



REPUBLIC OF KENYA



SBS Dunhil Group (East Africa) Limited v Shah & 4 others (Environment and Land Case Civil Suit E112 of 2023) [2024] KEELC 3752 (KLR) (24 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3752 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT E112 OF 2023**

LN MBUGUA, J

APRIL 24, 2024

BETWEEN

SBS DUNHIL GROUP (EAST AFRICA) LIMITED PLAINTIFF

AND

AJEETKUMAR C SHAH & OTHERS 1ST DEFENDANT

PANKAJ CHHAGANLAL SHAH 2ND DEFENDANT

KAMALKUMAR CHHAGANLAL SHAH 3RD DEFENDANT

AND

PRAVICHANDRA JAMNADAS KAKAD T/A P.J KAKAD & CO

ADVOCATES 1ST INTENDED DEFENDANT

LAND REGISTRAR, NAIROBI 2ND INTENDED DEFENDANT

RULING

background

1. This matter is at the infancy stage as the plaint was only filed in the month of October 2023. The plaintiffs have been occupying a building identified as Senteu Plaza situated on parcel LR. 1/1373 (Original Number 1/989, 1/990), hereinafter, the suit premises on lease/licence basis, of which the said lease / licence came to an end in August 2023. The plaintiffs claim that pursuant to a board resolution of 12.7.2017, they were to purchase the suit premises from the defendants, but the latter are however bent on evicting them from the suit premises.
2. What is now before this court for determination are 3 applications which are: The Plaintiff's Notice of Motion Applicants dated 9.10.2023 and 18.1.2024, and the Defendant's Notice of Motion application dated 10.11.2023. The applications were canvassed through written submissions.



Application Dated 9.10.2023

3. In the above mentioned application, the Plaintiffs seek a temporary injunction restraining the Defendants from forcefully evicting them from the suit premises or interfering with the Plaintiffs' businesses and clients. They also seek orders that the OCS Kilimani Police Station be directed to ensure enforcement of the orders.
4. The application is based on grounds on its face and on the Supporting Affidavit sworn on 9.10.2023 by Geoffrey Somoni Birundu, who describes himself as the Group Chief Executive Officer and Principal Chief of Party of African Continental Footprints of the Plaintiffs.
5. The plaintiffs' case is that on 12.6.2017, their international Board of Directors held a meeting in Orlando Florida, United States of America in which a resolution was arrived at and direction issued to the Plaintiffs to the effect that a fully-fledged office was to be opened and operated in Kenya within Senteu Plaza.
6. That it was also resolved by the said board that the prospective landlord would be informed that the Plaintiff would only take up space and invest close to USD 10 Million if the said landlord agreed to sell off the building in good faith at the expiry of the anticipated 6-year term lease beginning 2017 - 2023.
7. That further, the said minutes of the board were to officially and irrevocably form part of the terms of the lease agreement that was expected to be executed between the Plaintiffs and Ajeetkumar Chhaganlal Shah, Chandulal (Chhaganlal) Shah, Pankaj Chhaganlal Shah and Kamalkumar Chhaganlal Shah trading as AJEETKUMAR C. SHAH & OTHERS (1st Defendant).
8. That pursuant to the resolution, the Plaintiff's group Chairman Christantus Obure, engaged the 1st Defendant's partners in negotiations and on 12.7.2017, he wrote to Mr. Chandu Shah, a director of the 1st Defendant seeking office space at Senteu Plaza and he shared a copy of the board minutes of 12.6.2017 with him for consideration and he did not receive any objection from him and the other directors of the 1st Defendant.
9. That eventually, the 1st Defendant leased the suit premises to the Plaintiff for a total period of 6 years with the 1st term running from 1.9.2017 to 31.8.2020 and the 2nd term running from 1.9.2020 to 31.8.2023. That during the subsistence of the lease, the Plaintiff maintained a very cordial working relationship with Mr. Ajeetkumar Chhaganlal Shah and Mr. Chandulal Shah who were running affairs at the suit premises and were the face of the 1st Defendant.
10. He avers that upon signing the lease, the Plaintiff took possession and in early 2020, the Defendants moved from the space they were originally occupying on the 1st floor of the building to the 4th floor to allow the Plaintiff to occupy the 1st floor.
11. That additionally, in the course of the 6 year term lease, the 1st Defendant with full knowledge that the Plaintiff was keen on purchasing the building at the end of 6 years permitted it to; rename the building in readiness for takeover, as well as to undertake major installations/renovations including CCTV cameras, car park, water/sewer systems etc, of which the Plaintiff invested USD 1,200,000/= on the premises.
12. That in the suit premises, the plaintiffs run high end businesses including; real estate consulting firms, international executive private jet charter companies, a wellness center, an executive and exclusive woman only spa, spa products distribution, investment consultancy among others.



