



**Hasbah Kenya Limited v Ainu Shamsi Automobile & Hardware Ltd & another;
Lablink East Africa Company Ltd (Interested Party) (Environment & Land
Case E008 of 2023) [2023] KEELC 17034 (KLR) (29 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 17034 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E008 OF 2023
EK WABWOTO, J
MARCH 29, 2023**

BETWEEN

HASBAH KENYA LIMITED PLAINTIFF

AND

AINU SHAMSI AUTOMOBILE & HARDWARE LTD 1ST DEFENDANT

ICON AUCTIONEERS 2ND DEFENDANT

AND

LABLINK EAST AFRICA COMPANY LTD INTERESTED PARTY

RULING

1. The Plaintiff filed a Notice of Motion Application dated 9th January 2023 which was accompanied by a Supporting Affidavit sworn by Arafat Abdulla Said. In the said application, the following orders were sought;
 - i. Spent.
 - ii. That an order of temporary injunction do issue restraining the Defendants/ Respondents jointly and severally their employees, servants and/or agents from attaching, removing, alienating, advertising, disposing, selling by auction and/or in any way interfering with Applicant/Plaintiff properties pursuant to a proclamation by the 2nd Defendant dated 30th December 2022 pending hearing and determination of this application.
 - iii. That an order of temporary injunction do issue restraining the Defendants/ Respondents jointly and severally their employees, servants and/or agents from attaching, removing, alienating, advertising, disposing, selling by auction



and/or in any way interfering with Applicant/Plaintiff properties pursuant to a proclamation by the 2nd Defendant dated 30th December 2022 pending hearing and determination of this suit.

- iv. That an order of temporary stay do issue staying and/or suspending the proclamation and/or attachment by the 2nd Defendant dated 30th December 2022 pending hearing and determination of this application.
- v. That an order of temporary stay do issue saying and/or suspending the proclamation and/or attachment by the 2nd Defendant dated 30th December 2022 pending hearing and determination of this suit.
- vi. That the OCS Embakasi Police Station be and is hereby ordered to ensure maintenance of peace in compliance with the order of this court
- vii. That the 1st Defendant be condemned to pay costs of this suit in any event.

2. The Application was made on the grounds that:

- i. On 21st December 2022, the 2nd Defendant on instructions from the 1st Defendant did a proclamation allegedly distressing for rent against the Plaintiff for a sum of Ksh 104,393,328/- and Auctioneers fees of Kshs 10,437,932/- and giving 7 days to collect the distrained goods.
- ii. On 30th December 2022, the 2nd Defendant did a new proclamation rectifying the period as 14 days and rent arrears as Ksh 104,393,328/- + 10,437,932/- and Auctioneers charges as Kes 7,839,800/-.
- iii. Through a lease dated 1st January 2014, the 1st Defendant leased to the Plaintiff 20 go-downs at LR No 209/20292 for a term of 10 years and an initial quarterly rent of Kes 20,240,000/- with an escalation of 5% annually.
- iv. Vide a judgement by Lady Justice Githumbi on 21st April 2017, it was ruled that LR No 209/11319 had been fraudulently amalgamated with LR No 209/20292 and court proceeded to cancel the title held by 1st Defendant-which included a section that had been leased to the Plaintiff
- v. LR No 209/11319 was later sold to Lablink East Africa Co Ltd (Interested Party) to which the Plaintiff regularized their tenancy with the company.
- vi. The amount being distressed is a deducted amount paid as lawful rent to the Interested Party with respect to LR No 209/11319.
- vii. The Plaintiff is a FMCG distribution of some of the most popular brands in the market such as Pampers, Ariel, Always, Kellogs, Weetabix, Red bull, Downy, Gillette and Energizer which are not its products but products of its principals and motor vehicles are its tools of trade.
- viii. Unless the orders sought are granted the Plaintiff/Applicant is bound to incur monumental loss and damage and the application herein rendered nugatory.
- ix. There is no prejudice that will be occasioned on the part of the Defendants/ Respondents if the orders sought are granted as prayed.



