



REPUBLIC OF KENYA



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Telkom Kenya Limited v Roka Trading Company Limited & 5 others (Environment and Land Case Civil Suit E65 of 2022) [2024] KEELC 725 (KLR) (15 February 2024) (Ruling)

Neutral citation: [2024] KEELC 725 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND CASE CIVIL SUIT E65 OF 2022
LA OMOLLO, J
FEBRUARY 15, 2024

BETWEEN

TELKOM KENYA LIMITED PLAINTIFF

AND

ROKA TRADING COMPANY LIMITED 1ST DEFENDANT

JOAN WANJIKU KAMAU 2ND DEFENDANT

CHARLES KAHUGI NJOROGE 3RD DEFENDANT

JANET WANJIKU NJOROGE 4TH DEFENDANT

RACHEL EVONNE MUTHONI NJOROGE 5TH DEFENDANT

NJOROGE KAHUGI 6TH DEFENDANT

RULING

1. This ruling is in respect of the Plaintiff's/Applicant's Notice of Motion application dated 16th November, 2022 which is expressed to be brought under Section 1A, 1B, 3 and 3A of the [Civil Procedure Act](#), Order 40 Rule 1 and Order 51 Rule 1 of the [Civil Procedure Rules, 2010](#).
2. The Application seeks the following orders:
 - a. Spent
 - b. That this Honourable Court be pleased to issue an interim injunction restraining the Respondents by themselves, servants, agents and/or employees or whomsoever acting on their behalf from removing, interfering, destroying or in any other way dealing with goods in, or entering into, taking possession of, vandalizing, demolishing, destroying or in any way interfering with the property known as Nakuru/Municipality/Block 5/19 together with the development thereon pending the hearing of this Application inter partes.



- c. That this Honourable Court be pleased to issue an interim injunction restraining the Respondents by themselves, servants, agents and/or employees or whomsoever acting on their behalf from removing, interfering, destroying or in any other way dealing with goods in, or entering into, taking possession of, vandalizing, demolishing, destroying, or in any way interfering with the property known as Nakuru/Municipality/Block 5/19 together with the development thereon upon the hearing and determination of this Application.
 - d. That this Honourable Court be pleased to issue an interim injunction restraining the Respondents by themselves, servants, agents and/or employees or whomsoever acting on their behalf from removing, interfering, destroying or in any other way dealing with goods in, or entering into, taking possession of, vandalizing, demolishing, destroying or in any way interfering with the property known as Nakuru/Municipality/Block 5/19 together with the development thereon pending the hearing and determination of the suit.
 - e. That this Honourable Court be pleased to issue an order directing the Officer Commanding Station (OCS), Nakuru Police Station and/or officers acting under his or her orders and/or directions to enforce the orders of the Honorable Court.
 - f. That the costs of this Application be provided for.
3. The application is based on the grounds on its face and supported by the affidavit sworn on 16th November, 2022 by one Thinwa Kagai and filed on 18th November, 2022.

Factual Background.

4. The Plaintiff instituted this suit vide the Plaint dated 16th November, 2022 and filed on 18th November 2022.
5. The Plaintiff seeks the following prayers:
 - a. A permanent injunctive order restraining the Defendants by themselves, servants, agents and/or employees or whomsoever is acting on their behalf from removing, interfering, destroying or in any other way dealing with goods in, or entering into, taking possession of, vandalizing, demolishing, destroying or in any way interfering with the property known as Nakuru/Municipality/Block 5/19 together with the development.
 - b. An order of specific performance compelling the Defendants to pay the outstanding rent arrears in the sum of Kshs 39,401,462.26 relation to Property known as Nakuru/Municipality/Block 5/19 and interest thereon from the date of the suit.
 - c. An order directing the Defendants to remedy damage caused as a result of vandalism to Property known as Nakuru/Municipality/Block 5/19 and interest thereon from the date of the suit.
 - d. General damages for breach of contract.
 - e. Costs of this suit.
 - f. Interest on a) to d) above from the date of filing suit until payment in full; and
 - g. Any other relief that this Honourable Court may deem fit and just to grant in the circumstances.



