



**Lunga Lunga Energy Limited v Acme Wanji Investments Limited & another;
Energy & Petroleum Regulatory Authority (Interested Party) (Land Case
E044 of 2024) [2024] KEELC 6060 (KLR) (18 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6060 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
LAND CASE E044 OF 2024
A NYUKURI, J
SEPTEMBER 18, 2024**

BETWEEN

LUNGA LUNGA ENERGY LIMITED PLAINTIFF

AND

ACME WANJI INVESTMENTS LIMITED 1ST DEFENDANT

IRENE ADHIAMBO T/A ZASHA AUCTIONEERS 2ND DEFENDANT

AND

ENERGY & PETROLEUM REGULATORY AUTHORITY INTERESTED PARTY

RULING

1. Before court are two applications. The first application is dated 4th June 2024 filed by the plaintiff, while the 2nd application is dated 15th July 2024 and filed by the defendants.

Application dated 4th June 2024

2. In the Notice of Motion dated 4th June 2024, the plaintiff sought the following orders;
 - a. Spent
 - b. That this court be pleased to issue an interim injunction restraining the respondents whether by themselves, their agents, assignees, servants or any other person acting pursuant to their instructions from entering, accessing, evicting, demolishing, blocking or interfering with the applicant's possession of the property known as Mavoko Municipality Block 6/3 and or returning any property removed from the gas plant pending the hearing and determination of this application and the order be effected by the Inspector General of National Police Service,



and or County Commander Machakos and or OCS Athi River Police Station and or Energy and Petroleum Regulatory Authority or any other police officer.

- c. The court be pleased to issue an injunction restraining the respondents whether by themselves, their agents, assignees, servants or any other person acting pursuant to their instructions from entering, accessing, evicting, demolishing, blocking or interfering with the applicant's possession of the property known as Mavoko Municipality Block 6/3 and or returning any property removed from the gas plant pending the hearing and determination of this suit and the order be effected by the Inspector General of National Police Service, and or County Commander Machakos and or OCS Athi River Police Station and or Energy and Petroleum Regulatory Authority or any other police officer.
 - d. That this court be pleased to commit the 1st respondent's directors herein to civil jail for a period of six months for contempt of court in deliberate and blatant disregard to an order of the High Court at Milimani issued to the 1st respondent in the High Court by Hon. Lady Justice Mongare in HCC Comm E140 of 2024 restraining the 1st respondent either in person or through his agents from accessing, trespassing, demolishing or evicting the applicant from the said property issued on the 21st March 2024.
 - e. That costs be provided for.
3. The application is supported by the affidavit sworn by Jama Hersi the plaintiff's Managing Director on 4th June 2024. The plaintiff's case is that the plaintiff and the 1st defendant have been in a lessor – lessee agreement pursuant to a lease agreement entered into on 1st July 2019 over property known as Mavoko Municipality Block 6/3 measuring 0.9146 Hectares (suit property) for a period of 5 years and 1 month. That subsequently upon negotiations, the plaintiff and the 1st defendant entered into another agreement for a new lease for a period of 10 years with effect from 1st July 2019 which is currently in force. That he complied with the requirements of the lease and proceeded to establish a Liquid Petroleum Gas (LPG) plant on the suit property on approval from the relevant regulatory authorities.
 4. He further stated that in February, the 1st defendant informed the plaintiff that he had secured investors and he intended to construct a factory on the suit property and required the plaintiff to vacate the property immediately which was declined by the plaintiff since the lease agreement was in force and no requisite notices had been issued.
 5. The plaintiff stated that the 1st defendant entered the suit property and began constructing a go down, blocking the entry – way to the plaintiff's plant and broke down the wall securing the plaintiff's gas plant thereby exposing the public to danger. He stated that he reported this matter to the police and proceeded to file a suit in the High Court obtaining orders on 21st March 2024. He also stated that on 31st May 2024, the 1st defendant through the 2nd defendant without any right or notice, unlawfully entered the suit property, knocked down the plaintiff's establishment, demolishing the property, purporting to evict the plaintiff which acts were in contravention of the High Court order. He stated that it is the intervention of officials of the interested party that led to stop the defendants from removing pipes connected to the storage containers containing liquid petroleum gas which has a capacity of over 30 cubic meters. That they diffused 5 tonnes of LPG gas worth Kshs. 20 million into the air with the potential to burn up to 8 kilometers radius, thereby risking millions of lives around Mavoko area. He stated that the defendants looted the plaintiff's property including pipes, cylinders, generators and containers worth Kshs. 4,500,000/-.
 6. The plaintiff also argued that if their property is interfered with, they stand to lose over 40 million Kenya Shillings as their business will waste away. That they have invested over Kshs. 100,00,000/- He