13. He avers that the conduct by the lessors amounted to acquiescence and could only be interpreted to mean that they were aware and had agreed to the Plaintiffs' purchasing the whole building at the expiry of the lease term, but they have since made a u turn of which in correspondence dated 31.7.2023, they informed the Plaintiffs that Senteu Plaza is not for sale and have since asked them to vacate.
14. The Plaintiffs contend that they have discovered that the Defendants acted fraudulently as the lease and further agreements herein were purportedly signed by Mr. Ajeetkumar Chhaganlal Shah while he in fact died on 18.3.2018 while Mr. Chandulal Shah died on 30.4.2022.
15. It is averred that the 2nd defendant has now engaged his daughter one Ms. Mili Shah to run the affairs of Senteu Plaza, yet she was not there when the initial agreements herein were signed.
16. It is also contended that when the Plaintiff paid the Defendant the last quarterly rent on 19.8.2023 before the expiry of the lease term, it paid an excess of Ksh.216,816.35 for the next engagement.
17. It is averred that the business carried out by the Plaintiff are niche and highly exclusive attracting select clientele and bring in annual returns running into millions of Kenya shillings, thus should the Plaintiff be evicted, its businesses will be extensively disrupted leading to loss of expected earnings which cannot be adequately compensated by damages. The estimated value of their items in the building translates to Ksh.1 billion. The properties belong to their parent company based in the United States, and for them to safely and securely relocate these properties within and outside the building, they will need experts, thus it will be an expensive and time consuming affair.
18. The application is opposed by the Defendants vide the 2nd Defendant's Replying Affidavit sworn on 7.11.2023. He avers that the 1st Defendant is the registered owner of parcel LR No. 1/1373 (Original Number 1/989/990) on which it has erected the building known as Senteu Plaza where the Plaintiffs have been tenants on the 1st floor of the said premises from 1.9.2017 to 31.8.2023.
19. He contends that there is no agreement or an offer to sell Senteu Plaza or part of it to the Plaintiff or any other party.
20. He further avers that by a letter dated 21.6.2023, the Defendants wrote to the Plaintiffs and reminded them that their lease was to expire on 31.8.2023 and sought to confirm if they intended to renew the lease.
21. That in response, the Plaintiff's by correspondence dated 17.7.2023 informed the Defendants of the desire to purchase the building and in the alternative to purchase the entire 1st floor space together with the additional space dubbed as "Maybach lounge" next to the main security gate. In response thereof, the Defendants vide their letter dated 31.7.2023 were categorical that Senteu Plaza was not for sale, but they were willing to consider renewal of the lease.
22. That upon expiry of the lease, the Defendants demanded that the Plaintiff vacate the suit property and hand over vacant possession and in their response dated 3.11.2023, the Plaintiffs contended that they had paid rent of up to Ksh.150 million for the lease period to be utilized as a deposit for the purchase of the property which remark is not based on the lease.
23. He avers that due to the Plaintiffs' refusal to vacate the suit premises, the Defendants have suffered loss of Ksh.4,660,043.20 since 31.8.2023.
24. That the alleged minutes of the board of an entity that is alleged to be affiliated to the Plaintiffs were only brought to the Defendants' attention on 18.10.2023. He avers that the alleged board resolution is, but an internal document of the USA based entity known as SBS Dunhill & Meriton.



