



**Schumacher v Huk (Environment & Land Case E045 of 2024)
[2024] KEELC 13414 (KLR) (19 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13414 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE E045 OF 2024**

**AE DENA, J
NOVEMBER 19, 2024**

BETWEEN

ANNA WAMBUI SIMMONS SCHUMACHER PLAINTIFF

AND

PAWEL HUK DEFENDANT

RULING

Introduction

1 The court is tasked with determination of two applications the first having been filed contemporaneously with the plaint instituting this suit. The second application is by the Defendant Respondent herein.

Application Dated 16th June 2024

2 The Plaintiff Applicants Notice of Motion is dated 11/6/2024. The Applicant seeks the following orders;

- i. Spent
- ii. That a temporary injunction be and is hereby issued restraining the respondent by himself, servants, workmen and/or agents or otherwise howsoever from trespassing, managing, entering, encroaching and/or in any way interfering with the Plaintiffs peaceful and derivative enjoyment of her proprietary rights on the suit properties Kwalediani Beach Block 1517 & Kwalediani Beach Block 1714 pending the hearing and determination of this suit.
- iii. That a permanent injunction be and is hereby issued restraining the respondent by himself, servants, workmen and/or agents or otherwise howsoever from trespassing, managing, entering, encroaching and/or in any way interfering with the Plaintiffs peaceful and derivative enjoyment of her proprietary rights on the suit properties Kwalediani Beach Block 1517 & Kwalediani Beach Block 1714 pending the hearing and determination of this suit.



- iv. That a mandatory injunction compelling the Defendant by himself, servants, workmen and agents to enter, manage and enjoy her proprietary rights on the suit properties Kwalediani Beach Block1517 & Kwalediani Beach Block1714
 - v. That the Honourable court be pleased to issue orders compelling the Respondents to furnish the applicants with detailed records and accounts of the rent income gained from the suit properties as from October 2023 to date
 - vi. That the Honourable court be pleased to issue an order compelling the Respondents to hand over full control and management of the various accounts associated with the suit properties including the Airbnb platform for Bahari Kwetu Villa within the suit property Kwalediani Beach Block1714 registered under the Respondent's names and details.
 - vii. That the OCS Diani police station to provide security for effective compliance of the orders 2,3 & 4 above
- 3 The application is premised upon grounds listed on its face and the supporting affidavit of Anna Wamboi Simmons Schumacher the Applicant. She avers that she is married to Charles Henry Simmons a British Citizen and they are the joint registered owners of matrimonial properties Kwalediani Beach Block1517 & Kwalediani Beach Block1714 hereinafter referred to as the suit properties. The Respondent is a foreigner from Poland purporting to have authority and interest over the suit properties and is in actual possession of the same. The Applicant states that she has never given any consent to have anyone use and occupy the suit properties or manage the same and hence the Respondent's actions amount to trespass. That the Respondent has further sub-let the premises which has apartments and has a running Air BnB business.
- 4 According to the Applicant, she left for the United Kingdom sometime in the year 2016 together with her two children and her husband has been in occupation of the properties and managing the same. That she was soon thereafter diagnosed with cancer and which restricted her movements and she only managed to visit the properties in early 2020. That her husband health has also gradually deteriorated and led to the Respondent's actions of taking over the properties.
- 5 The Applicant maintains that the Respondent's actions have been without her knowledge and consent. That the Respondent has his own private residence which he resides upon with his family. That he has however invaded the properties and has even without consent taken occupation and use of the Applicant's matrimonial house which prompted her to seek security for protection of the house. The Respondent has however made it impossible for the security guards to work and which has prompted several reports to the police by the applicant through the security guards. The Applicant seeks that the orders sought are granted.

Replying Affidavit

- 6 The Respondent opposed the application vide a lengthy replying affidavit dated 1382024. It is stated that the Notice of Motion and the supporting affidavit do not bear a similar date being 1162024 and 1172024 and the same is a fatal mistake. The applicant states that the nature of the prayers sought cannot obtain as mandatory and permanent injunctions cannot issue at an interlocutory stage as they can lead to finalising of a suit at an interim stage. The court is directed to in the event the orders are granted, the same are with the aim of restoring status quo and the status quo in the instant matter is that the Respondent is a lawful tenant of the suit property Baharini Kwetu Villa [Kwalediani Beach Block1714].



