Mahadi Investment Limited v Kenya Railways Corporation & another (Environment & Land Case E502 of 2024) [2024] KEELC 13967 (KLR) (20 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13967 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E502 OF 2024

JO MBOYA, J

DECEMBER 20, 2024

BETWEEN

MAHADI INVESTMENT LIMITED ..... PLAINTIFF

AND

KENYA RAILWAYS CORPORATION ..... 1ST DEFENDANT

THE TRUSTEES, KENYA RAILWAYS CORPORATION STAFF RETIREMENT BENEFITS SCHEME ..... 2ND DEFENDANT

RULING

Introduction And Background:

1. The Plaintiff/Applicant has approached the court vide Notice of Motion Application dated 27th November 2024 brought pursuant to the provisions of Sections 1A, 1B, 3A and 63[e] of the *Civil Procedure Act*; Order 40 Rule 1; and Order 50 Rule 1 of the Civil Procedure Rules 2010; Sections 3, 13 (1) (2) & (7) of the *Environment and Land Court Act*, 2011; and in respect of which the Applicant has sought the following reliefs;

    i. .....Spent

    ii. An interim order of injunction do issue restraining the Defendants/Respondents, their officers, agents, employees, functionaries or officials by whatever name called from trespassing, encroaching upon, demolishing, evicting, transferring or any way whatsoever interfering with the Plaintiff/Applicant's quite possession and occupation of all that property known and described as L.R NO. 209/1064/1, 2, & 3 situate at Valley Road, within Nairobi County pending the hearing and determination of the instant application.

    iii. An interim order of injunction do issue restraining the Defendants/Respondents, their officers, agents, employees, functionaries or officials by whatever name called from trespassing,

encroaching upon, demolishing, evicting, transferring or any way whatsoever interfering with the Plaintiff/Applicant's quite possession and occupation of all that property known and described as L.R NO. 209/1064/1, 2, & 3 situate at Valley Road, within Nairobi County pending the hearing and determination of the suit filed herein.

iv. The OCS Kilimani Police Station do ensure compliance of the orders herein.

v. Costs of this application be provided for.

2. The instant Application is premised/anchored on various grounds which have been enumerated at the foot thereof. Furthermore, the Application is supported by the Affidavit Asha Hersi Moghe sworn on 27th November 2024 and a Further Affidavit sworn on 10th December 2024.

3. Upon being served with the subject Application, the 1st Defendant/Respondent filed a Replying Affidavit sworn by Philip J. Mainga on 7th December 2024 and a Further Replying Affidavit sworn on 16th December 2024. Instructively, the Deponent of the Replying Affidavit has averred that the lease in respect of the suit properties lapsed in 2010 long before the purported sale between the 2nd Defendant/Respondent and the Plaintiff/Applicant herein.

4. The 2nd Defendant/Respondent filed a Replying Affidavit sworn on 13th December 2024 and a Further Replying Affidavit sworn on 16th December 2024. Suffice it to underscore that the 2nd Defendant/Respondent contended that the suit properties were vested in it vide *Legal Notice No. 169 of 2006*.

5. The subject Application came up for hearing on 16th December 2024 whereupon the advocates for the respective parties covenanted to canvass and dispose of the subject Application by way of oral submissions.

Parties' Submissions

A. Applicant's Submissions:

6. Learned counsel for the Applicant adopted the grounds contained at the foot of the Application and also reiterated the averments contained in the body of the Supporting Affidavit. In addition, learned counsel for the Applicant also highlighted the contents of the Further Affidavit.

7. Furthermore, learned counsel for the Applicant raised and canvassed six [6] salient issues for consideration by the court. Firstly, learned counsel for the Applicant submitted that the Applicant entered into and executed a Sale Agreement with the 2nd Defendant/Respondent in respect of L.R No. 209/1064/1, 2, 3, 4 & 5 respectively. For coherence, it was contended that the Sale Agreement was reduced into writing and duly executed by the parties.

8. Arising from the foregoing, learned counsel for the Applicant has therefore submitted that the case beforehand touches on and concerns specific performance and not a claim for liquidated damages.

