



**Mugwetwa v Rubis Energy Kenya PLC & another (Environment & Land Case E003 of 2023) [2024] KEELC 5710 (KLR) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5710 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT CHUKA  
ENVIRONMENT & LAND CASE E003 OF 2023**

**CK YANO, J  
JULY 25, 2024**

**BETWEEN**

**MUTEGI MUGWETWA ..... PLAINTIFF**

**AND**

**RUBIS ENERGY KENYA PLC ..... 1<sup>ST</sup> DEFENDANT**

**HENRY RUTERE NJAGI ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. This ruling relates to two applications. The first application is a Notice of Motion dated 30<sup>th</sup> November, 2023 by the plaintiff and the second application is a Notice of Motion dated 27<sup>th</sup> February, 2024 by the 1<sup>st</sup> Defendant.

**Plaintiff's Application Dated 30th November, 2023**

2. The Plaintiff's application is brought under Section 1A, 1B and 3A of the *Civil Procedure Act* and Order 40 Rule 2, 3 and 4 of the Civil Procedure Rules and seeks for orders:
  1. Spent
  2. A temporary injunction be and is hereby issued restraining the Defendants, their agents, employees, servants or assigns or licensee from trespassing on, entering into, remaining on, operating a petrol station or carrying on any other business or in any other way accessing any part of the Plaintiff's property known as Chuka Township/3 suited in Chuka Town, County of Tharaka Nithi, pending the interparties hearing and determination of this Application.
  3. A temporary injunction be and is hereby issued restraining the Defendants, their agents, employees, servants or assigns or licensee from trespassing on, entering into, remaining on, operating a petrol station or carrying on any other business or in any other way accessing any



part of the Plaintiff's property known as Chuka Township/3 suited in Chuka Town, County of Tharaka Nithi, pending the hearing and determination of the suit.

4. An interlocutory injunction be and is hereby issued compelling the Defendants, their employees, agents and servants to forthwith remove all their equipment, branding and logos unlawfully brought by the Defendants onto the property known as Chuka Township/3 suited in Chuka Town, County of Tharaka Nithi, and to grant the Plaintiff's vacant possession of property known as Chuka Township/3 suited in Chuka Town, County of Tharaka Nithi pending the hearing and determination of the suit.
  5. In default of compliance with order 4 above, the Plaintiff be at liberty, without need to apply, to enforce compliance through the court bailiff and the officer Commanding Chuka Police Station to provide security during the enforcement of the orders.
  6. The costs of this application be borne by the Defendants.
3. The application is supported by the affidavit of Mutege Mugwetwa and is based on the grounds that:
- a. The Plaintiff is the registered owner all that property being Title Number Chuka Township/3 suited in Chuka, County of Tharaka Nithi erected thereon, a petrol station (hereinafter referred to as 'the Suit Property').
  - b. The Plaintiff entered into a lease agreement dated 18<sup>th</sup> June, 2009 with Gulf Energy Limited for a term of Seventeen (17) years from 1<sup>st</sup> July, 2009 with an Option to Renew the said Lease Agreement.
  - c. On 13<sup>th</sup> January, 2020 Gulf Energy Limited, the Plaintiff and Gulf Energy Holdings Limited, signed a Deed of Assignment and Variation where the Lease Agreement dated 18<sup>th</sup> June, 2009 was assigned to Gulf Energy Holdings Limited and the references in the Lease were to be read and construed to the Assignee except clause 4 (m) of the said Lease which was deleted and replaced with a different clause.
  - d. Gulf Energy Holdings Limited vacated the suit property in November 2021, without the Plaintiff's knowledge and or his prior consent, contrary to the lease agreement dated 18<sup>th</sup> June, 2009 as well as the Deed of Assignment and Variation dated 13<sup>th</sup> January, 2020 and thus effectively terminated the said contracts automatically.
  - e. In the month of November 2021, the Plaintiff was surprised to notice that the Defendants had wrongfully entered and illegally taken possession the Plaintiff's suit property and unjustifiably, remained in the illegal possession of the suit property and started branding the petrol station with its colours and logos.
  - f. The Defendants are carrying out the business of selling petroleum, lubricants, oils, tyres and other products related to the business of petrol station without any colour of rights and as a consequence of illegal occupation of the suit property, the Plaintiff continues to suffer loss of monthly rent in the sum of Kshs. 450,000.00 exclusive of VAT at 16% and Mesne Profits while the Defendants are running his Petrol Station at a profit to the detriment of the Plaintiff.
  - g. The Plaintiff wrote a letter dated 12<sup>th</sup> November, 2021 through his erstwhile advocate advising the Gulf Energy Holdings Limited that the labelling and branding of the Petrol Station using their trade name Rubis instead of Gulf Energy amounted to unlawful occupation and trespass to his suit property.