- 7 The Respondent denies that the Applicant is the wife of Charles Henry Simmons and stated that the property is not even jointly registered as alluded to. That the only rights the respondent has asserted over the property are for the use as a lessee and nothing else. He states that he has never taken advantage of Charles Henry Simmons to unjustly enrich himself and states that they are in some form of partnership where they gain rent income from the suit properties. The Respondent denies having received any request to give statements of account and maintains that he was not given adequate notice of the eviction.
- 8 The Respondent depones that from the agreement he was allowed to use the premises to run the Airbnb business. That the applicant is trying to invalidate a contract in which she is not a party to. That no amount has been paid towards termination fees and that the court should not allow the application.

Further Affidavit

- 9 The Applicant filed a further affidavit in response to the averments raised in the replying affidavit deponed by the Respondent. She avers that she was not a party to the lease agreement dated 182022. That she is not bound by the same and has no intentions of being bound by it. That the lease is between Charles Henry Simmons and the Defendant and does not confer any obligations to the Applicant as per the doctrine of privity of contract. The Applicant contends that she is legally married to Charles Henry Simmons and are blessed with 2 children. Further that she is the joint registered owner of the suit properties and the interest on the land is matrimonial and indefeasible. The Applicant maintains that the Defendant should seek appropriate contractual remedies from her husband and not from her. The Applicant vehemently denies any forced evictions. That the date in the application is a typographical error which cannot lead to dismissal of the suit. The court is urged to allow the application as prayed.

Defendants Application

- 10 The second application is a Notice of Motion by the Defendant dated 182024. It is brought under the provisions of the *Judicature Act* Section 10 and High Court [Practice and Procedure Rules] Rule3, Order 40 Rule 1,2,3 and 4 and order 51 of the Civil Procedure Rules, Sections 1A,1B and 3A of the *Civil Procedure Act*, Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law. It seeks the following orders;
1. Spent
 2. That pending hearing and determination of this application this Honourable court be pleased to issue the following orders
 - a. This Honourable court be pleased to order the immediate reinstatement of the applicant to enter and take possession of the suit property known as Baharini Kwetu Villa [Kwalediani Beach Block1714]
 - b. That a temporary injunction be and is hereby issued restraining the respondent by themselves, their servants, employees, agents andor any other persons working under their instructions from trespassing, entering, encroaching and or in any way interfering with the Applicants peaceful possession as well as dealing with the suit property known as Baharini Kwetu Villa [Kwalediani Beach Block1714]
 3. That pending hearing and determination of this suit this Honourable court be pleased to issue a temporary injunction restraining the respondent by themselves, their servants, employees, agents andor any other persons working under their instructions from trespassing, entering,



encroaching and or in any way interfering with the Applicants peaceful possession as well as dealing with the suit property known as Baharini Kwetu Villa [Kwalediani Beach Block1714]

4. That the OCS Diani Police Station to assist with the compliance of the orders of this Honourable court
 5. That this Honourable court do grant any other and further order as may be just and expedient and for the interest of justice.
 6. That the cost of this application be borne by the Respondent.
- 11 The same is based on several grounds listed on the application and the supporting affidavit of Pawel Huk the DefendantApplicant. He avers that he entered into a lease agreement with Charles Henry Simmons on 182022 for a period of 4 years which expires on 1st August 2026. The lease was for the suit properties herein at a consideration of Kshs 115,000- per month. That the lease is still in operation between the parties and there was no restriction on the applicant subletting the premises in whichever way. The Applicant states that the law recognises the contract between him and Charles Henry Simmons and that he has been in peaceful and quiet enjoyment of the property and has been deriving an income therefrom through an Airbnb business. That he has further made improvements on the property until 2662024 when the RespondentPlaintiff without any colour of right forcefully evicted him from the property.
- 12 The Applicant has annexed several correspondences between his clients and himself who attest to the allegedly terrifying eviction. The applicant states that the Plaintiff is not a party to the contract between him and Charles Henry Simmons because of the doctrine of privity of contract. That she therefore has no right of filing a suit against the applicant and attempting to evict the respondent. That the Plaintiff has no locus to institute anything with regard to the suit properties and cannot terminate the lease. The Defendant states that he is in the danger of losing his business as bookings for the Airbnb have been cancelled and this will greatly be prejudicial to him. The court is referred to the lis pendens doctrine and urged to invoke the same so as to preserve the suit property pending the decision of the court and allow the application in the interest of justice.

