



Efficient Dynamics & Supplies Limited v Gret Café' Limited (Environment & Land Case E006 of 2023) [2024] KEELC 773 (KLR) (21 February 2024) (Ruling)

Neutral citation: [2024] KEELC 773 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E006 OF 2023
JA MOGENI, J
FEBRUARY 21, 2024**

BETWEEN

EFFICIENT DYNAMICS & SUPPLIES LIMITED PLAINTIFF

AND

GRET CAFÉ' LIMITED DEFENDANT

RULING

1. This ruling is in respect of four applications one dated 11/07/2023, 28/07/2023, 8/08/2023 and 26/09/2023. There is the main application that gave rise to the subsequent applications dated 11/07/2023. Then there are the two applications dated 28/07/2023 and one dated 26/09/2023 by the defendant and the interested party respectively then we have one other filed by plaintiff herein where he filed a chamber summons and a Notice of Motion both dated 08/08/2023.
2. For good order, it was agreed that all these applications which involve the same subject matter and almost the same parties to be dealt with concurrently. Nonetheless, for clarity sake, the Honorable Court has undertaken to treat each of these applications separately as possible while framing out issues as distinctly as possible.
3. Now the main application dated 11/07/2023 filed by the plaintiff gave rise to the plethora of application pursuant to Section 1A, 1B, and 3A of the *Civil Procedure Act*, Order 40 Rule 2 (1) and (4) and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and other enabling provisions of the law seeking the following orders:
 - a. Spent
 - b. That pending the inte partes hearing and determination of this application, a quia timet injunction be and is hereby issued restraining the Defendant/Respondent whether by themselves, their employees, servants and agents from carrying on any acts that directly and/or indirectly interfere with the Plaintiff/Applicant's peaceful and quiet enjoyment of the



demised premises and from further interrupting the Plaintiff/Applicant's business, whether by blocking the frontage and/or usage of the demised premises being LR Number 3734/843 situate off James Gichuru Road.

- c. That pending the inter partes hearing and determination of this application, a mandatory injunction be and is hereby issued ordering the Defendant/Respondent to immediately, and in any case not later than 24 hours after the issuance of this order, to remove its signboard, signages, tools, machines, generators, cars, sand and gravel dumped in and around the demised premises to immediately allow the Plaintiff/Applicant unhindered and unconditional access to the suit property being LR Number 3734/843 situate off James Gichuru Road.
- d. That pending the inter partes hearing and determination of this application, a temporary injunction be and is hereby issued restraining the Defendant/Respondent whether by themselves, their employees, servants and agents from any further interruption of the quiet possession and peaceful enjoyment of the suit property, including but not limited to removing any of the properties of the Plaintiff/Applicant from the suit property being LR Number 3734/843 and from further trespassing and/or gaining entry to the said premises without prior notice to and consent of the Plaintiff/Applicant.
- e. That pending the inter partes hearing and determination of the main suit, a quia timet injunction be and is hereby issued restraining the Defendant/Respondent whether by themselves, their employees, servants and agents from carrying on any acts that directly and/or indirectly interfere with the Plaintiff/Applicant's peaceful and quiet enjoyment of the demised premises and from further interrupting the Plaintiff/Applicant's business, whether by blocking the frontage and/or usage of the demised premises being LR Number 3734/843 situate off James Gichuru Road.
- f. That pending the inter partes hearing and determination of the main suit a mandatory injunction be and is hereby issued ordering the Defendant/Respondent to immediately and in any case not later than 24 hours after the issuance of this order, to remove its signboard, signages, tools, machines, generators, cars, sand and gravel dumped in and around the demised premises to immediately allow the Plaintiff/Applicant unhindered and unconditional access to the suit property being LR Number 3734/843 situate off James Gichuru Road.
- g. That pending the hearing and determination of the main suit, an injunction be and is hereby issued restraining the Defendant/Respondent whether by themselves, their employees, servants and agents from any further interruption of the quiet possession and peaceful enjoyment of the suit property, including, but not limited to removing any of the properties of the Plaintiff/Applicant from the suit property being LR Number 3734/843 and from further trespassing and/or gaining entry to the said premises without prior notice to and consent of the plaintiff/applicant.
- h. That if the defendant fails to comply with the timelines in (f) above, this Honorable Court be pleased to grant an order to the Plaintiff/Applicant pending the hearing and determination of the main suit to remove its signboard, signages, tools, machines, generator, cars, sand and gravel dumped in and around the demised premises and deliver them to Muthangari Police Station for safe custody.
- i. That this Honorable Court directs the Officer Commanding Muthangari Police Station to ensure compliance and to provide security for the enforcement of the orders.
- j. That costs of this application be in the cause.



