



**ARC Packaging Limited & another v Sundries Bargains (Nairobi) Limited & another  
(Environment & Land Case E344 of 2022) [2023] KEELC 17492 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17492 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE E344 OF 2022**

**OA ANGOTE, J  
MAY 25, 2023**

**BETWEEN**

**ARC PACKAGING LIMITED ..... 1<sup>ST</sup> PLAINTIFF**

**CEMPACK SOLUTIONS LIMITED ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**SUNDRIES BARGAINS (NAIROBI) LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**ADAM NG'ETHE T/A GARAM INVESTMENTS AUCTIONEERS .... 2<sup>ND</sup>  
DEFENDANT**

**RULING**

1. On 19<sup>th</sup> October 2022, pursuant to an application by the Plaintiffs, this court granted interim orders pending inter-parties hearing as follows:
  - a. That until 3<sup>rd</sup> November 2022, an order of injunction is hereby issued restraining the 1<sup>st</sup> Defendants whether by itself or through the 2<sup>nd</sup> Defendant or otherwise howsoever from levying for distress that the 1<sup>st</sup> Plaintiff may allegedly owe to the 1<sup>st</sup> Defendant by seizing or causing the multi-wall Kraft sack manufacturing plant and equipment belonging to the 2<sup>nd</sup> Plaintiff to be seized and sold by Public Auction or private treaty.
  - b. That until 3<sup>rd</sup> November 2022, an order of injunction is hereby issued restraining the 1<sup>st</sup> Defendant whether by itself or through the 2<sup>nd</sup> Defendant or otherwise howsoever from exercising any rights of re-entry into or regaining possession of or otherwise interfering with the 1<sup>st</sup> Plaintiff's quiet possession of the property known as Land Reference 336/1257 (Original Number 336/106/2) provided the 1<sup>st</sup> Plaintiff pays the reserved rent.
  - c. That until 3<sup>rd</sup> November 2022, an order of injunction is hereby issued restraining the 1<sup>st</sup> Defendant whether by itself or through the 2<sup>nd</sup> Defendant or otherwise howsoever from



levying for distress for rent that the 1<sup>st</sup> Plaintiff may allegedly owe to the 1<sup>st</sup> Defendant by seizing or causing the multi-wall Kraft sack manufacturing plant and equipment belonging to the 2<sup>nd</sup> Plaintiff to be seized and sold by public auction or private treaty.

