



Blackstone Properties Limited v Riziki Limited & another (Environment & Land Case E027 of 2023) [2023] KEELC 18138 (KLR) (15 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18138 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E027 OF 2023**

**LN MBUGUA, J
JUNE 15, 2023**

BETWEEN

BLACKSTONE PROPERTIES LIMITED PLAINTIFF

AND

RIZIKI LIMITED 1ST DEFENDANT

ROBERT KIOKO 2ND DEFENDANT

RULING

1. This ruling is in respect of the Plaintiff's Notice of Motion application dated January 30, 2023. The Plaintiff seeks orders that the 2nd Defendant be ordered to pay a monthly rent of USD 4, 200 on or before every month from January 2023 for his occupation of the suit premises namely House No.3 on Land reference Number 1160/1047 situate in Karen. It also seeks orders that the 2nd Defendant be ordered to deposit in court a sum of USD 79, 8000, being rent arrears for the period between June 2022 and December 2022 and to furnish security as may be sufficient to satisfy the decree that may be passed against the Defendant in this suit within 45 days from the date of the order.
2. The application is supported by the annexed supporting affidavit of Pricilla Ransley, a director of the Plaintiff sworn on January 30, 2023 and her further affidavit sworn on May 2, 2023.
3. She avers that Plaintiff is the registered owner of LR No 1160/1047 and house No 3 erected thereon. She states that by a Tenancy Agreement entered into between the Plaintiff and the Defendants, the Defendants rented house No 3 erected on the suit land at a monthly rent, service charge and water bill of USD 4,200/=, khs 30,000 and ksh 8000/= respectively from June 1, 2018 to May 31, 2019 with an option to purchase the suit premises within the tenancy period.
4. She avers that on August 31, 2018, the 1st Defendant and the Plaintiff executed an option agreement to purchase the suit premises from the Plaintiff at an agreed price of USD 1,050,000.00 on or before



- the end of the tenancy agreement but the 1st Defendant defaulted on payment of the purchase price consequently forfeiting the deposit under the said contract.
5. She further avers that by an agreement dated September 26, 2019, the 2nd Defendant offered to purchase the suit property but also defaulted on payment on the purchase price thus the said contract terminated and the 2nd Defendant opted to continue with the tenancy.
 6. The applicant contends that it was also a term of the option agreement dated 26.9.2019 that if the 2nd Defendant failed to comply with its obligations under the agreement, the option agreement would be terminated and the Plaintiff would have the right to re-enter House No.3.
 7. It is her case that on February 21, 2021, the Plaintiff issued the Defendants with a demand to pay rent, service charge and water bill arrears for the period upto the notice which the Defendants settled until June 2021 but since then, they have refused to pay rent which remains outstanding at USD 75,600 as at December 31, 2022.
 8. It is also averred that in July 2021, Messers Icon Auctioneers were instructed to recover possession of the suit house but the 2nd Defendant frustrated the auctioneers which prompted the Plaintiff to file Nairobi CMCC Miscellaneous Application No E980 of 2021 and obtained an order to evict the Defendants. However, the Defendants appealed the order vide Nairobi HCCA No E543/2021. She adds that the Plaintiff has since withdrawn the suit Miscellaneous Case No 986/2021.
 9. The applicant further contends that she is apprehensive that unless interim relief is granted, the Plaintiff will suffer irreparable loss as the 2nd Defendant has refused to vacate the suit premises and has been removing household goods from the suit house with intent to frustrate the plaintiff's right to levy distress against him.
 10. The application is opposed by the Defendants vide the 2nd Defendant's replying affidavit sworn on April 16, 2023 and his further affidavit sworn on May 26, 2023. He avers that on July 1, 2018, the Plaintiff and the 1st Defendant where he is a director/shareholder signed an option agreement which contemporaneously served as a tenancy agreement over House no. 3 on the suit land and an agreement to purchase the property which is undated and was to commence on July 1, 2018 and end on June 30, 2019.
 11. He further avers that the purchase price of the property was agreed at USD 1,050,000 and the deposit was USD 100,000 payable in 2 installments which was USD 50,000 to be paid on or before signing of the agreement and USD 50,000 within 30 days of signing the agreement. He adds that he deposited USD 100,000 towards purchasing the property in the months of September and October 2018, of which at clause 6.3 all other agreements entered into between the parties in relation to the property were denounced, making the 1st Defendant an unnecessary party.
 12. He avers that the option agreement expired on June 30, 2019 and the parties agreed to renew the option to purchase and extend the lease via another Option Agreement. Consequently, he entered into an Option Agreement dated September 26, 2019 with the Plaintiff removing the 1st Defendant from this new agreement. The option agreement granted him rights to purchase the property within an exclusive period ending on November 30, 2019 but he was unable to exercise the option to purchase by the time the exclusivity period lapsed but the Applicant accepted payment of the rent quarterly in the sum of USD 12,600 therefore extending the terms of the lease beyond November 30, 2019.
 13. He avers the Applicant sought to evict him from the premises by filing a Miscellaneous Application case number 986 of 2021 and obtained orders that purportedly sought to evict him but he appealed