4. The grounds of the application are on the face of it and are reiterated by the 21 paragraphed affidavit of Martin Njenga sworn on 11/07/2023.
5. The application is opposed by the defendant/respondent who filed the application dated 28/07/2023 in opposition of the application dated 11/07/2023 and to the Ex Parte Orders dated 11/07/2023, under Order 40 rule 7 of the Civil Procedure Rules, Sections 80 and 3A of the [Civil Procedure Act](#) and Order 45 rule 1 of the Civil Procedure Rules. The Interested Party in the said application seeks the following orders:
 - a. Spent
 - b. That in the first instance, the Honorable Court be pleased to issue a stay of the execution of the Orders issued on the 18th July 2023 pending the hearing of this application.
 - c. That the Interested Party RNN MOTORS LIMITED be enjoined in this suit.
 - d. That this Honorable Court be pleased to set aside, review and/or vary its orders issued on the 18th July 2023 pending hearing and determination of the Plaintiff Application.
 - e. That the costs of this application be provided for.
6. The applicant enumerated 1-18 grounds contained on the face of the application.
7. The application is opposed by the plaintiff/respondent.
8. The third application was filed by the plaintiff dated 08/08/2023 under Certificate of urgency seeking the following orders:
 - a. Spent
 - b. That a declaration do issue that the Defendant/Respondent is in contempt of the Order of this Honorable Court made on 18th July 2023 and 31st July 2023 respectively.
 - c. That a declaration do issue that the Defendant/ Respondent director, namely John Malogo Ndiritu is in contempt of the Order of this Honorable Court made on 18th July 2023 by dint of his explicit refusal to:
 - i. Restrain his employees, servant and agents from carrying out any acts that directly and/or indirectly interfere with the Plaintiff/Applicant's peaceful and quiet enjoyment of the demised premises and from further interrupting the Plaintiff/Applicant's peaceful and quiet enjoyment of the demised premises and from further interrupting the Plaintiff/Applicant's business, whether by blocking the frontage and/or usage of the demised premises being LR Number 3734/843 situate off James Gichuru Road once the Plaintiff/Applicant regained access and re-entry to its offices of 28th July 2023.
 - ii. Restrain his employees, servant and agents from any further interruption of the quiet possession and peaceful enjoyment of the suit property, including but not limited, to removing any of the properties of the Plaintiff/Applicant from the suit property being LR Number 3734/843 and from further trespassing and/or gaining entry to the said premises without prior notice to and consent of the Plaintiff/Applicant once the Plaintiff/Applicant regained access and re-entry to its offices on 28th July 2023.
 - d. That a declaration do issue that the Defendant/Respondent director, namely John Malogo Ndiritu is in contempt of the Order of this Honorable Court made on 31st July 2023 by dint of



him deliberately directing his employees, servants and agents to ensure that the status quo as at 28th July, 2023 being that the Plaintiff/Applicant was already in possession of the suit property be maintained pending the inter partes hearing on 9th October 2023.

- e. That the Honorable Court be pleased to direct the Officers Commanding Muthangari Police Station to arrest the Defendant/Respondent's director namely John Malongo Ndiritu and produce him to this Honorable Court to answer charges of disobedience of this Honorable Court orders issues on 18th July 2023 and 31st July 2023 respectively.
 - f. That consequently, the Defendant/Respondent's director namely John Malongo Ndiritu be committed to civil jail for a period of six (6) months or such other period as this Honorable Court may determine for contemptuous disobedience of the orders of this Honorable Court made on 18th July 2023 and 31st July 2023.
 - g. That the Defendant/Respondents do purge the contempt fully by complying with the Orders of this Honorable Court made on 18th July 2023 and 31st July 2023 respectively.
 - h. That this Honorable Court do make such further or other orders and issue such directions as will expeditiously ensure the Defendant/Respondent's compliance with the Orders of this Honorable Court made on 18th July 2023 and 31st July 2023 respectively.
 - i. That the costs of this Application be awarded to the Plaintiff/Applicant.
9. The Chamber Summons dated 8/08/2023 sought to have the application dated 8/08/2023 admitted alleging that the defendant/respondent has disobeyed the orders issued by this Honorable Court on 18/07/2023 and 31/07/2023 stating that the status quo prevailing at the time of filing the application that led to the issuance of the orders of 18/07/2023 to be respected.
 10. The grounds of the applications are contained on the face of the applications and I see no need of reproducing them here.
 11. The two applications are opposed by the defendant/respondent Director Joh Malogo who filed a replying affidavit dated 15/12/2023 denying that he disobeyed court orders and stated that the application of the plaintiff is devoid of merit since the defendant was issued with orders by the court dated 31/07/2023 which by interpretation meant that the ex parte orders of 18/07/2023 had been stayed and the status quo maintained at the time of filing the review application by the defendant. A copy of the orders dated 31/07/2023 were attached and marked "JM1".
 12. Further the defendant stated that the plaintiff had not effected on the defendant served of the orders which he had obtained and the same were obtained through misrepresentation of facts. He also averred that the plaintiff had been arrested because he never showed up at the suit premises.
 13. He further averred that his interpretation of the Orders issued by the court was that the defendant was in possession of the suit premises since the plaintiff was already in police custody for having destroyed the suit premises and a report was made and recorded as OB No. 21/11/7/23. Accordingly, that the issue of possession of the suit property was settled by the summons to the OCS Muthangari to whom orders were issued.
 14. On his part, the plaintiff filed a replying affidavit sworn on 8/10/2023 through its director Martin Njenga who averred that the Interested Party is complicit and an active participant in the illegal acts of the Defendant/Respondent of trespass despite there being an active lease dated 28/10/2022 for LR 3734/843 which is the suit property.