9. Secondly, learned counsel for the Applicant has submitted that the Sale Agreement which underpins the suit beforehand was entered into between the Applicant and the 2nd Defendant. In particular, it has been submitted, that the 1st Defendant/Respondent was not a party to the Sale Agreement. To this end, learned counsel for the Applicant has submitted that the 1st Defendant/Respondent has no locus standi to sue or be sued under the Agreement.

10. Thirdly, learned counsel for the Applicant has submitted that the suit properties, namely L.R No. 209/1064/1, 2, 3, 4 & 5 were vested in the 2nd Defendant herein. In this regard, learned counsel for the Applicant has cited and referenced *Legal Notice No. 169 of 2006*. Pertinently, it has been contended

that on the basis of the said Legal Notice, the suit properties belonged to the 2nd Defendant and not otherwise.

11. Fourthly, learned counsel for the Applicant has submitted that the *Legal Notice No. 169 of 2006* has never been challenged and/or impugned by the 1st Defendant. In this regard, it has been contended that the 1st Defendant cannot now be heard to raise a claim to and in respect of the suit properties.

12. Fifthly, learned counsel for the Applicant has submitted that pursuant to the Sale Agreement that was entered into and executed on 2nd February 2015 the Applicant herein paid 50% of the purchase price/ consideration. To this end, learned counsel for the Applicant cited and referenced clause 3.2.4 of the sale agreement which highlighted the manner in which the purchase price was to be paid.

13. Having paid 50% of the purchase price, learned counsel for the Applicant has submitted that the Applicant herein accrued and acquired lawful rights to and in respect of the suit properties. In any event, learned counsel for the Applicant added that upon payment of the 50% of the purchase price, the 2nd Defendant handed over the suit properties to the Applicant. Instructively, it was posited that the suit property was handed over on 3rd March 2015.

14. Sixthly, learned counsel for the Applicant has submitted that the Applicant is the one who has been in occupation of the suit properties. For coherence, it was submitted that the Applicant has been in occupation of the suit properties for more than nine (9) years. In this regard, it was posited that the Applicant is entitled to the equitable orders of temporary injunction to avert the offensive activities by and on behalf of the 1st Defendant/Respondent.

15. Arising from the foregoing submissions, learned counsel for the Applicant has therefore submitted that the Applicant has established and demonstrated the existence of a prima facie case with probability of success.

16. Other than the foregoing, learned counsel for the Applicant has also submitted that the loss that the Applicant is disposed to suffer is irreparable. In particular, it has been contended that the loss in question is not quantifiable in monetary terms. Furthermore, it has been posited that the loss cannot be quantified because the nature of the claim before the court is one for specific performance of the sale agreement and not for liquidated damages.

17. Flowing from the foregoing submissions, learned counsel for the Applicant has therefore implored the court to find and hold that the Application beforehand is meritorious. The court has been invited to grant the orders of temporary injunction in the manner highlighted at the foot of the Application.

B. 2Nd Respondent's Submissions:

18. Learned counsel for the 2nd Respondent relied on the contents/averments contained in the Replying Affidavit sworn on 13th December 2024 and the Further Affidavit sworn on 16th December 2024. In addition, learned counsel for the 2nd Respondent has highlighted three [3] pertinent issues for consideration.

19. First and foremost, learned counsel for the 2nd Respondent has submitted that the suit properties were vested in the 2nd Respondent vide *Legal Notice No. 169 of 2006*. In this regard, learned counsel for the 2nd Respondent has posited that the 2nd Respondent acquired and accrued legal rights to and in respect of the suit properties.

20. Furthermore, it was contended that the Legal Notice under reference has never been challenged by the 1st Respondent. In this regard, it was submitted that the 2nd Respondent therefore had the proprietary rights and/or interests capable of being sold to and in favour of the Applicant.

21. Secondly, it was submitted that the 2nd Respondent entered into and executed a Sale Agreement with the Applicant on 2nd February 2015. In addition, learned counsel for the 2nd Respondent submitted that thereafter the 2nd Respondent proceeded to and handed over vacant possession to the Applicant on 3rd March 2015.