- those orders through High Court Civil Appeal No E 543 of 2021, which orders were stayed and the Appeal is pending determination. Further, the High Court issued status quo orders which still subsist.
14. He further avers that pending hearing and determination of High Court Civil Appeal No E 543 of 2021, they engaged into negotiations with the Plaintiff for the full purchase of the property. The Plaintiff accepted and promised to sell the property to him upon providing reasonable finances for the purchase. He added that acting on the promise, he obtained a letter of credit from Paramount Bank of Kshs 112 million to purchase the property as at August 31, 2021, but the Applicant reneged on its promise.
 15. The 2nd Defendant also states that he is part owner of the suit premises equal to his deposit on the premises, noting that the improvements which he has made on the premises equal to the sum of Kshs 30 million, and as such, he has no rent arrears. He argues that if there is any rent balance due as purported by the Applicant, the said amount is catered by the existing deposit towards the purchase of the premises at USD 100, 000/- which is in Plaintiff's custody and the 2 months' rent deposit of USD 8, 400/-.
 16. He points out that the Plaintiff has failed to disclose to the court that it filed a similar application dated November 19, 2021 seeking similar prayers, before the Milimani High Court in Civil Appeal Number E 543 of 2021 which has not been prosecuted thus rendering this Application *sub-judice*.
 17. The 2nd Defendant also states that he has not removed any of the items from the suit premises. On the issue of deposit on security, he avers that the Plaintiff has failed to demonstrate sufficient reasons for that award.
 18. In her supplementary affidavit sworn on May 2, 2023 in response to the 2nd Defendant's replying affidavit, the Plaintiff avers that she withdrew the application dated November 19, 2021 it had lodged in the High Court in Milimani HCCA No E54/2021 on grounds of want of jurisdiction. She denies allegations that parties were in fresh negotiations and states that the alleged improvement of 30 million do not confer ownership of the suit property.
 19. In response, the 2nd Defendant filed a further affidavit sworn on May 26, 2023. He avers that Miscellaneous E986 of 2021 is incapable of being withdrawn since an appeal was proffered and a decision was made on the matter.
 20. He further argues that the Notice of withdrawal of the Plaintiff's application dated November 19, 2021 filed in HCCA No E543 /2021 was filed on May 3, 2023, 5 months after this application was filed and the matter has a hearing date slated for July 18, 2023.
 21. I have duly considered the arguments raised herein and the rival submissions. It is admitted by both parties that the plaintiff herein had filed a suit for the eviction of the defendant; the same being CMC Miscellaneous Application No E980 OF 2021, of which an appeal was filed in the High Court case no E543 OF 2021. In the circumstances, I frame the issues for determination as follows;
 - a. Whether this suit is *res-subjudice*.
 - b. Whether the Plaintiff is entitled to an order of
 - c. mandatory injunction and an order for deposit of security.
 22. On the 1st issue, the plaintiff claims to have filed the suit Nairobi CMCC Miscellaneous Application No E980 of 2021 seeking eviction orders against the 2nd Defendant on the basis of distress for rent. He won, but the 2nd defendant apparently lodged an appeal HCCA No E543 OF 2021, where the High Court stayed the eviction orders and the appeal is pending determination.



23. It has emerged that the Plaintiff herein filed an application dated November 19, 2021 in HCCA No E543 OF 2021 which seeks similar orders as the orders sought herein. The Plaintiff had concealed that fact, though it apparently later withdrew the application on May 3, 2023.
24. In the case of *Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya* [2020] eKLR, the court stated that;
- “... I have stated that litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks. Pursuing two processes at the same time constitutes and amounts to abuse of court/legal process”.
25. In Supreme Court of Kenya’s case of *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* [2020] eKLR, it was stated that:
- “... A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”
26. The Plaintiff argues that it withdrew Nairobi CMCC Miscellaneous Application No E980 of 2021 thus the appeal is non-existent; However, this is a hollow argument. One cannot withdraw a matter in which a determination has been reached. Doing so would be an affront to the right of appeal which every party is entitled to.
27. The contents of paragraph 11 of the affidavit of the 2nd respondent reads as follows in reference to the orders obtained in the magistrates’ court;
- “I appealed those orders through High Court Civil Appeal No E543 OF 2021 which orders were stayed and the appeal is pending determination”.
28. The applicant has not denied the existence of the High Court case and the orders issued therein. In the circumstances, I find that the Respondents have established that this suit is subjudice to the High Court matter. I also find that the filing of this suit amounts to an abuse of the court processes.
29. The end result is that the Application dated January 30, 2023 and the entire suit are hereby struck out with costs to the respondents.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF JUNE, 2023 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Litoro and Mr. Kinyanjui for Plaintiff

Kimosop for Defendant

Court assistant: Philis



