



**Abeid as trustees for and on behalf of Abeid, Arwa Abeid & Amira Abeid v
Goldstone Apartments Management Limited & 2 others (Environment & Planning
Appeal E008 of 2024) [2025] KEELC 496 (KLR) (12 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 496 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & PLANNING APPEAL E008 OF 2024
SM KIBUNJA, J
FEBRUARY 12, 2025**

BETWEEN

**WAHIDA SAID AL ABEID AS TRUSTEES FOR AND ON BEHALF OF ABEID,
ARWA ABEID & AMIRA ABEID APPELLANT**

AND

GOLDSTONE APARTMENTS MANAGEMENT LIMITED 1ST RESPONDENT

GSST PROPERTY MANAGEMENT LIMITED 2ND RESPONDENT

MOHAMED SWALEH 3RD RESPONDENT

RULING

1. The appellants moved the court vide a notice of motion dated 25th September 2024 seeking for the following orders:
 1. Spent.
 2. That this Honourable Court be pleased to grant an order of injunction restraining the defendants by themselves, their servants, employees or agents from suspending, terminating or in any manner whatsoever from interfering with the provision of services specified in the lease agreement dated 17.1.2020 pursuant to the 2nd and 3rd defendant's notices dated 7th and 8th March 2024 respectively pending this hearing of the application interpartes.
 3. That this Honourable Court be pleased to grant an order of injunction restraining the defendants by themselves, their servants, employees or agents from suspending, terminating or in any manner whatsoever from interfering with the provision of services specified in the lease agreement dated 17.1.2020 pursuant to the 2nd and 3rd defendant's notices dated 7th



and 8th March 2024 respectively pending the hearing of Civil Appeal No. ECEPA E008 OF 2024, the appeal herein.

4. That costs of this application be provided for.

The application is supported by five (5) grounds on its face and the affidavit of Wahida Said Al-Abeid, the appellant, sworn on 25th September 2024, inter alia deposing that this appeal arises out of a ruling dated 13th September 2024 by the trial court on her application dated 21st March 2024, for injunctive orders; that the trial court relied on alleged minutes by the Goldstone Management Company of 3rd November 2023, and not of the 1st respondent; that the said minutes did not have the list of attendees, was not signed, and had no resolutions; that since the sublease agreement dated 17th January 2020 was registered and indicated the service charge per quarter as Kshs.10,000, the same can only be varied through a written and registered agreement; that the trial court failed to apply its mind to section 3 of the *Law of Contract Act* when it relied on the unsigned minutes to vary the service charge; that her appeal has a good chance of success, as the suit property is her residential home, and the respondents are likely to terminate the essential services, including water supply, thereby exposing her to diseases and compromise her health. That it is only just and fair that the orders sought herein be granted.

2. The application is opposed by Mohamed Swaleh, the 3rd respondent, through his replying affidavit sworn on 4th October 2024, inter alia deposing that the application is defective as the appellant is trying to run away from her obligations after the trial court denied her the same prayers; that injunctive remedies are not convenient in this case as the appellant ought to have paid the service charge, and claim a refund if successful in her appeal; that the other lessees of the 1st respondent are complying with the regulations and the court ought not to allow the interests of the appellant to outweigh the common good of the other lessees; that the lease provided for service charge of Kshs.10,000 per quarter and had a provision for revision; that the service charge was revised to Kshs.12,000 per month in a consultative forum attended by all the lessees on 23rd November 2023, and the minutes thereof circulated through WhatsApp group of all residents, where the appellant is a member; that the appellant is not deserving of the services as she breached the terms of the provision of services and thus the notice of termination of services was within the rights of the respondents; that the appellant did not meet the threshold for grant of injunctive orders which led to dismissal and discharge of the temporary orders in the trial court and that the balance of convenience lies in directing the applicant to comply and pay the service charge which is monetary in nature and can easily be refunded if the court allows the appeal; that the appellant must comply with the contractual requirements and pay the service charge in order to be provided with security, maintenance, cleaning of common areas, water and sewerage services among others.
3. The appellant filed a supplementary affidavit sworn on 28th November 2024, inter alia deposing that she complied with orders of this court and deposited the disputed amount in court but the respondents are yet to render the services set out in the sub lease agreement; that the sublease agreement was in personam and it was not enforceable as against the world; that amendments to a registered lease must be done in compliance with the legal requirements for the original lease, such as signing by authorized parties as required by the provisions of the *Law of Contract Act*, and its registration with the relevant authorities; that variation of terms must be agreed between herself and the lessor, Adnan Sharif Nur, expressed through a deed of variation and not by unilateral decisions of the 1st respondent, who is only a Management Company.
4. The court issued directions on filing and exchanging submissions on the 19th November 2024, but as of today, the 6th February 2025, none has been filed.
5. The issues for determination by the court are as follows:



- a. Whether the appellant has met the threshold for the injunctive orders sought to be issued.
 - b. Who is entitled to costs?
6. The court has meticulously considered the grounds on the application, affidavit evidence by the parties as summarized above, and come to the following determinations:
- a. As correctly stated by the appellant, temporary injunction pending appeal is provided for in Order 42 Rule 6 (6) of the *Civil Procedure Rules*. In the case of *Patricia Njeri & 3 others v National Museums of Kenya* [2014] eKLR the court, while relying on the case of *Venture Capital & Credit Limited v Consolidated Bank of Kenya Ltd* Civil Application No Nairobi 349 of 2003 (174 of 2003) UR, gave the following guidance on grant of temporary injunctions pending appeal:

In the Venture Capital case the Court of Appeal said that an order for injunction pending appeal is a discretionary matter. The discretion must, however, be “exercised judicially and not in whimsical or arbitrary fashion.” This discretion is guided by certain principles some of which are as follows:

- (a) The discretion will be exercised against an Applicant whose appeal is frivolous (See *Madhupaper International Limited v Kerr* (1985) KLR 840 (cited in Venture Capital). The Applicant must state that a reasonable argument can be put forward in support of his appeal (*J. K. Industries v KCB* (1982 – 88) KLR 1088 (also cited in Venture Capital)
- (b) The discretion should be refused where it would inflict greater hardship than it would avoid (See *Madhupaper supra*).
- (c) The Applicant must show that to refuse the injunction would render his appeal nugatory (See *Butt v Rent Restriction Tribunal* (1982) KLR 417 (cited also in Venture Capital).
- (d) The Court should also be guided by the principles in *Giella v Cassman Brown & Company Ltd* (1973) EA 358 as set out in the case of *Shitukha Mwamodo & Others* (1986) KLR 445 (also cited in Venture Capital).

The superior courts decisions/case laws seem to rely on *Madhupaper* case [supra] and agree that the *Venture* case [supra] is the locus classicus on the injunctions pending appeal.

- b. The court has gone through the parties’ averments and or depositions, the oral submissions by both counsel of 9th October 2024 and 19th November 2024, and what comes out clearly is that there is a dispute between the parties on the service charge payable, and whether or not appellant is in arrears of the same, that led to issuance of a termination letter and stoppage of services to the appellant. The said termination letter appear not to have been availed by the parties to the court.
- c. According to the 3rd respondent, the appellant, has been enjoying services without fulfilling her obligation to pay service charge as required under the sublease. The court on 9th October 2024 directed the appellant to deposit the service charge arrears from February to



October 2024 in an interest-earning joint account. Further, the court on 19th November 2024 directed the appellant to continue paying service charge in the said account as it becomes due.

- d. The court reminds itself that it need not make any final findings on any points of facts or laws that are in dispute at this interlocutory stage, but upon considering the facts so far presented by the parties, I find the appellant has a prima facie case in her appeal. In applying the principles of a temporary injunction, and having found that the appellant has passed the first principle of a prima facie case, the court need to make a finding on whether the second principle of suffering irreparable injury has been established by the appellant. The appellant has in her deposition deposed that discontinuation of services will expose her to diseases. That probability has not been rebutted and I find the appellant has satisfied the second principle. That in view of the orders made on the 9th October 2024 and 19th November 2024 that secures the interests of both parties as this appeal is heard and determined, I find the appellant's application has merit.
- e. Cost under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya follows the events unless where for good reasons otherwise directed by the court. Though the appellant has successfully prosecuted the application, I am of the view that justice will be better served with an order that costs abide the outcome of the appeal.

7. From the determinations, the court finds and orders as follows:

- a. The notice of motion dated the 25th September 2024 has merit and is allowed in terms of prayer 3 of the said application on condition that the appellant continues depositing the service charge whenever it becomes due in the joint account as ordered on 19th November 2024.
- b. The costs to abide the outcome of the appeal.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 12TH DAY OF FEBRUARY 2025.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the presence of:

Appellant : Mr Wameyo

Respondents : M/s Achieng

Shitemi – Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