22. Arising from the foregoing, it has been contended that the suit properties were lawfully sold to and in favour of the Applicant. Besides, it was contended that what was outstanding was the delivery of the Certificate of Title by the 1st Respondent herein.

23. Thirdly, learned counsel for the 2nd Respondent has submitted that the 1st Respondent herein has variously acknowledged the proprietary rights and interests of the 2nd Respondent over the suit properties. To this end, learned counsel for the 2nd Respondent cited and reference annexure JKK16 attached to the Replying Affidavit sworn on 13th December 2024.

24. Owing to the fact that the 1st Respondent has variously admitted and acknowledged the rights of the 2nd Respondent over the suit properties, it was contended that the 1st Respondent is therefore estopped from challenging the rights of the Applicant to the suit properties.

25. At any rate, learned counsel for the 2nd Respondent has submitted that the 2nd Respondent did not participate in the eviction of the Applicant from the suit properties. Consequently, learned counsel for the 2nd Respondent implored the court to find and hold that the transaction between the Applicant and the 2nd Respondent was lawful and valid.

26. To vindicate the submissions that the 2nd Respondent acquired lawful rights to and in respect of the suit properties, counsel cited and referenced the decision in Teleposta Pension Scheme v Intercountries Limited & Others [2024] KECA [Court of Appeal Decision].

C. 1St Respondent's Submissions:

27. Learned counsel for the 1st Respondent adverted to the Replying Affidavit sworn by Philip Mainga on 7th December 2024 and the Further Affidavit sworn on 16th December 2024. Furthermore, learned counsel for the 1st Respondent also referenced the List and Bundle of Authorities dated 14th December 2024.

28. Additionally, learned counsel for the 1st Respondent has submitted that the sale agreement which is being relied upon by the Applicant to advance a claim to the suit properties was entered into in 2015. However, it has been contended that by the time the Applicant and the 2nd Respondent were entering into the impugned Sale Agreement, the 2nd Respondent had no title to and in respect of the suit properties. In this regard, it has been posited that in the absence of a title to the suit properties, the 2nd Respondent had nothing to convey to and in favour of the Applicant.

29. Secondly, it has been submitted that the lease in favour of the suit properties lapsed in 2010. Furthermore, it has been contended that upon the lapse of the lease in 2010, the vesting order no. 169 of 2006 ceased to have any legal effect. To this end, it has been submitted that the Applicant herein acquired no rights to and in respect of the suit properties.

30. Arising from the foregoing, learned counsel for the 1st Respondent has submitted that the Applicant herein has neither established nor demonstrated the existence of a prima facie case with probability of success.

31. Thirdly, learned counsel for the 1st Respondent has submitted that the Applicant herein has failed to demonstrate that same [Applicant] shall be disposed to suffer irreparable loss. In any event, it has been submitted that the Sale Agreement that was entered into between the Applicant and the 2nd Respondent contained a clause for termination. To this end, learned counsel for the 1st Respondent referenced clause 8 of the Sale Agreement.

32. Suffice it to state that learned counsel for the 1st Respondent contended that by dint of clause 8 of the Sale agreement the Applicant herein would be entitled to damages in the event of termination of the Contract/ Sale Agreement. In this respect, learned counsel for the 1st Respondent has posited that insofar as the loss to be suffered, if any, is capable of being quantified and paid in monetary terms, the Applicant is not entitled to an order of temporary injunction.

33. In any event, learned counsel for the 1st Respondent has submitted that the Applicant herein has venture forward and tabulated the nature of loss that same [Applicant] shall be disposed to suffer. To the extent that the Applicant has tabulated the loss, if any, that same is disposed to suffer, it has been contended that the loss in question is therefore compensable in monetary terms

34. Finaly, learned counsel for the 1st Respondent has submitted that the Applicant herein has approached the court with unclean hands. In this regard, it has been contended that the Applicant had previously filed ELC E476 of 2024 and when the court did not grant any interim orders, the Applicant herein quickly filed the instant suit without disclosing the existence of the previous suit.

