



**Mohamed v Abafae & 10 others (Enviromental and Land Originating Summons
40 of 2023) [2024] KEELC 6264 (KLR) (25 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6264 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 40 OF 2023
NA MATHEKA, J
SEPTEMBER 25, 2024**

BETWEEN

JELAN ATHMAN ABABAE MOHAMED APPLICANT

AND

MOHAMED OMAR ABABAE 1ST RESPONDENT
NEEMA OMAR ATHMAN 2ND RESPONDENT
FATNA OMAR ATAMAN ABABAE 3RD RESPONDENT
RUKTYA OMAR ABABAE 4TH RESPONDENT
NAJIA OMAR OSMAN 5TH RESPONDENT
KHADIJA OMAR OSMAN 6TH RESPONDENT
MANUU OMAR ATHMAN 7TH RESPONDENT
AMINAH OMAR ATHMAN ABABAE 8TH RESPONDENT
ATHMAN OMAR ABABAE 9TH RESPONDENT
OMAR ATHMAN ABABAE 10TH RESPONDENT
HAZE INVESTMENT LIMITED 11TH RESPONDENT

RULING

1. The application is dated 2nd May 2023 and is brought under Order 32 Rule 2, Order 2 Rule 15 of the [Civil Procedure Rules](#) and Section 3A of the [Civil Procedure Act](#) seeking the following orders;
 1. That this application be certified as urgent and service be dispensed with at the first instance.



2. That there be a stay of further proceedings herein pending the hearing and determination of this application.
 3. That the honourable court be pleased to strike out the Originating Summons dated 17th 2023.
 4. That the costs of this application be provided for.
2. It is supported by the Supporting Affidavit of Omar Athman and on such further grounds that the General Power of Attorney No. 21697 dated 27th June 2022 allegedly given by Jelani Omar Athman to Abubakar Omar is a forgery since on the date when the Power of Attorney was allegedly signed by Jelani Omar Athman, the said Jelani Omar Athman was not in Kenya and could not have signed the said document. That in Civil Case No. 244 of 2021, the said Jelani Omar Athman had, through his advocates, severally indicated to the court that he was out of the country and could therefore not physically attend court. That by reason of his inability to attend court due to his being out of Kenya, Jelani Omar Athman made a formal application seeking the substitution of Abubakar Omar as the defendant therein.
 3. The next application is dated 14th June 2023 and is brought under Section 80, 3, 41 63(e) of the 32 Rule 15 of the Civil Procedure Rules, Order 45 Rule 1 and 2 of the Civil Procedure Rules seeking the following orders;
 1. That this application be certified as urgent and service be dispensed with at the first Instance.
 2. That there be a stay of further hearing pending the hearing and determination of this application.
 3. That the honorable court be pleased to review its orders/directions given on the 30 May 2023 and set the same aside.
 4. That this court be pleased to strike out the suit herein
 5. That the costs of this application be provided for.
 4. It is supported by the Supporting Affidavit of Rukiya Omar Athman and on such further grounds that there is an error apparent on the face of the record. That there is no interlocutory application that has been filed by the plaintiff/applicant. That the directions were issued on the understanding that there were two interlocutory applications which could be heard and disposed-off together. That the Originating Summons dated 15th April 2023 is fatally defective. That the defendants have no capacity to institute the suit and the same should be struck out. This application appears to have been struck off by Judge Kizito in his ruling dated 30th October 2023 at page 7.
 5. The last is the originating summons dated application is dated 17th April 2023 by the Applicant Jelani Omar Athman Abafae Mohammed which is the basis of this suit seeking orders inter alia that a temporary injunction do issue as against the respondents by themselves and/or their agents from collecting, receiving monthly rentals from any tenant from the suit premises known as MSA/BLOCK XXI/179 pending the hearing and determination of this application.
 6. This court has considered the applications and submissions in all three applications however, the preliminary issue for determination is whether it is procedural for an originating summons seeking interlocutory orders as the basis of this suit. In the case of Director of Public Prosecutions v Justus Mwendwa Kathenge & 2 others [2016] eKLR the court of appeal held that;
 7. Traditionally the basis of application of the equitable remedy of injunction has been section 63 of the Civil Procedure Act and Order 40 (previously 39) of the Civil Procedure Rules. Today Article 23 of the



Constitution specifically identifies an order of injunction as one of the reliefs that a court can grant if it is satisfied that a person's right or fundamental freedom under the bill of rights has been denied, violated or infringed or is threatened. Needless to emphasize, the remedy of temporary injunction is a vital tool intended to preserve the property in a dispute until legal rights and conflicting claims are established, so as to prevent the ends of justice from being defeated. Order 40 recognizes that a temporary injunction will be sought where a property in dispute is in danger of being wasted, damaged, or alienated, or wrongfully sold in execution of a decree, or where a party threatens or intends to remove or dispose of the property in order to defeat any execution that may ultimately be passed. An injunction may also be applied for to restrain a party from committing a breach of contract or other injury. It is equally settled that a temporary injunction cannot be claimed as a matter of right, neither can it be denied arbitrarily by the court.

8. Because of its importance and susceptibility to abuse certain guidelines have been developed while considering an application for temporary injunction. The three well-known tests enunciated in *Giella v Cassman Brown* [1973] EA 358 are to the effect that a party seeking a temporary injunction has to establish a prima facie case, whether the party seeking injunction will suffer irreparable damage if injunction is denied, and in case of doubt the issue in contention ought to be decided on the scale of a balance of convenience.
9. In 2010 the Rules Committee being conscious of the susceptibility to abuse of the remedy of temporary injunction introduced in the Civil Procedure Rules certain strictures in Order 40 rule 4, intended to obviate those abuses. The first condition is that where the court is satisfied that the object of granting the injunction would be defeated by the delay, it may hear the application ex parte. Secondly, an ex parte injunction may be granted only once for not more than 14 days, which in turn cannot be extended thereafter, except once by consent of the parties or by order of the court for a period not in excess of 14 days. Thirdly, where an ex parte injunction has been granted, the application, pleading and the order must be served on the other side within 3 days of the date of issue of the ex parte order and in default, the injunction would automatically lapse. The fourth condition is that, all applications for injunction must be heard expeditiously and in any event within 60 days from the date of filing unless for good reason time is extended by the court. The next requirement is that after inter partes hearing the ruling has to be delivered either at once or within 30 days of the conclusion of the hearing. Finally, where a suit in respect of which an interlocutory injunction has been granted is not determined within 12 months from the date of the grant, the injunction is to lapse unless for some sufficient reason."
10. In the circumstances, the Originating Summons dated 17th April 2023 is defective to the extent that it is crafted as an interlocutory application and seeks temporary remedies pending the of the hearing of the same. Temporary injunctions are a stop gap measure to preserve the property pending final orders which are not identifiable in this application. Having found so they would be no need to consider the other issues of locus of the applicant and so on. I find that this suit is unsustainable and I strike out this suit in its entirety with costs to the respondents.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 25TH DAY OF SEPTEMBER 2024.

N.A. MATHEKA

JUDGE

