Kinyua v Wanjiru (Civil Appeal E001 of 2023)
[2024] KEHC 4653 (KLR) (25 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4653 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL APPEAL E001 OF 2023

FN MUCHEMI, J

APRIL 25, 2024

BETWEEN

SIMON MWANGI KINYUA ..... APPELLANT

AND

SALOME JUDY WANJIRU ..... RESPONDENT

RULING

Brief Facts

1. The application for determination is dated 11th July 2023 seeks for orders of injunction restraining the respondent from interfering with the appellant's quiet use, levying distress, increasing monthly rent and enjoyment of the suit premises located along Makongeni, Thika pending the hearing and determination of the appeal.

2. In opposition to the application, the respondent filed a Replying Affidavit dated 5th March 2024.

The Applicant's case

3. The applicant states that he is a protected tenant within the provisions of Cap 296 of the Laws of Kenya, having executed a written agreement dated 15th May 2015 with the respondent's deceased mother. The applicant states that he pays a monthly rent of Kshs. 14,000/- and during the time of entry he paid a sum of Kshs. 44,000/- being rent plus utilities. The applicant further states that he also paid a sum of Kshs. 56,000/- to the respondent's deceased mother for allowing him to put up semi-permanent structures.

4. Pursuant to restraining orders issued by the Rent Restriction Tribunal on 9th July 2021, the applicant was able to remain in situ without disturbance from the respondent. On 29th June 2023, the tribunal delivered its judgment and dismissed his application seeking a restraining order and hence he states that he is exposed to auction and eviction as threatened.

5. The applicant states that he has invested in the said premises and used colossal amounts of money to repair, renovate and improve the plot that is fence maintenance, gate repair, water piping, roofing, ceiling painting, tiling, kitchen, bathroom and toilets, changing door locks, drainage to avoid flooding and electricity wiring system all estimated at Kshs. 405,000/-. The applicant further states that he has erected semi-permanent structures worth Kshs. 180,000/- where he rears chicken and goats.

6. The applicant contends that the respondent admitted before the tribunal that she facilitated with Kshs. 70,000/- for removal of his container worth Kshs. 620,000/- including logistic by Thika County Government which he had placed adjacent to the plot. The applicant further states that he spent Kshs. 120,000/- to get back the container and further it was damaged.

7. The applicant states that the respondent has been receiving rent from him which shows that she admitted him to continue as her tenant under the existing lease agreement dated 15th May 2015. As such, the applicant avers that he does not have accrued rent arrears and has paid rent up to date. Further, the applicant contends that he has heavily invested in the said plot and that he shall suffer substantial loss if the orders sought are not allowed.

8. The applicant contends that the intended appeal has high chances of success and the same shall be rendered nugatory if the orders sought are not granted.

The Respondent's Case

9. The respondent states that she is the owner of House No. 874 in Kamenu Estate Thika having bought the house from one Samuel Ngari Enos for the sum of Kshs. 1,850,000/-. At the time of purchasing the house, the respondent states that her mother was unwell and she allowed her mother to collect rent on it. Thus she states that her mother has no authority to sign any document on her behalf and in relation to her house. The respondent further states that the applicant became a tenant in her house when her mother was alive. The respondent contends that there was no written tenancy agreement signed by herself nor did she authorize her mother to sign any agreement. As such, the respondent contends that the document produced by the applicant is a forgery and fraud.

10. The respondent contends that her mother did not receive any deposit for rent nor did she receive any security to put up illegal structures around her house. The respondent argues that construction of illegal structures by the applicant is contrary to the county by laws as all structures should be put up with the approval of the county government.

11. The respondent states that in the year 2020, she lost her job and returned back to the country but she could not move into her house as it was occupied by the applicant. The respondent states that she asked the applicant to vacate her house and served him with a one month notice to vacate but the applicant filed Rent Restriction Case No. E320 of 2021 on 9/7/2021 seeking orders to stop his eviction.