25. That the allegations that the Plaintiffs have heavily invested in the building in furnishing, stocking and refurbishing the rented premises cannot be a reason to force the Defendants to sell the property to the Plaintiffs.
26. That the payment of the sum of USD 79,600 paid by the Plaintiff was made towards rent arrears of 5 months and in any case, the said sum was frozen by the Asset Recovery Agency in Chief Magistrates' Anti-Corruption Court Misc Criminal Application No. E150 OF 2023 because it was suspected to be proceeds of crime from the Plaintiff and its affiliates, while Ksh.216,816.35 was not a deliberate overpayment but surplus owing to gain on forex exchange.
27. It is averred that the Plaintiff has not met the threshold for grant of the reliefs sought.
28. The Defendants also oppose the application vide the affidavit sworn on 10.11.2023 by Pravinchandara Jamnadas Kakad, an Advocate of the High Court of Kenya and a partner in the firm of PJ Kakad & Company Advocates.
29. He avers that his firm was instructed by the 1st defendant to prepare the lease herein dated 1.10.2017 as well as the leave and license agreement dated 1.10.2020 of which registration was done in accordance with the prevailing law and in conformity with the usual conveyancing practices .
30. He avers that the lease and subsequent leave and license agreements contained all the terms of the entire lease arrangement and understanding between the parties, thus he is a stranger to the alleged board resolution passed by the Plaintiffs' international board of directors as they were not part of the lease.
31. The Plaintiffs filed a Further Affidavit sworn on 21.11.2013 by Geoffrey Somoni Birundu in response to the Defendants' Replying Affidavits. He admits that there is no sale offer which explains why the Plaintiffs reminded the Defendants to share the offer.
32. He further avers that ksh.150 million paid in the pendency of the 6 year term between the Plaintiff and the 1st Defendant was for rent and not made for purchase of the suit property.
33. He reiterates that vacation of the premises by the Plaintiffs would be an arduous task considering the nature of the items/assets it would have to relocate, thus the balance of convenience lies in granting the orders sought.

Submissions

34. Plaintiff's submissions are dated 28.11. 2023 where they aver that they have met the threshold for grant of a temporary injunction as established in the case of *Giella v Cassman Brown* [1973] E.A 358, [*Mrao v. First American Bank of Kenya Limited & 2 Others*](#) (2003) eKLR and [*Nguruman Limited v. Jan Bonde Nielsen & 2 Others*](#) [2014] eKLR.
35. It is argued that a *prima facie case* is established as Mr. Chandulal Chhaganlal Shah (deceased) acknowledged the contents of the board resolutions dated 12.6.2017, thus the 1st Defendant created a legitimate expectation upon which the Plaintiffs invested heavily on the suit premises.
36. It is submitted that the Plaintiff will suffer irreparable loss as it has established good will with its clients who have in turn consistently patronized its establishment, thus if evicted, the stability that the Plaintiff has provided for its client will sway, causing loss of trust which cannot be remedied by monetary compensation.



37. The Plaintiffs also argue that they are entitled to the orders sought on a balance of convenience as they would have to go to great lengths to safely and securely relocate their property while on the flipside, the Defendants' will not be inconvenienced.
38. The Defendants' submissions are dated 4.12.2023 where they argue that the plaintiffs have not met the threshold for grant of the orders sought as they have no case.
39. It is pointed out that the 1st Defendant owns the suit premises and that the Plaintiffs have been tenants whose tenancy expired on 31.8.2023 and have refused to renew the lease or hand over possession to the Defendants. It is reiterated that there was never an agreement to sell the suit premises.
40. It is argued that the Plaintiffs did not demonstrate that they would suffer irreparable loss, save for stating that they would lose good will and trust from their customers, yet such loss is quantifiable.
41. It is further submitted that the Plaintiffs did not demonstrate that damages would not be an adequate remedy. To this end, the case of *Hydro Water Well (K) limited v Sechere & 2 others (Sued in their representative capacity as the officers of Chae Kenya Society)* [2021] KEHC 22 KLR is relied upon.
42. The Defendants also submit that the Plaintiffs' conduct in their dealing with the Defendants has been less than equitable, thus the balance of convenience does not tilt in their favour. To this end, the case of *Pius Kipchirchir Kogo v Fran Kimeli Tenai* [2018] eKLR as well as the case of *Tecno Holdings Limited & 4 others v National Social Security Fund Board of Trustees* [2018] eKLR are relied upon.

