



**Nairobi Java House Limited v Katko Investments Limited (Miscellaneous Application E321 of 2022) [2022] KEHC 12083 (KLR) (Commercial and Tax) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 12083 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS APPLICATION E321 OF 2022**

**WA OKWANY, J**

**JULY 28, 2022**

**BETWEEN**

**NAIROBI JAVA HOUSE LIMITED ..... PLAINTIFF**

**AND**

**KATKO INVESTMENTS LIMITED ..... DEFENDANT**

**RULING**

1. The plaintiff filed this suit seeking orders that:-
  - a) A temporary injunction be and is hereby issued against the defendant whether acting by themselves, their servants, agents, representatives or howsoever otherwise from commencing, instituting and/or prosecuting any liquidation and/or winding up proceedings against the plaintiff pursuant to the respondent's demand noticed dated 14<sup>th</sup> and 21<sup>st</sup> April 2011 or any other notice whatsoever, pending the resolution of the dispute between the parties through arbitration.
  - b) Costs of the suit.
2. In response to the suit, the defendant filed an application dated June 7, 2022 seeking the following orders:-
  1. That this application be certified as urgent and the same be heard ex-parte in the first instance.
  2. That pending the hearing and determination of this application, this Honourable court be and is hereby pleased to issue an order directing the respondent to pay the accrued rent arrears and service charge arrears in the sum of Kshs 16,186,464.40/- as at May 25, 2022.



3. That pending and hearing and determination of this application this Honourable court be and is hereby pleased to issue an order directing the respondent to pay the applicant the requisite sum of rent and service charge as per Clause 4 of the Lease Agreement between the parties, on or before the 5<sup>th</sup> of every month as and when it falls due.
  4. That the Honourable court be and is hereby pleased to make a finding that the proposed arbitration dispute does not disclose an arbitrable dispute to warrant reference to arbitration.
  5. That in the alternative to prayer 4 above, the Honourable court be and is hereby pleased to issue an order directing the respondent to pay the accrues arrears and service charge arrears in the sum of Kshs 16,186,464.40/- as at May 25, 2022, pending the hearing and determination of this arbitration.
  6. That equally in the alternative to prayer 4 above, the Honourable court be and is hereby pleased to issue an order directing the respondent to pay to the applicant the requisite sum of rent and service charge as per Clause of the Lease Agreement dated February 8, 2021, on or before the 5<sup>th</sup> of every month as and when it falls due, pending the hearing and determination of this arbitration.
  7. That the costs of this application be provided for on a full indemnity basis.
3. The application is premised on the grounds that:-
1. The applicant is registered proprietor of all that property known as L.R. No. 14977( hereinafter referred to as “ the suit property”) wherein it has erected several go-downs for commercial use.
  2. This application seeks to restrain a nefariously calculated attempt, by Nairobi Java House Limited(hereafter “the respondent”) to steal a match, on the applicant, through a precipitated cause of action, to found a suit to defeat the applicant’s lawful interest accruing under the Lease Agreement dated February 8, 2021.
  3. The respondent has mala fides moved this Honourable court under a contrived claim vide a motion dated April 26, 2022. Totally underserving of the orders sought the motion is premised on careful non-disclosure and distortion of material facts formed by a misapprehension of the applicable law.
  4. The applicant is now denied ability to realize any rental income from the property leased to the respondent, who remains in lawful occupation and actual possession. Whereas the said property, with the respondent’s knowledge is charged to Prime Bank Limited, and now exposed to possible imminent realization proceedings.
  5. Pursuant to a Lease Agreement dated 8<sup>th</sup> February 2021(hereinafter “the Agreement”) the respondent leased out a Go-downs 1, 2, 3, 4, 5, 6, 7 and 8 respectively situated on L.R. No. 14977 to the applicant (hereafter “ the premises”). Materially, parties negotiated and agreed that the aforesaid Agreement was for An Agreed Term of ten(10) years from 1<sup>st</sup> November,2019 to 31<sup>st</sup> October, 2029(Kindly see Clauses 1.13 and 2.11 at pages 3 & 4 of the Agreement), at an agreed rent of Ksh s32 per square foot exclusive of VAT and subject to a 10% increment every 12 years, plus an additional service charge of Kshs 3 per square foot exclusive of VAT and subject to a 10% increment every 2 years.
  6. It was never contemplated, neither does the Lease Agreement contain any clause envisaging premature termination whatsoever, and therefore the supposed termination of the said



Agreement before its effluxion, through unilateral is in law unavailable to the respondent, which legal position was affirmed by the Court of Appeal in the case of Kenya [\*Commercial Bank Limited v Popatial Madhavji & another\*](#)[2019] e KLR.