2. These orders, which were extended on multiple dates, are the subject of the application by the 1<sup>st</sup> Defendant dated 28<sup>th</sup> February 2023 seeking for the following reliefs:
  - a. That the court do vacate and/or set aside the ex-parte order issued on 18<sup>th</sup> October 2022 and variously extended by the Court.
  - b. That the Court do vacate all the directions it issued on the hearing and determination of the Plaintiffs' Notice of Motion dated 26<sup>th</sup> October 2022.
  - c. That the Plaintiffs do pay the cost of the application.
3. The application is supported by the affidavit of the Plaintiff's Director who deposed that the Court, pursuant to the Plaintiffs' Notice of Motion dated 18<sup>th</sup> October 2022, issued an ex parte injunction against the 1<sup>st</sup> Defendant, which has been variously extended and is yet to be confirmed or discharged inter partes and that the Plaintiffs filed another application dated 26<sup>th</sup> October 2022 alleging that the 1<sup>st</sup> Defendant had disobeyed the court order of 18<sup>th</sup> October 2022.
4. The 1<sup>st</sup> Defendant's Director deposed that the 1<sup>st</sup> Defendant has complied with the ex parte order and is not in disobedience of the same; that the order of 18<sup>th</sup> October 2022 subsists in perpetuity and is open ended contrary to the express provisions of the law; that the ex parte order offends Section 1B (i) (a)-(d) of the [Civil Procedure Act](#) and that other than the suit and the rights created in favour of the Plaintiff by the order of 18<sup>th</sup> October 2022, the parties have no subsisting legal relationship.
5. The 1<sup>st</sup> Defendant's Director deposed that the order of this court created a tenancy relationship whereby the Plaintiffs occupy the 1<sup>st</sup> Defendant's property for free; that the legal relationship ended when the license agreement expired by effluxion of time on 5<sup>th</sup> September 2022 and that the order of this court has prolonged the life span of the ended relationship by 188 days, which is an abuse of the court.
6. The 1<sup>st</sup> Defendant's Director deposed that the 1<sup>st</sup> Defendant is incurring costs and penalties with the contractors it engaged to build certain structures on the portions of the suit property and that the 1<sup>st</sup> Defendant's rights under Article 40 of [the Constitution](#) is being compromised by this court's orders dated 18<sup>th</sup> October 2022 and the subsequent directions given by the court.
7. In response, the 1<sup>st</sup> Plaintiff's Director deposed that the 1<sup>st</sup> Plaintiff asked the 1<sup>st</sup> Defendant as far back as 6<sup>th</sup> October 2022 for Electronic Tax Invoices (ETR Invoices) to facilitate payment of rent in accordance with the provisions of the Value Added Tax (Electronic Tax Invoices) Regulations 2022; that the 1<sup>st</sup> Defendant has to-date neglected or refused to deliver ETR invoices to the 1<sup>st</sup> Plaintiff and that the failure by the 1<sup>st</sup> Defendant to comply with the ETR Regulations amounts to an offence and the offender is liable under Section 63 of the [Value Added Tax Act](#) 2013.
8. According the 1<sup>st</sup> Plaintiff, delivery by the 1<sup>st</sup> Defendant of a valid ETR invoice is a condition-precedent to payment of rent in respect of the suit premises; that the 1<sup>st</sup> Plaintiff is thus not in breach of its payment obligations as regards payment of rent in respect of the suit premises and that the 1<sup>st</sup> Defendant should not be allowed to benefit from its own wrongdoing.
9. It was deposed that the 1<sup>st</sup> Plaintiff informed the 1<sup>st</sup> Defendant that they were not liable to pay any rent to the 1<sup>st</sup> Defendant for the period when the 1<sup>st</sup> Defendant unlawfully locked them out of the



suit premises and that following the injunctive orders of this court dated 18<sup>th</sup> October 2022, the 1<sup>st</sup> Defendant has refused to issue them with ETR invoices for settlement of rent in a ploy to frustrate the execution of the court order.

10. It was deposed by the 1<sup>st</sup> Plaintiff's Director that it is the Business Premises Rent Tribunal (BPRT) that is empowered under Section 12(1) (e) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* to determine any dispute regarding payment of rent in a controlled tenancy, including determination of variation of rent payable in respect of a controlled tenancy.
11. According to the 1<sup>st</sup> Plaintiff, these instant proceedings arise out of a controlled tenancy which could only be determined in accordance with the law; that in the absence of an order from the BPRT to the effect that the 1<sup>st</sup> Plaintiff is in default of its rent payment obligations, the court lacks jurisdiction to determine such a dispute and that this dispute is not ripe for determination, including the consequences for non-payment of rent.
12. The 1<sup>st</sup> Defendant also filed a preliminary objection in which it averred that the Defendants have relied on a license agreement dated 5<sup>th</sup> March 2021 and by implication, this court had no jurisdiction at the time the suit was filed and that Section 3 (3) of the *Law of Contract Act* provides that no suit shall be brought upon a contract for disposition of an interest in land unless the contract upon which the suit is founded is in writing and is signed by all the parties.

### **Submissions**

13. In his oral submissions, Counsel for the 1<sup>st</sup> Defendant submitted that the lease agreement was for one year; that the lease agreement lapsed on 5<sup>th</sup> September 2022 and the relationship between the Plaintiffs and the Defendants ended; that the Plaintiffs stayed on the premises on the basis of a court order and that the 1<sup>st</sup> Defendant has entered into contracts with third parties in respect of the suit property.
14. Counsel submitted that the order of the court is not proportionate as the Plaintiffs are not paying rent; that this is not a controlled tenancy; and that the suit premises is not a shop but a factory for manufacturing paper bags.
15. The Plaintiff's counsel submitted that the tenancy that subsisted between the 1<sup>st</sup> Defendant and the 1<sup>st</sup> Plaintiff was for 18 months and is therefore a controlled tenancy; that the Defendants purported to distress for rent arrears despite having refused to issue VAT receipts for the rent arrears; that an oral termination of a controlled tenancy is illegal and that because of the threat by the Defendants to auction the Plaintiffs' assets, the Plaintiffs approached this court for an injunction.
16. Counsel for the Plaintiffs submitted that it has filed BPRT E863/2022 and only moved this court to preserve its equipment; that BPRT has no jurisdiction to preserve the substratum of the dispute and that the suit property was under threat of auction and proclamation.
17. In response, the 1<sup>st</sup> Defendant's counsel submitted that the Plaintiffs in their Plaint have sought declarations including the infringement of their rights and for a permanent injunction and damages and that this suit and the suit before the BPRT are distinct.