Application dated 18.1.2024

43. In the application dated 18.1.2024, the Plaintiffs seek to set aside the orders issued herein on 20.12.2023, leave to amend the plaint as set out in the draft amended plaint as well as orders restraining the Registrar of Lands from effecting registration of any further disposition against parcel LR No. 1/1374 (Originally 1/1373; amalgamated from LR No. 1/989 & 1/990 Nairobi)-registered in the name of Ajeetkumar Chhaganlal Shah (now deceased) Chandulal Chhaganlala Shah, the 2nd Defendant as well as the 3rd Defendant all trading as the 1st Defendant herein.
44. The application is based on grounds on its face and on the Supporting Affidavit sworn on 18.1.2024 by Geoffrey Somoni Birundu who describes himself as the Continental Executive Director and the Chief Executive Officer of the Plaintiff. He avers that at the time of institution of the suit, the suit property was known as LR Number 1/1373 Nairobi (Original Number LR No. 1/989 & 1/990 Nairobi) in the name of the 1st Defendant.
45. That during pendency of the instant suit, the Plaintiffs realized that the 1st - 3rd Defendants through the Intended 4th Defendant have since obtained change of user and amalgamation of LR No. 1/989 and 1/990 culminating into LR No. 1374, which transaction was concealed to both the Court and the Plaintiffs.
46. That the Defendants' actions constitutes an alteration to the description of the suit property, thus tactically removes them (defendants) from the court's jurisdiction and would ultimately have all the proceedings before the court rendered academic.
47. He further avers that the said action of amalgamation and change of user are consistent with the Defendants' bad faith from the beginning of their lease transaction being that credentials of Ajeetkumar Chhaganlal Shah (deceased) were used to prepare lease documents which were commissioned by the intended 4th Defendant, whereupon he illegally falsified signatures of the said deceased Ajeetkumar stating that he appeared before him on 1.10.2018 and 13.7.2020 while the



- said Ajeetkumar had died on 24.4.2018, thus the 4th Intended Defendant should be enjoined for accountability purposes.
48. It is also contended that the orders issued on 20.12.2023 did not take into account certain critical facts which the court was not privy to which include; the fact that the local office of the Plaintiffs fully depends on funding and financing of all operations of the East African Corporation from the United States of America and as such, any order issued ought to be shared with the International head office for immediate execution.
 49. That the court was not aware that the accounts of the Plaintiff's sister company (Cullinan) that was used to remit Usd 76,900 to the 1st Defendant was mysteriously frozen by asset recovery agency vide an order issued in Chief Magistrate Court Anti-Corruption & Economic Crimes Miscellaneous Criminal Application No. E150 of 2023, just 2 days after settling rent payments to the 1st Defendant.
 50. He adds that the Plaintiffs read malice in freezing of the said sums as it is the 2nd and 3rd Defendants who had recommended to the Plaintiffs to open an account for their sister company, Cullinan Private Jets Corp at I& M Bank Limited through a Ms. Reshma Patel, a relationship officer at the said bank, and it is the same bank that raised a report that Cullinan Private Jet Corp was engaged in "suspicious" transactions leading to freezing of the above stated sums.
 51. He avers that the representation by the Plaintiffs' Advocates which led to the issuance of the directions of 20.12.2023 completely veered off from the Plaintiffs' instructions when proposing that the Plaintiffs could continue paying rent to the Defendants.
 52. He contends that it is impossible for the Plaintiffs' parent company which operates in the United States of America to move funds to Kenya because there is no large sum operational account as all the Plaintiffs' large sum accounts are restricted by the anti-corruption court, and also due to the fact that there is no invoice raised by the Defendants and even if there was, it would not hold water since there is no lease between the parties, the previous one having expired on 31.8.2023.
 53. It is also averred that plaintiffs have paid the utility bills.
 54. The application is opposed by the Defendants vide the 2nd Defendant's Replying Affidavit sworn on 7.2.2024. He avers that the Plaintiffs are in breach of this court's orders of 20.12.2023, and owes the Defendants Ksh.13,597,131.20/= being mesne profits for continued occupation of the suit premises from 1.9.2023 to February 2024 and have also failed to reimburse the Defendants the sum of Ksh.508,219/= that they incurred to settle the Kenya Power and Lighting Company PLC .
 55. He avers that the Defendant's planners began undertaking a change of user from residential to office use and amalgamation of LR No. 1/989 together with the adjoining LR No. 1/990 in 2013 and that the process ended on 26.5.2023, and the Plaintiff has always been aware of the intended amalgamation of the suit property as indicated at paragraph 1 of the recitals to the lease dated 1.10.2018.
 56. He denies the allegation that the Defendants enticed the Plaintiffs to open an account at I&M Bank. Further, that it is not true that the consent order of 20.12.2023 was adopted without fundamental disclosure of material facts as alleged and that the Plaintiffs have not satisfied grant of the orders sought.
 57. In response to the Defendants' Replying Affidavit, the Plaintiffs filed a Further Affidavit sworn by Geoffrey Somoni Birundu on 13.2.2024 in which he reiterates the averments set out in his Supporting Affidavit to the instant motion.