- h. Gulf Energy Holdings Limited responded to the plaintiff's letter through a letter dated 22<sup>nd</sup> November, 2021 alleging that it was Gulf Holdings Limited operating the Petrol Station while the facts on the ground was that the Defendants were operating the petrol station.
  - i. The Plaintiff is in total loss of monthly rent income in the sum of Kshs. 12,528,000/= inclusive of 16% VAT as from November 2021 to-date and the said loss of monthly rent accrues every month at the rate of Kshs. 450,000.000 exclusive 16% VAT per month.
  - j. As at the date of the suit, there is no Deed of Assignment and Variations and or lease agreement entered into between the Plaintiff and the Defendants herein and or a lease registered in favour of the Defendants herein to claim any interest over the Plaintiff's suit property.
  - k. The Plaintiff therefore contends that the Defendants are trespassers on the suit property and has been denied rights, privileges associated with the ownership of the suit property which interlia; - exclusive possession.
  - l. It is on this basis that the Plaintiff is seeking a temporary injunction, pending the interparties hearing and determination of the instant Notice of Motion, restraining the Defendants, their agents, employees, servants or assigns from trespassing on, entering into, remaining on, operating a petrol station or carrying on any other business or in any other way accessing any part of that Plaintiff's property know Chuka Township/3 suited in Chuka, County of Tharaka Nithi.
  - m. The interim relief sought herein by the Plaintiff's herein in the Notice of Motion dated 30<sup>th</sup> November, 2023 is for the preservation of the suit property pending interparties hearing without any of the parties herein continues to benefit on the suit property to the disadvantage of the other.
  - n. There is not prejudice that will be occasioned to the Defendants who are unlawfully without the consent of the Plaintiff operating petrol station and making profit to the disadvantage of the Plaintiff, if the orders sought herein are granted for justice to be met.
  - o. Unless the orders sought in the instant Motion are granted, the Plaintiff will continue to suffer loss and damage from the continued trespass of the defendants.
4. In his supporting affidavit sworn on 30<sup>th</sup> November, 2023, the plaintiff reiterated the above grounds and annexed copies of the title deed to the suit property, the lease agreement, dated 18<sup>th</sup> June, 2009, the Deed of Assignment and Variation dated 13<sup>th</sup> January, 2020, photos showing occupation by Gulf Energy Holdings Limited and a certificate of photographic evidence, photos showing occupation by the Defendants and a certificate of photographic evidence, a letter dated 12<sup>th</sup> November, 2021, letter dated 22<sup>nd</sup> November, 2021, acquisition announcement by the Competition Authority of Kenya as well as Gulf Energy Holdings' CR12, a letter dated 3<sup>rd</sup> December, 2021, payment receipts by Rubis Energy Holdings Limited, and a valuation report.
  5. It is the plaintiff's contention that Gulf Energy Holdings Limited was bound by the terms of the lease between him and Gulf Energy Limited which included inter alia, not to transfer or part with possession of the suit premises without the plaintiff's prior written consent. The plaintiff states that he instructed his advocates on record to find out whether the 1<sup>st</sup> Defendant was indeed a licensee of Gulf Energy Holdings Limited and they were informed that Gulf Energy Holdings Limited was acquired by the 1<sup>st</sup> Defendant by acquiring/purchasing its entire share capital, making it its subsidiary through its local subsidiary Kenol Kobil. Relying on legal advice, the plaintiff contends that there is a difference between licensing and transferring or parting with possession. The plaintiff states that he did not enter into