### **Analysis and Determination**

18. The following issues arise for the determination by this court:
  - a. Whether this court has jurisdiction to determine this suit.
  - b. Whether the orders dated 18<sup>th</sup> October 2022 should be vacated.



19. The Plaintiffs instituted this suit by way of a Plaint dated 11<sup>th</sup> October 2022. In the Plaint, the Plaintiffs sought for several reliefs including a declaration that the multi-wall manufacturing plant and equipment situate on the suit land belongs to the 2<sup>nd</sup> Plaintiff and is not available for purposes of levying distress for rent that the 1<sup>st</sup> Defendant may allegedly owe.
20. The Plaintiffs further sought for an order of permanent injunction restraining the 1<sup>st</sup> Defendant from levying for distress the rent the 1<sup>st</sup> Plaintiff may owe to the 1<sup>st</sup> Defendant by seizing or causing the manufacturing plant and equipment to be seized and sold and a permanent injunction restraining the 1<sup>st</sup> Defendant from exercising any rights of re-entry or regaining possession or interfering with the 1<sup>st</sup> Defendant's quiet possession of the suit property.
21. It is not disputed that the relationship between the 1<sup>st</sup> Defendant and the 1<sup>st</sup> Plaintiff was based on a license agreement with effect from 5<sup>th</sup> March 2021 which subsisted for eighteen (18) months. The said license agreement has since lapsed by effluxion of time. The 1<sup>st</sup> Plaintiff has argued that a controlled tenancy subsisted between the parties while the 1<sup>st</sup> Defendant vehemently opposes the same.
22. The 1<sup>st</sup> Defendant has annexed to its application a copy of the impugned license agreement. The 1<sup>st</sup> Plaintiff has challenged the jurisdiction of this court on the basis that that the Business Premises and Rent Tribunal (BPRT) has not issued an order to the effect that the 1<sup>st</sup> Plaintiff is in default of its rent obligations.
23. The principles upon which the Court exercises its jurisdiction to set aside ex-parte injunctive orders was considered in the case of *Aga Khan Education Service Kenya vs Republic Exparte Ali Seif & 3 Others [2004]* eKLR, where the Court of Appeal stated as follows:

“We would, however, caution practitioners that even though leave granted ex-parte can be set aside on an application, that is a very limited jurisdiction and will obviously be exercised very sparingly and on very clear cut cases ....”
24. Courts have held that they are entitled to discharge orders issued ex parte on the ground of non-disclosure of material facts or that the application was an abuse of the court process or that it is in the public interest to discharge the orders. For instance, in *Esther Muthoni Passaris vs Charles Kanyuga & 2 Others [2015]* eKLR, the court held that it may vacate orders where it found that the party failed to disclose material facts. The court held as follows:

“There is no controversy that there exists a court made rule that if a party moves the court for restraining or injunctive orders ex parte (without notice), then the party is obligated to disclose the facts which the court thinks are most material to enable the court to fairly form its judgement. Where a party does not observe this rule, he disentitles himself from the relief which he asks the court to grant and such relief will not even be visited by the court at the inter parties' stage.”
25. The Court also considered the words of May L. J. in respect of setting aside ex parte orders in Ex-parte Harbage as quoted in the Court of Appeal's in *Judicial Commission of Inquiry to the Goldenberg Affair & Others vs Job Kilach [2003]* eKLR as follows:

“The next point to make is that although an appeal does lie to this court against an ex-parte order made by a judge of the High Court by virtue of s.16(1) of the Supreme Court Act,