12. The respondent states that she pays a monthly rent of Kshs. 25,000/- and yet she receives Kshs. 14,000/- as monthly rent from the applicant, which is a total loss to her as she is paying Kshs. 11,000/- on top of the rent the applicant is paying.

13. The respondent argues that she continues to suffer loss despite owning a house and she if she had gotten back her house on 29/7/2021 when she served the notice, she would have saved a sum of Kshs. 253,000/-.

14. The respondent states that the applicant without her authority has been keeping domestic animals on the compound of her house as well as farming on the premises thus making the place extremely untidy and smelly. Furthermore, the respondent contends that the owners of neighbouring properties have

made complaints to her accusing her of allowing farming within an urban area thus reducing the living standards of the area. The respondent further states that the county officials have questioned her as she does not have a permit to rear domestic animals in her house.

15. The respondent further states that the applicant without authority brought a shipping container next to her house in readiness to put up business stalls. The respondent contends that the applicant tried to entice her with a free stall which she declined and the county officials removed the illegal container. The respondent argues that she is the owner of the house and the applicant should not use it to enrich himself.

16. The respondent states that she has been suffering loss due to the continued stay of the applicant in her house and further the applicant has plans to become a landlord over her property by letting out stalls next to her house. Furthermore, the respondent contends that her plans to put up a perimeter fence around her house have not been possible due to the applicant's occupation of the house.

17. The respondent states that the applicant has been very problematic in paying rent as he is currently in arrears of Kshs. 120,000/- made up of rent Kshs. 59,000/-, water Kshs. 42,740/-, security Kshs. 20,000/- and electricity Kshs. 23,377/-.

18. The respondent contends that on 29/7/2021, the applicant secured orders to stop eviction from her house and thus he has enjoyed the said orders from 9/7/2021 up to 29/6/2023, which is a period of over 23 months. Moreover, the applicant stated in his affidavit that he was not opposed to vacating the respondent's house and all he needed was time to look for an alternative house however, the respondent contends that it has now been more than two years and the applicant has had more than ample time to move to another house.

19. The respondent states that the rent tribunal found that the tenancy agreement between the applicant and her late mother was not binding on her, that she was entitled to live in her own house to cut down costs and that that the applicant had more than enough notice to vacate her house.

20. The respondent argues that it is against Article 40 of the *Constitution* to deny her the use of her property since2021 when she asked the applicant to vacate her house. Further, the respondent contends that the applicant has not invested in her house but he has only illegally kept chicken and goats which ought to be removed. As such, the respondent argues that the applicant does not stand to suffer any loss as he has no permission to put up structures in her property as her house is not a business premises but a residential house.

21. The respondent argues that the appeal has no chances of success, is frivolous and an abuse of the court process as there is no law that allows tenants to live perpetually in other people's properties.

22. The applicant filed a further affidavit dated 15th March 2024 and states he entered into a valid agreement with the respondent's mother and it was for a period of 10 years. The applicant further states that at the point of entering into the agreement, the respondent's mother represented herself as the owner of the premises. Moreover, the applicant contends that the respondent is not the owner of the house as she has not furnished any ownership document.

23. The applicant argues that the respondent cannot dispute the agreement as she was not a party. Further, the respondent cannot deny the existence of the agreement but acknowledge that the applicant is a tenant. The applicant further argues that the respondent has been receiving rent thus implying acknowledgement of the agreement.

The Applicant's Submissions

24. The applicant relies on the cases of *RTS Flexible Systems Ltd vs Molkerei Alois Muller GmbH & Co KG (UK Production)* [2010] UKSC14 [45] and *Fidelity Commercial Bank Limited vs Kenya Grange Vehicle Industries Limited* [2017] eKLR and submits that he entered into a valid agreement dated 15th May 2021 with the respondent's mother and fulfilled the requirements of the agreement thus becoming a tenant. The applicant further argues that since the authenticity of the agreement has not been successfully challenged, the court ought to protect him as a tenant.

25. Relying on the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto* (2013) eKLR, the applicant submits that he has extensively developed the property and he stands to suffer irreparable damage in the event the orders sought are not granted.

