



**Kombe v Kupalia (Environment & Land Case E370 of 2022)
[2024] KEELC 989 (KLR) (26 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 989 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E370 OF 2022**

JA MOGENI, J

FEBRUARY 26, 2024

BETWEEN

MASUMBUKO YERI KOMBE PLAINTIFF

AND

LINDA KASICHANA KUPALIA DEFENDANT

RULING

1. There are two applications before this court, one dated 20/04/2023 and one dated 28/07/2023. The notice of motion dated 20/04/2023 is brought under Section 13(7) (a) of the [Environment and Land Court Act](#) as read together with Sections 1A, 1B, 3, 3A of the [Civil Procedure Act](#) and Order 40 Rules 1, 2, 3 and 4 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and the other enabling provisions.
2. It seeks orders:
 1. Spent
 2. That pending the hearing and determination of this application inter partes interim order be and are hereby issued restraining the Defendant/Respondent her servants, agents and anybody else acting or claiming for, through or on her behalf or at her direction, instructions or behest from interference in any manner whatsoever with the Plaintiff/Applicant's quiet-possession, occupation and/or use of all that property known as Woodside Villas House H located on L.R No. 12832/5 in Nairobi
 3. That pending the hearing and determination of this suit, interim orders be and are hereby issued restraining the Defendant/Respondent her servants, agents and anybody else acting or claiming for, through or on her behalf or at her direction, instructions or behest from interference in any manner whatsoever with the Plaintiff/Applicant's quiet-possession, occupation and/or use of all that property known as Woodside Villas House H located on L.R No. 12832/5 in Nairobi



4. That this court be pleased to issue any other order that it shall deem fit.
5. That costs of this application be provided for.
3. It is based on the grounds that the Applicant entered into a sale agreement for purchase of LR No. Woodside Villas House H located on LR No. 12832/5 in Nairobi on 5/10/2020 with the defendant for a construction of Ksh. 65,000,000 and he was to pay 50% deposit. The mode of payment was broken down into the following portions Ksh. 10 million upon signing the agreement, Ksh 22,500,000 within 10 days after executing the agreement and the balance of Ksh 32,500,000 to be paid in 3 equal portions as per the schedule that was provided as per the sale agreement.
4. The plaintiff stated that the purchaser was to get vacant possession once 50% of the purchase price was paid and take full possession upon successful completion. That the plaintiff advanced the defendant Ksh. 3 million travel to Dunai and to allow the plaintiff time to complete the transaction but the plaintiff is not sure if the amount was part of the purchase price.
5. He contended that the timelines as per the agreement expired but the defendant never issued any notice. The plaintiff requested for title documents to enable him to ascertain ownership of the suit property but instead the defendant declined but granted the plaintiff vacant possession since he had intended to charge the said property to raise the purchase price but the documents were not handed to him.
6. He stated that on 15/09/2022 the defendant sent auctioneers to proclaim the plaintiff for what the defendant stated was rent owed. He however stated this was surprising for him since the sale agreement had not been rescinded making it hard for the plaintiff to comprehend how the sale agreement was turned into a tenancy.
7. That the plaintiff file and obtained injunctive relief against the defendant seeking Ksh. 7.2 million which the latter claimed to be rent. The plaintiff states that he filed contemporaneously this instant suit to address the issue of ownership. He therefore contends that he had established a prima facie case. He prayed that the court considers his prayers for injunctive relief which if not considered will render the suit nugatory if action is not thwarted.
8. That it is in the interest of justice that the orders sought herein are granted as prayed. That the defendant will not suffer any prejudice if this Application is allowed as prayed.
9. This court has considered the application and submissions therein. In the case of *Giella vs Cassman Brown & Co Ltd (1973) EA 358* the principals for granting an injunction are stated as follows:
 1. First an applicant must show a prima facie case with a high probability of success;
 2. An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages;
 3. If the Court is in doubt, it will decide an application on the balance of convenience.
10. It is a finding of fact that the plaintiff/applicant herein does not dispute that there is a sale agreement between the defendant/respondent. It is also not in dispute that the sale agreement was executed by both the vendor and the purchaser showing that both parties intended to honor their part of the bargain in ensuring the sale agreement was respected.
11. At the same time, it is my understanding from the documents on record that none of the parties honored their part of the bargain in the agreement. The agreement states that the defendant shall be given vacant possession upon completion of the sale process. The agreement sets out the schedule of payment.