15. That the Interested Party being a contemnor has blocked entrance to the suit property and erected strange signboards in total disregard of the court order dated 18/07/2023 and affirmed on 25/09/2023.
16. Further that there are two application filed for joinder one dated 28/07/2023 by the respondent and another dated 26/09/2023 by the Interested Party both seeking similar orders. That the application is frivolous and that it was filed on 26/09/2023 immediately the court issued the orders dated 25/09/2023 affirmed the orders earlier issued dated 18/07/2023.
17. The application is an act by the defendant/respondent to steal a match by seeking similar orders which are yet to be granted through the application but by introducing a new firm of advocates for the interested party.
18. That there is a lead for the Interested Party issued while the defendant is full aware that there is an existing lease dated 28/10/2022 which has never been terminated. A copy marked as "MN-4" of the lease was annexed. According to the plaintiff therefore, the lease for the interested party was introduced to cause confusion through the back door. That the application dated 26/09/2023 should therefore be dismissed with costs.
19. In response, the defendant/respondent filed a supplementary affidavit to the application dated 18/07/2023 and to the plaintiff's replying affidavit dated 8/10/2023 and stated that the only way they could challenge an ex parte order was by seeking review of the application and not via replying affidavit
20. That the court needs to address the conduct of the parties leading to issuance of the Ex Parte interim orders. Since the pleadings were never served but only the Order was served on 28/07/2023 at 3.45 p.m in a bid to defeat justice.
21. He averred that the plaintiff abandoned the suit premises for failure to pay rent in April 2023 and then the plaintiff filed this suit on 11/07/2023 and was directed to serve defendants but did not comply leading to the ex parte hearing of 18/07/202. That the last time the plaintiff paid rent was March 2023 but he stayed in the suit premises for three (3) months and consumed rent deposit for April, May and June 2023 and so on 1/07/2023 the plaintiff was not a tenant and therefore the defendant re-entered the premises and leased them to the Interested Party.
22. Plaintiff has used the premises for illegal purposes leading to being summoned to CID. The defendant attached a copy of summons marked as "JM1" dated 10/08/2023. As a result, the plaintiff is now in hiding and cannot access the suit premises. That since the plaintiff is in breach of the lease agreement having failed to pay rent he has abandoned the suit premises from 1/07/2023. That if any recourse is available to him it is only damages and not injunctive orders.
23. That the plaintiff abandoned the suit premises in April 2023 with no single asset within and that he defendant was entitled to repossession and therefore the orders of 18/07/2023 should be set aside and or reviewed.
24. On their part the defendant/respondents in response to the application dated 12/07/2023 filed an application dated 28/07/2023 seeking stay of execution of the Orders issued on the 18/07/2023, joinder in the suit of the Interested Party, and that the court sets aside, reviews and or varies its orders.
25. There is yet another application dated 26/09/2023 filed by the Interested Party seeking orders as captured here below:
 - a. Spent
 - b. That RNN MOTORS LIMITED be enjoined in this suit as an interested party



- c. That in the first instance the Honorable Court be pleased to issue a stay of the execution of orders issued on 18th of July 2023 and further orders as affirmed on 25th of September 2023 pending the hearing and determination of this application.
 - d. That this Honorable Court be pleased to set aside, review and or vary its orders issued on the 18th of July 2023.
 - e. That the cost of this application be provided for.
26. This application is equally opposed by the plaintiff/respondent. In support of the application The Interested Party also filed a supporting affidavit sworn by Antony K Migwi dated 26/09/2023. The gist of the supporting affidavit is that the Interested Party had a lease to the suit property and he annexed it and marked it as “AKM2” and stated that any orders issued will affect the Interested Party.
27. Thus that the interim orders issued on 18/07/2023 and affirmed on 25/09/2023 has the effect of terminating his business by way of eviction from the suit property. That the interested party was not enjoined nor heard prior to grant of the orders yet they should have been heard before grant of the said orders.
28. From the pleadings seen the ex parte orders were issued through misrepresentation of facts since the interested party is the current lease in possession as per the lease agreement dated 28/06/2023 and was in possession all this time so orders issued on 18/07/2023 should be set aside.
29. That the interested party invites the court to visit the ground to confirm the correct position.
30. The court gave directions on the disposal of the three applications on 30/10/2023 after the parties had agreed to canvass the three applications by way of written submissions. The parties filed their written submissions the defendant filed its submissions dated 15/12/2023 to the applications dated 28/07/2023 and 08/08/2023.
- The Interested party filed their submissions dated 19/12/2023 and the plaintiff on their part filed their submissions dated 20/11/2023 to the applications dated 11/07/2023, 28/07/2023, 8/08/2023 and 26/09/2023.

