



**Threeways Shipping Services (K) Ltd v Slapper Shoe Industries Limited (Civil Suit 8 of 2020) [2022] KEHC 17064 (KLR) (30 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 17064 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL SUIT 8 OF 2020  
MN MWANGI, J  
SEPTEMBER 30, 2022**

**BETWEEN**

**THREEWAYS SHIPPING SERVICES (K) LTD ..... PLAINTIFF**

**AND**

**SLAPPER SHOE INDUSTRIES LIMITED ..... DEFENDANT**

**RULING**

1. The application before this court is a notice of motion dated July 10, 2020 brought under the provisions of order 40 rules 7 and 11 of the [Civil Procedure Rules, 2010](#), Sections 1A, 1B, 3, 3A & 63(e) of the [Civil Procedure Act](#), and all other enabling provisions of the law. The defendant seeks the following orders-
  - i. That the ex parte temporary injunction granted on April 16, 2019 be discharged and/or set aside;
  - ii. That in the alternative to prayer (i) above, the plaintiff be ordered to deposit to this honourable court a sum of Kshs 31,731,800/= being security for rental arrears;
  - iii. That the plaintiff be compelled by this honourable court to continue paying his rental obligations; and
  - iv. That the costs of the suit and this application be awarded to the defendant.
2. The application is supported by an affidavit sworn on July 10, 2020 by Mayur Malde, the defendant's Managing Director. In opposition to the application herein, the plaintiff filed a replying affidavit sworn on September 14, 2020 by Fredrick Michael Otieno Opot, the plaintiff's General Manager.
3. The application was canvassed by way of written submissions. The defendant's submissions were filed on October 13, 2020 by the law firm of Balala & Abed Advocates, whereas the plaintiff's submissions were filed by the law firm of Mutisya & Associates Advocates on October 6, 2020.



4. Mr. Mohamed, learned Counsel for the defendant referred to Order 40 Rule 7 of the *Civil Procedure Rules, 2010* and submitted that an injunction order being an equitable relief can be granted by the Court at its discretion upon being shown and satisfied that it is just to do so. Similarly, the said injunctive order can be discharged, varied and/or set aside if a party is aggrieved by the said order. He relied on the case of *Magnate Ventures Ltd & another v City Council of Nairobi & 2 others* [2013] eKLR, where the court when dealing with a similar application analyzed the court's jurisdiction in discharging and/or setting aside an order of injunction.
5. The defendant's Counsel contended that an injunctive order can be discharged, varied and/or set aside upon the applicant successfully demonstrating that the order was irregularly obtained or there was a change in circumstances such that it was unjust to maintain it in force, or it was otherwise unjust and inequitable to let the order remain. He submitted that prior to the filing of the instant case, the plaintiff filed two cases being Mombasa CMCC No 779 of 2017 and Mombasa CMCC No 989 of 2018. He indicated that the two matters are substantially the same, having the same parties and the same cause of action seeking an order of injunction against the defendant from levying distress.
6. Mr. Mohamed further submitted that it does not matter that the periods of the arrears leading to distress for rent are different, but it was upon the plaintiff to approach this Court with clean hands for it to be granted an equitable relief. He stated that since the application herein led to the issuance of the ex parte temporary injunctive orders, the plaintiff should have disclosed to the court that there are other similar matters. He contended that the plaintiff was still in the suit premises and had stopped paying its rental obligations under the lease agreement upon getting the ex parte injunctive order. It was submitted by the defendant's Counsel that the existence of the injunctive order is unjust and inequitable as against the defendant, who cannot exercise its right to levy distress for rent under section 4 of the *Distress for Rent Act*.
7. Mr. Mohamed submitted that the plaintiff had neglected to produce any receipts or bank deposit slips to show payment of its rental obligations since May 2017 to at least show that it was up to date with the rental payments and rebut the defendant's assertions as required under Sections 107 to 110 of the *Evidence Act*. He relied on the provisions of Order 40 Rule 11 of the *Civil Procedure Rules, 2010* and submitted that the court can make an order on deposit for security since the defendant will not have access to this money until the court makes a determination upon full hearing as to whether the defendant is entitled to the said amount and as such, the plaintiff will not be prejudiced by the order being sought.
8. He further submitted that the order to transfer this suit from the lower Court was made on November 20, 2019 where the plaintiff was directed to move the Court after allocation of a High Court case number but despite the said order, the plaintiff went to sleep as it enjoyed the injunctive orders, thus necessitating the application herein to discharge the impugned orders as equity aids the vigilant, not those who slumber on their rights.
9. Mr Mutisya, learned Counsel for the plaintiff submitted that the suit herein was lawfully filed to challenge the defendant's illegal distress for rent and that the previous suits concerned totally different rental periods and amounts. He stated that each case has to be considered on its own merit. He contended that the rental negotiations were on a without prejudice basis and no enforceable agreement was ever reached. He submitted that the plaintiff has its rights under the tenancy agreement which have to be protected in law.
10. It was submitted by the plaintiff's Counsel that there is no provision for security for rent arrears in law thus the prayer in the application was incompetent and bad in law. He contended that the amount sought in the application is a substantive amount and allowing the application would deny the plaintiff



its right to prosecute this suit. He argued that the plaintiff had not contributed to any delay in this matter but instead it was the defendant who has been raising unnecessary objections thereby causing delays and extension of the injunctive orders. Mr. Mutisya submitted that the tenancy agreement is a contract between the parties and urged this Court not to impose terms on the parties as prayed in the application herein.

