



Maple Management Limited v Kihara & another (Environment and Land Case Civil Suit E265 of 2022) [2023] KEELC 16976 (KLR) (27 April 2023) (Ruling)

Neutral citation: [2023] KEELC 16976 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT E265 OF 2022**

AA OMOLLO, J

APRIL 27, 2023

BETWEEN

MAPLE MANAGEMENT LIMITED PLAINTIFF

AND

JULIANA NIJAMBI KIHARA 1ST DEFENDANT

SGEBO TUNDURA GAGI T/A GAGI INVESTMENTS

LIMITED 2ND DEFENDANT

RULING

1. There are two applications requiring determination by this court. The 1st application was filed by the plaintiff and is dated August 11, 2022. It is brought under the provisions of order 40 of the [Civil Procedure Rules](#) and section 1A, 1B and 3B of cap 21. In it the plaintiff sought to be granted the following:
 - (i) An order directing the defendants to deliver vacant possession of the swimming pool and health club erected upon all that land known as LR No 1870/VI/85 to the plaintiff.
 - (ii) An award of mesne profits (to be quantified) against the 1st plaintiff for the use of the swimming pool and health club erected upon all that land known as LR No 1870/VI/85.
 - (iii) An award of special damages in the sum of Kshs 1,614,200.00 against the 1st defendant being the outstanding service charge arrears as at August, 2022.
 - (iv) Costs of the suit.
2. The second application by the defendants and it is dated November 11, 2022 supported by the affidavit of Juliana Kihara and brought under the provision of order 10 and 11 of the [Civil Procedure Rules](#). It is also premised on the provisions section 1A, 1B, 3A and 63(c) of the [Civil Procedure Act](#) cap 21. The application sought orders that;



- a) That orders issued on the 9th of November be varied and/or set aside.
 - b) That the court find that the respondents have filed alongside this application a response to the application dated August 11, 2022.
 - c) That the honourable court be pleased to find that the application dated August 11, 2022 in its entirety is subjudice.
 - d) That the costs of this application be provided for
3. The plaintiff filed grounds of opposition dated December 6, 2012 which listed four lengthy grounds. They are as follows;
1. That the application is misconceived, incurably defective, incompetent, frivolous, vexatious and therefore an abuse of the process of this honourable court.
 2. That in so far as the said application seeks to review and/or set aside the interim orders issued by this honourable court on November 9, 2022, the same do not meet the threshold for warranting such review at all. In particular;
 - a) Whereas the said application is predicated on the averment that the 1st applicant had been ailing thus was unable to instruct the advocates on record for the applicants prior to November 8, 2022, no supporting documentation demonstrating the nature and period of her ailment has been produced.
 - b) Further even had there been supporting documentation of the purported ailment, the said excuse presented by the 1st applicant cannot hold water and does not explain why the 2nd applicant did not similarly enter appearance or file any response prior to the issuance of the orders of November 9, 2022;
 - c) When the matter was before the Honourable Justice Okong'o on September 21, 2022, the court gave the applicants ample time to sort out their representation and to file responses to the plaintiff's application dated August 11, 2022 but as at the time of grant of the orders of November 9, 2022, neither of the applicants herein had complied.
 - d) It is therefore evident that the applicants had all intentions of delaying the hearing and determination of the plaintiff's application and as such, the court was justified in granting the interim orders issued on November 9, 2022, in the absence of any response by the applicants.
 3. That as regards the assertion that the suit herein is sub judice, the same lacks merit in view of the following;
 - a) The suit before the Business Premises Rent Tribunal is defective and fundamentally flawed in view of the fact that the plaintiff has no landlord/tenant relationship with either of the applicants;



- b) The suit before the Business Premises Rent Tribunal is solely in respect of alleged interference with the 2nd applicant's alleged tenancy granted by the 1st defendant herein whereas this suit raises fundamental issues that are outside the jurisdiction of the Business Premises Rent Tribunal as follows;
 - i) Whether the 1st applicant is the legal and lawful owner of the swimming pool area situated on all that land known as LR No 1870/VI/85;
 - ii) Whether the lease entered between the applicants in respect of the swimming pool area situated on all that land known as LR No 1870/VI/85 is lawful and valid;
 - iii) Whether the applicants have breached the special conditions imposed upon by the grant of title in respect of as LR No 1870/VI/85 as well as the Connaught Apartments residents handbook all of which prohibit the carrying out of commercial activity thereon;
 - iv) Judgment in respect of unpaid service charge by the 1st applicant to the plaintiff as a management company.
 - c) That in view of the foregoing, the said application ought to be dismissed with costs to the plaintiff.
4. The defendants opposed the application dated August 11, 2022 by filing of notice of preliminary objection dated November 11, 2022 and replying affidavit of even date. in the preliminary objection, it is pleaded thus;
- a) That the application dated August 11, 2022 falls short on the doctrine of "*res subjudice*" under section 6 of the *Civil Procedure Act*, there is an active suit on the same subject matter with the same parties pending determination at the Business Rent Tribunal E628/2022.
 - b) That the application dated August 11, 2022 be dismissed as they seek this court to interfere with the orders issued by the Business Premises and Rent Tribunal on July 29, 2022.
 - c) That this application be dismissed for want of jurisdiction by dint of section 20 and 30 of the *Sectional Properties Act* of 2020, which offers settlement of disputes through a committee mandated to resolve such disputes relating to sectional units.
 - d) That in the alternative, this court's jurisdiction is ousted as the applicant should have preferred either a judicial review application or an appeal against the orders of the Business Premises Rent Tribunal issued on July 19, 2022 by Hon May.
5. The 1st respondent deposed that *vide* a transfer dated November 6, 2000. She became the registered lessee and holder of title in respect of the Health Club on the lower ground floor, Connaught Apartments situated on LR No 1870/VI/85 Nairobi and attached a copy of the lease. She deposed that she fully complied with the terms and conditions of the said lease. The respondent averred that



the circumstances of how and when the suit property was sold to her are within the knowledge of the plaintiff.