3. In the Plaintiff's Further Affidavit dated 24th February 2023, sworn by Arafat Abdulla Said, it was reiterated that the Plaintiff had begun to vacating the premises but the remaining goods, vehicles and furniture were detained for distress of rent. Therefore the distress for rent was a gimmick to contain the Plaintiff at the premises.
4. In support of the Plaintiff's application, the Interested Party filed a Replying Affidavit sworn by Oscar Kiprono Sang dated 13th January 2023, where it was submitted that the Plaintiff was a lawful tenant of the Interested Party having paid rent amounting to Kes 113,924,798/- and did not have any arrears. It was also averred that the interested party was the registered owner and landlord of LR No 209/11319 therefore only the Interested Party would have priority to levy distress for rent as with regards to LR No 209/11319.
5. In a Replying Affidavit dated 17th February 2023, sworn by Mohamed Rashid Muhumed, it was argued that since the Interested Party was never a party to Nairobi ELC No 724 of 2012, it cannot be a bona fide beneficiary of the orders. Furthermore, it was argued that since the Plaintiff was still on the premises without payment of rent, the suit was now an attempt to abuse the court process and ultimately avoid settlement of lawful outstanding rent arrears.
6. I have considered the application and respective submissions. In my view, the issue that arises for determination is whether the Plaintiff has met the threshold to be granted the temporary injunction order.
7. *Giella v Cassman Brown* (1973) EA 358 sets out the principles to determine the threshold for temporary injunction in that a party seeking a temporary injunction has to establish a prima facie case, whether the party seeking injunction will suffer irreparable damage if injunction is denied, and in case of doubt the issue in contention ought to be decided on the scale of a balance of convenience.
8. Section 63 of the *Civil Procedure Act* and Order 40(1) of the *Civil Procedure Rules*, stipulates that where in any suit it is proved by affidavit or otherwise—
 - (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
 - (b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders. [Emphasis Mine]
9. In *Nguruman Limited v Jan Bonde Nielsen & 2 Others*, Ca No. 77 Of 2012, the Court outlined that:

“In an interlocutory injunction application, the applicant has to satisfy the three requirements to;

 - (a) Establish his case only at a prima facie level,
 - (b) Demonstrate 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”

10. In the instant case, It is undisputed that a landlord-tenant relationship was established between the Plaintiff and 1st Defendant under the Lease Agreement dated 1st January 2014. In my opinion, the issue of variation of the lease, rights and obligations of parties following the orders granted by Hon. Lady Justice Githumbi would only be effectively determined during trial. Therefore, at this point in time, the grant of the temporary injunctive orders sought would be prudent and in the interest of justice for all parties.

11. In the foregoing, this Court finds that the Applicant has established a prima facie case and therefore the Notice of Motion application dated 9th January 2023 is allowed in the following terms:

- i. That pending hearing and determination of the main suit a temporary order of injunction is hereby issued against the Defendants/Respondents jointly and severally their employees, servants and/or agents from attaching, removing, alienating, advertising, disposing, selling by auction and/or in any way interfering with Applicant/Plaintiff properties pursuant to a proclamation by the 2nd Defendant dated 30th December 2022.
- ii. That pending hearing and determination of the main suit an order of temporary stay do issue staying and/or suspending the proclamation and/or attachment by the 2nd Defendant dated 30th December 2022.
- iii. Costs will abide the determination of the main suit.

12. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 29th DAY OF MARCH 2023.

E. K. WABWOTO

JUDGE

In the presence of: -

Mr. Ali for the Plaintiff.

Mr. Obam h/b for Mr. Kuria for the 1st and 2nd Defendants.

Mr. Gathaiya for the Interested Party.

Court Assistant; Caroline Nafuna