12. Whereas the plaintiff claims that she advanced the defendant Ksh. 3 million for trips to Dubai no evidence is presented to attest to this. It is not in dispute that the registered proprietor of the suit property is the defendant.
13. Further it is not in dispute that there is no transfer of the suit property to the defendant but I also note that in line with the sale agreement the defendant did not serve notice upon the plaintiff who had defaulted to honor the payment schedule. Both parties have violated the sale agreement by not paying up and by not issuing requisite notices to extend the period or rescind the agreement.
14. It is not lost to my mind that at this stage I should only address myself to whether the plaintiff/applicant's notice of motion seeking injunctive reliefs is merited.
15. The following substantive issues arise for determination by the court:
 - i. Whether the Plaintiff/Applicant has made out a case for the issuance of the orders sought; and
 - ii. Whether the application is merited under the circumstances.
16. The principles the court applies when asked to consider an application for grant of interlocutory injunctions are as articulated in the often quoted case of *Giella vs Cassman Brown & Co. Ltd.*(supra). From the information I have I have to ask myself whether the plaintiff/applicant has established a prima facie case with a probability of success. In the Court of Appeal case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR, a prima facie case was defined by the court as follows:

“In civil cases it is a case in 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.”
17. Further, in the *Mrao* case above, the Court of Appeal further opined that:

“....a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right and the probability of the Applicant's case upon trial...”
18. In this case, it is the Plaintiff/Applicant's case that he had entered into a sale agreement with the defendant to purchase the suit property and in the course of the process he was given vacant possession of the suit property but was evicted after accruing what is alleged to be rent amounting to Ksh. 7.2 million which he however denies. He accused the defendant/respondent of forcefully evicting him out of the suit property in violation of the court order issued dated 17/05/2023. He further contended that he has been in occupation of the suit property having been given vacant possession by the defendant. It was therefore the Plaintiff's/Applicant's case that his quiet and peaceful occupation of the suit property has been recently interrupted by the defendant/respondent.
19. On her part, the defendant/respondent denied the allegation that the plaintiff is in possession and or occupation of the suit property. She argued that she is in possession and occupation of the suit property and that the plaintiff tried to use the court order of 17/05/2023 to evict her and that it took the intervention of the police to restore order and protect her proprietary rights.
20. From the report filed in court by the Honorable Deputy Registrar it is undisputed that the defendant and her family are currently in occupation of the suit property. Based on the material on record, there is nothing to suggest that the suit property is under any kind of immediate threat as would waste it



hence defeating the course of justice. It is therefore apparent to the court that the plaintiff/applicant has not established a prima facie case as would warrant granting of the orders sought.

21. On the second condition whether the applicant is likely to suffer irreparable loss and damage if the orders sought are not granted. The Black's Law Dictionary (9th Ed) defines irreparable loss as an injury which cannot be remedied by an award of monetary damages.
22. In *Nguruman Limited vs. Jan Bonde Nielsen & 2 Others* [2014] eKLR; Civil Appeal No. 77 of 2012 (Nairobi) the Court of Appeal held as follows with regard to Irreparable loss and damage:

“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury.

The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

23. Having shown that the defendant is in occupation of the suit property and that the suit property is not in any kind of immediate threat of being wasted, the court holds the view that there is equally no evidence that the plaintiff/applicant is likely to suffer irreparable injury if the orders sought are not granted.