26. The applicant relies on the case of *Butt vs Rent Restriction Tribunal* [1979] eKLR and urges the court to exercise its discretion and issue the orders sought. The applicant further submits that his appeal has high chances of success.

The Respondent's Submissions

27. The respondent relies on the cases of *Giella vs Cassman Brown* [1973] EA 358 and *Mrao Ltd vs First American Bank of Kenya Ltd & 2Others* [2003] KLR 125 and submits that the applicant has not made out a *prima facie* case. The respondent argues that no rights of the applicant have been breached as he was a tenant on her premises and she served him with a notice to vacate way back in July 2021. Further, the Rent Restriction Tribunal held that he should vacate the house. Thus, the respondent submits that the tenancy contract terminated when the notice period ended and the applicant cannot force a contractual relationship between himself and the respondent. The respondent argues that the applicant is the one trampling on her rights as she is paying rent of Kshs. 25,000/- elsewhere and yet she receives Kshs. 14,000/- as rent from the applicant. The respondent states that she has suffered great loss over time as she has had to top up Kshs. 11,000/- on the rent she pays. Thus, the respondent argues that if the injunction is denied, the applicant will not suffer any harm at all as he can move to another house and pay the same amount of rent. As such, the respondent contends that the applicant will not suffer any irreparable harm that cannot be compensated by way of damages. To support this contention, the respondent relies on the case of *Banis Africa Ventures Limited vs National Land Commission* [2021] eKLR.

28. The respondent submits that the balance of convenience tilts in favour of denying the orders as a competent tribunal investigating the matter of tenancy was satisfied that the alleged lease agreement dated 15/5/2015 was not binding on the respondent. As such, the respondent submits that the applicant has failed to demonstrate that he deserves injunctive orders.

29. The respondent submits that the applicant is essentially seeking stay of execution of the judgment of the tribunal. Relying on the case of *Rebecca Chepkoech Lagat vs William Kibor Lagat* [2020] eKLR, the respondent submits that the applicant does not stand to suffer any substantial loss as he is not claiming ownership of the house but is forcing himself as a tenant which she is not keen to have him as such.

30. The respondent further submits that the applicant has no arguable appeal as he has no written lease or tenancy agreement with herself. The respondent submits that the tribunal already determined that the tenancy agreement signed between by the applicant and her mother is not binding on her as she was not a party thereto. Moreover, the applicant did not sue the estate of the respondent's mother if he intended to enforce the alleged written tenancy.

31. The respondent further submits that by his own admission, the applicant agreed to vacate and asked for sufficient time to vacate vide his affidavit 13/1/2022. Thus the respondent argues that the applicant has had more than sufficient time to vacate as it has been more than two years now since the applicant filed the said affidavit.

32. The respondent states that the judgment in the tribunal was delivered on 29/6/2023 and he filed the current application and secured the interim orders on 14/7/2023. However upon getting interim orders, the applicant has not filed the record of appeal, nine months down the line. The respondent contends that the applicant has been enjoying interim orders for 9 months just like in the tribunal where the applicant got the interim orders in 2021 and he did not prosecute the case until 2023, thus enjoying interim orders for around 23 years. The respondent contends that it is clear that the applicant is not interested in the merits of the appeal but he is intent on continuing to frustrate her.

33. The respondent submits that a balance ought to be struck as she is entitled to enjoy the fruits of the judgment of the tribunal. She successfully defended the tribunal case and was happy that she should finally get to enjoy her house after a protracted suit at the tribunal.

34. The respondent further submits that the applicant has blatantly refused to pay rent, water bills, electricity bills and security fee to the tune of Kshs. 120,000/-. The applicant is abusing the court orders in place to deny her rental income despite living in her house or pay other utilities. The respondent states that the applicant has not denied the outstanding amount and neither has he produced any evidence to show that he has paid for rent or the utilities.

The Law

Whether the applicant has met the requisite conditions to warrant the granting of a temporary injunction.