6. The matter came up in court on 21st September, 2023 and counsel for the Defendants requested to be granted 14 days to file a response to the application. The court scheduled the matter for 17th October, 2023 to confirm filing of a response by the Defendants.
7. On 17th October 2023, counsel for the for the Plaintiff informed the court that he has not been served with the Defendants response. The court directed that the application be heard by way of written submissions and scheduled the matter for mention on 14th November, 2023 to confirm filing of submissions.
8. On 14th November, 2023, counsel for the Plaintiff/Applicant informed the court that there was no response from the Respondents and that they had not served him with any submissions.
9. The application was then scheduled for ruling on 15th February, 2024.

The Plaintiff's/ Applicant's Contention

10. The Plaintiff/Applicant deposes that he is the Head of Facilities in the Applicant Company. He contends that by a lease agreement dated 4th December, 2017 ("Lease"), the Applicant leased the 1st Respondent 14,993 square feet on the ground, 1st, 2nd and 3rd floors in a development on the Property known as Nakuru/Municipality/Block 5/19 ("Property") for a term of 10 years commencing on 1st December, 2017.
11. He contends that the said Lease contained clauses defining the relationship between the Applicant and the 1st Respondent in relation to the Property including payment of rent and alterations to the Property.
12. He contends that in relation to payment of rent, the Third Schedule to the Lease provided that rent on the ground floor shall be Ksh 100 per square foot with an escalation of 7.5% biennially, while rent on the 1st, 2nd, and 3rd floors shall be Ksh 60 per square foot with an escalation of 7.5% biennially, commencing on 1st December, 2017.
13. The Plaintiff/Applicant contends further, that pursuant to clause 4.6 of the Lease, it was a condition that the 1st Respondent would use the Property in a reliable manner and would not commit any waste or make any addition or alteration whatsoever except in accordance with the provisions of the Lease which included first making an application to the Applicant for consent.
14. He contends that in utter disregard of the Lease, the 1st Respondent has been in breach of the terms of the Lease by continuously defaulting to pay rent on the Property with arrears of Ksh 39,401,462.26 as at 4th October, 2022.
15. The Plaintiff/Applicant contends that as a result of the continuous breach dating back to September 2019, the Applicant issued the 1st Respondent with several demands for it to clear the arrears but the demands were not honoured.
16. He contends that subsequently, the Applicant commenced the process of levying distress for rent with instruction to the auctioneer who proclaimed and attached the 1st Respondent's goods in October, 2022.
17. He contends that consequent to the said proclamation and attachment, the Respondents have forcefully and without authorization gained entry into the property and started removing the attached goods, and stripped and carted away the fittings to an unknown location vandalizing the Property in the process.



18. The Plaintiff/Applicant contends that there is an imminent risk that if the said actions are to continue, they will occasion the Applicant irreparable damage to the property as well as irreversible loss of commercial value which cannot be remedied by an award of damages.
19. He contends that it is necessary that this Honourable Court issues the orders prayed for in order to preserve the subject matter of the dispute as between the parties pending resolution of the suit herein.
20. The Plaintiff/Applicant contends that he has a prima facie case against the Respondents and stands to suffer irreparable loss which cannot be remedied or atoned by an award of damages.
21. The Plaintiff/Applicant contends that it has credible grounds of challenging the impugned actions of the Respondents and is concerned that the Respondents may take advantage of the time it would take for determination of the Suit to occasion irreparable harm to the Applicant thereby rendering the outcome of the Application and Suit otiose.
22. The Plaintiff/Applicant contends that in the circumstances of the case and in view of the foregoing, it seeks the Honourable Court's intervention and it is necessary in the circumstances of the case for the Honourable Court to issue interim measures of protection to preserve the subject matter and substratum of the Suit.
23. The Defendants/Respondents did not file any response.

Issues For Determination.

