



**Kiguru v Lenana Gardens Limited & another (Environment & Land  
Petition E003 of 2024) [2024] KEELC 3928 (KLR) (24 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3928 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND PETITION E003 OF 2024**

**AA OMOLLO, J  
APRIL 24, 2024**

**BETWEEN**

**CATHERINE WANJIKU KIGURU ..... PETITIONER**

**AND**

**VILLA CARE MANAGEMENT LTD ..... 1<sup>ST</sup> RESPONDENT**

**LENANA GARDENS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. This is a Notice of motion dated 19<sup>th</sup> February 2024 by the Petitioner seeking for the following orders;
  1. Spent
  2. Spent
  3. This order shall be enforced by the Officer Commanding Station Mutuini Police Station or any other police station who jurisdiction the premises are under.
  4. Pending the hearing and determination of this Petition, this Honourable Court be pleased to issue an interim injunction restraining the Respondents herein, whether acting jointly, separately or through their representatives and/or servants and/or agents or in any manner whatsoever from interfering with and/or denying the Petitioner Permission/Access to install Solar Power back-up system at the housing project known as Lenana Gardens Apartments Phase One located on Dagoretti/Mutuini/618.
  5. Such other appropriate reliefs as may appear to the Court to be just and convenient.
  6. Costs of the application to be in the main cause



2. The motion was supported by grounds indicated in the application and a supporting affidavit sworn on 19th February 2024 by Eunice Ng'endo Kiguru who stated that she had authority from the Petitioner to swear it.
3. The Petitioner stated that on 7<sup>th</sup> July 2020, she entered into a sale agreement with the 1<sup>st</sup> Respondent to purchase all that property known as Apartment Number D11 located on Block 6<sup>th</sup> Floor, on Dagoretti/Mutuini/618 herein after referred to as “the apartment”.
4. That as a key term of the said agreement, the Petitioner was to complete payment of the purchase price and the 1<sup>st</sup> Respondent was to complete construction of the apartment and handover ownership in terms of clause 6.3 of the said agreement which the Petitioner completed her part of the obligation and 1<sup>st</sup> Respondent on its part partially completed its obligations. That on 17<sup>th</sup> March 2022, the 1<sup>st</sup> Respondent handed over most of the completion documents but undertook to issue a share certificate later upon registration all the leases.
5. The Petitioner stated that as its part of obligation and in order to make the apartment habitable, the Respondents were to connect the same to the Nairobi City County Water system with her own meter registered in her own name and billed by the Nairobi City County Government. That also, the Respondents were required to connect the apartment to Kenya Power and Lighting Company electricity through her own independent meter billed directly to her by Kenya Power and Lighting Company, in this case, one in which she can be able to purchase a token directly from Kenya Power and Lighting Company.
6. She contended that she had incurred the connection charges which were paid together with the purchase price before the apartment was handed over to her but the Respondents have failed to connect the apartment with the said water and electricity.
7. That the Respondents have opted to sink a borehole and supply water at exorbitant rates to her yet the borehole water was only supposed to act as a backup to the Nairobi City County Water. Further, in respect of the electricity, the Petitioner contended that she is still relying on the temporary and centralized meter which automatically cuts off power when there's an overload thereby being extremely unreliable and has not been unable to install any electronics because of damage.
8. The Plaintiff stated that she has consistently complained about the said issues but the 2<sup>nd</sup> Respondent who has been tasked by the 1<sup>st</sup> Respondent to manage the project where the apartment is situate, has failed to conclusively address the issue which is not an isolated one as other tenants continue to complaint over similar frustrations but the Respondents continues to turn a blind eye to their pleas.
9. She further stated that she informed the 2<sup>nd</sup> Respondent that since they had failed to provide services she had already paid for, she would no longer pay service charge, electricity and water bills until her issues are addressed and in return the 2<sup>nd</sup> Defendant disconnected her water and electricity and also denied her the opportunity to install solar power plant she has purchased as back up power system and a back – up water tank installed.
10. The Petitioner stated that on 14<sup>th</sup> February 2024 after being denied permission to have her solar power installed, her advocates wrote a demand letter to the 2<sup>nd</sup> Respondent to allow her technicians inside the premises and install the solar power but the 2<sup>nd</sup> Respondent remained adamant.
11. The Petitioner contended that the apartment is uninhabitable and they are unable to do any basic need related to water in the apartment and they are unable to work, socialize on online platforms, conduct research or to even just get information from any electronic source since the Apartment doesn't have



power. She added that she suffering due to the continued violations of her basic rights and that the Respondents will not suffer any prejudice if the orders sought are granted.