35. Order 42 Rule 6(6) of the *Civil Procedure Rules* 2010 empowers this court to grant a temporary injunction on terms it deems fit so long as the procedure for filing an appeal from the subordinate court has been complied with. It provides thus:-

> Notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in the exercise of its appellant jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from subordinate court or tribunal has been complied with.

36. In the instant case, the judgment of the Rent Restriction Tribunal was delivered on 29th June 2023 whilst the Memorandum of Appeal was filed on 11th July 2023. To that end, the applicant duly complied with the procedure for instituting an appeal before this court and thus the court has jurisdiction to entertain the present application.

37. The principles for granting of a temporary injunction pending appeal are now well settled. Those principles were set out by Visram J (as he then was) in *Patricia Njeri & 3 Others vs National Museum of Kenya* [2004] eKLR where the learned Judge stated:-

> The appellants did however, pray (in the alternative) for an order of injunction pending appeal. There was no dispute that the court can, in a proper case grant an injunction pending appeal. What are the principles that guide the court in dealing with such an application.
>
> In *Venture Capital & Credit ltd vs Consolidated Bank of Kenya Ltd* Civil Application No. Nairobi 349 of 2003 (UR) the Court of Appeal said that an order for injunction pending

appeal is a discretionary matter. The discretion must, however, be exercised judicially and note in a whimsical or arbitrary fashion. This discretion is guided by certain principles some of which are as follows:-

> The discretion will be exercised against an applicant whose appeal is frivolous. *(Madhuaper International Limited vs Kerr [1985] KLR 840 which cited Venture Capital)*. The applicant must state that a reasonable argument can be put forward in support of his appeal.
>
> The discretion should be refused where it would inflict greater hardship that it would avoid. (*Madhupaper supra*).
>
> The applicant must show that to refuse the injunction would render his appeal nugatory (Butt vs Rent Restriction Tribunal [1982] 417).
>
> The court should also be guided by the principles in *Giella vs Cassman Brown & Co. Ltd* [1973] EA 358.

38. The principles in *Giella vs Cassman Brown & Co. Ltd* [1973]EA 358 were restated by Ringera J, (as he then was) in *Airland Tours & Travel Limited vs National Industrial Credit Bank* Nairobi (Milimani) HCCC No. 1234 of 2002 as follows:-

    a. A prima facie case with a probability of success at trial;

    b. The applicant is likely to suffer an injury, which cannot be adequately compensated in damages;

    c. If the court is in doubt about the existence or otherwise of a prima facie case it should decide the application on a balance of convenience;

    d. The conduct of the applicant meets the approval of the court of equity.

A prima facie case with a probability of success at trial

39. What then constitutes a prima facie case? In the case of *Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125,

    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 being 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.

40. Similarly in *Nguruman Limited vs Jan Bonde Nielsen & 2 Others* [2014] eKLR the court stated:-

    > 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 an urgent necessity to prevent the irreparable damage that may result from the invasion....The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the appellant's case is more likely than not to ultimately succeed.

41. The determination of whether the applicant has made a *prima facie* case with chances of success in the instant application calls for a consideration of whether the applicant has an arguable appeal.

42. Concerning what comprises an arguable appeal, the Court of Appeal stated in *Stanley Kang'ethe Kinyanjui vs Tony Keter & 5 Others* [2013] eKLR that:-

> The first issue for our consideration is whether the intended appeal is arguable. This court has often stated that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous, a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable.

43. Similarly in *Dennis Mogambi Mong'are vs Attorney General & 3 Others* Civil Appeal No. Nairobi 265 of 2011 (UR 175/2011) where the same court stated that:-

> An arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court's consideration.