1981, nevertheless in his judgment in that case Sir Donaldson MR [1983] 3 All ER 589 at p 593 said:

“I have said ex-parte orders are essentially provisional in nature. They are made by the judge on the basis of evidence and submissions emanating from one side only. Despite the fact that the Applicant is under duty to make full disclosure of all relevant information in his possession whether or not it assists his application, this is no basis for making a definite order and every judge knows this. He expects at a later stage to be given opportunity to review his provisional order in the light of evidence and argument adduced by the other side and in so doing he is not hearing an appeal from himself and in no way feels inhibited from discharging or varying his original order. This being the case, it is difficult, if not impossible, to think of circumstances in which it would be proper to appeal to this court against an ex parte order without just giving the High Court judge an opportunity of reviewing it in light of argument from the defendant and reaching a decision.”

26. In this matter, the 1<sup>st</sup> Defendant has sought that the orders of this court be set aside or vacated on the grounds that the orders of the court are open ended and contrary to the express provisions of the law; that that there is no subsisting legal relationship between the parties and that the order of this court has created a tenancy relationship where none exists.
27. The orders of this court dated 18<sup>th</sup> October 2022 were issued pursuant to the 1<sup>st</sup> Plaintiff's application dated 18<sup>th</sup> October 2022, seeking injunctive orders pending the hearing and determination of the said application and the suit.
28. It is clear from those orders that the injunctive orders were granted pending the inter-parties hearing which was scheduled for 3<sup>rd</sup> November 2022. The inter-parties hearing, which has never taken off to date, was the forum for the 1<sup>st</sup> Defendant to ventilate its case, and have the ex parte orders vacated. The delay in hearing the application was occasioned by the 1<sup>st</sup> Defendant, who was accused of having declined to comply with the orders of this court.
29. Indeed, the Plaintiffs having filed an application dated 26<sup>th</sup> October, 2022 seeking to have the 1<sup>st</sup> Defendant's directors cited for contempt, the court directed that the application for contempt should be heard first. That has always been the position of this court, and this matter is not an exception.
30. When the application for contempt came up for hearing on 21<sup>st</sup> November, 2022, the Plaintiffs' advocate informed the court that despite their client being allowed in the premises pursuant to a consent order of 16<sup>th</sup> November, 2022, the Defendants had damaged the suit premises during the pendency of the orders of the court.
31. On the said date, this court gave the following directions:

“The applicant to file a Further Affidavit to the application dated 26<sup>th</sup> October, 2022 (for contempt) together with submissions within 21 days and the Respondents to file submissions within 21 days of service. Mention on 26<sup>th</sup> April, 2023.”
32. In a nutshell, it was not until 16<sup>th</sup> November 2022 that the parties entered into a conditional consent with respect to the application dated 26<sup>th</sup> October 2022. The issue of compliance with the consent of 16<sup>th</sup> November, 2022 seems not to have been agreed upon fully, thus necessitating the court to direct the parties to file submissions in respect to the application for contempt.



