



Lake Oil Limited v Family Bank Limited (Environment & Land Case E217 of 2023) [2024] KEELC 3314 (KLR) (23 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3314 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E217 OF 2023**

**JA MOGENI, J
APRIL 23, 2024**

BETWEEN

LAKE OIL LIMITED PLAINTIFF

AND

FAMILY BANK LIMITED DEFENDANT

RULING

1. I have before me a Notice of Motion Application dated 18/12/2023 brought under Article 159 (2) (d) of *the Constitution* of Kenya, Section 1A, 1B, 3A and Section 63 (e) of the *Civil Procedure Act*, Order 40 Rule 2 and Rule 4, Order 51 Rule 1 of the Civil Procedure Rules 2010 and all other enabling provisions of the Law seeking the following orders:
 - a. Spent
 - b. That pending the inter partes hearing and determination of this application this court be pleased to issue a temporary injunction against the Defendant/Respondent, its agents, servants and/or any other person acting on the Defendant’s instruction restraining them from disturbing the Plaintiff’s occupation of Land Reference No. 1/1338 (original Number 1/933/2) Nairobi (New Number Nairobi /Block 19/796), barring access to the suit property and/or in any other manner interfering with the Plaintiff’s occupation of the said land.
 - c. That pending the hearing and determination of this suit this court be pleased to issue a temporary injunction against the Defendant/Respondent, its agents, servants and/or any other person acting on the Defendant’s instruction restraining them from disturbing the Plaintiff’s occupation of LAnd Reference No. 1/1338 (original Number 1/933/2) Nairobi (New Number Nairobi /Block 19/796), barring access to the suit property and/or in any other manner interfering with the Plaintiff’s occupation of the said land.



- d. That this court be pleased to issue orders of mandatory injunction compelling the Defendant/Applicant to permanently withdraw the vacation notice dated 30th October, 2023 and to cease and desist from interfering with the plaintiff/applicant's occupation of the portion of Land Reference No. 1/1338 (original Number 1/933/2) Nairobi (New Number Nairobi /Block 19/796), on which the Plaintiff's business premises is situate during the subsistence of the lease agreement which expires on 2nd October 2028.
 - e. That the Honorable Court be pleased to direct the Officer Commanding Police Division Kilimani Area, Nairobi and the Officer Commanding Station, Kilimani Police Station to assist in implementation of the orders this Honorable Court is pleased to grant.
 - f. That costs of this application be borne by the Defendant/Respondent.
2. The application is based on the grounds captured in the 17 paragraphs which I see no need of reproducing here and the 33 paragraphed supporting affidavit of G.B Ramu sworn on 18/12/2023.
 3. In brief the plaintiff avers that he has a lease-tenant relationship over a petrol station premises on the suit property which tenancy is based on a lease agreement executed on 20/06/2013 and renewed on 11/07/2023 for a further 5 years and 3 months to expire on 2nd October 2028.
 4. That initially Alfaways Limited was the lessor and Hashi Energy Limited was lessee for ten years from 2/07/2013 and the lease provided for renewal. A copy of the lease agreement dated 20/06/2013 is annexed as "GVR-1". That on 3/10/2013 Alfaways Limited sold its interest to Family Bank and the Hashi Energy was occupying the premises. Annexed to the document is a copy of the conveyance instrument marked as "GVR-2".
 5. The applicant company acquired Hashi Energy Limited vide an agreement for sale and purchase of retail business dated on even date and the applicant annexed a copy of the agreement marked as "GVR-3".
 6. With the acquisition the plaintiff took over legal rights and obligations that Hashi Energy Limited had contracted under the lease agreement dated 20/06/2013 and became the lessee. In the period subsisting the lease agreement the plaintiff company has discharged all duties under the lease agreement including settling the rent invoices generated by the respondent company.
 7. That aware that there was an impending expiry of lease agreement that was signed on 20/06/2013, the applicant wrote to the respondent company requesting for an extension of the lease for a further ten years. A copy of the letter dated 27.06.2023 is annexed as "GVR-4". To which the respondent responded via a letter of offer dated 11/07/2023 with revised terms of the extension.
 8. The revised renewal offer letter proposed to extend the term for 5 years and 3 months with effect from 2/07/2023 with a rental charge of Ksh 744,608.22 with an upward review of 15% every two years during the subsistence of the lease.
 9. That the applicant found the terms of the agreement agreeable and signed the said letter of offer on 11/07/2023 and emailed it back. He has annexed copies of the letter of offer and the acceptance via email as "GVR-6a and 6b". The applicant also paid rent deposit as well as rent payment until December 2023 following the acceptance and copies of the remittances are annexed as "GVR 7a, 7b, and 7c".
 10. The applicant contends that the action of accepting the offer by signing and paying the requisite charges namely the rent deposit and rent means that the lease is deemed to have been extended till 2/10/2028.