44. I have perused the Memorandum of Appeal and noted that the applicant has challenged the judgment of the Rent Restriction Tribunal on the premise that the tribunal found that the tenancy agreement dated 15th May 2021 is not valid under the doctrine of privity of contract since the said agreement was not between the applicant and the respondent. I have further perused the judgment of the tribunal and it is my considered view that the applicant has not raised any arguable points of appeal. Without going into the merits of the appeal, it is not disputed by the applicant that he entered into a tenancy agreement with the respondent's mother and not the respondent. Therefore by law, the respondent was not privy to the tenancy agreement and accordingly, the said agreement cannot be enforced against her. It is trite law that only parties to a contract can confer rights and impose obligations. Further, any person who is not a party to a contract cannot sue to enforce such rights or claim damages in the event of breach of contract. Thus, since the applicant's case is premised on the tenancy agreement dated 15th May 2021 and it is not in dispute that the applicant entered into the said agreement with the respondent's mother, the agreement cannot be enforced against her for she was never privy to the said agreement. Accordingly, the applicant has failed to demonstrate that he has an arguable appeal or a *prima facie* case with a probability of success.

Irreparable Injury

45. In *Paul Gitonga Wanjau vs Gathuthi Tea Factory Company Ltd & 2 Others* [2016]eKLR the court considered Halsbury's Laws of England on what irreparable loss is and stated that:-

> " First, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages."

46. Therefore, has the applicant demonstrated that he will suffer irreparable loss unless the injunction is granted, which loss would not adequately be compensated by an award of damages? The applicant has argued that he stands to suffer irreparable loss as he has extensively developed the suit premises by erecting semi-permanent structures worth Kshs. 180,000/- where he rears chicken and goats and repaired and improved the suit premises incurring a cost of Kshs. 405,000/-.

47. On perusal of the pleadings of the parties it is evident that the applicant has quantified his loss monetarily to the tune of Kshs. 585,000/-. Moreover, I have noted that the loss he states that he has incurred is not continuous. Although the respondent has contended that the applicant has outstanding rent and utility bills to the tune of Kshs. 120,000/-, the applicant has not denied the same nor has he

provided prove to show that he has paid all the rent and utility bills during the period he has been occupying the premises. In the circumstances, it is evident that the applicant does not stand to suffer irreparably. There is no doubt that any loss incurred by the applicant can be compensated by way of damages. It would be unfair for the applicant to claim that he stands to suffer irreparably when he is not paying rent and utility bills. In fact it is the respondent who would stand to suffer loss in the event that the orders sought are granted. As such, it is my considered view that the applicant has not demonstrated that he will suffer irreparable damage or how the appeal would be rendered nugatory if a temporary injunction is denied.

Balance of Convenience Test

48. In the case of *Pius Kipchirchir Kogo vs Frank Kimeli Tenai* [2018] eKLR, the court in dealing with the issue on balance of convenience held as follows:-

> The meaning of balance of convenience in favour of the plaintiff is that if the injunction is not granted and the suit is ultimately decided in favour of the plaintiffs, the inconvenience 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 would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer? In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it.

49. I am in agreement with the observation in the Pius Kipchirchir case on the balance of inconvenience. It is my considered opinion that the balance of convenience tilts in favour of the respondent because the inconvenience caused to her will be much greater than that caused to the applicant. The respondent successfully defended the case in the tribunal and she is yet to enjoy the fruits of the judgment one year down the line. I have perused the court record and the applicant has been enjoying interim orders both in the tribunal and in the instant case over long periods of time instead of fast tracking the merits of the case at the tribunal and currently the appeal. The applicant is therefore not entitled to equity as he has come to court with unclean hands. The applicant seeks to enjoy interim orders yet he is in rent and utility arrears, a fact which he has not denied and further although he stated in his affidavit dated 13/1/2022 that he needs more time to vacate the premises, it has been over two years since then and he has not made any arrangements to vacate the premises. The respondent on the other hand is suffering losses for she is paying rent for the house she is currently occupying, at a sum of Kshs. 25,000/- yet she is the owner of the suit premises. It is therefore my considered view that the balance of convenience tilts against the applicant.

Conclusion

50. In conclusion, my considered view is that the application dated 11th July 2023 lacks merit and it is hereby dismissed with costs.

51. The costs shall abide in the appeal.

DELIVERED, DATED AND SIGNED AT THIKA THIS 25TH DAY OF APRIL 2024.

F. MUCHEMI

JUDGE