Submissions

58. The Plaintiff's submissions are dated 20.2.2024 where they argue that they have satisfied conditions governing amendment of pleadings as the motion has been brought timeously, is not prejudicial to the Defendants and doesn't affect any vested interest or accrued legal right. To this end, the case of *Institute for Social Accountability & Another v Parliament of Kenya & 3 Others* [2014] eKLR as well as *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited* [2013] eKLR were proffered.
59. On the prayer to set aside the orders of 20.12.2023, the Plaintiffs submit that some negotiations were attempted as between the parties, but no agreement was reached to warrant the Plaintiffs' former advocate recording a consent with the Defendants' advocate in court, as he (plaintiffs' advocates) had no such instructions. To this end, the case of; *Wema Foundation Trust Company Limited v County Government of Nairobi City & Another* [20222] eKLR is relied upon.
60. It is also argued that since the suit property is registered in the name of the 1st Defendant, no one would be injured if a status quo order maintains in terms of the entries in the proprietary section of the lease.
61. The Defendants' submissions are dated 21.2.2024. The case of *Kenya Commercial Bank Limited v Specialized Engineering Company Ltd* [1982] KLR 485 is relied upon to submit that the Plaintiffs have not met the test for setting aside or varying a consent order.
62. It is submitted that when the matter came up before the court on 20.12.2023, the Defendants had no notice that the Plaintiffs' advocate was acting against any express instruction from the Plaintiffs' thus the said advocates had an implied authority to record a consent on behalf of the Plaintiffs.
63. It is argued that where an advocate acts against the instructions of their clients, then the client has a cause of action against the Advocate. The case of *Duale Maryan Gurre v Aminal Mohammed Mahamood & Another* [2014] eKLR is relied upon.
64. It was further argued that Plaintiffs have no *prima facie case* since they have admitted that their lease with the 1st Defendant expired on 31.8.2023, and they have failed to comply with orders of 20.12.2023 requiring them to pay rental arrears.
65. On the issue of amendment of the Plaint to introduce new parties, it is argued that the intended Defendants are not necessary to the suit and that the Plaintiff has failed to demonstrate the rights / reliefs they seek against them. The case of *Technomatic Limited t/a Promopack Company v Kenya Wine Agencies Limited and another* [2014] eKLR is relied upon.
66. It is also argued that the firm of PJ Kakad & Co. Advocates acted for the 1st Defendant in preparing and registering the lease and leave/license agreement between the Plaintiffs and the Defendants, thus in accordance with the law of agency, the said firm was an agent of a disclosed principle, hence the Plaintiff cannot sue that agent of a disclosed principal. The case of *Antony Francis Wareham t/s AF Wareham & 2 Others v Kenya Post Office Savings Bank* [2004] eKLR is relied upon.

Application dated 10.11.2023

67. The above Defendants' application seeks orders to strike out this suit with costs. The same is premised on grounds that the plaint does not disclose a cause of action against the 1st Defendant which is the registered owner of the suit parcel on which it has erected the building known as Senteu Plaza.
68. That the Plaintiffs have been tenants at the said premises for 6 years occupying the 1st floor for the period 1.9.2017 to 31.8.2023 pursuant to a lease agreement dated 1.10.2017 together with the leave and license agreements dated 13.7.2020, 2.3.2021 and 14.7.2021.



69. That under clause 3 (v) of the lease dated 1.10.2017 and clause 2 (s) of the leave and license agreement, the Plaintiffs agreed to deliver up the premises with vacant possession together with the lessor's fixtures and fittings in such a state of repair and condition as at 31.8.2023.
70. That despite the lease having expired, the Plaintiffs are still in occupation of the suit premises and have failed to handover vacant possession and continue to run their businesses thereon without paying rent to the 1st Defendant.
71. The application is opposed by the Plaintiff vide Grounds of Opposition dated 10.11.2023 where they contend that the Defendants' application lacks in material and form as the application does not have a Supporting Affidavit, thus it offends Order 51 Rule 4 of the Civil Procedure Rules.
72. They also contend that the Defendants have failed to demonstrate that the grounds proffered in the application are capable of disposing off the matter in its entirety without the court pronouncing itself on the Plaintiffs' rights.
73. The Plaintiffs also opposed the application vide a Replying Affidavit sworn on 18.1.2024 by Geoffrey Somoni Birundu but the averments there of do not speak to the Defendant's Notice of Motion dated 10.11.2023 as they are a copy paste of the Plaintiffs' Supporting Affidavit to their Application dated 18.1.2024.