emphasized that if this court does not grant the orders sought, irreparable harm would befall Mavoko Municipality in the form of a gas explosion and a total loss of a multi-million investment. He attached CR 12; copy of lease dated 1st July 2019; copy of lease of 10 years; copy of OB No. 45/12/03/2024; photographs and video of eviction; OB Number 55/31/05/2024; court order in MCC MISC 37 of 2024; single business permit, petroleum business licence; fire clearance notice; cheques for Kshs. 300,000/- dated 6th January 2024, 13th January 2024 and 20th January 2024.

7. The application was opposed. Johnson Ngori Shibayilu the 1st defendant's operations manager filed a replying affidavit dated 18th July 2014. He stated that the plaintiff was insincere and dishonest as he relied on a fictitious, fraudulently obtained and unsanctioned lease agreement dated 26th July 2019 to seek the prayers and in obtaining interim orders issued by court on 11th July 2024. He maintained that the lease agreement of 26th July 2019 was never entered into by the parties, it is unexecuted, not sealed by the 1st defendant and is unstamped hence it has no legal effect.
8. He stated that the 1st defendant never entered into any such lease agreement with the plaintiff as the same was purportedly executed by a company known as "ACME Dream Limited" which is not the 1st defendant and which is a different legal entity. He conceded to the fact that the agreement dated 1st July 2019 was legally entered into by the parties which was duly executed by the parties, stamp duty paid and the lease sealed and stamped. He maintained that it is only the agreement of 1st July 2019 which had been governing the parties relationship and that is why it was the same relied upon by the plaintiff when he filed Nairobi Milimani HCC Comm No. 140 of 2024 – Lunga Lunga Energy Limited v. Acme Wanji Investments Limited.
9. He deposed that the plaintiff's business is storing and filling Liquid Petroleum Gas (LPG) in cylinders and are thus licensed by the Energy and Petroleum Regulatory Authority (EPRA). He stated that the plaintiff's licence expired on 23rd March 2024 and has not been renewed. He stated that according to the lease agreement of 1st July 2019, the lease was for a period of 5 years and one month, meaning that the lease expired on 1st August 2024. He further stated that the agreed monthly rent of Kshs. 300,000/- was to be paid quarterly beginning 15th January 2020 and rent was to be paid on 15th day of each subsequent quarter. He stated that the plaintiff was allowed to occupy the suit property rent free for the months of October, November and December 2019.
10. He argued that in Clause C paragraph (e) of the lease agreement, it was agreed that late payment of rent attracted 10% penalty and that clause C paragraph (f) provided that if rent was not paid for over 30 days the lease stood terminated. He stated that in January 2021, the plaintiff breached the terms of the lease agreement by defaulting in payment of the monthly rent with an outstanding arrears of Kshs. 1,800,000/- and penalties of Kshs. 180,000/- for late payment and by March 2024, the plaintiff had not paid rent for October 2022 and an arrears of Kshs. 3,600,000/- plus penalty of Kshs. 120,000/- remained unpaid.
11. He therefore stated that on account of the plaintiff's default, the 1st defendant instructed the 2nd defendant on 9th April 2024 to recover rent arrears from the plaintiff and the 2nd defendant obtained orders for police assistance while levying distress. That the orders were issued in Mavoko Chief Magistrate Court MCC MISC No. E037 of 2024.
12. He averred that the 2nd defendant advertised in the Standard Newspaper of 11th June 2024 for sale of the plaintiff's property which was on the suit property by public auction; which were one big LPG gas tank, one generator and 40 feet containers and which were sold on 20th June 2024. He stated that as at the time this court was issuing the interim orders, there were no property of any kind belonging to the plaintiff on the suit property and that to date, there are no properties of the plaintiff on the suit



property. He also stated that the plaintiff filed application dated 28th June 2024 in Mavoko CMCC MISC No. E037 of 2024 seeking to stop the auction, and that the application was to be mentioned on 7th August 2024.