### **Analysis and determination.**

11. This Court has considered the application filed herein, the affidavit filed in support thereof, the replying affidavit as well as the written submissions relied on by Counsel for the parties. The issues that arise for determination are-
  - i. Whether the exparte temporary injunction should be discharged and/or set aside;
  - ii. Whether the plaintiff should deposit Kshs 31,731,800/= in Court as security for rental arrears; and
  - iii. Whether the plaintiff should be compelled to continue paying his rental obligation.
12. The defendant deposed that through a lease agreement dated February 1, 2013, the defendant being the legal owner of plot No 3647/VI/MSA leased the said property to the plaintiff for a term of five years and one month. It was also averred that it was a term of the said agreement that the plaintiff shall be paying rent on a quarterly basis in advance, which rent would thereafter rise by 10% after every two years. He stated that sometime in the year 2016, the plaintiff fell into rental arrears which prompted the defendant to levy distress. That the plaintiff instituted a case seeking an order of injunction restraining the defendant from levying distress, that is in Mombasa CMCC No 779 of 2017 *Threeways Shipping Services Ltd v Slapper Shoe Industries Ltd & another*.
13. It was stated by the defendant that the plaint therein was accompanied by a notice of motion application dated May 10, 2017, which sought an order of temporary injunction. The defendant stated that the said application was dismissed by a ruling dated September 13, 2017, where the learned Chief Magistrate noted that the plaintiff was in rent arrears. The defendant averred that the plaintiff abandoned the said case and in the year 2018, it filed another similar suit being Mombasa CMCC No 989 of 2018 which was struck out after the defendant raised a preliminary objection on grounds that the suit offended the provisions of Section 6 of the *Civil Procedure Act*.
14. The defendant deposed that on August 28, 2018, representatives of the parties herein met with a bid to resolve the rental dispute, and that the plaintiff admitted to being in arrears and provided the defendant with a payment plan but it had failed to honour the agreement. That in the said meeting, the defendant stated that as at January 1, 2020, the rental arrears amounted to Kshs 31,7361,800/=.
15. The plaintiff in its replying affidavit deposed that it did not conceal any material facts at all and this suit was not an abuse of the Court process as the plaintiff has its rights under the tenancy agreement which have to be protected in law. The plaintiff averred that the defendant has not filed any counter-claim and therefore, considering all the circumstances of this case and in the interest of justice and equity, all the relevant law and the *Constitution of Kenya 2010*, the defendant's application should be dismissed accordingly.
16. Before delving into the determination of the issues highlighted above, this Court will first suo moto determine whether it is properly seized with the jurisdiction to hear and determine this matter, as jurisdiction is at the core of the exercise of power by a Court of law, and without it a Court ought not



to move on with a matter. This was the position held by the Court of Appeal in the Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR as stated below-

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

17. Upon perusal of the plaint and the pleadings herein, this Court finds that the subject matter of the suit relates to distress for rent arrears. In the plaint, the plaintiff avers that the defendant has unilaterally and unlawfully and without any prior notice, instructed M/S Ndutumi Auctioneers to levy distress for alleged rent arrears as per the Auctioneers’ proclamation, which distress is unlawful. This Court is of the considered view that the issue herein revolves around the issue of use and occupation of, and title to land which makes it clear that the dispute between the parties herein is purely within the ambit of Article 162(2)(b) of the Constitution of Kenya, 2010 and Section 13 of the Environment and Land Court Act No. 19 of 2011. The latter provisions state as hereunder -

- “ 1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
2. In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—
  1. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
  2. relating to compulsory acquisition of land;
  3. relating to land administration and management;
  4. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
  5. any other dispute relating to environment and land.
3. Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.
4. In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.”

18. It is very clear to me that under the broad jurisdictional framework set out in Article 162 of the Constitution, 2010 and Section 13 of the Environment and Land Court Act, the subject matter of the suit herein falls within the ambit of Section 13 of the Environment and Land Act. This Court finds that it lacks jurisdiction to hear and determine the application herein. The Court of Appeal in Phoenix



of EA Assurance Company Limited vs. SM Thiga t/a Newspaper Service [2019] eKLR, when dealing with an issue on jurisdiction held that: -

“Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If the suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction upon itself”.

19. Consequently, the suit herein having been filed before a Court without jurisdiction is a nullity ab initio and can therefore not be transferred to the Environment and Land Court for hearing and determination. I am guided by the Court of Appeal holding in the case of Mulemi v Angweye & another [2021] KECA 214 (KLR), where the learned Judges cited with authority the case of Adero & another v Ulinzi Sacco Society Limited [2002] eKLR, wherein Judge AG Ringera expressed itself as hereunder-

“..... My view is that jurisdiction either exists or does not ab initio and the non-constitution of the forum created by Statute to adjudicate on specified disputes could not of itself have the effect of conferring jurisdiction on another forum which otherwise lacked jurisdiction..... jurisdiction cannot be conferred by the consent of the parties. Much less can it be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction. And jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal. Having taken the view that this Court had no jurisdiction to entertain the matter, it follows that it could not transfer the same to another Court. In that regard it is trite law that where a cause is filed in Court without jurisdiction, there is no power to transfer it to a Court of competent jurisdiction”.

20. Given the circumstances herein, the only orders that commend themselves to this Court is to strike out the application dated July 10, 2020, with costs. For the same reason, the suit is also struck out with costs to the defendant.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2022.  
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:**

Mr. Mohamed for the defendant/applicant

No appearance for the plaintiff

Mr. Oliver Musundi – Court Assistant.