24. The Plaintiff/Applicant filed its submissions dated 26th October, 2023 and filed on 10th November, 2023. It identified the following issue for determination:
 - a. Whether the Applicant has met the threshold for grant of injunctive orders?
25. The Applicant relies on the judicial decisions of *Giella v Cassman Brown & Company Limited* [1973] E.A 358 and *Nguruman Limited Vs Jan Bonde Nielsen & 2 others* CA No 77 of 2012 (2014) eKLR.
26. The Plaintiff/Applicant submits that it has established a prima facie case. It relies on the judicial decision of *Mrao Ltd Vs First American Bank of Kenya Ltd & 2 others* [2003] eKLR. It submits that a prima facie case is evident from the Applicant's pleadings and in particular for the following reasons: There exists a Lease Agreement dated 4th December, 2017 between the Applicant and the Respondent; The Lease has a term under Clause 4.1 that the Respondent would pay rent without defaulting and a default would be breach of the terms of the lease; Further, clause 4.6 of the Lease Agreement makes it a violation of the Lease to cause waste and alterations on the Property; Pursuant to Clause 7 of the Lease, a termination clause for breach of the terms of the lease is established through which the Applicant exercised its rights.
27. The Applicant submits that based on the material presented before the Honourable Court, the Applicant's right has been infringed by the Respondents, and that the Applicant has demonstrated a prima facie case.
28. The Applicant submits that it will suffer irreparable harm in the form of damage to the goodwill of its commercial property. It further submits that while an award of damages may be sufficient to compensate for the financial losses, the Respondents will not be able to pay the said sums as they are already in default of over Ksh 39,401,462.26 to the Applicant.
29. The Applicant relies on the judicial decision of *Marple Brooks Projects Company Limited & Another v I & M Bank Limited* [2019] eKLR. It submits that it follows that where the Applicant has demonstrated that the Respondent would not be in a position to pay, the court should grant the



- Applicant an injunction. It submits that in the instant case, it has demonstrated that the Respondent already owes the Applicant over Kshs 39,401,426.26 and therefore would most likely not be in a position to pay damages.
30. It submits that it is not an absolute rule that an interlocutory injunction will never issue where damages may be an appropriate remedy. It submits that there are cases, such as the present one, where an injunction can be granted even if damages would be an adequate remedy for the harm and the applicant may suffer if the other party is not restrained. The applicant relies on the judicial decision of *Wathaka v Industrial and Commercial Development Corporation* [2001] eKLR.
 31. It submits that an injunction will normally be granted where there is a risk of injustice, even if an award of damages would be the appropriate remedy. It urged the Honourable Court to grant the Applicant an injunction to prevent injustice against it.
 32. It submits that the balance of convenience in the instant suit tilts in favour of allowing the Application for injunction. It submits that it is the Applicant who stands to suffer damage should the injunctive orders be granted, as opposed to the Respondents who do not stand to suffer any loss (sic).
 33. The Applicant relies on the judicial decision of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR. It submits that the Respondent breached the terms of the lease and has been vandalizing the property. It submits that if the orders are not granted, the Applicant will suffer loss and in any event, the Respondent will not at all be prejudiced by the grant of the orders sought.
 34. The Applicant submits that this Court can grant the order to stop the Respondent from vandalizing the property and to preserve of the Applicant's property until determination of the main suit.
 35. The Applicant urges that this Honourable Court allows this Application and suit for the reasons that the Applicant has satisfied the triple requirements for grant of an injunction. It prays that the Application be allowed with costs to the Respondents.
 36. The Defendants/Respondents did not file any submissions.

Analysis And Determination.

37. I have considered the application, the affidavit in support of the application and submissions filed. The single issue that arises for determination is whether the Plaintiff/Applicant is entitled to an order of temporary injunction pending the hearing and determination of this suit.
38. The Plaintiff/Applicant has moved the court under the provision of Order 40 Rule 1 of the Civil Procedure Rules 2010. It provides as follows:

Where in any suit it is proved by affidavit or otherwise—

 - a. that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
 - b. that the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.



39. In the judicial decision of *Giella vs. Cassman Brown* [1973] EA 358, the court stated the conditions for grant of interlocutory injunctions as follows;

“The conditions for the grant of interlocutory injunction are now I think well settled in East Africa. First an Applicant must show a prima facie case with probability of success. Secondly an interlocutory injunction will not be normally granted unless the Applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly if the court is in doubt it will decide an application on the balance of convenience.”