The balance of convenience

24. Finally, on considering the balance of convenience, I of the view that the plaintiff having failed to satisfy the preceding requirements, the balance of convenience in this case will ultimately tilt in favor of not giving the orders sought by the plaintiff/applicant.
25. In the above cited case of *Nguruman Limited vs. Jan Bonde Nielsen & 2 Others* [2014] eKLR; Civil Appeal No. 77 of 2012 (Nairobi)(supra) the Court of Appeal explained further that all the three conditions established in *Giella's* case are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.
26. Consequently, with the above in mind, I find that the plaintiff/applicant's application is not merited under the circumstances. The same is hereby dismissed with costs to the defendant/respondent.
27. The second application is the one dated 28/07/2023 brought under Article 159 (1), 2 (e) of [the Constitution](#), section 1A, 1B, 3A, 63 (c) of the [Civil Procedure Act](#), section 5 (1) of the [Judicature Act](#), section 14 of the [Environment and Land Court Act](#), Rule 81.4 of the English Civil Procedure (Amendment No 2) Rules, 2012 Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law. It seeks the following orders:
 - a. Spent
 - b. THAT pending hearing of this application, this court be pleased to issue police orders/an order directing the OCS of Karen Police Station to enforce/ensure compliance with the orders of this court issued by Honorable Justice Mogeni on 17/05/2023



- c. THAT pending hearing and determination of the Applications dated 15/05/2023; and Application dated 20th April, this court be pleased to issue police orders/an order directing the OCS Karen Police Station to enforce/ensure compliance with the orders of this court issued by Honorable Justice Mogeni J on 17th May 2023.
 - d. THAT this Court be pleased to cite Linda Kasichana, the Defendant herein, for contempt and punish her by order for her imprisonment for a period of six (6) months.
28. The grounds upon which the application is founded on are set out on the face of the motion and in the Supporting Affidavit of the Plaintiff/Applicant, Masumbuko Yerry Kombe sworn on 27/07/2023. According to the Plaintiff/Applicant, orders that this Honorable Court issued on 17/05/2023 were duly served upon the defendant. The said orders were clarified on 20/06/2023 when the court heard the Preliminary Objection dated 15/05/2023 where it stated that the orders of 17/05/2023 were still in force and were to be obeyed. Counsel for the defendant Ms Asli Osman was in court.
 29. On 21/07/2023 the respondent in total disobedience of the court order raided the suit property confiscating the personal effects of the plaintiff/applicant and causing destruction to the suit property. He then forcefully evicted the respondent from the suit property. The plaintiff despite reporting the incident to the police, they were not able to respond stating that they were awaiting a court order directed at them to act.
 30. In opposing the application, the Defendant swore a replying affidavit in response sworn on 17/10/2023. She opposes the application dated 28/07/2023 by the plaintiff and terms it as extremely frivolous and an abuse of court process since the applicant has no basis upon which to seek the said orders.
 31. She deposed that whereas the application seeks to cite the defendants alleging contempt, the court order of 17/05/2023 which is meant to restrain the defendant from interfering with the suit property was issued on the basis of material non-disclosure of facts especially because it is the defendant who was in occupation of the suit property before the impugned application was filed since the defendant has been in occupation since April 2023.
 32. It is the defendant's contention that the plaintiff tried to use the Order of 17/05/2023 as an eviction order and that on 21/07/2023 the plaintiff tried to gain entry to the suit property by failed. That this botched attempt was reported to Karen Plain Police station where the defendant obtained an OB number – OB No. 08/22/7/2023.
 33. The defendant stated that as a result to the plaintiff's action they filed an application dated 28/07/2023. The defendant denies that they are in contempt.
 34. The Court, in determining issues of contempt, derives its authority from Section 5(1) of the *Judicature Act* and Order 52 Rule 1(2) of the Rules of the Supreme Court of England. The adoption of the rules of the Supreme Court of England is well illustrated in the Court of Appeal case of Christine Wanjiru Gachege v Elizabeth Wanjiru Evans & 11 Others (2014) eKLR where the Appellate Court held inter alia:

“Therefore, today the only statutory basis of contempt of court law in so far as the Court of Appeal and the High Court are concerned is Section 5 of the *Judicature Act*. In addition, Section 63 (c) of the *Civil Procedure Act* provides that a disobedience of an order of



temporary injunction will attract punishment in the form of imprisonment or attachment and sale of the contemnor's property. Section 28(4) of the [Supreme Court Act](#) vests in that court the power to punish for contempt. Of relevance to the matter at hand is Section 5 (1) of the [Judicature Act](#) which provides as follows:-

“5. (1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.