35. It has been submitted, that by filing the instant suit during the pendency of ELC E476 of 2024, the Applicant herein was indulging in forum shopping and an endeavour to abuse the due process of the court. In this respect, learned counsel for the 1st Respondent has impugned the conduct of the Applicant.

Issues For Determination

36. Having considered the Notice of Motion Application dated 27th November 2024, the Responses thereto and upon taking into account/considered the oral submissions on behalf of the parties, the following issues emerge and are thus worthy of consideration:

    i. Whether the Applicant has established and demonstrated the existence of a prima facie case with a probability of success.

    ii. Whether, the Applicant has proved that same shall be disposed to suffer irreparable loss if the orders sought are not granted, or otherwise.

    iii. Whether the conduct of the Applicant meets the threshold for the grant of an Order of temporary Injunction.

Analysis And Determination:

Issue No. 1 Whether the Applicant has established and demonstrated the existence of a prima facie case with a probability of success.

37. The Application beforehand seeks the grant of the equitable remedy of temporary injunction. To this end, it is incumbent upon the Applicant to establish and demonstrate the existence of a prima facie

case with probability of success. For coherence, it suffices to state and underscore that the existence of a prima facie case constitutes a pre-cursor or prelude to partaking of and benefiting from an order of temporary injunction.

38. Put differently, the existence of a prima facie case constitutes a launching pad towards partaking of an order for injunction. In particular, it is instructive to state that any Applicant desirous to procure an order of temporary injunction must demonstrate at the onset a prima facie case.

39. Given the importance of a prima facie case with probability of success to an application for temporary injunction, it becomes imperative to appreciate and discern what a prima facie case denotes. To this end, it is apposite to state that what constitutes a prima facie case has received judicial interpretation in a number of decisions.

40. Notably, prima facie case was defined and elaborated upon in the case Mrao Limited v First American Bank of Kenya [2003] eKLR where the court stated and held thus:

> 4. A prima facie case in a civil application includes but is not confined to a "genuine and arguable case." It is 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.

41. The meaning and import of a prima facie case was re-visited in the case of Jan Bonde Nielsen v Nguruman Limited & 2 others [2016] eKLR where the Court of Appeal stated as hereunder:

> (24) Starting with what amounts to a prima facie case, the learned Judges expressly accepted the definition given in Mrao Ltd. –v- First American Bank of Kenya Ltd. & 2 Others, (supra). In that case, a prima facie case was defined as follows:
>
> "In civil cases, a prima facie case is a case in 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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case".
>
> On this definition, the learned Judges expressly stated: -
>
> "We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be urgent necessity to prevent the irreparable damages that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it, the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title, it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or as otherwise put, on a preponderance of probabilities".

42. Flowing from the definition of what constitutes a prima facie case [details in terms of the preceding paragraphs], it is now apposite to revert to the facts of the instant matter and to discern whether the Applicant herein has demonstrated a prima facie case in the first place.

43. To start with, it is imperative to recall that the Sale Agreement which underpins the Applicant's claim for specific performance was entered into on 2nd February 2015. Furthermore, the said Sale Agreement contained terms and conditions including the completion period. Having been entered into and executed on 2nd February 2015, there arises a question pertaining to and concerning whether the suit beforehand had been filed within the requisite limitation period.

44. Pertinently, the suit by and on behalf of the Applicant herein which touches on and concerns breach of contract by the 2nd Respondent appears [I say appears] to be caught up by limitation.

45. Secondly, it is also worthy to recall that by the time the Applicant and the 2nd Respondent were entering into and executing the Sale Agreement on 2nd February 2015, the lease term in respect of the suit property had lapsed. To this end, it suffices to recall that the 2nd Respondent indeed acknowledged that the lease term had lapsed and even communicated with the Commissioner of Lands in and endeavour to have the lease renewed.

46. At any rate, it is not lost on this court that both learned counsel for Applicant and the 2nd Respondent conceded that the only document bespeaking the renewal of the lease was a letter from the Commissioner of Land dated 21st June 2010.

47. Be that as it may, there is no gainsaying that where a lease term expires and/or lapses it is incumbent upon the person seeking extension or renewal [whichever is applicable] to comply with the statutory provisions of the law. In particular, it suffices to reference the provisions of Sections 12 and 13 of the *Land Act* 2012 [2016].