Response

- 13 In opposing the application, the Plaintiff Anna Wambui Simmons Schumacher filed a replying affidavit and confirmed that she was indeed not a party to the lease agreement. That she did not consent to the lease agreement as a joint registered owner of the property with the said Charles Henry Simmons. That the Defendant was aware that the property was owned jointly but did not seek her express consent. At paragraph 14 the Plaintiff states that she served the Defendant with an eviction notice and he was to vacate the premises within 30 days. That the Defendant purported to having powers of attorney from Charles Henry Simmons.to be on the suit property. The Plaintiff denies sending goons to evict the applicant and maintains that ample time was given for him to leave the suit property. The court is asked to consider the Plaintiffs rights of ownership of the suit properties and to consider the Defendants Notice of Motion as being grossly misconceived, lacking in merit and scandalous and must be dismissed with costs.

Submissions

- 14 The application was heard by way of written submissions. The Plaintiff filed her submissions that I have considered, I further note that when the file was placed before this court for mention to confirm filing of submissions on 1892024, the Defendant had not complied despite being given ample time to



do so. The court noted that it would proceed to make it the ruling with what is on record as captured in the proceedings of the said date.

Preliminaries

15 Before delving into the main issues for determination, I will address several issues raised by the Defendant herein which touch on the merits of the Plaintiff's application and suit. I do not wish to deal with the same as substantive issues but then the same cannot be ignored as they have been raised in the pleadings and need a finding of opinion of the court.

16 The Defendant states that he is in use of the suit property by virtue of a lease between him and one Charles Henry Simmons. That the doctrine of privity of contract does not allow the Plaintiff to interfere with the terms set out in the contract and which allow him to be in use of the suit property for a term of 4 years starting the year August 2022. The Plaintiff has in a further affidavit filed before court and whose contents have been summarised above herein, informed the court that she is a wife to Charles Henry Simmons and in fact attached a copy of the marriage certificate and further that the suit properties form her matrimonial property. I have had the opportunity to peruse the marriage certificate serial No. 178627 solemnised at Swahili Beach Diani in Kwale District. It confirms that the plaintiff is indeed the wife to the said Charles Henry Simmons.

17 Rule 4 of the Matrimonial Property Rules provides that:

Any person, including the following persons, may institute civil proceedings claiming any right or relief in relation to matrimonial property—

- (a) a spouse;
- (b) any person against whom a spouse has made a conflicting claim in respect of property; and
- (c) a trustee in bankruptcy, an executor under a will or other testamentary grant, an administrator or a personal representative, of the estate of a spouse for an order or declaration relating to the status, ownership, vesting, or possession of any specific property by, or for the beneficial interest of, a spouse or former spouse.

18 I will not delve into the issue of whether the suit property herein is matrimonial property or not as the court has not been called upon to do so. In any case the court is devoid of jurisdiction as the same is a preserve of the High court. However, the court is of the opinion that it is necessary to point out that the Plaintiff having stated that this suit and application have been filed on the strength that the suit property jointly belongs to her and her husband Chris Henry Simmons and annexed a copy of the marriage certificate, then it is imperative to point out that the law under the matrimonial property rules clothes her the locus to file the suit. The Defendant will at the opportune time give evidence if any disputing the marriage alluded to, for now the marriage certificate prima facie cements the claim of an existing marriage.