13. The deponent asserted that the plaintiff was forum shopping and abusing the court process by seeking similar orders. He stated that the interim orders issued by this court on 11th July 2024 were already overtaken by events and ought to be vacated and discharged on grounds that; the plaintiff was not a tenant at the time of issuance of the interim orders and is still not a tenant because he failed to pay rent and the tenancy ceased to exist by dint of clause C paragraph (e) and (f); the plaintiff is not in physical occupation or use of the suit property; there is no property of any kind or description on the suit property belonging to the plaintiff; the defendant already undertook construction of a steel plant before this case was filed and upon withdrawal of Nairobi Milimani HCC Comm No. 140 of 2024; the plaintiff failed to pay rent hence violating the lease agreement leading to distress for rent and subsequent auctioning of his property by public auction on 20th June 2024 by the 2nd defendant; the lease agreement terminated on 1st August 2024 and the 1st defendant is not willing to review the same; and that the plaintiff's goods on the suit property were sold to 3rd parties and cannot be returned as contemplated in the interim orders.
14. That the steel plant by the 1st defendant needs to be completed in time to store products which are overseas. That the interim orders led to stopping of the construction by the 1st defendant leading to severe business loss and suffering injustice. That the orders issued deprived the 1st defendant of his property contrary to the provisions of *the Constitution*. That this court has unfettered discretion to discharge the injunction granted since court orders ought not be punitive and unjust.
15. He attached authority of the 1st defendant's board; an unexecuted, unsealed and unstamped agreement dated 26th July 2019; lease agreement dated 1st July 2019; plaint and application dated 14th March 2024 in Nairobi Milimani HCCC Comm No. 140 of 2024; plaintiff's licence and 1st defendant's letter dated 12th March 2024; letter of instruction by the 1st defendant to the 2nd defendant dated 22nd May 2024; court order from Mavoko MCC MISC E037 of 2024 and letter dated 12th July 2024; copies of Notification of sale of movable property dated 31st May 2024; Standard Newspaper advertisement and photographs of the plaintiff's goods; application dated 28th June 2024 in Mavoko Chief Magistrates Court MCCC MISC E037 of 2024; and photographs of the current status on the land.
16. In a rejoinder, the plaintiff's managing director Jama Hersi filed a further affidavit dated 22nd July 2024 and stated that the 1st defendant has confirmed the lease agreement dated 1st July 2019 and that this suit being of breach of contract is premised on that lease agreement.
17. He stated that the purpose of the lease agreement of 26th July 2019 was to indicate extension of the lease period by five years. He stated that it was deceitful for the 1st defendant to state that they were strangers to ACME Dream Limited when they had filed a letter of instruction to the 2nd defendant and that it was signed by Johnson Ngori for ACME Dream Limited and that the invoice from the 2nd defendant and filed by the 1st defendant shows ACME Dream Limited. He stated that both entities have some directors and operate the companies inter changeably. He stated that the validity and credibility of the lease agreement of 26th July 2019 can be determined at the trial because it is a substantive issue.
18. In regard to the plaintiff's licence, he stated that the same expires annually and is renewed and that should not concern the 1st defendant. He stated that the expiry of the licence cannot give them the right to decommission or interfere with the LPG gas which is why EPRA did not respond to the letters. Further that EPRA wrote to the defendants warning them against interfering with a gazetted plant, which they disregarded. On rent payment, he stated that the 1st defendant was malicious and dishonest



as the plaintiff has diligently been paying rent having no outstanding balance. He stated that there were inconsistencies in the defendants' documents as they alleged that outstanding rent was Kshs. 3,600,000/- but instructed auctioneers to levy distress for Kshs. 1,800,000/- and that the issue of rent distress was based on falsehoods for purposes of evicting the plaintiff without compensation.

19. According to him, for rent distress to be effective, he ought to have been served with notices but none were served and that a person's tools of trade are exempted from distress. He questioned the process and legitimacy of the court orders issued at Mavoko. Further that as at 25th July 2024, the 1st defendant was going on with construction on a gazetted gas plant. He attached CR 12; notice from EPRA; bank statements and OB numbers.