Submissions

74. The submissions of the Defendants are dated 20.2.2024, where it is argued that at paragraph 5 of the plaint dated 9.10.2023, the Plaintiffs acknowledges that the lease between them and the 1st Defendant was for a period of 6 years which lapsed on 31.8.2023, and since the 1st Defendant is the registered proprietor of the suit parcel, the Plaintiffs have no cause of action. To this end, the case of Time Magazine International Ltd & another v Michael F Rotich & Another [2002] eKLR is relied upon.
75. The Defendants also argue that the Plaintiffs' claim that the board resolutions between themselves and their parent company bind the 1st Defendant to sell the suit premises to the Plaintiffs is baseless as the doctrine of privity of contract does not contemplate that a party would be bound by the terms of an agreement it is not party to. The case of Kenya Women Finance Trust v Bernard Oyugi Jaoko & 2 other [2018] eKLR is relied upon.
76. It is also argued that there is no legal basis that allows a tenant to acquire proprietary interest in a property by virtue of any improvement made on the landlord's property.
77. It is submitted that in view of the Plaintiffs' trespass, rules of natural justice require that the Plaintiffs vacate the suit property and that the suit should be struck out. The case of Crescent Construction co ltd v Delphis Bank Limited [2007] eKLR as well as the case of Paolo Murri v Gian Battista Murri & Another [200] eKLR are relied upon.
78. On the Plaintiff's contention that the application ought to fail because it is not supported by an affidavit, it is submitted that there is no requirement to adduce evidence in support of an application made to strike out a suit under Order 2 Rule (15) (1) (a) of the Civil Procedure Rules. The case of Kyanzavi Farmers Limited v Middle East Bank Kenya Limited [2012] is cited.
79. The Plaintiff's submissions are dated 15.2.2024 where they contend that the suit raises a myriad of issues for determination thus it should not be struck out in a draconian manner.
80. The case of James Ndung'u Kero v Chief Land Registrar, Director of Survey & Attorney General (Environment & Land Case E046 OF 2021) [2022] KEELC 1446 (KLR) as well as the case of



University of Nairobi v George Mbele Sifuna [2021] eKLR are relied upon to submit that the application is self-defeatist for lack of a Supporting Affidavit.

Determination

81. The court will determine the Plaintiffs' 2 applications together as the issues raised therein are related, then the court will proceed to determine the merits of the application brought by the defendants.
82. The issues to be determined in plaintiffs' applications dated 9.10.2023 and 18.1.2024 are; whether the Plaintiffs have made a case for grant of a temporary injunction restraining the defendants from forcefully evicting them from Senteu Plaza, whether the Registrar of Lands should be restrained from effecting further dispositions against the suit property, whether the Plaintiffs should be granted leave to amend their pleadings and whether the Plaintiffs have made a case for setting aside of this court's directions of 20.12.2023.
83. On the prayers for injunction, reference is hereby made to the locus classicus case *Giella v Cassman Brown & Company Limited* (1973) EA 358, where it was stated 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. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”
84. The Plaintiff does admit that its lease with the defendants in relation to the suit premises came to an end in August 2023. They however contend that vide a resolution of its international board of directors dated 12.6.2017 and adopted by the Defendants, it was agreed that the Defendants would sell the suit property to the Plaintiffs at the expiry of the lease.
85. I have combed through the two documents which enabled the plaintiffs to enter into the suit premises; that is the initial lease running from 1.9.2017 to year 2020, and the leave/license agreement running from 1.7.2020 to 31.8.2023 (page 9-26 of plaintiffs' bound application dated 9.10.2023), and nowhere in the aforementioned documents is reference made to the alleged international board of directors resolution dated 12.6.2017. On the contrary, and as rightly indicated by the defendants, the plaintiffs were to give vacant possession of the suit premises upon expiry of the lease, leave and licence agreements (See clause 3 (v) of the first lease as well as clause 2 (s) of the leave/licence agreement.
86. The contents of paragraph 10 in the Supporting Affidavit to the application dated 9.10.2023 read as follows:

“That the Minutes were to officially and irrevocably form part of the terms of the Agreement that was expected to be executed between the Applicant and Ajeetkumar Chhaganlal Shah, Chandulal Chhaganlal Shah, Pankaj Chhaganlal Shah and Kamalkumar Chhaganlal Shah – the proposed Landlords whose profiles had been supplied to the Board by the Applicant's African Group Chairman and Founder, Chrisantus Obure.”
87. It is clear beyond peradventure that the aforementioned Minutes/Resolutions were futuristic and never came to pass as they were not incorporated in the lease, leave and license contracts between the protagonists.
88. The Plaintiffs have also categorically admitted in their Further Affidavit filed in the Notice of Motion dated 9.10.2023 that there was no offer from the Defendant for sale of the suit property.



89. From the above analysis, I opine that there is no *prima facie case* established by the Plaintiffs that would warrant this court to issue a temporary injunction against their eviction.
90. Further, the allegation that the lessors allowed the Plaintiffs to invest over 2 billion in the suit premises and that such conduct amounted to acquiescence and could only be interpreted to mean that they were aware and had agreed to the Plaintiffs' purchasing the suit premises fails for the reason that the Plaintiffs admit that there was no offer to sell the suit premises at any time during the subsistence of the leases.
91. The Plaintiffs were also required to establish by evidence that they would suffer irreparable injury, which cannot adequately be compensated by an award of damages. See *Nguruman Ltd v Jan Baide Nielsen & 2 Others* [2014] eKLR.
92. The Plaintiffs alleged that they would suffer loss of good will and business but they did not proffer any evidence to that effect. Their contention that relocating from the suit premises would be an expensive affair was not quantified. After all, they were aware that the lease documents indicated that they were to vacate the suit premises upon expiry of the leases/ licences.
93. Similarly, the plaintiffs failed to establish that the Defendants would not be able to pay damages if the orders sought are not granted.
94. Even if the court was to determine the matter on the balance of convenience, the same would tilt towards the owners of the suit parcel who are protected under Article 40 of *the Constitution*. In the Court of Appeal case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR, it was stated that;
- “It must also be remembered that it is a serious thing to restrain a registered proprietor of a property over what is undeniably his unless there are justifiable grounds to do so”.
95. In the case at hand, the lease between the protagonists came to an end in August 2023, the same was not extended. There is no iota of evidence to indicate that an offer for sale was ever made to the plaintiffs.
96. What more, the plaintiffs claim that they have discovered that the leases were fraudulent, and on that basis, their source of funds in USA were paused. The plaintiffs cannot be heard to challenge the leases on the basis of fraud, but cling to an alleged agreement for sale of the same premises, since according to them, the lease was anchored on the notion that they would buy the suit premises.
97. This far, the prayer for injunction fails.
98. Similarly, the prayer that the Registrar of Lands should be restrained from effecting further dispositions against the suit property fails for the same reasons analysed in the prayer for injunction. The court would only add that the Plaintiffs had been made aware of the impending amalgamation of LR no. 1/989 & 1/990 which was eventually completed on 26.5.2023 well before this suit was filed.
99. The Plaintiffs also sought to set aside directions given by the court on 20.12.2023. The said orders (which were given by consent) required the Plaintiffs to pay all water bills and electricity bills by 21.12.2023, 20% of rent arrears by 31.12.2023 and the rent arrears balance as well as rent for January by 31.1.2024.
100. The Plaintiffs now claim that their advocates had no instructions to enter into the said consent, that the said advocates were advancing the Defendants interest, and that fundamental material was not disclosed to the court, being that the Plaintiffs are funded by their international sister company and that their accounts have been frozen by the Anti-Corruption Court.