19 The Defendant contends that the Notice of Motion by the Plaintiff herein and the affidavit in support of the same do not bear a similar date which is a fatal mistake. The Plaintiff on the other hand states that the omission on the dates was a typographical error that can be amended under Section 100 of the



Civil Procedure Act. Does this anomaly in dates make the motion a fatality? The form of affidavits are provided for in law under Order 19 Rule 3 (1) of the Civil Procedure Rules, 2010 as follows;-

“Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove: Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.”

20 The Plaintiff has stated that the difference in dates was because of a typographical error and that the affidavit was filed at the same time as the motion. I have not come across any evidence on record of the motion having been filed without an accompanying affidavit as alluded to. I find this to be more of an issue of form rather than substance as the contents of the affidavit are not being questioned but rather the date. Consequently I find no merits in the Defendants arguments. I am guided by the Court of Appeal holding in *Stephen Boro Gitiha – Vs – Family Finance Building Society & 3 Others CA 3632009*, where the court held inter alia that:

“The overriding objective overshadows all technicalities precedents, rules and actions which are in conflict with it and whatever is in conflict with it must give way. If the often talked of backlog of cases is littered with similar matters, the challenge to the courts is to use the new “broom” of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible.”

21 The Defendant has lastly urged the court to rely on the doctrine of *lis pendens* in preservation of the suit properties and specifically stated that the same will be for the preservation of the suit property. The doctrine of *lis pendens* has been defined in the Black’s Law Dictionary, Ninth Edition at page 1015 as

“the jurisdiction, power, or control acquired by a court over property while a legal action is pending”

22 The concept of *lis pendens* was embodied in Section 52 of the repealed Transfer of Property Act, 1882, which provided that during the pendency of a suit, in which any right to immovable property is in question, the property cannot be transferred by any party to the suit so as to affect the rights of other parties, the same is however currently provided for under the *Judicature Act*.

23 *Lis pendens* as aptly put by Lady Justice P. Nyamweya in *Mary Njeri Kabundi v Christine Mithiri Mbugua & another* [2014] eKLR literary means a pending suit, and under the common law, the mere existence of a lawsuit involving real property creates notice to the world, and will bind subsequent purchasers of that property as to the outcome of the pending suit, regardless of their actual notice. The doctrine therefore is aimed at the protection of the property rights of parties involved in a suit, and gives authority to the court to bind any subsequent purchasers of that property.

24 With regards to the instant proceedings, I have not seen any evidence by either parties of an intention to dispose of the suit property to third parties. No danger has been posed as to any dealings on the property by any other parties other than the litigants herein. I will disregard the invitation to the court to apply the doctrine.

Analysis And Determination

25 Upon consideration of all the materials presented in respect of the two Notice of Motion applications dated the 11/6/2024 and 18/2/2024, I have identified the following issues for determination:

1. Whether either of the parties is entitled to the orders of temporary injunction sought



2. Whether the PlaintiffApplicant should be granted orders of permanent injunction and Mandatory injunction at the interlocutory stage.
 3. Whether the court should issue orders compelling the Respondent to furnish the Applicant with detailed records and accounts of the rent income gained from the suit properties as from October 2023 to date and to hand over full control and management of the various accounts associated with the suit properties including the Airbnb platform for Bahari Kwetu Villa
 4. Who bears the costs of both applications?
- 26 The first issue for determination is whether either the Plaintiff and Defendant have 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 Versus 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 versus 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”.
- 27 The Court of Appeal in the case of *Nguruman Limited vs. Jan Bonde Nielsen & 2 others [2014] eKLR* further opined that:
- ...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 stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially... if the Applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the Respondent will suffer, in the event the injunction is not granted will be irreparable. In other words, if damages recoverable in law are an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.”
- 28 In the case of *Kenya Commercial Finance Co. Ltd vs. Afraha Education Society [2001] Vol. 1 EA* (the court quoted in the *Nguruman Limited* case (supra), that the triple requirements in an interlocutory injunction application are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent and all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.
- 29 Consequently, the parties ought to, first, establish a prima facie case. The Plaintiff submitted that she has established a prima facie case as the property is jointly registered in her names with Charles Henry Simmons. That however she was not consulted before a lease was entered into with the Defendant



herein. The Court of Appeal in *Mrao Ltd Versus First American Bank of Kenya Ltd (2003) EKLK* 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.”