Application dated 15th July 2024

20. In the application dated 15th July 2024, the defendants sought the following orders;
- a. Spent
 - b. This Honourable Court be pleased to vacate, discharge, review and/or set aside its interim orders issued on 11th July 2024 in respect of the application dated 4th June 2024 pending the hearing and determination of this application inter partes.
 - c. The Honourable Court be pleased to fix the application herein for hearing on 25th July 2024 on the same date that the plaintiff's application dated 4th June 2024 is concurrently scheduled for directions.
 - d. This Honourable Court make further orders and issue other directions as it may deem just and expedient.
 - e. The costs of this application be provided for.
21. The application was supported by the affidavit of Johnson Ngori Shibayilu dated 15th July 2024. The defendant's case was the same as that in their replying affidavit as explained above. He alleged that the interim orders issued on 11th July 2024 had been overtaken by events as there was no tenancy relationship between the parties herein and that the same were fraudulently obtained having been based on a forged lease agreement of 26th July 2019 which was never executed by the 1st defendant. Further that clause C (e) and (f) of the lease agreement provided for default of payment of rent and where the same was for over 30 days, the agreement of 1st July 2019 would stand terminated. He also stated that the orders had barred the 1st defendant from putting up its steel plant and that the orders infringed on his Constitutional right to property.
22. The application was opposed. Jama Hersi the plaintiff's managing director filed a replying affidavit dated 22nd July 2024. He stated that the application resulting in the orders of 11th July 2024 was a wholesome application with supporting evidence including the lease agreements of 1st July 2019 and 26th July 2019. He stated that the issue of the validity of the lease agreement dated 26th July 2019 was a substantive issue which could only be determined at the trial and that although ACME Dream Limited is a different entity, it is the one that issued instructions for distress hence the two entities are one.
23. He denied allegations of not being in possession of the suit property and referred to the newspaper advertisement of 11th June 2024. Further that the advertisement was illegal and against procedures of dealing with a gas plant and that EPRA has issued notices against interfering with the gazetted plant.



24. Parties filed written submissions in support of their respective arguments. The plaintiff's submissions are dated 23rd July 2024 while those of the defendants are dated 9th September 2024. The court has duly and carefully considered both parties' submissions.

Analysis and determination

25. The court has duly considered the applications herein, the responses thereto and the submissions filed. The issues that arise are;
- a. Whether the plaintiff has met conditions for grant of temporary injunction;
 - b. Whether this court ought to punish the 1st defendant's directors for contempt of orders issued in Nairobi HCC Comm No. 140 of 2024.
 - c. Whether the interim orders issued on 11th July 2024 ought to be vacated.
26. Order 40 Rule 1 of the Civil Procedure Rules gives this court the jurisdiction to grant a temporary injunction where a disputed property is in danger of being wasted, damaged or alienated or there is a threat of it being removed or disposed in circumstances that will obstruct or delay the plaintiff in executing any decree which may be passed in the plaintiff's favour.
27. The conditions for grant of a temporary injunction are well settled. In the case of *Giella v. Cassman Brown* [1973] EA 358, the court held that a claimant seeking a temporary injunction must demonstrate a prima facie case with a likelihood of success; that if the injunction is not granted, he stands to suffer irreparable loss which cannot be compensated in damages and where the court is in doubt it ought to determine the matter on a balance of convenience.
28. A prima facie case was described in the case of *Mrao Ltd v. First American Bank of Kenya Ltd & 2 Others* [2003] KLR, by the Court of Appeal as follows;
- A case which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.
29. In this case, it is not disputed that the parties entered into a lease agreement dated 1st July 2019 for lease of the suit property for 5 years and 1 month, hence the lease was to subsist until 1st August 2024. In that agreement the parties agreed in clause C (f) that in default of payment of rent for over 30 days, the lease shall stand terminated. The parties also agreed that the monthly rent was Kshs. 300,000/- to be paid quarterly on the 15th day of each quarter. The agreement dated 1st July 2019 was entered into between ACME Wanji Investment and Lunga Lunga Energy Limited, and there is no dispute about that fact.
30. The dispute arises on whether the parties herein entered into a second lease agreement dated 26th July 2019 extending the lease period by five more years to make it ten years. Unlike the first agreement, this second agreement dated 26th July 2019 was endorsed with the stamp of ACME Dream Limited. While the 1st defendant denies entering into that agreement arguing that ACME Dream Limited and ACME Wanji Investment Limited are not one and the same person, the plaintiff argues that the directors in the two companies are the same, and filed CR 12 in respect thereto.
31. In the case of *Salomon v. Salomon & Co. Ltd* [1986] UKHC 1 [1897] AC 22, the House of Lords held that a company is a separate legal entity from its directors. Therefore I take the view that if the same directors form two or more different companies, those companies are separate and independent legal entities and legal persons and one company cannot be said to be one and the same as the other company just because the shareholders are the same.