- any contractual agreement with the 1<sup>st</sup> Defendant, hence a trespasser to the suit property. That the payment for rent are done by Gulf Energy Holdings Limited which shows that the only contractual relationship that exist is between Gulf Energy Holdings Limited and the Plaintiff, not the defendants.
6. In opposing the application, the 1<sup>st</sup> Defendant filed a Replying Affidavit dated 26<sup>th</sup> February, 2024 sworn by Fred Patta, the Retail Manager of the 1<sup>st</sup> Defendant. Relying on Legal advice, the deponent believes that the application is a gross abuse of court and ought to be struck out and dismissed with costs on the grounds that the matters in the application and indeed the entire suit are res sub judice as the issues are alive and pending before this court in ELC Number E002 of 2022 – Gulf Energy Holdings Limited v Mutegi Mugwetwa wherein the plaintiff is an active participant. That this suit was filed with the sole intention of stealing a match form the 1<sup>st</sup> Defendant herein by seeking to obtain ex-parte interim orders of injunction without disclosing full facts. It is also contended that the application is without merit as the applicant has failed to show a prima facie case against the 1<sup>st</sup> Defendant.
  7. It is admitted that the plaintiff entered into a lease agreement dated 18<sup>th</sup> June 2009 with respect to the suit property with Gulf Energy Limited (Gulf) which was to have uninterrupted and quiet possession of the property throughout the term of the lease, which was described to be 17 years from 1<sup>st</sup> July, 2009, with an option to renew the term. That it was also a term of the lease that Gulf could sub-let and/or license the suit property to third parties without the consent of the plaintiff as provided in clause 1(c) of the lease.
  8. The deponent avers that by a Deed of variation and Assignment dated 13<sup>th</sup> January, 2020 executed between the plaintiff, Gulf and Gulf Energy Holdings Limited (“Gulf Holdings”), it was expressly agreed that the lease was assigned to Gulf Holdings, with all the terms of the lease being incorporated, save for clause 4 (m), which clause was delegated and replaced with a different clause. Copies of the Lease and the Deed of Variation and Assignment have been annexed.
  9. The deponent states that the 1<sup>st</sup> Defendant is not on the suit property as alleged by the plaintiff, and that neither did Gulf Holdings part with possession of the suit property, but has simply permitted the 1<sup>st</sup> Defendant herein to use its branding on the suit property which it is currently doing. That the 1<sup>st</sup> Defendant is not a trespasser on the suit property as alleged by the plaintiff. That the allegations that the plaintiff has suffered any losses on account of the alleged possession of the suit property are untrue and not justified in light of the clear terms of the Lease, and that the plaintiff is only lawfully entitled to be paid rental income from the Lease by Gulf Holdings, and there are no allegations in the application that the same has not been paid. The deponent states that he is aware that the plaintiff’s demands in his letter dated 12<sup>th</sup> November, 2021 were fully addressed by the letter dated 22<sup>nd</sup> November, 2021 where it was reiterated that the 1<sup>st</sup> Defendant is not in possession of the suit property, whether as alleged by the plaintiff or at all.
  10. It is also contended that quite apart from the fact that the application does not show a prima facie case against the 1<sup>st</sup> Defendant, there has been an inordinate and unexplained delay in bringing the application as the plaintiff alleges that the 1<sup>st</sup> Defendant took possession of the suit property in November, 2021 while the application was filed in November, 2023, nearly two years later. That the delay is a clear indication that the application was brought with bad faith and with the sole intention of stealing a match against the 1<sup>st</sup> Defendant. It is also the 1<sup>st</sup> Defendant’s contention that the plaintiff will not suffer irreparable harm should the application not be allowed as the plaintiff’s only lawful entitlement is the rent payment that he receives from Gulf Holdings on account of the lease. That the balance of convenience would tilt in denying the prayers sought in the application, as allowing them would be tantamount to determining the entire suit at an interlocutory stage of the proceedings.