48. Nevertheless, I beg to underscore that the extension of leases or better still the renewal thereof, is dependent on the issuance of a fresh certificate of lease. For good measure, it is the issuance of such certificate of lease under the relevant act that confers/bestows upon the designated party legal rights and/or interest over a particular property. [See 24 and 25 of the *Land registration Act* 2012].

49. Furthermore, it is important to recall and reiterate the holding of the Court of Appeal in the case Joseph N.K. Arap Ng'ok v Moijo Ole Keiwua & 4 Others [1997] eKLR where the court stated as hereunder:

> It is trite that such title to landed property can only come into existence after issuance of letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to provisions in the Act under which the property is held.

50. Additionally, though there was a vesting order which vested the suit property to and in favour of the 2nd Respondent, there is no gainsaying that what was vested upon the 2nd Respondent was the remainder of the lease term. To this end, it suffices to underscore that the moment the lease term at the foot of the vesting order expired then the ownership of the suit properties reverted to the government. In this regard, a question does arise as to whether or not the 2nd Respondent had any lawful rights or interests over the suit properties capable of being conveyed to the Applicant.

51. On the other hand, it is instructive to recall that the Applicant herein is also seeking an order of specific performance. Pertinently such an order can only be sought for and against the parties who were privy to the Contract/ Sale Agreement.

52. In this regard, one would have imagined that the claim for specific performance would only be raised against the 2nd Defendant/Respondent. Nevertheless, it suffices to underscore that the claim for specific performance has also been raised against the 1st Defendant/Respondent.

53. Suffice to state that the import and tenor of the doctrine of privity of contract may arise and become relevant in respect of the instant matter. Instructively, the question that may have to be addressed relates to whether the claim for specific performance can ensue as against the 1st Defendant/Respondent. [See AFC vs Lengetia (1985) eKLR.] [See also Savings and Loans Limited vs Kanyenje Karangaita Gakumbi ltd (2015) eKLR].

54. Be that as it may, I hold the humble opinion that the doctrine of privity of contract may not bind the 1st Defendant/Respondent. However, I must reiterate that I am not called upon to make any final proclamation on the issue and the legal consequences of the doctrine of privity of contract.

55. Furthermore, to the extent that the Application is anchored on a claim for specific performance, there also arises the question as to whether the Sale Agreement dated 2nd February 2015, complies with all the legal requirements. Suffice to say, that there is a lingering question of the validity of the sale agreement and limitation of actions that may have to be addressed.

56. Yet again, the court will have to evaluate whether the contract that underpins the claim for specific performance meets and or satisfies the legal ingredients that were highlighted in the case of Reliable Electrical Engineering Ltd vs Mantrac (K) Ltd (2005) eKLR. For coherence, the court elaborated on the parameters that anchor a claim for specific performance in the following terms:

> Specific performance, like any other equitable remedy, is discretionary and the court will only grant it on the well settled principles.
>
> The jurisdiction of specific performance is based on the existence of a valid, enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or unenforceable.
>
> Even where a contract is valid and enforceable specific performance will, however, not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even where damages are not an adequate remedy specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the defendant.

57. I beg to state that what is before me is an interlocutory application. To this end, I am not called upon to make precipitate findings of fact and law. Nevertheless, there is no gainsaying that a court dealing with an interlocutory application like the one beforehand is called upon to weigh the conflicting aspects of the case and thereafter to form a prima facie opinion on the chances of success.

58. To buttress the foregoing exposition of the law, it suffices to adopt and reiterate the holding in the case of Mbuthia v Jimba Credit Finance Corporation & Another [1988] eKLR:

> The correct approach in dealing with an application for the injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side's propositions.

59. Having reviewed the affidavit evidence on record and having taken into account various principles of the law, I am afraid that the Applicant herein has neither established nor demonstrated a prima facie

case with probabilities of success. For good measure, there are various questions of the law, including limitation of actions, nemo dat quod non habet , validity of the Sale agreement and the legality of the impugned Sale Agreement. These perspectives hamper proof of a prima facie case.