Analysis and Determination

31. I have read keenly and carefully considered the pleadings, annexed evidence and submissions made by the three parties who filed applications before this court. I note that the outstanding prayers made vide the applications are those of temporary quia timet injunction, mandatory injunction, to find the defendant/respondent to be in contempt of court orders issued on 18/07/2023, prayer for joinder and review, stay and or variation of the court orders issued on 18/07/2023.
32. In the circumstances therefore firstly, I have to consider the circumstances of granting mandatory and temporary injunctions.
33. The principles for the grant of temporary and mandatory injunctions are settled. The requirements for the grant of temporary injunctions are stated in *Giella vs Cassman Brown & Co Ltd*, (1973) EA 358 , and that these are that the applicant must establish a prima facie case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience.
34. For the grant of mandatory injunctions, the principles were set out by the Court of Appeal in *Kenya Breweries Ltd and another v Washington Okeyo* (2002) 1 E.A. 109 wherein it was held that that there must be special circumstances shown over and above the establishment of a prima facie case for a



mandatory injunction to issue, and even then only in clear cases where the court thinks that the matter ought to be decided at once.

35. Lastly, as to what constitutes a prima facie case, the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] eKLR stated as follows:

“a prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case 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.”

36. The plaintiff in making the application for grant of a quia timet injunction was able to get an order issued on 18/07/2023. This order was to maintain the state of affairs existing at the time of giving of the order. Accordingly, the plaintiff/applicant got temporary orders which were reaffirmed on 25/09/2023 until the application was heard and determined and the OCS Muthangari was directed to ensure the orders were implemented.

37. Before the application was heard the plaintiff filed an application for contempt dated 08/08/2023 stating that the defendant had evicted the plaintiff from the suit property and entered into a new lease dated 28/06/2023 whereas there was an existing lease dated 28/10/2023.

38. Additionally, there is an application for joinder by the interested party dated 26/09/2023.

39. In contempt proceedings, proof must be made beyond the standard in civil cases as contempt is quasi-criminal. The burden of proof lies on the Applicant. In the case of *Gatharia K. Mutikika –v- Bahirini Farm Ltd* (1985)KLR 227, it was held as follows:

“The courts take the view that where the liberty of the subject is or might be involved in breach for which the alleged contemnor is cited must be precisely defined. A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved....it must be higher than proof on a balance of probabilities almost but not exactly, beyond reasonable doubt. ”

40. Therefore, an Applicant in an application for contempt must prove beyond peradventure that the respondent is guilty of contempt. The power to commit for contempt is one to be exercised with great care and can only be granted in clearest of cases.

41. In this case, the defendant/respondent is alleged to have disobeyed the orders issued by the court on 18/07/2023 and reaffirmed on 25/09/2023. It is the plaintiff’s contention that the court issued interim orders until the application was heard and determined. Both parties were in court on 25/09/2023 but the defendant/respondent had entered into a new lease agreement with the interested party despite there being a subsisting lease between the plaintiff and the defendant which was signed on 22/10/2022 is to expire on 31/01/2028.

42. The plaintiff further contends that the defendant sought orders on 31/07/2023 and then ignored orders issued on 18/07/2023. In the orders issued by this court on 31/07/2023 following an application filed by the applicant the court stated thus:

“4. THAT the court directs that the status quo prevailing as at the date of filing of the application be preserved pending the inter partes hearing which shall be on 9/10/2023”.