33. However, before 26<sup>th</sup> April 2023, the date that the court had fixed for a Ruling date on the contempt application, the 1<sup>st</sup> Defendant approached this court vide the current application seeking to set aside the ex parte orders of 18<sup>th</sup> October, 2023. From the record, it is apparent that the interim ex parte orders have subsisted due to the actions of the 1<sup>st</sup> Defendant, if the consent order of 16<sup>th</sup> November, 2022 is anything to go by.
34. Indeed, it is evident from the record that the ex parte interim orders of injunction are not open-ended as claimed by the 1<sup>st</sup> Defendant, but were issued pending inter-parties hearing and determination of the application dated 18<sup>th</sup> October 2022 and the subsequent contempt application dated 26<sup>th</sup> October, 2022.
35. I will now consider the merits of the current application. The 1<sup>st</sup> Defendant has sought that the ex parte orders of this court be set aside or vacated on the grounds that that there is no subsisting legal relationship between the parties and that the order of this court has created a tenancy relationship where none exists.
36. Indeed, if it shown that the Plaintiffs obtained ex parte orders on the basis of material non-disclosure, such orders should be set aside. The court can also set aside an ex parte order if its satisfied that it did not have jurisdiction to issue such orders in the first place, or if it was misled either in fact or law in granting the orders.
37. In the Plaint, the 1<sup>st</sup> Plaintiff has averred that the license entered into between the 1<sup>st</sup> Plaintiff and the 1<sup>st</sup> Defendant on 5<sup>th</sup> March 2015 created a controlled tenancy over the premises which the 1<sup>st</sup> Plaintiff occupied wholly for the purposes of the business of manufacturing paper bags, a position the 1<sup>st</sup> Defendant does not agree with on the ground that the Plaintiff's business is neither a shop, a hotel nor a catering establishment.
38. The 1<sup>st</sup> Plaintiff has further averred in the Plaint that it referred the tenancy dispute in respect of the matters complained of to the Tribunal by instituting legal proceedings (Nrb BPRT/E863/2022) on 28th September 2022, and that the Tribunal does not have jurisdiction under section 12 of the Act to issue an order of injunction to restrain the Defendants from committing the injury arising out of the matters complained of or any injury of a like kind relating to the Premises or the controlled tenancy aforesaid, thus the filing of this suit.
39. Considering that the dispute before BPRT is pending, this court will refrain itself from making comments that may prejudice the fair hearing of the dispute. Indeed, the question of whether the BPRT has jurisdiction or not can only be decided by the Tribunal, whose decision is appealable to this court.
40. That notwithstanding, it is the view of this court that the Plaintiffs ought to have chosen one forum to ventilate the issue of tenancy between them and the 1<sup>st</sup> Defendant. Indeed, although the Plaintiff has alleged that they moved this court because the BPRT did not have jurisdiction to issue injunctive orders, the reliefs sought in the Plaint do not make any reference to the BPRT at all.
41. Indeed, it is trite that the BPRT has jurisdiction to make an order of status quo or grant injunctive orders in a situation where the tenant has not been evicted from the premises. The Court of Appeal in *John Mugo Ngunga vs Margaret M Murangi [2014]* eKLR rendered itself on this question and



asserted that the Business Premises Rent Tribunal (BPRT) had jurisdiction to grant an injunction stating as follows:

“On the jurisdiction of the Tribunal to issue an order of injunction, it is clear the judge was right, the jurisdiction is provided for by the Act and that was further fortified by aforesaid decision of this court”

42. Relying on the aforesaid case, the Court in *Republic vs Chairman Business Premises Rent Tribunal; Audio Corner Limited (Interested Part) Ex parte Thande Holdings Limited [2020]* eKLR held as follows:

“In light of the above pronouncement by the Court of Appeal, my finding on the second issue is that where the Tribunal is properly seized of a dispute, it can properly issue an injunctive or conservatory order.”

43. Furthermore, pursuant to Article 169 of (1)(a) of *the Constitution* of Kenya 2010, tribunals are subordinate courts and by dint of their status as subordinate courts, they have jurisdiction under Sections 3A of the *Civil Procedure Act* and Order 40 of the *Civil Procedure Rules* to issue injunctive orders.

44. That being the case, and to the extent that the Plaintiffs have stated that it is the Business Premises Rent Tribunal that has jurisdiction in this matter, and having filed a dispute before the tribunal, this court ought to allow the Tribunal determine the issues in dispute. The issuance of the ex parte orders by this court usurps the role of the Tribunal, which should not be the case.

45. For those reasons, I allow the 1<sup>st</sup> Defendant’s application dated 28<sup>th</sup> February 2023 as follows:

- a. The ex-parte order issued on 18<sup>th</sup> October 2022 and variously extended by the Court be and is hereby set aside.
- b. All directions issued on the hearing and determination of the Plaintiffs’ Notice of Motion dated 26<sup>th</sup> October 2022 are vacated.
- c. The Plaintiffs do pay the costs of the application to the 1<sup>st</sup> Defendant.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 25<sup>TH</sup> DAY OF MAY, 2023.**

**O. A. Angote**

**Judge**

**In the presence of;**

Mr. Ondari for Omwanza for Plaintiff

Mr. Ahmednassir for 1<sup>st</sup> Defendant

Court Assistant - Tracy