Issue No. 2 Whether, the Applicant has proved that same shall be disposed to suffer irreparable loss if the orders sought are not granted, or otherwise.

60. Having come to the conclusion that the Applicant herein has neither established nor demonstrated a prima facie case with probability of success, it would have been apposite to bring the ruling to a close. For coherence, it is settled law that the conditions for the grant of an order of temporary injunction are sequential.

61. To this end, it behoves any applicant, the current Applicant not excepted, to first and foremost to establish a prima facie case. It is only after the establishment of a prima facie case that an Applicant can venture forward and address the question of irreparable loss.

62. To underscore the foregoing position of the law, it suffices to cite and reference the decision in the case of Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86, where the Court of Appeal stated and held as hereunder:

> 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 is 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.

63. Notwithstanding the foregoing, I feel obligated to venture forward and consider the issue of irreparable loss. In particular, it is imperative to ascertain whether the Applicant shall be disposed to suffer irreparable loss if the order sought is not granted.

64. First and foremost, the Applicant's case beforehand revolves around the Sale Agreement which was entered into between the Applicant on one hand, and the second Respondent on the other hand. For good measure, the Sale Agreement under reference is dated the 2nd February 2015.

65. Pertinently, the Sale Agreement under reference contains the various terms and conditions under which the Applicant and the 2nd Respondent contracted. Nevertheless, it suffices to posit that the Sale Agreement contained a clause on termination and recompense, if any, payable on breach/frustration of the contract. [See clause 3.4.2 of the Sale Agreement under reference].

66. Other than the foregoing, it is also worthy to state that the Applicant herein has ventured forward and enumerated the nature of loss that same shall be disposed to suffer. Instructively, the loss that is envisaged by the Applicant has been quantified and claimed at the foot of the Plaint beforehand.

67. To my mind, the loss, if any, that flows from breach and/or frustration of a contract are not only ascertainable and quantifiable, but same are also measurable in monetary terms. In any event, it is trite and established law that damages for breach of contract lie in compensation.

68. In this regard, it suffices to take cognizance of the Holding in the case of Kenya Tourist Development Corporation v Sundowner Lodge Limited [2018] eKLR where the Court of Appeal stated thus:

> With the greatest respect to the learned Judge, we think that the reasoning is quite flawed. We are not persuaded that the authorities cited by the learned Judge support the proposition

> that in cases of breach of contract there does exist a large and wide-open discretion to the court to award any amount of damages. The opposite is in fact the case: as a general rule general damages are not recoverable in cases of alleged breach of contract and that has been the settled position of law in our jurisdiction, and with good reason. In DHARAMSHI vs. KARSAN [1974] EA 41, the former Court of Appeal held that general damages are not allowable in addition to quantified damages with Mustafa J.A expressing the view that such an award would amount to duplication.
>
> And so it would be. See also Securicor (k) Vs. Benson David Onyango & Anor [2008] eKLR. The same situation applies to the case at bar in that the respondent having quantified what it considered to have been the loss it suffered, and gone on to particularize the same, there would be absolutely no basis upon which the learned Judge would go ahead to award the totally different, unrelated, unclaimed and unquantified sum of Kshs. 30 million merely because he believed that the respondent "had suffered serious damages" (sic). What was suffered or was believed to have been suffered, the damage that is, to be compensated by way of damages, could only be known by the respondent and it claimed it in specific terms which, in the event, it was unable to prove."

69. On the other hand, it is worthy to recall that the Applicant herein did not contend that the 1st Respondent is not seized of the requisite capacity and ability to pay damages, if any, that may ultimately be found due and payable.

70. On the contrary, it is common ground that the 1st Respondent is a statutory body created and established an Act of Parliament, namely, *Kenya Railways Corporation Act* Chapter 397, Laws of Kenya. In this regard, there is no gainsaying that the 1st Respondent is possessed of sufficient resources capable of meeting and paying any amount of damages that may ultimately be found due, subject to proof by the Applicant.