43. The order above is very clear since the court had granted through its order of 18/07/2023 and reaffirmed on 25/09/2023 the following prayers which had not and have not been set aside:

a.

b. That pending the inter partes hearing and determination of this application, a quia timet injunction be and is hereby issued restraining the Defendant/Respondent whether by themselves, their employees, servants and agents from carrying on any acts that directly and/or indirectly interfere with the Plaintiff/Applicant's peaceful and quiet enjoyment of the demised premises and from further interrupting the Plaintiff/Applicant's business, whether by blocking the frontage and/or usage of the demised premises being LR Number 3734/843 situate off James Gichuru Road.

c.

d. That pending the inter partes hearing and determination of this application, a temporary injunction be and is hereby issued restraining the Defendant/Respondent whether by themselves, their employees, servants and agents from any further interruption of the quiet possession and peaceful enjoyment of the suit property, including but not limited to removing any of the properties of the Plaintiff/Applicant from the suit property being LR Number 3734/843 and from further trespassing and/or gaining entry to the said premises without prior notice to and consent of the Plaintiff/Applicant.

SUBPARA i.

That this Honorable Court directs the Officer Commanding Muthangari Police Station to ensure compliance and to provide security for the enforcement of the orders.

44. The orders of 31/07/2023 were not in any way reviewing the orders in existence they were upholding the orders in existence since at the time of filing the application for 31/07/2023 the status quo was in respect of the orders granted on 18/07/2023.

45. Further the orders of 18/07/2023 were reaffirmed on 25/09/2023 when the Counsel for the defendant was present in court. It is telling that the defendant chose not to file any response to the application dated 08/08/2023.

46. It is clear that the defendant was aware of the orders issued by this court and the orders of status quo issued later did emphasize that since there was already a conservatory orders existing at the time of filing the application that is what had to be preserved.

47. I have perused the documents filed by the plaintiff and noted that the defendant was not served with the order of 18/07/2023. Further from the defendant's submissions it has emerged that there was no service of the order which was granted ex parte.

48. Courts will not hesitate to punish a person who wilfully disobeys a court order. It has been held by courts time and again that the objective of the law on contempt is to protect the dignity of the court and uphold the rule of law. Anybody served with a court order is supposed to move the court in a respectful manner to explain why he is unable to comply or to seek stay or setting aside of such orders. There is no other option available to a person who is served with a court order. The person must abide unless there is an order either staying or setting aside those orders.

49. In the case of Shimmers Plaza Limited Vs. National Bank of Kenya Ltd (2015) eKLR the court held as follows: 'the notice of the order is satisfied if the person or his agent can be said to either have been present when the order was given or made; or was notified of its terms by telephone, email or otherwise.



In our view, 'otherwise' would mean any other action that can be proved to have facilitated the person having come into knowledge of the terms of the judgement and/or order. This would definitely include a situation where a person is represented in court by counsel. Once the Applicant has proved notice, the Respondent bears an evidential burden in relation to wilfulness and mala fides disobedience.'

50. I note there are three elements that must be proved in contempt proceedings:

SUBPARA a.

Applicant must demonstrate terms of orders

SUBPARA b.

Applicant must demonstrate knowledge of terms by respondent

SUBPARA c.

Applicant must demonstrate failure of respondent to comply with court order.

51. In the instant case, I note that the Order that was purportedly disobeyed was granted ex parte hence with the officials of the defendant/respondent not participating when the same was granted. Further, the application dated the 11/07/2023 has never been heard inter partes and determined. The Defendant/Respondent directors were never served directly which fact has not been controverted by the Plaintiff. Further, the defendant submitted that the plaintiff presented a false affidavit of service and this has also not been rebutted by the plaintiff.

52. Contempt proceedings are criminal in nature and hence the burden of proof should be on the Plaintiff to prove that the same is ongoing. I note from the various affidavit of service, there is no indication whether the Court Order was served accompanied with the mandatory Penal Notice.

53. In the relying on the authorities cited I find that in the current circumstances and with the facts presented, I decline to allow the application dated the 08/08/2023 at this juncture.

54. Applying the tests for the grant of temporary and mandatory injunctions as explained in the foregoing I note that the claim by plaintiff to the suit property is based solely on the argument that there is a legal lease in existence which was executed on 28/10/2022 and was set to expire on 31/01/2028 yet the defendant has evicted the plaintiff from the leased property and locked them out of the suit premises. Infact the defendant had executed a new lease agreement with the interested party on 28/06/2023.

55. The principles for granting a temporary injunction are set out in the case of Giella vs Cassman Brown (1973) EA 358. which are: that firstly, 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 adequately be compensated by an award of damages, and thirdly, if the Court is in doubt, it will decide an application on a balance of convenience.

56. On the other hand, the principles for granting a mandatory injunction are different from a prohibitory injunction in the sense that an applicant for mandatory injunction must prove his case on a standard higher than the standard in prohibitory injunctions. This is because issuance of a mandatory injunction in some circumstances concludes a case at the interlocutory stage.

57. For the grant of mandatory injunctions, the principles were set out by the Court of Appeal in Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109 wherein it was held that that there must be special circumstances shown over and above the establishment of a prima facie case for a mandatory injunction to issue, and even then only in clear cases where the court thinks that the matter ought to be decided at once.



