under the lease are transferred to the new owner, and are exercisable against the new owner. No such explicit intention has been demonstrated in this case.
29. Though the 1<sup>st</sup> Defendant has cast doubt on the validity of the leases between the Plaintiffs and the 2<sup>nd</sup> Defendant, that for sure is an issue for determination after the hearing of the main suit.



30. I am further persuaded that the Plaintiffs have established irreparable loss they are likely to suffer and that may not be compensated by an awarded of damages unless the orders of interim injunction are granted pending hearing and determination of this case. This is in view of their diverse businesses, renovations and business goodwill that has accrued to them having carried on business on the suit property for the last eight (8) years.
31. Considering the totality of the Plaintiffs' case, the balance of convenience tilts in their favour.
32. Accordingly, I allow the Plaintiffs' application dated 30<sup>th</sup> January 2023, and grant an order of interim injunction pending hearing and determination of this suit.
33. In accordance with the provisions of Order 40 Rule 6 of the *Civil Procedure Rules*, the interim injunction order shall be for a period of not more than twelve (12) months from today's date within which time this suit must be set down for hearing and determined. The Plaintiffs must continue paying rent to the 1<sup>st</sup> Defendant/Respondent.
34. Regarding the application dated 31<sup>st</sup> January 2023, there is an appeal filed and pending hearing against the decision of the BPRT in case number 1227 of 2022. The appeal is ELCA E009/2023 which is before my sister Judge, Lady Justice Omenge. The court handling the appeal will have the occasion to call for and examine the record of the BPRT file and satisfy itself as to the legality and procedural propriety of the proceedings and make such orders as by law empowered to. I find it inappropriate and unprocedural for this court to exercise its supervisory powers over the matter while there is a pending appeal. Accordingly, I disallow the Plaintiffs' application dated 31<sup>st</sup> January 2023 in its entirety.
35. In regards to costs, I find it appropriate to issue an order that the same follow the cause.
36. Consequently, the court makes the following orders:-
  - a. The Plaintiffs' application dated 31<sup>st</sup> January 2023 is dismissed in its entirety.
  - b. An order of interim injunction be and is hereby issued, restraining the Defendants by themselves, and or agents from harassing, evicting the Plaintiffs/Applicants, encroaching into, transferring, alienating and terminating the Plaintiffs/Applicants tenancy or lease or in any other way dealing with or interfering with the Plaintiffs/Applicants quiet possession over all the shops erected on the suit property, LR. No. 36/VII/401 pending hearing and determination of this suit.
  - c. The Plaintiffs/Applicants shall in the meantime continue paying rent to the 1<sup>st</sup> Defendant/Respondent.
  - d. The costs of the application shall be in the cause.
37. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 16<sup>TH</sup> DAY OF JANUARY, 2024.**

**M.D. MWANGI**

**JUDGE**

In the virtual presence of:

Ms. Asli for the Plaintiffs/Applicants



Ms. Kwamboka holding brief for Mr. Muganda for the 2<sup>nd</sup> Defendant/Respondent

Ms. Okoth for the 1<sup>st</sup> Defendant/Respondent

Court assistant - Yvette