101. In *Total Kenya Limited v Kerugoya Service Station Ltd & Another* [2019] eKLR, the court stated that the principles for setting aside and/or varying a consent order are as follows:
- “(1) Where the consent was obtained fraudulently.
 - (2) In collusion between affected parties.
 - (3) Where an agreement is contrary to the policy of the Court.
 - (4) Where the consent on insufficient material facts.
 - (5) Where the consent is based on misapprehension or ignorance of material facts and
 - (6) Any other sufficient reason.”
102. The court has considered the grounds advanced by the Plaintiffs in seeking to review the orders of 20.12.2023. The Plaintiffs’ CEO categorically avers that it will be difficult for them to accomplish the orders of 20.12.2023 for a myriad of reasons advanced in the Supporting Affidavit to the Notice of Motion of 18.1.2024: including the averments that their accounts have been frozen by the Anti Corruption court.
103. This court gets the sense that the prayer is sought because the Plaintiffs are unable to meet their obligations set out in the consent order of 20.12.2023, and not because they have met any of the conditions for setting aside a consent order.
104. Nevertheless, the court is alive to the circumstances, under which the consent was made. Primarily, there was the spirit of exploring Alternative Dispute Resolution Mechanisms (ADR), and in the intervening period, the plaintiffs were to be paying rent and bills. Since the said ADR did not see the light of the day, the court would not insist on the compliance of the said consent. Indeed in this court’s ruling of 7.2.2024, where plaintiffs were seeking preservative orders, the court took into account that preservative orders had been given on the basis of ADR where plaintiffs were not to be evicted. But since the plaintiffs had declined to pay rent as per orders of 20.12.2023, then the court declined to give any preservative orders.
105. The upshot of my findings is that the orders of 20.12.2023 are no longer tenable.
106. On amendment, of the plaint, I make reference to the provisions of order 8 rule 3(1) of the *Civil Procedure Rules* which mandates a court to allow amendments of pleadings on terms deemed fit. See *Eastern Bakery v. Castelino* [1958] EA461.
107. In the case of *Antony Francis Ware Ham AF Wareham & 2 Others v Kenya Post Office Savings Bank* [2004] eKLR, it was held that:
- “For the purposes of determining the real questions in controversy between the parties, or of correcting any defect or error in any proceedings, the court may order any document to be amended.”
108. In the case at hand, the reasons advanced by plaintiff to have the 4th defendant joined in these proceedings was because the said party caused the execution of the lease agreement involving Ajeetkumar when the latter was dead.



109. However, as rightly submitted by the defendants, the intended 4th defendant was acting as their agent and nothing more. It would have been a different scenario if the defendants are denouncing their participation in the lease.
110. It is not lost to this court that the plaintiffs have given contradictory information as to when Ajeetkumar died. In the plaint at paragraph 22, they state that he died on 18.3.2018, while in the Supporting Affidavits to the application of 9.10.2023, and the one of 18.1.2024, they state that Ajeetkumar died on 24.4.2018.
111. I opine that there is no basis of having the intended 4th defendant joined as a party to these proceedings.
112. However, since a specific relief has been brought against the Land Registrar, then the said party is thereby joined in these proceedings as the 4th defendant.
113. On Defendants application dated 10.11.2023 that the instant suit should be struck out since it does not disclose any reasonable cause of action against them, I have taken into account that the 1st Defendant is the registered proprietor of the suit parcel and that they had entered into a lease with the Plaintiffs, which lease lapsed on 31.8.2023. The said lease has not been extended and no offer was made to have the property sold. The Plaintiffs have admitted that much. Thus there is no legal basis upon which the Plaintiffs can hold on to the 1st Defendants' property, hence the cause of action is indeed thin on substance!. I must add that pursuant to the provision's of order 2 rule 15 of the Civil Procedure Rule, the defendants were not required to avail any evidence, thus the application is properly before this court.
114. That notwithstanding, Courts have held that striking out a suit is a summary remedy that must be granted in the clearest of cases with extreme caution. See the case of Hasham Lalji Properties Limited v Philip Kimaiyo Komen & 2 others [2017] eKLR. There are accusations and counter accusations by the protagonists relating to payments made and or received. To this end, I hesitate to strike out the suit at this stage.

Final Orders

1. The Application dated 9.10.2023 is dismissed in its entirety with costs to the defendants.
2. The Application dated 18.1.2024 is allowed in the following terms;
 - a. The orders of 20.12.2023 are hereby set aside.
 - b. The Land Registrar is joined in these proceedings. To this end, the plaint is to be amended accordingly. The amended plaint is to be filed and served within 30 days along with summons to enter appearance upon the new party, failure to which, the order allowing the amendment shall lapse.
 - c. The plaintiffs are condemned to pay costs of the said application to the defendants.
3. The application dated 10.11.2023 is disallowed with no orders

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF APRIL, 2024 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-



Makori for Defendants

Court assistant: Eddel