58. As to what constitutes a prima facie case, the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] eKLR stated as follows:

“a prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case 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.”

59. The plaintiff in this regard relied on its argument and submissions that the defendant has violated the terms of the lease agreement which required under the Further Conditions in the lease agreement that the lessor was to issue a written notice where the lessee breached the requirements of the lease requiring the lessee to remedy the same. In the event the lessee failed to remedy the said failure within 2 days upon receiving the written notice (emphasis mine), the lessor would terminate the lease. The lessor would then upon termination re-enter the premises which would revert to the lessor and who may take any action appropriate relating to the leasing of the suit property including renting it out to a new party.

60. On his part the defendant alleged that the plaintiff had violated the terms of the lease but there was no evidence presented that the defendant who is the lessor issued the required written notice that is provided for in the lease document. Infact the plaintiff states that the defendant received the June rent in July and then went ahead to lock him out of the suit premises.

61. Referring to the application of those principles, the Court of Appeal in *Kenya Airport Authority – vs- Paul Njogu Muigai & 2 others*, Civil Application No. NAI 29/97 (UR) stated that an order which results in granting a major relief claimed in the suit, which may not be granted at the final hearing, ought not to be granted at an Interlocutory stage. Again referring to the principle in the *Shepherd Homes Case 1971 ICH 34* as adopted in the case of *Locabail International Finance Ltd Mustil LJ* said at page 906.

“The matter before the court is not only an application for a Mandatory Injunction, but it is an application for a Mandatory Injunction which, if a granted, would amount to the grant of a major part of the relief claimed in the action. Such an application should be approached with caution and the relief granted only in a clear case...”

62. It is the Plaintiff’s contention that the lease agreement entered into between the parties was still in existence and is set to expire on 31/01/2028 and that the Defendant’s continued occupation of the suit premises amounts to trespass. The plaintiff maintains that its lease is still running and the same has not been terminated in accordance with the Lease Agreement.

63. In my considered view, and having taken into consideration the principles outlined for the grant of a Mandatory Injunction, and having applied the same to this case, the Plaintiff’s case herein does not pass the tests outlined. From the facts that have emerged, it is apparent that this is not a case that one can regard as plain and clear and which the Court can decide at once. Ordering the Defendant to vacate from the Suit Premises at this stage will be tantamount to making a final decision in the case before the main issues are heard and determined in the main Suit, or the Suit is otherwise determined in summary manner. In my view, granting the orders sought at this stage would leave nothing further to await in the main suit.

64. For the interlocutory orders sought, the test applicable when considering an application for an interlocutory injunction is well settled and I need not belabour it. Such an applicant is required to establish a prima facie case with a probability of success. Even where a prima facie case is established, an injunction will not issue if damages are an adequate remedy in the circumstances of the case. If



the court is in doubt as to whether damages will be an adequate compensation, then the court will determine the matter on a balance of convenience. All three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. See *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR.

65. As to what constitutes a prima facie case, we need look no further than the decision of the Court of Appeal in *Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others* (2003) KLR 125 where the court defined the term as follows:

... 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... [it] 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 success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.

66. The plaintiff has indicated they that they are protected by the lease agreement and in particular Clauses 7(1) of the Lease agreement and Section 65 (1) (a) of the *Land Act* No. 3 of 2012.
67. The defendant deny that the plaintiff has honoured their part in the lease agreement having failed to make regular payment of rent as and when it fell due. They however, do not deny that there was a lease agreement with the defendant but they aver that now they have a new agreement with the interested party and that the lease with plaintiff has been terminated by the actions of the plaintiff. However, the defendant's position is that he has no intention of evicting the interested party from the premises.
68. I am inclined to consider that the existence of a lease agreement which is set to expire on 31/01/2028 which is about four years away as evidence sufficient to support the plaintiff's prima facie case against the defendant. However, I must stress that conclusive proof of the issue is dependent on the production of evidence at the main trial.
69. At present it is clear from the defendant's side that the interested party is in possession and that it was the plaintiff's duty to show that he was evicted unfairly from the suit property despite fulfilling the requirements of the existing lease. This allegation will also be expected to be proved by way of evidence at the hearing of the main suit.
70. Though the denial by the defendant of receipt of rent under the agreement with the plaintiff is denied, this court is also aware of the need to put such a crucial issue to the test of evidence before reaching a conclusive determination of the same.
71. It is worth noting that the orders sought by the plaintiff seek to inhibit the defendant or its employees, servant and its agents from directly and/or indirectly interfering the plaintiff's/applicant's peaceful and quiet enjoyment of the demised property and immediate unhindered and unconditional access.
72. In the end this court finds that the plaintiff has not established a prima facie case with a probability of success against the defendant. There is some doubt as to whether the plaintiff would suffer any loss that cannot be compensated for by way of damages. I need not examine the other grounds since there is no prima facie case established.
73. The next application for determination is the one dated 28/07/2023 filed by the defendants seeking stay of execution, review, variation and setting aside of the order dated 18/07/2023 and joinder by the Interested Party to the suit. I will only address the issue of stay first.