(2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.” (Emphasis Supplied). The emphasis imposes a duty on the High Court, the Court of Appeal and law practitioners to ascertain the applicable law of contempt in the High Court of Justice in England, at the time an application is brought. This duly was noted by H.G. Platt J. and D.C. Porter, AgJ. (as they then were) In the Matter of an Application by GurbaKsh. Singh & Sons Ltd Misc. Civil Case No. 50 of 1983, where they said:-

“The second aspect concerns the words of Section 5 – “for the time being”, which appear to mean that this Court should endeavor to ascertain the law in England at the time of the trial, or application being made. Sometimes it is not known, or may not be known exactly, what powers the court may have. It seems clear that the [Contempt of Court Act](#) 1981 of England is the prevailing law and that the procedure is still that set out in order 52 of the Supreme Court Rules.”

35. In the instant application the court stated in its order of 18/10/2023 that “The Court directs that the status quo prevailing as at 15/05/2023 when the first application was filed in this matter and interim order dated 17/05/2023 issued remains in force”.

There is no ambiguity in the order stated above. The Plaintiff proceeded to file the substantive application seeking for the committal to civil jail of the defendant for breach of the orders of the Court issued on 17/05/2023. In an application for committal to civil jail, as per the present application, the standard of proof that has to be established is that of “beyond all reasonable doubt”, as was held in *Re Bramblevale Ltd* [1970] Ch 128. Neil, LJ in his determination of standard of proof in *Dean v Dean* [1987] 1 FLR 517 held inter alia:

“...it is to be remembered that contempt of court, whether civil or criminal, is a common law misdemeanor. Furthermore, there are many authorities of which the decision in *Re Bramblevale Ltd* is an authoritative example, to the effect that proceedings for contempt of court are criminal or quasi criminal in nature and the standard of proof to be applied is the criminal standard.”

36. The Court of Appeal in *Christine Wanjiru Gachege v Elizabeth Wanjiru Evans & 11 Others* (supra), on the strict application of the law, reiterated as follows:

“Because in terms of Section 5(2) of the [Judicature Act](#), the court in punishing for contempt exercises ordinary criminal jurisdiction, it is paramount that the procedure for instituting such proceedings be scrupulously followed.”



37. In the Replying Affidavit of the defendant, at paragraph 7, states that they have been in occupation of the suit property since April 2023 and that the order of this court on 17/05/2023 could not apply since they were already in occupation. That the order was issued on the basis of material non-disclosure.
38. The Applicants filed submissions and reiterated their claim. They argued that the Respondent was in contempt of court since the term of the order was clear; she had knowledge of the said order and her conduct is deliberate.
39. The Respondent filed her submission and insisted she was not in contempt of court as the order granted was about her not interfering with the suit property yet she has been in occupation since April 2023. Further that she has not dealt with the property contrary to the Court Order.

Analysis and Determination

40. Upon perusal of the materials presented in respect of the Notice of Motion dated the 28/07/2023, the only issue for determination is whether the defendant is in contempt of the Order of the Court dated the 17/05/2023.
41. The Applicant contend that the Plaintiff has interfered with the suit property by forcefully evicting him and his family causing him irreparable damage and this is a blatant display of contempt of the Court Order and it is in the interest of justice that she be committed to civil jail. The Respondent on the other hand insists she is not in Contempt of Order of Court as the Applicant has misled the Court on the existing circumstances as he is the one in occupation of the suit property. She denies disobeying the Court Order but insists she has clearly acted within its ambits and as per the status quo as existing at the time of filing the application on 15/05/2023. She states that she has not forced the defendant out of the suit property since she is the one in occupation. Further that she is the owner of the suit property. She confirms she has not in any way dealt with the property contrary to the orders of the court and the instant application is misplaced, misleading as well as a typical nuisance.
42. Section 27(b) of the Contempt of Court Act provides that a person who willfully and without lawful excuse disobeys an order or directions of a superior or subordinate court in the course of the hearing of a proceeding;’
43. While Section 28(1) of the Contempt of Court Act provides that ‘save as otherwise expressly provided in this Act or in any other written law, a person who is convicted of contempt of court is liable to a fine not exceeding two hundred thousand shillings or to imprisonment for a term not exceeding six months, or to both.’
44. In the case of North Tetu Farmers Co. Ltd v. Joseph Nderitu Wanjohi (2016) eKLR where Justice Mativo (as he then was) stated that: ‘ writing on proving the elements of civil contempt, learned authors of the book Contempt in Modern New Zealand have authoritatively stated as follows: -