7. There cannot possibly be any legal dispute on a settled Question of Law, as to amenability to termination or not, and such certainly no arbitrable subject matter capable of protection and/or preservation under section 7, [\*Arbitration Act\*](#).
  8. The respondent is not paying the monthly rent as it falls due, neither has it paid any damages, or even offered any, in supposed unilateral 'surrender': which evinces the illegality against which the respondent founds its claim herein. Indeed, this Honourable court ought not lend its aid to the respondent who not only patently founds its cause of action upon a contrived illegal act, but is demonstrably culpable of inequitable conduct.
  9. Despite, the respondent knowing that no surrender of lease has ever been executed, between the parties, it quite brazenly asserts that it supposedly issued a 'surrender of lease' which is in effect a purported termination as evinced in its letter dated April 21, 2022.
  10. Critically herein, the applicant has standing financial obligation to its financiers, Prime Bank Limited in respect of a loan facility advanced to it, which facility has been secured by a charge over the suit property vide a charge dated April 10, 2014 and a further charge dated February 13, 2022. In that regard, the rent and service charge received from the respondent monthly was being applied (with the respondents knowledge) to service the applicant's facility with its bank, now grossly prejudiced.
  11. The applicant stand to be gravely prejudiced if the preservative orders sought herein are not granted as it will be deprived of its property right accruing under the lease agreement, and exposed to a further possible loss of its property being rendered unable to meet its obligation under the aforementioned charge, with the respondent successfully driving it away from the seat of justice, contrary to the dictates of natural justice.
  12. Quite inimical to the course of justice, the respondent seeks to assert 'adverse effects on business' to excuse its patently illegal action, and invoke the Honourable court's aid in transplanting the said effects on the applicant.
  13. Minded of the test in [\*Channel Tunnel Group Limited v Balfour Beatty Construction Ltd\*](#) (1993) AC 334, this Honourable court in considering an application under section 7, [\*Arbitration Act\*](#), is enjoined to consider, "on the one hand the need for the court to make a tentative assessment of the merits in order to decide whether the plaintiff's claim is strong enough to merit protection, and on the other the duty to respect the choice of Tribunal". Noting the grave prejudice that the applicant continues to suffer, and minded of the settled position in law, in as far as the Subject Matter of the intended arbitration is concerned, then it is only fair and just in the Special Circumstance of this case that for any interim orders to be granted to the respondent, then the same ought to be balanced with the admitted obligations under terms of the Lease Agreement which is validly subsisting between the parties.
  14. Unless this application is certified urgent and the order herein granted as prayed, the applicant will continue to suffer grave prejudice and the arbitral proceedings (if at all allowed) will not remedy the comparatively huge prejudice visited on the applicant and the lower risk of injustice tilts in its favour.
4. When the application came up for directions on July 14, 2022, Mr. Lusi for the applicant/defendant moved the court to grant prayer No. 2 and 4 of the application on the basis that there is no arbitrable



dispute capable of being referred to arbitration. Counsel urged the court to bar the commencement of arbitration.

5. Mr Okuta advocate for the plaintiff opposed the granting of the prayers sought on the basis that the matter had already been referred to arbitration and an arbitrator duly appointed.
6. Mr. Lusi for the defendant, on his part argued that there is no dispute to be referred to arbitration.
7. The court declined to grant the orders sought but directed the parties to file and exchange skeleton submissions on prayer No. 4 of the application. It was not disputed that an arbitrator has been appointed and that the parties' agreement contained an arbitral clause. The defendant herein is opposed to arbitration and argued that the accrued rent due to it is not an arbitrable dispute.
8. I am not persuaded by the defendant's argument over the arbitral clause and its applicability to the dispute.
9. The plaintiff herein, in recognition of their agreement and arbitral clause has invoked the said process and I find that the defendant, who has not sued for the alleged rent arrears cannot be seen to resist a process that it clearly agreed to by signing the contract that contained the arbitral clause.
10. I am not persuaded that the defendant has made out a case for the granting of status quo orders as to so would be tantamount to standing in the way of a party who wishes to pursue his case before the arbitrator. I therefore decline to grant the status quo orders sought.
11. I make no orders as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28<sup>TH</sup> DAY OF JULY 2022.**

**W. A. OKWANY**

**JUDGE**

In the presence of: -

Ms Okuta for Kuyo for plaintiff.

Mr. Lusi for Defendant/Respondent.

Court Assistant- Sylvia