74. The principles for grant of orders stay are well settled and are anchored on Order 42 rule 6 of the Civil Procedure Rules. Under this Order, the court must be satisfied that substantial loss may be occasioned if the order of stay is not granted, the application must be made without undue delay and the court may order for security for the performance of such decree or order as may ultimately be binding on the applicant.
75. However, the application dated 28/07/2023 is one where there is no pending appeal. My perusal of the documents filed has not chanced on any notice of appeal having been filed to prove intention to appeal, no appeal has been preferred and there is no ground for stay of execution.
76. The court in the case of Nairobi Court of Appeal Civil Application NO. 78 of 2011 Equity Bank Limited=vs= West Link MBO Limited held that:-
- “..... An application for stay that has been filed and where no actual appeal has been lodged there must be an intention of appeal which is manifested by lodging a notice of appeal in my view, the notice of motion is predicated on an appeal. It is not a standalone matter”.
77. I have also looked at the supporting documentation and is of the view that the applicant has not met the threshold as provided for under order 42 Rule 6 of the Civil Procedure Rules. This alone shows the lack of seriousness on the part of the applicant’s counsel to pursue this matter. Counsel was given an opportunity to present his client’s application but failed to do so. The submissions filed do not even make a case for stay.
78. The applicant has not demonstrated that they will suffer substantial loss if the stay of execution order is not granted. These ingredients are necessary when seeking such orders.
79. The application dated 28/07/2023 has addressed the same issues as the application dated 26/09/2023 namely setting aside, varying and/or review of the order dated 18/07/2023 and joinder of the interested party. I will therefore address the two applications jointly because of duplication of prayers in the applications.
80. The applicable law on setting aside of orders and the provisions of section 80 of the [Civil Procedure Act](#) and Order 45 Rule 1 of the Civil Procedure Rules, which avail an opportunity to any person who feels aggrieved by a decree or order of the court to apply to have the said decree or order varied or set aside. Order 45 Rule 1 (b) of the Civil Procedure Rules in addition spells out conditions that must be met in an application for review of a decree or order as follows:
- c. There must be discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant’s knowledge or could not be produced by him at the time when the decree was passed or the order made,
 - d. mistake or error apparent on the face of the record,
 - e. or for any other sufficient reason,
 - f. the application must be made without unreasonable delay.
81. The Defendant’s main arguments in its pleadings were that the orders of this court should be set aside and/or reviewed on the grounds that there was material non-disclosure on the part of Plaintiff that they were in possession leading to the issuance of the said orders, and that the defendant was not given an opportunity to be heard.



82. I have perused the court record, and note that the orders made by this Court on 18/07/2023 were interim after the court was satisfied that the defendant was served but chose not to file any response. The court reaffirmed the interim orders on 25/09/2023, to await the final ruling on the application after giving the parties a chance to be heard.
83. Under the provision of Rule 25 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (What is now terms as “The Mutunga Rules”) provides as follows:
- “Setting Aside, Varying or Discharge – An Order issued under Rule 22 may be discharged, varied or set aside by the Court either on its own motion or an application by a party dissatisfied with the order”.
84. It means this court has discretionary powers to discharge, vary or set aside its own orders either on its own motion (“Suo Moto”) or on an application by a party. In that case the defendant was within their right to have moved court under the filed application dated 28/07/2023 seeking the orders above stated.
85. A clear reading of the provisions of review and setting aside indicate that Section 80 of the *Civil Procedure Act* is on the power to do so while Order 45 sets out the rules on doing it.
- Section 80 provides:- any person who considers himself aggrieved:-
- a. By a Decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
 - b. By a decree or order from which no appeal is allowed by this Act, may apply for a review of Judgement to Court which passed the decree or made the Order and the Court may make such order thereto.
- Order 45 (1). States as follows:- Any person considering himself aggrieved:-
- a. By a Decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
 - b. By a decree or order from which no appeal is allowed by this Act, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of Judgement to the Court which passed the decree or made the order without unreasonable delay”.
86. From the stated provisions, it is quite clear that they are discretionary in nature. Thus, the unfettered discretion must be exercised judiciously, not capriciously and reasonably.
87. The power of review is available only when there is an error apparent on the face of the record. Indeed, this Court emphasizes that a review is not an appeal. The review must be confined to error apparent on the face of the record and re – appraisal of the entire evidence or how the Judge applied or interpreted the law would amount to exercise of Appellate Jurisdiction, which is permissible.