32. In view of the above, as the second agreement dated 26th July 2019 was signed by ACME Dream Limited and not the 1st defendant, it is clear that the 1st defendant did not execute the lease agreement dated 26th July 2019 and therefore the same does not create any relationship between the parties. That being the case, the only document creating a lease agreement between the parties is the one dated 1st July 2019 for a term of five years and one month.
33. The plaintiff denies breaching the agreement of 1st July 2019. He attached cheques for 6th January 2024, 13th January 2024 and 20th January 2024 of Kshs. 300,000/- each. On the other hand, the 1st defendant stated that the payments for the first quarter was to be made beginning 15th January 2020 and that by early January 2021, the plaintiff was in rent arrears of Kshs. 1,800,000/-.
34. Although the parties agreed for the rent to be paid quarterly by the 15th day of the quarter, the plaintiff was paying the rent in bits of monthly rent. In addition, whereas the 1st defendant stated that the plaintiff had rent arrears of Kshs. 1,800,000/- as of early January 2021, the plaintiff did not present any evidence to show that he paid rent for 6 months (Kshs. 1,800,000/-) preceding January 2021. There is no evidence for rent payment and or how the same was paid in 2020.
35. The plaintiff while insisting to have diligently paid rent as agreed only produced 3 cheques of Kshs. 300,000/- each and a bank statement dated 2nd February 2021 for Kshs. 300,000/-. It is therefore clear that the plaintiff breached the lease agreement of 1st July 2019 for failing to pay rent quarterly as agreed and by delaying for periods of over 30 days. As the parties had expressly agreed as per clause C (f) of their agreement of 1st July 2019 that delay of rent payment for over 30 days will result in the lease to stand terminated, it follows that the lease agreement dated 1st July 2019 stood terminated as of January 2021 and this court cannot rewrite the parties' agreement. Since the lease stood terminated in 2021 for failure to pay rent as agreed, there is no tenancy relationship between the parties herein and therefore there is no basis for the plaintiff's continued stay on the suit property. At any rate, the lease agreement was to expire on 1st August 2024 if the same had not been breached by the plaintiff and therefore as of today, the plaintiff has no legal right to be on the suit property.
36. For the above reasons, I find and hold that the plaintiff has failed to demonstrate a prima facie case with a likelihood of success and therefore they are not entitled to orders of temporary injunction.
37. Regarding punishing the defendant's directors for disobedience of an order issued by the High Court in Nairobi HCCC Comm No. E140 of 2024, the court notes that the court in that matter granted prayers 2 and 3 of the application dated 14th March 2024. This court does not have the benefit of knowing what orders 2 and 3 were all about as the plaintiff did not attach the application in issue. But most importantly, this court is aware that the Judge who issued the said orders is a serving Judge.
38. The plaintiff has not given this court any explanation why having obtained orders before the High Court they have not cited the defendants for contempt before the High Court that issued the orders. I do not think that this court has jurisdiction to punish for contempt of alleged disobedience of orders issued by the High Court as both this court and the High Court are courts of equal status. Jurisdiction is conferred by law and the plaintiff has not cited any law allowing this court to punish for contempt of orders issued by the High Court. In the premises, the prayer for punishing the defendants for contempt is rejected.
39. On the question for vacating the interim orders of 11th July 2024 because the same were fraudulently obtained on a forged lease agreement dated 26th July 2019 and that the same were over taken by events as the plaintiff was no longer a tenant of the 1st defendant, this court takes the view that as the court has herein found that the plaintiff has failed to demonstrate a prima facie case and dismissed their prayer for



temporary injunction, the defendant application dated 15th July 2024 is overtaken by events and it will not serve the interests of justice or be a proper use of precious judicial time to make a determination of the same as interim orders granted on 11th July 2024 have ceased to be in force upon the dismissal of the plaintiff's application dated 4th June 2024. Besides, the basis for the application dated 15th June 2024 is also contained in the 1st defendant's affidavit replying the plaintiff's application dated 4th June 2024, hence the basis of the application was merely a duplication of the defendant's response. Thus the application was superfluous as the matters raised could be and have been sufficiently addressed in the determination of the plaintiff's application dated 4th June 2024.

40. In the premises, I find no merit in the applications dated 4th June 2024 and 15th July 2024 and the same are hereby dismissed. Each party shall bear its own costs.

41. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 18TH DAY OF SEPTEMBER, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Mr. Mayende for the 1st and 2nd defendants

Mr. Makowande for plaintiff

Court assistant – Josephine