6. The 1st defendant deposed further that as the lessee and holder of title of the health club, she had authority over the property which she opened up for use to the public and which property she leased to the 2nd defendant for a 5 year period. She argued that she is advised that the scope and applicability of Connaught Apartments Management Company has been overtaken by events by virtue of the provisional of the [Sectional Properties Act](#) of 2020 which gave independence to sectional unit owners in transacting without permission from the management company.
7. The 1st defendant denies owing any service charge or the alleged sum of Kshs 1,614,200 demanded arguing she operates independently and operating independent electricity account. She added that the 2nd defendant endeavored to install a generator which move was vehemently opposed by the plaintiff and which action necessitated the filing of the case before the Business Premises Rent Tribunal in case No E628 of 2022. They add that the tribunal granted interim orders on July 29, 2022 which orders remain in force. She urged the court to dismiss the plaintiff's application.
8. The parties argued the application by filing of written submissions which I had opportunity to read and consider. The first question I shall deal with is whether this suit is subjudice the case pending before the Business Premises Rent Tribunal Case No E628 of 2022. The defendants annexed copies of pleadings filed in the stated case where the 2nd defendant was the plaintiff in BPRT E628 of 2022. It sought the following reliefs;
 - a) A declaration that the tenant is legally entitled to the said premises and Connaught Apartments for business use and the same right has been violated by the defendants and hence entitled to compensation loss suffered.
 - b) A declaration that the denial of access by the landlord to the business is illegal, irregular, unprocedural and contrary to the law.
 - c) An order that the tenant is entitled to full enjoyment of the economic right that has been violated.
9. The plaintiff in this suit has no tenancy relationship with the 2nd defendant as the tenancy agreement exhibited is executed between the defendants. Section 2 of the Land Lord & Tenant Act cap 301 defines a landlord in relation to a tenancy to mean the person for the time being entitled as between himself and the tenant, to the rents and profits of the premises payable under the terms of the tenancy.
10. The question would then be whether the present plaintiff can bring a counter-claim against the 2nd defendant in the case before the Business Premises Rent Tribunal when there is no landlord/tenancy relationship. My answer is no because the lack of such relationship would limit the reliefs that the Business Premises Rent Tribunal can give to the plaintiff in the event it is successful.
11. The second limb of the preliminary objection is that this court lacks jurisdiction to hear this claim by dint of section 20 and 30 of the [Sectional Properties Act](#) of 2020. Section 20 provides for the duties of the corporation while section 30 provides for enforcement of by-laws. Section 30(1)

“If an owner contravenes any of the by-laws, a corporation or an aggrieved owner may refer the dispute to the committee provided for under section 20 and 30.”



Section 30(4)

“A corporation shall not commence an action under this section unless it is authorized by the by-laws to do so.”

Section 30(6)

“In the event of non-compliance with an order of a committee the aggrieved party may apply to the court to enforce the order of the committee.”

Section 20(6) provides “the corporation may constitute an internal dispute resolution committee on a need basis to hear and determine disputes.” (underline for emphasis)

12. In contesting the point of lack of jurisdiction, the plaintiff relied on the provisions of section 18 of the Act for the proposition that;

- (1) the corporation shall be capable of suing and being sued in its corporate name.
- (2) the corporation may sue for and in respect of damage or injury to the common property caused by any person, whether that person is the proprietor of the unit or not.

13. However, it is my considered opinion that the power to sue or be sued does not take away from the corporation the responsibility to constitute where there is none an Internal Dispute Resolution Committee to deal with the issue before approaching this court. In the case of *Benson Ambuti Adega and 2 others v Kibos Distillers Ltd & 5 others* [2020] EKLK where the Supreme Court held thus;

“48. As was also noted by the petitioners, the issue of jurisdiction and discretion are distinct. Be as it may, the two are nonetheless inextricably intertwined; it would seem incongruous to discuss one without referring to or including the other. Such is the extent that these two quite seemingly innocuous terms are referred to quite often, and rather mistakenly, interchangeably. But for purposes of this present issue, jurisdiction, as referred to by the petitioners, would denote whether the adjudicatory body has the power to entertain the proceedings and, discretion, to be whether such, upon determination that it has such powers, chose to exercise such powers or not.

51. Judicial abstention, as with judicial restraint, is a doctrine not founded in constitutional or statutory provisions, but one that has been established through common law practice. It provides that a court, though it may be vested with the requisite and sweeping jurisdiction to hear and determine certain issues as may be presented before it for adjudication, should nonetheless exercise restraint or refrain itself from making such determination, if there would be other appropriate legislatively mandated institutions and mechanism”

14. In light of the above analysis, this court reaches the conclusion that the plaintiff ought to have exhausted the alternative dispute resolution mechanisms provided in the Act before filing the present application. I find merit on this ground of the preliminary objection and proceed to strike out the application dated August 11, 2022. The consequence of this striking out is that the interim orders that were in force stands vacated.

DATED, SIGNED AND DELIVERED AT NAIROBI VIRTUALLY THIS 27TH APRIL 2023



A. OMOLLO

JUDGE

In the Presence of:

Mr Kinuthia Advocate for the Plaintiff

Mr Oyieko Advocate for the Respondent