11. That notwithstanding the payment of rent and rent deposit and signing the offer letter the respondent has illegally and unlawfully issued a vacation notice dated 30/10/2023 requiring the plaintiff/applicant to vacate the suit premises on or before 30/01/2024 a copy is annexed marked as “GVR -8”.
12. The plaintiff/applicant is apprehensive that given the notice they may lose their projected revenue for the duration of the lease agreement estimated at Ksh 500,000,000. That the action of the respondent is unlawful, unconscionable and immoral contrary to Article 43 of *the Constitution* of Kenya for the respondent to issue a notice to vacate contrary to the lease expiry period.
13. The plaintiff/applicant states that the circumstances of this case are clear and they call for issuance of a mandatory order to compel the respondent to permanently withdraw the notice to vacate dated 30/10/2023 and that the said orders are merited to meet the ends of justice since there is no justification for the illegal acts by the respondent.
14. The defendant filed a replying affidavit sworn by Joan Gachomba the Legal Officer on 29/01/2024 and opposed the application. She averred that they are the registered owners of the suit property and that there is no registered lease agreement between the plaintiff and the defendant.
15. That the defendant acquired the suit property from the previous owner Alfways Limited. That the lease agreement of 20/06/2013 did not involve the plaintiff and the defendant as parties and at clause 4:10:1 it barred Hashi Energy Limited from subletting or parting with possession without written consent and the plaintiff has not filed any proof of this consent.
16. She avers that the defendant sent an offer letter on 11/07/2023 to the plaintiff and stated that a lease had to be registered and the plaintiff accepted the terms set in the offer letter but no lease was prepared. She states that for the lease dated 20/06/2013 it lapsed and the plaintiff did not acquire any rights or obligations from it and it is not enforceable.
17. Further that the letter dated 11/07/2023 did not bar early termination of the tenancy since it was a periodic tenancy terminable with notice equivalent to the rent payment period of 3 months which the defendant has rightfully issued.
18. She avers that the defendant did not renew the lease of 20/06/2013 but offered to renew the lease for a period of 5 years and 3 months. It is her case that the application should be dismissed with costs. She has annexed a bundle of documents marked as Exh JGP which has various documents.

Analysis and Determination

19. The Court gave directions on filing of written submissions and a Ruling date was reserved.
20. In my view, the issues for determination at this stage are:
 - a. Whether the plaintiff/ Applicant has met the criteria for the grant of order of temporary injunction pending the hearing and determination of this suit.
 - b. Whether the Plaintiff/Applicant should be granted orders of Mandatory injunction at the interlocutory stage.
 - c. Who shall bear the costs of the application?
21. I have read the application, affidavit in support of the application, replying affidavit, and their accompanying annexures. I have also considered and weighed the rival submissions in this application as regards the grant of orders of temporary injunction and grant of orders of mandatory injunction and also taken into consideration the judicial decisions cited and attached.



22. The first issue for determination is whether the Plaintiff has met the criteria for the grant of an order of temporary injunction pending the hearing and determination of this suit.
23. The substantive law on interlocutory injunctions is Order 40 Rule 1(a) of the Civil Procedure Rules 2010 which provides:

“Where in any suit it is proved by affidavit or otherwise that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongly sold in execution of a decree ... 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.”
24. There are also guiding principles for the grant of orders of temporary injunction which are well settled and are set out in the judicial decision of *Giella Versus Cassman Brown* (1973) EA 358. This position has been reiterated in numerous decisions from Kenyan courts and more particularly in the case of *Nguruman Limited versus Jan Bonde Nielsen & 2 others* CA No.77 of 2012 (2014) eKLR where the Court of Appeal held that;

“in an interlocutory injunction application the Applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.

These are three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”.
25. The plaintiff/Applicant contends that they have a prima facie case which warrants granting of the orders sought. The Court of Appeal in the case of *Mrao Ltd Versus First American Bank of Kenya Ltd* (2003) EKLR described a prima facie case as thus:

“... 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 legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
26. In support of their application, the Plaintiffs have attached copies of documents relating to the offer and acceptance including the letter of offer, the acceptance via email and the payment of deposit and rent as was indicated in the offer letter.
27. From the information provided I am persuaded that the defendant in taking the steps leading to the offer letter they intended to enter into a contract that would culminate into a lease agreement. The actions of the defendant led the plaintiff to believe that the end process will be a resultant lease agreement expiring in 2028. No A contract is an agreement giving rise to obligations which are enforced or recognised by law.
28. In common law, there are 3 basic essentials to the creation of a contract: (i) agreement; (ii) contractual intention; and (iii) consideration. The first requisite of a contract is that the parties should have reached agreement. Generally speaking, an agreement is reached when one party makes an offer, which is



accepted by another party. In the instant suit there was an offer and an acceptance thus an agreement. I am therefore persuaded that the plaintiff has established a prima facie case by the actions undertaken.

29. Secondly, The Plaintiff has to demonstrate that irreparable injury will be occasioned to them if an order of temporary injunction is not granted. The judicial decision of Pius Kipchirchir Kogo Vs Frank Kimeli Tenai (2018) eKLR provides an explanation for what is meant by irreparable injury and it states;

“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury”.