30 In support of her application, the Plaintiff has attached copies of documents of title to the suit properties and a marriage certificate confirming her marriage to Charles Henry Simmons. The title deed to Kwalediani Beach Block1724 was issued on 19122012. The same indicates it is registered in the names of the Plaintiff herein and Charles Henry Simmons as proprietors. The title to Kwalediani Beach Block1517 which was issued on 972015 is registered in the same manner. The Defendant has on the other hand relied on a lease agreement between him and Charles Henry Simmons as prima facie evidence of his use of the suit property. The question is whether the Defendant’s interests on the land as a lessee override those of the Plaintiff who is one of the registered proprietors of the land. But I must be careful at this stage not to navigate into the merits of the case and unknowingly lead to the determination of the suit prematurely.

31 However, it is trite that a title deed is held as prima facie evidence of ownership of property unless the same is successfully challenged. The Defendant has raised questions over the alleged joint ownership and also over the marriage between the Plaintiff and Charles Henry Simmons. For now, the court is only mandated by statute to consider a title document as prima facie evidence of ownership to land and conclusive evidence of proprietorship to land that can only be challenged on grounds stipulated under Section 26 (1) (a) and (b) of the *Land Registration Act, 2012*. With this in mind, I find that the Plaintiff has established a prima facie case unlike the Defendant who holds no title to the suit property.

32 Secondly, the Plaintiff and the Defendant ought 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 on 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.

33 The Plaintiff has deponed on how she has been denied accessing the suit properties by the Defendant. That the property is matrimonial property and the Defendant has turned it into a profit making business of air BnB to the extent that even her house is being used as a guest room. That efforts to have the properties back into her use were set in motion and a notice given to the Defendant to vacate the property but failed to do so, after lapse of the 30 days notice the tenants were asked to vacate.

34 The Defendant on the other hand states that he was in use of the property pursuant to the lease between him and Charles Henry Simmons. The court confirms that indeed there exists a lease between the Defendant and Charles Simmons but not with the Plaintiff who is a proprietor together with Charles Henry. As to the legality of the lease, the court opines that the same is an issue to be dealt with at the final dispensation of the matter after both parties litigate over the matter fully.

35 The Defendant will also find due recourse with regards to the lease if any since the earnings are quantifiable based on the agreements in the lease. But as it now stands, it is the party with the title deed to the suit properties that has an upper hand in terms of loss and damage. The court finds that



the element of substantial loss has been proved by the Plaintiff. I find it necessary to mention that the element of irreparable loss being occasioned to the Plaintiff is enhanced by the notion that the same is matrimonial property, denied use of the same may not be compensable by damages in the event that she proves her case and gets the orders sought in the long run. To prevent this, it is necessary for the injunctive orders to be issued at this stage to prevent further loss and damage. I am guided by the holding in *Bob Njoroge Ngarama vs. Mary Wanjiru Ngarama & Another (2014) eKLR*, where the court held that;

‘a matrimonial home does not only have fiscal value but also has a great sentimental value to a surviving spouse and children of the deceased which cannot be equated to monetary value.’

- 36 Further, in *Joseph Siro Mosioma vs. Housing Finance Company of Kenya Limited & 3 Others [2008] eKLR*, where Warsame J (as he was then) persuasively held as follows;-

Damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be substituted for the loss which is occasioned by a clear breach of the law, in any case, the financial strength of a party is not always a factor to refuse an injunction. More so a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction.”

- 37 Thirdly, the parties 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* the concept of balance of convenience was elaborated thus:

‘The meaning of balance of convenience in 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”.

- 38 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.”



39 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” is also instructive.

The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice.”