“ there are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases - (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant; (b) the defendant had knowledge of or proper notice of the terms of the order; (c) the defendant has acted in
45. In the instant case, the order made by the Court on 17/05/2023 restrained the respondent from interfering with quiet possession of the subject matter of these proceedings being House No. 1 located at Woodside Villa H Located on LR No. 12832/5 in Nairobi. At the same time on 20//06/2023 while seeking to uphold the same orders started by stating that “The courts directs that the status quo



prevailing as at 15/05/2023 when the first application was filed in this matter and interim orders dated 17/05/2023 issued remains in force”.

46. In essence it therefore follows that whoever was on the suit property as at 15/05/2023 would stay on the suit property as this matter is heard and finally determined. The defendant claims to have been in occupation of the suit property since April 2023. The plaintiff has not provided any evidence to controvert what the plaintiff has claimed except for stating that he is the one who has been in occupation. Out of abundance of caution the court directed the deputy registrar to visit the suit property in the company of both parties including their counsels and to file a report on the exact persons who were occupying the suit property.
47. The report dated 16/10/2023 stated that during the visit those who were in occupation were the defendant’s family and that a Dr Simiyu and Mr Michael Sankale were introduced as part of the defendant’s family.
48. The applicant has not filed any information to rebut this report of the deputy registrar. Indeed, the applicant had indicated that the defendant had forcibly evicted him from the suit property in total disregard of the court order dated 17/05/2023.
49. I note that the Court issued an ex parte order of temporary injunction pending the hearing of the application dated 15/05/2023 against the suit land as it had emerged that then that the plaintiff was in occupation of the suit property. In the current scenario, it has emerged that the defendant is the one in actual occupation and not the plaintiff.
50. In the case of *Africa Management Communication International Limited Vs Joseph Mathenge Mugo & Anor* (2013) eKLR the Court observed that: ‘to my understanding, it is unequivocal that, pursuant to section 63 (c) of the *Civil Procedure Act*, Order 40 Rule 3 (1) of the Civil Procedure Rules will only apply where the breach relates to orders of an injunction. Therefore, the power donated under section 63 of the *Civil Procedure Act* and Order 40 rule 3 (1) is only in respect of disobedience of an order of injunction. It is a specific power.’
51. In relying on the legal provisions cited above including being persuaded by the judicial authorities above, I find that in the current circumstances and with the facts as presented, the defendant did not interfere with the order of the court dated 17/05/2023 as the court was made to believe by the plaintiff. The applicants’ allegations herein have not met the threshold required in contempt proceedings as envisaged by the law as the standard of proof in the said proceedings is higher than the balance of probabilities and almost beyond reasonable doubt, which position is well articulated in the case of *Africa Management Communication International Limited Vs Joseph Mathenge Mugo & Anor* (2013) eKLR.
52. It is against the foregoing that I find the application dated the 28/07/2023 unmerited and dismiss it.
53. Costs will be in the cause.

Disposal Orders:

1. Orders Issued on 17/05/2023 are vacated
2. Application dated 28/07/2023 is unmerited and is dismissed.
3. Application dated 20/04/2023 is unmerited and is dismissed.
4. The costs of both applications shall be in the cause.

It is so ordered.



DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26TH DAY OF FEBRUARY 2024.

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MOGENI J

JUDGE

In the virtual presence of: -

Mr. Muhammed Billow holding brief for Ms. Asli for Defendant

Mr. Musyoka holding brief for Dr. Okubasu for the Plaintiff

Ms. Caroline Sagina: Court Assistant

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MOGENI J

JUDGE