30. The Plaintiff has deposed on how the company will lose out on the projected revenue estimated at Kesh 500,000,000 since over ten (10) years of investment and goodwill is at threat of wasting away.

31. In my view, therefore, the inability to run the intended business on the suit parcel, threatened eviction despite acceptance of the offer made, payment of deposit and rent, is sufficient demonstration of irreparable loss being occasioned to the Plaintiff.

32. Thirdly, the Plaintiffs have to demonstrate that the balance of convenience tilts in their favour. In the case of Pius Kipchirchir Kogo Vs Frank Kimeli Tenai (2018) EKLR which defined the concept of balance of convenience as:

“The meaning of balance of convenience will favour of the Plaintiff is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.

In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting”.

33. In the case of Paul Gitonga Wanjau Vs Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR, the court dealing with the issue of balance of convenience stated as follows:-

“Where any doubt exists as to the Applicants’ right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies.”



34. It is the Plaintiff/Applicant contention that the balance of convenience tilts in his favour because they have legitimate expectation of peacefully occupying the suit property until 2nd October 2028 and that they had fully committed the Company's resources towards carrying out the business at hand for the duration.
35. The court in the case of Amir Suleiman Vs Amboseli Resort Limited [2004] eKLR the learned judge offered further elaboration on what is meant by "balance of convenience" and stated
- "The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice."
36. Bearing this in mind, I am convinced that there is a lower risk in granting orders of temporary injunction than not granting them, as I wait to hear the suit on its merits. This is especially so because I have not had opportunity to interrogate all the documents that might be relevant in providing a history and/or chronology of events in the instant suit including the annexures to the Defendant/Respondent's replying affidavit.
37. In Robert Mugo Wa Karanja Vs Ecobank (Kenya) Limited & Another [2019] eKLR the court in deciding on an injunction application stated;
- "circumstances for consideration before granting a temporary injunction under order 40 rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the Defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to a grant a temporary injunction to restrain such acts..."
38. I am convinced that if orders of temporary injunction are not granted in this suit, the properties in dispute might be in danger of being dealt in the manner that may not protect the rights of the plaintiff/applicant who is already apprehended by the defendant/respondent.
39. In view of the foregoing, I find that the plaintiff/applicant has met the criteria for grant of orders of temporary injunction.
40. The second issue is whether the plaintiff/applicant should be granted orders of Mandatory injunction at the interlocutory stage.
41. The decisions of the Court of Appeal offer guidance on this point.
42. The Court in the case of Joseph Kaloki t/a Royal Family Assembly Vs Nancy Atieno Ouma [2020] eKLR reaffirmed its decision in Kenya Breweries Limited & another Vs Washington O. Okeyo [2002] eKLR and stated that:
- "...a mandatory injunction can be granted on an interlocutory application as well as at the hearing but should not normally be granted in the absence of special circumstances but that if a case is clear and which the court thinks it ought to be decided at once, a mandatory injunction will be granted at an interlocutory application."



43. In the case of Shariff Abdi Hassan Vs Nadhif Jama Adan [2006] eKLR the Court also reaffirmed its decision where it stated that:

“The courts have been reluctant to grant mandatory injunction at the interlocutory stage. However, where it is prima facie established as per the standards spelt out in law as stated above that the party against whom the mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case.”

44. I am not convinced that special circumstances exist in this matter that may warrant the grant of a mandatory injunction. I am also not convinced that this case is so clear that it ought to be decided at once. There are competing claims by both parties and these require further interrogation. At this stage I cannot tell for sure that the Defendant/Respondent has a right to issue an eviction notice over the suit property to the plaintiff or that the plaintiff/applicant’s claim is absolute and deserves to be protected.

45. I therefore decline to grant orders of Mandatory injunction.

46. On the issue of who shall bear the costs of the application? Under section 27 of the *Civil Procedure Act* it is trite law that costs shall follow the event. The successful party shall ordinarily have costs.

47. Consequently, I make the following order:

1. That pending the hearing and determination of this suit this court issues a temporary injunction against the Defendant/Respondent, its agents, servants and/or any other person acting on the Defendant’s instruction restraining them from disturbing the Plaintiff’s occupation of Land Reference No. 1/1338 (original Number 1/933/2) Nairobi (New Number Nairobi /Block 19/796), barring access to the suit property and/or in any other manner interfering with the Plaintiff’s occupation of the said land.
2. That the Honorable Court direct the Officer Commanding Police Division Kilimani Area, Nairobi and the Officer Commanding Station, Kilimani Police Station to assist in implementation of the orders this Honorable Court is pleased to grant.
3. That costs of this application be borne by the Defendant/ Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT Nairobi THIS 23RD DAY APRIL 2024.

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MOGENI J

JUDGE

In the virtual presence of:

Mr. Mureithi for the Defendant

Mr. Makera for the Plaintiff

Ms. C. Sagina : Court Assistant

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MOGENI J

JUDGE