40 That being so, I am convinced that there is a lower risk in granting orders of temporary injunction in favour of the Plaintiff than not granting them, as it is awaited for the suit to be heard on its merits. This is especially so because the court has not had opportunity to interrogate all the documents that might be relevant in providing a history and/or chronology of events leading to the registration of title in the name of the Plaintiff. I have also not had the opportunity to interrogate the lease and the understanding between the annexures to the Defendants pleadings. I have noted that the Defendant is alluding to a partnership between him with Charles Henry Simmons. See paragraph 29 of the affidavit in response to the Plaintiff’s application. In *Robert Mugo Wa Karanja Vs Ecobank (Kenya) Limited & Another* [2019] eKLR where the court in deciding on an injunction application stated;

Circumstances for consideration before granting a temporary injunction under order 40 rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the Defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to grant a temporary injunction to restrain such acts...”

41 In view of the foregoing, I find that the Plaintiff has met the criteria for grant of orders of temporary injunction as opposed to the Defendant.

42 Should the Plaintiff be granted orders of Mandatory injunction at the interlocutory stage. It is trite that a Permanent Injunction fully determines the right of the Parties before the Court and is normally meant to perpetually restrain the commission of an act by the Plaintiff in order for the rights of the Plaintiff to be protected. This Court has the powers to grant the Permanent Injunction under Sections 1A, 3 & 3 A of the Civil Procedure Code, 2010 if it appears to the court that the right of a Party has been infringed, violated and/or threatened as the Court cannot just fold its hands, wait and watch under these given circumstances.

43 The circumstances under which the Court would grant a Mandatory Injunction at an interlocutory stage were articulated by the Court of Appeal, in *Kenya Breweries Limited & Another vs. Washington O. Okeyo* Civil Appeal No. 332 of 2000 [2002] 1 EA 109:

A mandatory injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However if the case is clear and one which the Court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the Defendant attempted to steal a march on the plaintiff, a mandatory injunction will be granted on an interlocutory application...A mandatory injunction ought not to 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 directed at a simple and summary act which could be easily remedied or where the Defendant had attempted to steal a march on the Plaintiff.”



44 The Court also reaffirmed its decision in Shariff Abdi Hassan Vs Nadhif Jama Adan [2006] eKLR where it stated thus:

The courts have been reluctant to grant mandatory injunction at the interlocutory stage. However, where it is prima facie established as per the standards spelt out in law as stated above that the party against whom the mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case.”

45 I think for now no special circumstances have been set forth warranting the grant of a permanent and mandatory injunction at an interlocutory stage. The issues raised by both parties clearly need further interrogation and it will be a miscarriage of justice to grant any permanent orders as of now. I therefore decline to grant orders of Mandatory injunction.

46 Whether the court should issue orders compelling the Respondent to furnish the Applicant with detailed records and accounts of the rent income gained from the suit properties as from October 2023 to date and to hand over full control and management of the various accounts associated with the suit properties including the Airbnb platform for Bahari Kwetu Villa, the Plaintiff has not proved that she has any stake in the business, the Defendant had alluded to having a partnership with Charles Henry Simmons but the same was just a statement made with no evidence of such partnership. Even if the said partnership existed then the Plaintiff is surely not part of it. I don't think enough basis has been laid to grant these orders. I also do not see any nexus of these orders to the contents of the Plaintiff.

47 I find and hold that the Defendant has not established that he has a prima facie case with a probability of success and I decline to grant the order of injunction sought and the Defendants Notice of Motion application dated 18/2024 is accordingly dismissed. It is noteworthy that on the 1st August 2024 the court issued orders reinstating the Defendants to the premises. For the avoidance of doubt the orders collapse with the application.

48 Consequently, I make the following orders; -

SUBPARA A.

A temporary injunction be and is hereby issued restraining the Defendant by himself, servants, workmen and/or agents or otherwise howsoever from trespassing, managing, entering, encroaching and or in any way interfering with the Plaintiffs peaceful and derivative enjoyment of her proprietary rights on the suit properties Kwalediani Beach Block1517 & Kwalediani Beach Block1714 pending the hearing and determination of this suit.

SUBPARA B.

Each party to bear its own costs.

RULING DATED SIGNED AND DELIVERED THIS 19TH DAY OF NOVEMBER 2024

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A E DENA

JUDGE

Mr. Oliech for the Plaintiff

Mr. Wango'mbe for the Defendant

Asmaa Muftah - Court Assistant