That the application has neither shown a prima facie case against the 1<sup>st</sup> defendant nor any special circumstances that would warrant the grant of a mandatory order of injunction at this stage of the suit.

#### **Defendants' Notice Of Motion Dated 27/2/2024**

11. The Defendants' application is brought under Section 1A, 1B, 3A and 6 of the *Civil Procedure Act*, Order 2 Rule 15 (1) (b), (c) and (d) and Order 51 of the *Civil Procedure Rules*. The same is seeking to strike out the Plaintiff's Notice of Motion and plaint dated 30<sup>th</sup> November 2023 on the grounds that the suit herein is res sub judice as there is a suit on the same or similar subject matters pending before this court in Chuka ELC Number E022 of 2022 – Gulf Energy Holdings Limited v Mutegi Mugwetwa. That the notice of motion dated 30<sup>th</sup> November, 2023 and the suit herein are a gross abuse of the process of this court and were filed with the sole intention of obtaining an ex-parte order of injunction against the 1<sup>st</sup> Defendant, and that with the intention to deceive this court, the plaintiff intentionally failed to disclose the proceedings of that other suit. That the plaintiff's conduct is a gross abuse of the process of this court, and the suit herein is frivolous, scandalous and vexatious, and is barred by the doctrine of Res sub judice. That the suit and the application were brought after an unexplained and inordinate delay, as the matters complained of are alleged to have occurred over 2 years prior to filing the suit on 30<sup>th</sup> November 2023. That consequently, the plaint and the application dated 30<sup>th</sup> November should be struck out and the suit dismissed, as the court does not have jurisdiction to entertain the suit.
12. The application is supported by the affidavit of Fred Patta, the retail manager of the 1<sup>st</sup> Defendant sworn on 27<sup>th</sup> February, 2024 wherein he reiterates the above grounds and has annexed copies of the pleadings filed in Chuka ELC Number E022 of 2022. He states that there is a risk that this court may be embarrassed into making conflicting orders with any orders that may be issued in Chuka ELC E002 of 2022.
13. In response, the plaintiff filed a Replying Affidavit dated 15<sup>th</sup> March, 2024 sworn by Mutegi Mugwetw, wherein he avers inter alia, that the suit is not res sub judice for the reason that ELC E002 and this suit have different parties since Gulf Energy Holdings Limited and Rubis Energy Kenya PLC are different entities, despite the fact that the 1<sup>st</sup> defendant acquired Gulf Energy Holdings Limited. The Plaintiff has annexed copies of the acquisition announcement. That the matter in issue and the reliefs sought in this suit are different from those in ELC E002 of 2022. The plaintiff avers that the issues raised in the current suit cannot be addressed in ELC E002 OF 2022 which involves different parties, issues and reliefs. That the instant suit can only be stayed.
14. The two applications were heard together by way of written submissions which were duly filed by both parties and which I have read and considered and I need not reproduce the same herein.

#### **Analysis And Determination**

15. I have considered the two applications as well as the affidavits in support and against and the rival submissions. I find that the following issues are for determination: -
  - i. Whether the present suit is sub judice.
  - ii. Whether the suit should be struck out.
  - iii. Whether the plaintiff is entitled to orders of temporary injunction pending the hearing and determination of the suit.