40. A prima facie case was defined in the case of *Mrao Limited vs. First American Bank of Kenya & 2 Others* [2003] e KLR as follows;

“A prima facie case in a civil case include but is not confined to a “genuine or arguable” case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.”

41. In *Rockland Kenya Limited v Elliot White Miller* [1994] eKLR, the court held as follows:

“The object of an interlocutory injunction is to protect the Plaintiff against injury by violation of his legal right for which he could not be adequately compensated in damages recoverable in the action if the matters in dispute were resolved in his favour at the trial. However, his need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal right for which he could not be adequately compensated under the Plaintiff’s undertaking in damages if the subject-matter of the trial was decided in his favour. It is a remedy that is both temporary and discretionary. In cases where the legal rights of the parties depend on facts that are in dispute between them, the evidence available to the Court at the hearing of the application for an interlocutory injunction is given on affidavit and is therefore incomplete as it has not been tested by oral cross-examination. At that stage therefore, it is not the function of the Court to attempt to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. Such matters are to be dealt with at the trial. Nonetheless, the Court must in the exercise of its discretionary power in this regard be satisfied that the claim in respect of which an interlocutory injunction is sought is neither frivolous nor vexatious: in other words, that there is a serious question to be tried.”

42. The Plaintiff/Applicant in support of the proposition that it has established a prima facie case states that there exists a Lease Agreement dated 4th December, 2017 between the Applicant and the Respondent; The Lease has a term under Clause 4.1 that the Respondent would pay rent without defaulting and a default would be breach of the terms of the lease; Further, clause 4.6 of the Lease Agreement makes it a violation of the Lease to cause waste and alterations on the Property ;and Pursuant to Clause 7 of the Lease, a termination clause for breach of the terms of the lease is established through which the Applicant exercised its rights.



43. This court has perused at the said lease agreement dated 4th December, 2017 which is attached to the Plaintiff's Application dated 16th November, 2022. The facts deposed to are indeed set out in the lease agreement. I find that the applicant it has established a prima facie case.
44. The second condition that an applicant seeking grant of orders of temporary injunction has to meet is that he/she/it must show that irreparable injury will be suffered by him/her/it, which injury would not adequately be compensated by an award of damages. The Plaintiff/Applicant deposes that the Respondents already owes it over Kshs 39, 401, 426.26 and it contends that that the Respondents would not be in a position or would struggle with payment of damages awarded by the court to it. The Plaintiff/Applicant concedes that an award of damages is a possibility but the Respondents ability to pay that is an issue.
45. The Plaintiff/Applicant further submits that it will suffer irreparable harm in the form of damage to the good will of its commercial property. In my view, the applicant has established that irreparable injury which cannot be compensated by way of damages may be occasioned to it. This arises from difficulty in paying damages which might be awarded and also reputational damage to its business.
46. In the judicial decision of Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR, the Court of Appeal pronounced itself as follows:
- “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 face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the Applicant. 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.” (Emphasis mine)
47. Further to the foregoing, this court notes that the Respondents did not file any response to the application. Taking into consideration the totality of the circumstances herein, this court has no reason not to grant the applicant the orders sought

Disposition.

48. consequently, the application dated 16th November, 2022 is allowed in the following terms:
- a. An order of interim injunction is hereby granted restraining the Respondents by themselves, servants, agents and/or employees or whomsoever acting on their behalf from removing, interfering, destroying or in any other way dealing with goods in, or entering into, taking possession of, vandalizing, demolishing, destroying or in any way interfering with the property known as Nakuru/Municipality/Block 5/19 together with the development thereon pending the hearing and determination of the suit.
 - b. The cost of this application shall be in the cause
- It is so ordered.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 15TH DAY OF
FEBRUARY, 2024**

L. A. OMOLLO

JUDGE

In the presence of:

Mr. Mbaya for plaintiff/Applicant

No appearance for Respondents

Court Assistant: Ms. Monica Wanjohi.