### Replying affidavit

12. In opposition to the Petitioner's the 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed a replying affidavit sworn on 4<sup>th</sup> March 2024 by Daniel Ojjo, a managing Director of the 2<sup>nd</sup> Defendant stating that the Application is devoid of merit, pre-emptive, an abuse of the court process and that the Applicant has come to court with unclean hands and also on material non-disclosure.
13. The deponent contended that the Petitioner has not been paying service charges like the Rest of the home owners which as at 1<sup>st</sup> February 2024 stood at KES 84,000 and the 1<sup>st</sup> Respondent has tried on several occasions to inform the Applicant herein to settle the service charges but in vain.
14. The Respondents further contended that under Tenancy Agreement, it provides that the Lease shall be deemed to have been accepted by the Tenant upon signing of the terms of the Agreement and that she wants to enjoy for services that she is not paid for.
15. The Respondent stated that Clause 3.10 of the Sub Lease agreement provides that no structural extension or alteration in addition to the apartment shall be made without written Consent of the Lessor and or the Manager.
16. They added that the issue raised concerning the Original Share certificate is overtaken by events because on 17<sup>th</sup> March 2022, the Respondent's counsel Kamau Muthoni Advocates had given a professional Undertaking to the Applicant's Advocates that the same will be provided within 14 days of the registration of the last Leases in the project which undertaking was acknowledged by the Applicants former Advocates in their letter dated 15<sup>th</sup> November 2023 and still enforceable once the Respondents fail to avail the Certificate after the period undertaken.
17. The deponent stated that the 1<sup>st</sup> Respondent applied to the Kenya Power and Lightning Company for the supply of the single/ three phase 150.0 kVa service line which request KPLC responded with the charges for the same and they are in the process of being settled. They stated that despite the Applicant not paying for the water and electricity, the same has been supplied to her and if there is black out, the same is not occasioned by them.
18. The Respondents stated that the instant Application has not met the bare minimum requirements for one to get interim orders as set out in the case of *Mrao Ltd —vs- First American Bank of Kenya and 2 Others* [2003] KLR.
19. They further contended that the Applicant has failed to exhaust all remedies available under the Sale Agreement, stating that doctrine of exhaustion must be adhered to. The Respondents also stated that this Petition does not meet the threshold for a Constitutional Petition as laid down in *Anarita Karimi Njeru* and *Mumo Matemu* landmark cases and that the Prayers sought are not tenable in this case as they are enforced under Judicial Review.
20. The Respondents stated that an Agreement, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid thus a mandamus cannot command the duty in question to be carried out in a specific way. That Clause 3.10 of the Agreement has specified the mode of performing an act which is that consent be obtained before any structural adjustments thus an order of mandamus cannot issue in this case.
21. The Respondents further stated that Courts of law exist to administer justice and in so doing they must balance between competing rights and interests of different parties but within the confines of



law, to ensure the ends of justice are met as was held in *Equity Bank Limited v Westlink MBO Limited* [20161 eKLR.

### **Submissions.**

22. The Application proceeded orally on 7<sup>th</sup> March 2024. Mr. Majimbo for the Plaintiff stated that they were seeking order 4 in the motion as 2 has been overtaken by events.
23. He argued that as indicated by the Petitioner at Par 12 and 14 of her supporting affidavit, it discloses that the Respondent failed to address her issues of water and electricity raised thus informed them that she would no longer pay for the service charge. That the Petitioner refused to pay the water bill because it was exorbitant and has been forced to use the borehole water instead of Nairobi water.
24. The Petitioner argued that the power system used is one which has frequent overloads and one has right to choose which power to use. That also, the Respondent insists that she requires a written consent as provided for in clause 10 yet in clause 3(8) allows for installation of solar panel.
25. Further, that the demand letter sent to the Respondents clearly indicated the intention to install a solar panel and gave a notice of 48 hours. The Petitioner stated that she continues to suffer as she does not have power and water and that the orders sought are not final. She stated that the lease does not provide for making a written request.
26. Mr. Nyamagwa for the Respondents contended that the Petitioner knows that any structural alterations, there must be a written request which she has not done. He continued to state that the Applicant has admitted not paying for service charge thus has come to court with unclean hands noting that the Respondent has not disconnected power or water.
27. The Respondents argued that the Petitioner has not disclosed a prima facie case thus do not deserve the orders sought and that they wholly rely on the replying affidavit filed and ask the court to dismiss the application.

### **Analysis and determination:**

28. I have considered the application, the supporting affidavit, replying affidavit and the annexures thereof together with submissions orally made by the parties. From the documents displayed, the Petitioner purchased an apartment unit from the 1<sup>st</sup> Respondent *vide* the agreement dated 7<sup>th</sup> July 2020 for consideration of Kshs.7,500,000/- which was to be handed over to her after completion and full payment of the purchase price.
29. That the apartment was handed over, however, the Petitioner contends that the Lessor failed to fulfil its obligation as regard the supply of electricity and water which made her refused to pay service charge as provided in the lease agreement. The Petitioner/Applicant wants this court to grant her an interim injunction restraining the Respondents from interfering with and/or denying her permission/access to install Solar Power back-up system at the apartment.
30. In order to merit the grant of the orders sought, the Applicant must demonstrate a prima facie case, likelihood of suffering irreparable loss and or on whose side the balance of convenience tilts. The Applicant has not referred to any clause in the sub-lease agreement which provided for installation of a back-up power system within the impugned premises. It is trite law that parties are bound by the terms of their contracts and although this court supports the use of green energy, its installation should not be in a manner that may inconvenience other residents. The Respondents deposed that they were to be blamed for the frequent black-outs and that they had applied to KPLC for supply of three phase power system.



31. I am persuaded that the Applicant has demonstrated a prima facie case, however, I am not convinced that she will suffer irreparable loss if the orders sought are not granted because the premises is already being served with electricity and water which the Applicant describes as unnecessarily expensive. Secondly, the balance tilts in not granting the orders for two reasons. First, the Applicant has come to court with unclean hands for failure to pay service charge as per the terms of the lease. Justice A. Mabeza, the case of *Benl Development Limited v First Community Bank Limited* [2021] eKLR;

“17. Interim injunctions do not suspend obligations of the parties to their contracts. They are rather meant to afford the parties an opportunity of being heard on their grievances.”

32. Secondly, if the Court allows the orders which though couched as temporary injunctions are more like a mandatory injunction and which mandatory injunction can only be granted in the clearest of cases. If issued in this instance, it will deny the Respondents an opportunity to be heard. The Petitioner’s prayer seeking for installation of a solar power back-up system in the apartment is making additional installation to the Apartment rather than preserving the current status of the same. Any alleged issues of breach of the sale agreement cannot be dealt with at this interlocutory stage.

33. In conclusion, I hold that the application is unmerited and the same is dismissed with costs to the Respondents.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF APRIL, 2024**

**A. OMOLLO**

**JUDGE**