### **Whether the present suit is sub judice.**

16. The defendants have pleaded that the suit offends the principle of res subjudice due to the existence of pending proceedings in Chuka Environment and Land Court Case number E002 of 2022 – Gulf Energy Holdings Limited v Mutegi Mugwetwa ELC Case No. E002 of 2022.
17. The doctrine of sub judice is found under Section 6 of the *Civil Procedure Act*, CAP. 21 which provides as follows: -

“ 6. No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

Explanation- The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court.”
18. Numerous decisions have put the issue in perspective. The Supreme Court of *Kenya in National Commission on Human Rights v Attorney General; IEBC & 16 Others* (2002) eKLR held:

“The purpose of sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter....When two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction,, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”
19. The sub judice rule like other maxims of law has a salutary purpose. The basic purpose and the underlying object of sub judice is to prevent the courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of same cause of action, same subject matter and the same relief. This is to pin down the parties to one litigation so as to avoid the possibility of contradictory verdicts by two courts in respect of the same relief and is aimed to prevent multiplicity of proceedings.
20. I have perused Chuka Environment and Land Court case number E002 of 2022 – Gulf Energy Holdings Limited v Mutegi Mugwetwa. The subject matter is the property known as Chuka Township/3 and it is the same subject matter of the suit herein. The two suits filed consecutively are with respect to the same subject matter. Secondly, the matter in issue is directly and substantially the same matter in issue in Chuka ELC Case No. E002 of 2022.
21. It is clear from the pleadings that in both suits, the claims arise from the lease agreement dated 18<sup>th</sup> June 2009 between the plaintiff herein and Gulf Energy Limited and relates to the same suit property. It is also not disputed that by a Deed of Assignment and Variation dated 13<sup>th</sup> January, 2020, it was expressly agreed that the lease was assigned to Gulf Holdings. Further, it was a term of the lease that Gulf could sub-let and/or license the property to third parties without the consent of the plaintiff.



22. Having perused the materials on record, I opine and I come to the inescapable conclusion that this suit is sub judice, and the same is hereby stayed, pending the determination of ELC No. E002 of 2022.
23. The next issue for determination is whether the suit should be struck out. In the plaint, the plaintiff has pleaded that the defendants are trespassers on the suit property. This allegation is disputed by the defendants. In view of the fact that the parties are at variance as to whether or not the defendants are trespassers, in my view, such is a triable issue that has to be canvassed at the trial of the suit.
24. In the case of *Mohamed Mohammed Hatimy v Lameck Oluoch t/a Lamathe Hygienic Foods* Civil Appeal No. 93 of 2018, the Court of Appeal at Mombasa stated as follows:
- “In as much as the power to strike out pleadings by a court is discretionary, it should be exercised sparingly and only in the clearest of cases. This is because the consequence of striking out a pleading is that a court does not subject the parties’ dispute to a full hearing. It follows, therefore that whenever a court is faced with the question of whether or not to strike out a pleading, it has to strike a balance between two competing rights, on the one hand, a party’s right to have his/her case determined in a full trial and on the other, an opposing party’s right not to be unduly burdened with a suit which is otherwise non-starter.”
25. In the case of *Yaya Limited Vs Trade Bank Limited (In liquidation)* [2000] eKLR, the court of Appeal expressed itself as follows:
- “A plaintiff is entitled to pursue a claim in our courts however improbable his chances of success unless the defendant can demonstrate shortly and conclusively that the plaintiff’s claim is bound to fail or is otherwise objectionable as an abuse of the process of court, it must be allowed to proceed to trial...”
26. In *D.T Dobies & Company (Kenya) Ltd v Muchina* (1982) KLR, the court of Appeal stated:
- “No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action or is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”
27. Having looked at the pleadings herein, in my view, there are triable issues between both parties worth a trial before the court. I do not need to go into the merits of those issues, but it suffices to state that from the pleadings, the suit raises triable issues in the sense of the law. I therefore decline to strike out the plaintiff’s suit as urged by the defendants.

### **Whether the Plaintiff is entitled to the orders of injunction sought**

28. The Plaintiff avers that the defendants are trespassers on the suit property and that he has been denied rights and privileges associated with the ownership of the suit property which inter alia includes exclusive possession. That it is on this basis that he seeks orders of temporary injunction restraining the defendants from inter alia, remaining on the suit property as well as an order compelling them to remove their equipment from the suit premises pending the hearing and determination of the suit.
29. The defendants submitted that the plaintiff filed the suit on the basis of deliberate non-disclosure of material facts of the existence of the proceedings in ELC E002 of 2022. That the plaintiff’s failure to



disclose the material facts could not be deemed innocent as the plaintiff is an active participant in ELC E002 of 2022 and is represented by the same firm of advocates.

30. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the judicial decision of *Giella v 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 v 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.”

31. Consequently, the Plaintiff ought to, first, establish a prima facie case. In *Mrao Ltd v First American Bank of Kenya Ltd* (2003) eKLR, the Court of Appeal gave a determination on a prima facie case and stated that:

“...in civil cases, it is a case in which, on the material presented to 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.”

32. In support of his application, the Plaintiff/Applicant has stated that the defendants are trespassers on the suit property and that he has been denied rights and privileges associated with the ownership of the suit property which inter alia includes exclusive possession. The Plaintiff however, has not denied that he has leased out the suit property, and is receiving rental income. From the material on record, I am not persuaded that the plaintiff has established a prima facie case with a probability of success.

33. Secondly, the Plaintiff has to demonstrate that irreparable injury will be occasioned to him if the order of temporary injunction is not granted. The judicial decision of *Pius Kipchirchir Kogo v 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.”

34. The Plaintiff avers that he is in total loss of monthly rent income in sum of Kshs. 12,528,000/= inclusive of 16% VAT as from November, 2021 and that the said loss of monthly rent accrues every month at the rate of Kshs. 450,000/= exclusive of 16% VAT. In my view, the injury that may be suffered by the plaintiff, if any can adequately be compensated for in damages.



35. Thirdly, if the court is in doubt, the plaintiff has to demonstrate that the balance of convenience tilts in his favour. In the case of *Pius Kipchirchir Kogo v 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 it.”

36. In the case of *Paul Gitonga Wanjau v Gathuthis Tea Factory 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.”

37. In this case, it is not in dispute that the defendants are the ones in possession of the suit premises. The balance of convenience tilts in their favour, and not the plaintiff. In my considered view, the plaintiff has been unable to surmount all the three hurdles required for the grant of an interlocutory injunction.
38. Besides the order for prohibitory injunction, the plaintiff also seeks an order for mandatory injunction compelling the defendants to remove their equipment and to give vacant possession of the suit premises. The law as regards the principle to be applied when considering whether or not to grant a mandatory injunction at an interlocutory stage is higher than in respect of prohibitory injunction.
39. In the case of *Locabail International Finance Ltd v Agro Export & Another* (1986) 1 ALL ER 990, it was stated:

“A mandatory injunction ought not be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high sense of assurance that at the end of the trial, it would appear that the injunction



had rightly been granted, that being a different and higher standard than required for a prohibitory injunction.”

40. As already stated, the plaintiff had leased out the suit premises. The defendants are the ones in possession and occupation. Granting the mandatory injunction would amount to evicting the defendants before the suit is heard and determined on merit. In my view, no special circumstances have been shown to warrant the grant of the order of mandatory injunction. This is also not a clear case that the court can decide at once or in a summary manner and grant the orders sought. I therefore decline to grant the order of mandatory injunction sought by the plaintiff.
41. Upon considering the two applications, and arising from the above reasons, the final orders of the court are as follows:
- a. The Notice of Motion dated 30<sup>th</sup> November, 2023 is dismissed.
  - b. I decline to strike out and dismiss the suit as sought in the Notice of Motion dated 27<sup>th</sup> February, 2024. Instead, the suit is stayed for being res subjudice Chuka ELC No. E002 of 2022.
  - c. Each party to bear their own costs.
42. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 25<sup>TH</sup> JULY, 2024**

In the presence of:

Court Assistant – Kiruja

Ms. Jeptoo holding brief for Ms. Onyango for 1<sup>st</sup> & 2<sup>nd</sup> Defendants

Ms. Mwikali holding brief for Murimi Murango for Plaintiff

**C.K YANO,**

**JUDGE**