88. Discussing the scope of the review, the Supreme Court of India in the case of “Ajit Kumar Rath – Versus – State of Orisa, 9 Supreme Court Cases 596 at Page 608. had this to say:-

“The power can be exercised on application of a person on the discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge or could not be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier; that is to say the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression “any other sufficient reason”means a reason sufficiently analogous to those specified in the rule...”

89. In the case of “Nyamongo & Nyamongo – Versus – Kogo” (2001) EA 170 discussing what constitutes an error on the face of the record, the Court rendered itself as follows:-

“An error apparent on the face of the record cannot be defined or exhaustively, there being an element of definitiveness inherent in its very nature and it must be determined judicially on facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning on points where there may conceivably in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong is certainly no ground for review though it may be one for appeal.....”

90. Additionally, in his authoritative write up, Sir. Dinashah Fardunji Mulla in “Code of Civil Procedure” 18th Edition (a writing on Order 47 Rule 1 of the Civil Procedure Code of India), (the equivalent of our Order 45 Rule 1), states that “..the expression “any other sufficient reason”means a reason sufficiently analogous to those specified in the rule.

91. Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out....would amount to an abuse of the liberty given to the tribunal under the Act to review its Judgement.

92. Further, there is another very useful guidance in the matter of “Tokesi Mambili and Others – Simion Litsanga Civil Appeal No. 45 of 2003 where the court held as follows:-

“In order to obtain a review an applicant has to show to the satisfaction of the Court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason”.

93. Applying the above principles to the instant application, this Courts makes a holding being fully satisfied that in indeed there was an error apparent, on the face of the record while delivering the ruling and order of 18/07/2023 since the interested party was already on the suit property but the plaintiff



did not enjoin them to the application. It is imperative that the order of 18/07/2023 and affirmed on 25/09/2023 has to be reviewed and set aside.

94. Having found that the order of 18/07/2023 was issued without considering the joinder of the interested party who was already on the suit property a fact that both the defendant and the plaintiff do not dispute, I see no point in belaboring the point on the issue of joinder. The Interested Party must of necessity be enjoined.
95. The Interested Party has been defined by Black's Law Dictionary, 9th Edition as:-
A party who has a recognizable stake (and therefore standing) in the matter".
96. Further in Rule 2 of *the Constitution* of Kenya (Protection of the Fundamental Rights and Freedoms) Practice and Procedure Rules 2013, 'Interested Party' is defined as:-
"A person or entity that has identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation".
97. Since the interested party has an alleged lease agreement which both the defendant and plaintiff have attested to, I am persuaded that the interested party has an equitable interest or recognizable stake in the suit property and thus a legal interest in the proceedings.
98. Order 1 Rule 10(2) of the Civil Procedure Rules provides that:-
(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added."
99. The Court will rely on the case of *JMK...Vs...MWM & Another* (2015) eKLR, where the Court of Appeal held:-
"It is not in dispute at all that when the Appellant applied to be made a party to the proceedings on 10th June 2014, there were no pending proceedings before the Industrial Court to which he could have been made a party, the Judgment having been delivered on 30th May 2014.
The Appellant however had not applied solely to be added as a party to the suit, he had also applied for review and setting aside of the Judgment of the court to give him an opportunity to be heard. On other words, the Appellant was effectively applying for review and setting aside of the Judgment of the Industrial court and an order for de novo hearing of the suit, which would afford him an opportunity to be heard".
100. The Interested Party has thus been affected by the order issued on 18/07/2023 while in occupation of the suit property. The proposed Interested Party is thus a necessary party herein and the Court finds and holds that they have persuaded the court on their necessity in this proceedings and thus they are now enjoined as Interested Parties herein.



101. Since the court already addressed the application for review which was also sought by the interested party the court will adopt its finding made in the application dated 28/07/2023. The order made on 18/07/2023 shall be reviewed.

Disposal Orders

1. The application dated 28/07/2023 is merited in terms of prayer 2 and 3 and all its consequential orders
2. The application dated 08/08/2023 is found to be un merited
3. The application dated 26/09/2023 is merited in terms of prayer 2 and 4 and the Interested Party is enjoined to this suit and granted 14 days from the date of this ruling to file their response to the application dated 11/07/2023 and serve the applicant.
4. The application dated 11/07/2023 shall be mentioned on 4/03/2024 for further directions on disposal of the application.
5. The costs of this application shall abide the cause.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 21st Day FEBRUARY 2024.

.....

MOGENI J

JUDGE

In the virtual presence of; -

Mr.Githumi for Plaintiff/Applicant

Ms. Chege for the proposed Intended Interested Party

Ms. C. Sagina: Court Assistant

.....

MOGENI J

JUDGE

