



**Tajbhai v Mistri & 4 others (Environment & Land Case
E032 of 2023) [2024] KEELC 4640 (KLR) (13 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4640 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E032 OF 2023
NA MATHEKA, J
JUNE 13, 2024**

BETWEEN

ZEENATBAI MUSTAFA TAJBHAI APPLICANT

AND

MAGANLAL PURSHOTAM MISTRI 1ST RESPONDENT

KANILABEN MAGANLAL MISTRI 2ND RESPONDENT

AHMED ISLAM ABEID 3RD RESPONDENT

AMRITLAL GOKALDAS JOSHI 4TH RESPONDENT

PRABHAVTI AMRITLAL JOSHI 5TH RESPONDENT

RULING

1. The application is dated 9th October 2023 and is brought under Order 40 Rule 1, 2 and 3 Order 51 rule I of the Civil Procedure Rules Section 1A, 1B, 3A and 63(e) of the *Civil Procedure Act*, Sections 152 1, 152B, 152E and 152 F of the *Land Act*, 2012(as amended) seeking the following orders;
 1. That this application be certified as urgent and service be dispensed with in the first instance.
 2. That Pending the hearing and determination of this application, a interlocutory Injunction do issue to restrain the respondents by themselves, their servants, workmen, agents, heirs personal representatives or otherwise howsoever from trespassing ,collecting rent and or conducting themselves.' as though they are co-landlords: co-owners/agents to the applicant and/or denying the Applicant peaceful access and full use of the premises known as Mombasa/Block 53/XX, or interfering in any manner whatsoever with the Applicant's goods in the property and /or any goods belonging to the applicant and/or proceeding with the collection of rent. and or conducting themselves as though they are co-landlords/co owners/agents for the said property belonging to the applicant.



3. That pending the hearing and determination of this application. a mandatory Injunction do issue to restrain the respondents by themselves their servants, workmen, agents, heirs, personal representatives or otherwise howsoever from trespassing. accessing. collecting rent. and or conducting themselves as though they are co-landlords, co-owners, agents to the applicant and /or denying the Applicant peaceful access and full use of the premises known as Mombasa/ Block 53/XX, or interfering in any manner whatsoever the Applicant's goods in the property and /or any goods belonging to the applicant and/or proceeding the collection of rent, and or conducting themselves as though are co-landlords/co-owners/agents for the said properly belonging to the applicant.
2. A permanent injunction be issued restraining the defendants either by themselves. his agents, relatives or employees or otherwise howsoever from trespassing. accessing' the property and or interfering with the Applicant's quiet and peaceful possession and occupation of the property known as Mombasa/ Block 53/XX, Mombasa County.
3. A declaration that the Applicant is entitled to exclusive ownership possession and occupation of the property known as Mombasa/Block 53/XX. Mombasa County as against the defendant, his agents, representatives or relatives, which possession and occupation should be granted to the claimant unconditionally. in default of which an eviction order against the defendant, his agents, representatives or relative do issue and which eviction order should be enforced by the Officer Commanding Station Mombasa Police Station.
4. That costs of this application be provided for.

It is based on the grounds that the Applicant is legal owner of premises known as Mombasa/Block 53/XX. Subject to a certificate of lease dated 2.11.2022 issued and approved by WAKF Commissioners of Kenya. That despite the fact that the Applicant is the legal owner of the premises known as Mombasa/Block 53/XX renewed lease dated 2.11.2022 and landlord to the rental houses developed on the suit land, the Respondents have proceeded to collect and or interfere with the Applicants right to collect rent from the said rented properties That despite the Applicant through her lawyers have issuing notices to the Respondents informing them of the renewed lease in place for Mombasa/Block 53/XX dated 2.11.2022, the Respondents remained adamant, neglected and refused to honor the said notices and continued to trespass and illegally access the suit premise. That the Applicant through her lawyers has issued letters to the Respondents instructing them to cease and decess from collecting rent and further gave them direction that the said rent ought to be either paid to the property owner or through the Advocates accounts for onward transmission to her. That the Respondents actions are unlawful and illegal and unless this Court grants the orders sought, the Applicant stands to suffer irreparable damage following the illegal conduct of the Respondents from the said premises or the possibility of the Applicant being locked out of the premises of instance.

5. This court has considered the application and the submissions therein. 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. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the judicial decision of Giella vs 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 the 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”.

6. Consequently, the Plaintiff ought to, first, establish a prima facie case. The plaintiff/Applicant submitted that they have established a prima facie case and relied on the judicial decision of Mrao Ltd vs First American Bank of Kenya Ltd (2003) EKLK in which the Court of Appeal gave a determination on a prima facie case. The court stated that;

“... 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.”

7. In support of their application, the Plaintiff has attached copies of documents of title to the suit property.

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) eKLK 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.

8. The Plaintiff has deponed on how she is the legal owner and the landlord to the rental houses developed on the suit land, the Respondents have proceeded to collect and or interfere with the Applicants right to collect rent from the said rented properties. In my view, therefore, the inability to collect rent from the suit property is sufficient demonstration of irreparable loss being occasioned to the Plaintiff.

9. 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) EKLK 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”.



10. 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 expressed itself thus;

“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.”

11. The Plaintiff/Applicant contends that the balance of convenience tilts in his favour because she is the owner of the suit property. The decision of Amir Suleiman vs Amboseli Resort Limited (2004]eKLR where the learned judge offered further elaboration on what is meant by “balance of convenience” and stated that;

“The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice.”

12. I find that, there is a lower risk in granting orders of temporary injunction than not granting them, at this stage. This is especially so because I have not had opportunity to to consider the matter on its merit. In view of the foregoing, I find that the Plaintiffs/ Applicants have met the criteria for grant of orders of temporary injunction.

13. The other issue for determination is whether the Plaintiff/Applicant should be granted orders of Mandatory injunction at the interlocutory stage. The Plaintiff/Applicant in his submissions states that despite the Applicant through her lawyers have issuing notices to the Respondents informing them of the renewed lease in place for Mombasa/Block 53/XX dated 2.11.2022, the Respondents remained adamant, neglected and refused to honor the said notices and continued to trespass and illegally access the suit premise.

14. The Court in Shariff Abdi Hassan vs Nadhif Jama Adan (2006) eKLR 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.”

15. 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. At this stage the court cannot tell for sure that the Defendants/Respondents have no claim over the suit pproperty. I therefore decline to grant orders of Mandatory injunction. I find that the application is merited and I grant the following orders;



1. That Pending the hearing and determination of this application, a interlocutory Injunction do issue to restrain the respondents by themselves, their servants, workmen, agents, heirs personal representatives or otherwise howsoever from trespassing, collecting rent and or conducting themselves as though they are co-landlords, co-owners/agents to the applicant and/or denying the Applicant peaceful access and full use of the premises known as Mombasa/Block 53/XX, or interfering in any manner whatsoever with the Applicant's goods in the property and /or any goods belonging to the applicant and/or proceeding with the collection of rent. and or conducting themselves as though they are co-landlords/co-owners/agents for the said property belonging to the applicant.
2. Costs to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 13TH DAY OF JUNE 2024.

N.A. MATHEKA

JUDGE