71. Flowing from the foregoing analysis, what comes to mind is to the effect that the loss that the Applicant may [I SAY, MAY] accrue is indeed quantifiable and ascertainable in monetary damages. Notably, the Applicant itself has gone forward and impleaded special /liquidated damaged at the foot of the Plaint.

72. Taking into Account the foregoing discussion, I come to the conclusion that the Applicant herein has neither demonstrated nor proved that same [Applicant] shall be disposed to suffer irreparable loss. Absent irreparable loss, an order of temporary injunction ought not to be issued.

73. The Court of Appeal in the case of Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR, had occasion to define the parameters that must be established and demonstrated before an order of injunction can issue.

74. For coherence, the Court stated thus:

> In conclusion, we stress that it must always be borne in mind that the very foundation of the jurisdiction to issue orders of injunction vests in the probability of irreparable injury, the inadequacy of pecuniary compensation and the prevention of the multiplicity of suits and where facts are not shown to bring the case within these conditions the relief of injunction is not available.

75. Before departing from the issue of irreparable loss, it suffices to cite and reference the decision in the case of Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 others [2015] eKLR, where the Court of Appeal elaborated on the meaning and import of what constitutes irreparable loss.

76. Instructively, the Court stated as hereunder:

> "On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."

77. My answer to issue number two (2) is twofold. Firstly, the Applicant herein has ventured forward and quantified the damages, which same [Applicant] envisage to suffer and/or accrue in the event of breach of contract.

78. Secondly, there is no gainsaying that the loss which the Applicant may suffer is quantifiable and ascertainable. To this end, the critical aspect that touches on and concerns irreparable loss, has not been met or established.

Issue No. 3 Whether the conduct of the Applicant meets the threshold for the grant of an Order of temporary Injunction.

79. The Applicant herein has sought for the equitable orders of temporary injunction. In this regard, it suffices to underscore that whoever seeks to partake of an equitable order of injunction is called upon to approach the Court with clean hands and not otherwise.

80. Nevertheless, it is imperative to recall that the Applicant herein had filed a previous case, namely ELC E476 of 2024 and wherein the Applicant contended that same [Applicant] had been evicted from the suit properties.

81. Other than the admission/confession by the Applicant in the said case [details in terms of the preceding paragraph], it is not lost on this Court that the Applicant had sought an order of interim injunction. Nevertheless, it suffices to recall that the court declined to grant such an interim protection.

82. In an endeavour to circumvent the orders that were granted by the court vide ELC E476 of 2024, the Applicant filed the instant suit. However, it suffices to posit that the Applicant did not disclose the existence of the previous suit and the attendant proceedings, either in the manner required under the provisions of Order 4 Rule 1[2] of the Civil Procedure Rules, 2010, or at all.

83. Be that as it may, the filing of the instant suit was unearthed by Hon. Justice MD Mwangi, Judge, who thereafter reverted the instant matter to this Court for consideration and determination.

84. From the background which has been highlighted in the preceding paragraphs, it is evident and apparent that the Applicant herein had been less than candid with the Court. Simply put, the conduct of the Applicant is devoid candour.

85. In a nutshell, I am afraid that the conduct of the Applicant herein does not meet the threshold set by equity. For good measure, equity frowns upon persons who seek to partake of benefits thereunder without making full and frank disclosures.

Final Disposition:

86. Flowing from the foregoing analysis, [details highlighted in the body of the Ruling] it must have become crystal clear that the Applicant herein has not established and/or proved the requisite conditions that underpin the grant of an order of temporary Injunction.

87. Further and at any rate, there is no gainsaying that the conduct of the Applicant herein has not been equitable.

88. In the premises, the final orders that commend themselves to the court are as hereunder:

    i. The Application dated 27th November 2024 be and is hereby dismissed.

    ii. Costs of the Application be and are hereby awarded to the 1st Defendant/Respondent only.

89. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER 2024

OGUTTU MBOYA,

JUDGE.

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In the presence of:

Hilda – court Assistant.

Mr. Etemere and Mr. Gitau for the Plaintiff/Applicant

Mr. Mwangi K M and Mr. Kipngétich for the 1st Defendant/Respondent

Mr. Mugo for the 2nd Defendant/Respondent