



REPUBLIC OF KENYA



Datoo & 5 others v Lagonaria Limited & 4 others (Environment & Land Case E048 of 2023) [2024] KEELC 4679 (KLR) (12 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4679 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E048 OF 2023**

NA MATHEKA, J

JUNE 12, 2024

BETWEEN

**ANWARALI RAJABILI DATOO 1ST PLAINTIFF
MASUMALI RAJABALI DATOO 2ND PLAINTIFF
SALIM RAJABALI DATOO 3RD PLAINTIFF
MOHAMED AWNALI DATOO 4TH PLAINTIFF
FARZANA AWNALI DATOO 5TH PLAINTIFF
HERMIN FATIMA SHAH 6TH PLAINTIFF**

AND

**LAGONARIA LIMITED 1ST DEFENDANT
SHELKA INDUSTRIES LIMITED 2ND DEFENDANT
DIAMOND TRUST BANK KENYA LIMITED 3RD DEFENDANT
LAND REGISTRAR 4TH DEFENDANT
ATTORNEY GENERAL 5TH DEFENDANT**

RULING

1. The application is dated 8th December 2023 and is brought under Sections 3, 13(7) of the *Environment & Land Court Act*, Sections IA, 1B, and 63(e) of *Civil Procedure Act*, Order 5 Rule 17, Order 40 Rules 1 and 10 of the *Civil Procedure Rules* seeking the following orders;
 1. That pending inter-partes hearing and determination of this Application, a temporary order of injunction be and is hereby issued to restrain the 1st, 2nd and 3rd Defendants jointly and severally whether by themselves, their employees, servants and/or agents from further selling, leasing,



charging, mortgaging, encumbering, alienating, disposing off, transferring to a 3rd parties, dealing and or interfering in any manner with the Plaintiffs Title Number Mombasa/Block XXI/374 measuring 0.1636 acres and Title Number Mombasa/Block X measuring 0.1655 hectares, situated in Ganjoni, Mombasa.

2. That pending hearing and determination of this suit, a temporary order of injunction be and is hereby issued to restrain the 1st, 2nd and 3rd Defendants jointly and severally whether by themselves, their employees, servants and/or agents from further selling, leasing, charging, mortgaging, encumbering, alienating, disposing off, transferring to a 3rd parties, dealing and or interfering in any manner with the Plaintiffs Title Number Mombasa/Block XXI/374 measuring 0.1636 acres and Title Number Mombasa/Block XXI/375, measuring 0.1655 hectares, situated in Ganjoni, Mombasa.
 3. That in the alternative to 1 and 2 above, an Order of inhibition do hereby issue to restrict registration of dealings including but not limited to transfer, charge, lease or any encumbrance of the properties known as Title Number Mombasa/Block XXI/374 measuring 0.1636 acres and Title Number Mombasa/Block XXI/375, measuring 0.1655 hectares, situated in Ganjoni, Mombasa until further orders of this Court.
 4. That costs of this Application be in the cause.
2. It is based on the following grounds that the Plaintiffs are the registered owners of freehold titles in properties known as Title Number Mombasa/Block XXI/374 measuring 0.1636 acres and Title Number Mombasa/Block XXI/375, measuring 0.1655 hectares, situated in Ganjoni, Mombasa (suit properties). The 1st and 2nd Defendants are Lessees of the Plaintiffs suit properties Title Number Mombasa/Block XXI/374 and Title Number Mombasa/Block XXI/375 respectively (originally known as 4 Section XXI, measuring 1.980 acres) for a leasehold period of 99 years with effect from 1/11/1949 on terms and conditions set out in an Indenture dated 1/12/1949 registered on 15.12.1949 save for revision of annual rent payable to KES. 12,500 p.a for each property.
 3. The Plaintiffs have recently discovered that the 1st Defendant in breach of the said Lease and in collusion with the 3rd and 4th Defendants fraudulently, illegally, irregularly and unprocedurally through corrupt means and without the Plaintiffs consent purported to charge and encumber the suit property Title Number Mombasa/Block XXI/374 for a sum of over KES. 152,000,000 and USD. 550,000.00 which Charge and Further Charges remain undischarged on the suit property thereby exposing the Plaintiffs to irreparable loss of the suit property in the event of default by the 1st Defendant who lacks sufficient assets and means to compensate the Plaintiffs in damages in the event of sale of the property by the 3rd Defendant in exercise of statutory power of sale. The 1st and 2nd Defendants have jointly and severally defaulted in payment of annual rent of KES. 12,500 per suit property to the Plaintiffs since the year 2001 despite having acknowledged the debt and promised to pay thereby prompting the Plaintiffs to issue the statutory notice of forfeiture on 21/08/2023 which has since lapsed but the said Defendants have refused to vacate the suit property and yield up to the Plaintiff, have threatened and intend to continue with acts of trespass, forceful detainer, wasting away, destroying the suit properties and continuous fraudulent, illegal and unlawful dealings in the suit properties in breach of the lease.
 4. The 1st Defendant states that by virtue of an indenture dated 7th December 1949 between Gulamhusein Abdulla Dato and Kenya Estates Limited over all that piece of land known demarcated on Plan No. 24206 as Numbered 4 Section XXI, Kenya Estates Limited leased the property for a period of 99 years from 1st November 1949. That Kenya Estates Limited under the indenture were permitted to constructed buildings on the said property, transfer, assign or sub-let the said property without needing the express permission of Gulamhusein Abdulla Dato and/or his successors in title. That the



indenture does not contain any restrictions on charging the leased property. That the said property was sub-divided by Kenya Estates Limited giving rise to properties known as Mombasa/Block XXI/374 and Mombasa/Block XXI/375.

