



Busaidy & 2 others v Bukhala (As Personal Representative of the Estate of Zacharia Bukhala Deceased) & 3 others (Environment & Land Case E022 of 2024) [2024] KEELC 6134 (KLR) (24 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6134 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E022 OF 2024
NA MATHEKA, J
SEPTEMBER 24, 2024**

BETWEEN

**SHWYN SAID SEIF BUSAIDY 1ST PLAINTIFF
SEIF SAID SEIF AL-BUSAIDY 2ND PLAINTIFF
ZEN SAIF SAID AL-BUSAIDY (SUING IN THEIR CAPACITY AS TRUSTEE OF SEIF BIN SALIM TRUST) 3RD PLAINTIFF**

AND

**JOSPHAT BUKHALA (AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ZACHARIA BUKHALA DECEASED) 1ST DEFENDANT
AGRIPINA BUKHALA 2ND DEFENDANT
SYLVESTER BUKHALA 3RD DEFENDANT
ALL THOSE UNKNOWN PERSONS OCCUPAYING TITLE NO. MSA/BLOCK XX/200 & MSA BLOCK XX/201 4TH DEFENDANT**

RULING

1. The application is dated 25th June 2024 and is brought under Order 40 Rules 1 and 2 of the Civil Procedure Rules and Section 1A, 2B and 34 of the [Civil Procedure Act](#) seeking the following orders;
 1. That this application be certified as urgent and be heard in the first instant.
 2. That this Honourable Court be pleased to issue an Order of temporary injunction restraining the Respondents' their agents, employees and or goons from trespassing, harassing and threatening Applicant's tenants with eviction from their business premises in Applicants'



commercial building situated on plot No. Mombasa/Block XX/200 and Mombasa/Block XX/201 pending interparty hearing of this application.

3. That this Honourable Court be pleased to issue an Order of temporary injunction restraining the Respondents' their agents, employees and or goons from trespassing, harassing and threatening Applicant's tenants with eviction from their business premises in Applicants' commercial building situated on Plot No. Mombasa/Block XX/200 and Mombasa/Block XX/201 pending hearing and determination of this suit.
 4. That O.C.S Central Police Station to supervise execution of this Court Order.
 5. That cost of this application be provided for.
2. It is supported by annexed affidavit sworn by Josphat Bukhala and grounds that the Applicants are the owners of a commercial building and the Respondents are the trustees of the landowner of Plot No. Mombasa/Block XX/200 and Mombasa/Block XX/201. That the Applicants have tenants who operate their businesses and shops within the building. That on 24th June 2024 and 7th May 2024 the Respondents instructed their agents, employees and or goons to proceed to the applicant's building and trespassed then threatened to evict Applicant's tenants from their business premises in the Applicants' commercial building situated on Plot No. Mombasa/Block XX/200 and Mombasa/Block XX/201. That the Respondents' action has caused the Applicants to suffer mental anguish and untold suffering. The tenants have threatened to vacate the Applicants' property. That the Applicant's stands to suffer irreparable loss and damages. That in the interest of justice we ask the Court to issue restraining Orders of injunction.

3. 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 vs 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".

4. Consequently, the Defendants ought to, first, establish a prima facie case. In the case of Mrao Ltd vs First American Bank of Kenya Ltd (2003) EKLR 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."



5. In support of their application, the Defendants have attached copies of the searches “JB1” to show that they are lessees of the suit plots. That they are the owners of the commercial building situated on the said plots which they have rented out.

6. Secondly, The Defendants have 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) 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.

7. The Defendants deponed that the Plaintiffs are the lessors of the suit plots that on 24th June 2024 and 7th May 2024 they instructed their agents, employees and or goons to proceed to the applicant’s building and trespassed then threatened to evict Plaintiff’s tenants from their business premises in the Plaintiffs’ commercial building situated on Plot No. Mombasa/Block XX/200 and Mombasa/block XX/201.

8. 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) 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”.

9. 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.”



10. The Plaintiffs/Respondents stated that no evidence has been adduced before court that their tenants have been threatened with eviction from the suit plots.

11. 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 consider the matter on its merit. The Defendants/Applicants stated that they are the owners of a commercial building and the Plaintiffs/Respondents are the trustees of the landowner of Plot No. Mombasa/Block XX/200 and Mombasa/Block XX/201. It is not disputed that the Defendants have tenants who operate their businesses and shops within the building. In view of the foregoing, I find that the Defendants/Applicants have established a prima facie case and I order that status quo be maintained pending the hearing and determination of this case. Costs of this application to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 24TH DAY OF SEPTEMBER 2024.

N.A. MATHEKA

JUDGE