5. That Kenya Estates Limited on or around 1st July 1971 sub-leased Mombasa/Block Ml/374 to Madatali Alibhai Shariff and a Certificate of Lease was issued on 9th July 1971 as per the title deeds and Green card produced by the Plaintiffs at pages 8 - 29. That the sub-lease to Mombasa/Block was thereafter transferred to United Transport Agencies on or around 19th April 1993. That thereafter on or around 7th November 2001, the 1st Defendant purchased the sub lease for a consideration of Kshs 2,000,000 / =being the Lease premium and the said sum was paid to Kenya Estates Limited and a Certificate of Lease dated 7th November 2001 was issued. Annexed hereto and marked as "SKI "is a copy of the Certificate of Lease. That Mombasa/Block XXI/374 currently hosts a go-down which has been rented out to Furniture Palace Limited. That contrary to the averments made by the Plaintiffs, it is not true that the 1st Defendant has defaulted on the payment of annual rent to the Plaintiffs as there is no such obligation upon the Defendant. That the 1st Defendant's obligations were directly with Kenya Estates Limited as the Sublease of the 1st Defendant is with Kenya Estates Limited.
6. The 3rd Defendant stated that while it is true that the 1st Defendant has charged the property known as Mombasa/Block XXI/374 there is no risk of it being disposed by the Bank by way of Statutory Power of Sale as the 1st Defendant is regularly servicing its financial facilities taken with the Bank. That the Plaintiffs would not suffer any irreparable loss as the freehold title is still in their name and any Statutory Power of Sale of Mombasa/Block would be in respect of the Sub-lease. That the Bank did not procedurally, irregularly and/or through corrupt means charge Mombasa/Block the said property has been charged previously without any issues.
7. This court has considered the application, supporting affidavits, annexures and submissions therein. The prayer for temporary injunction is well discussed in the celebrated case of *Giella v Cassman Brown* (1973) EA 358. In *Nguruman Limited v Jan Bonde Nielsen & 2 others* CA No.77 of 2012 (2014) eKLR 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”.
8. That the Plaintiffs state that they are the registered owners of freehold titles in properties known as Title Number Mombasa/Block XXI/374 measuring 0.1636 acres and Title Number Mombasa/Block XXI/375, measuring 0.1655 hectares, situated in Ganjoni, Mombasa (suit properties) as Tenants in Common. Attached is a copy of the Title Deeds for the suit properties and Green cards in the names of the Plaintiffs at pages 8-29. That the 1st and 2nd Defendants are Lessees of the Plaintiffs suit properties Title Number Mombasa/Block XXI/374 and Title Number Mombasa/Block XXI/375 respectively (originally known as 4 Section XXI, measuring 1.980 acres) for a leasehold period of 99 years with effect from 1/11/1949 on terms and conditions set out in an Indenture dated 1/12/1949 registered on 15.12.1949 save for revision of annual rent payable to KES. 12,500 p.a for each property. Section 26 of the [Land Registration Act](#) states as follows;



- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
 - (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”
9. On the 2nd pillar of temporary injunctions, the plaintiff is required to show irreparable injury and I am guided by *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) eKLR where court held;
- 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.”
10. The Plaintiffs state that they have recently discovered that the 1st Defendant in breach of the said Lease and in collusion with the 3rd and 4th Defendants fraudulently, illegally, irregularly and unprocedurally through corrupt means and without the Plaintiffs consent purported to charge and encumber the suit property Title Number Mombasa/Block XXI/374 for a sum of over KES. 152,000,000 and USD. 550,000.00 which Charge and Further Charges remain undischarged on the suit property thereby exposing the Plaintiffs to irreparable loss of the suit property in the event of default by the 1st Defendant who lacks sufficient assets and means to compensate the Plaintiffs in damages in the event of sale of the property by the 3rd Defendant in exercise of statutory power of sale. The 1st Defendant stated that the indenture does not contain any restrictions on charging the leased property and that they have not defaulted in any payment. I however, find that the Plaintiffs risk suffering irreparable loss and the suit herein being rendered nugatory. The Plaintiffs challenge the 1st and 2nd Defendants title and possession of the suit property and the Charges in favour of the 3rd Defendant on the suit properties. I find they have established a *prima facie* case as well.
11. The 3rd pillar which is the balance of convenience. In *Pius Kipchirchir Kogo* case (*Supra*) the court held;
- 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”.



12. The Defendants argue that the Plaintiffs' application is not meritorious at all, there is no *prima facie* case and is only meant to harass the Defendants and prevent us from the quiet and peaceful enjoyment of their property. Simply put there is no legal basis to warrant the granting of prayers sought in the Plaintiffs' application. That there is no evidence to indicate that the Plaintiffs will suffer irreparable harm and loss should the prayers sought be denied. The 1st Defendant states that Mombasa/ Block XXI/374 currently hosts a go down which has been rented out to Furniture Palace Limited I find the balance of convenience falls in their favour. Be that as it may I find that the Plaintiffs have established a *prima facie* case and I order that the status quo be maintained pending the hearing and determination of this matter. Costs of this application to be in the cause. Parties are advised to comply with order 11 and fix the matter for hearing.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 12TH DAY OF JUNE 2024.

N.A. MATHEKA

JUDGE

