



**Dixons Electronic Limited v United Housing Estate Limited (Environment and Land Appeal E045 of 2021) [2023] KEELC 18098 (KLR) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18098 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E045 OF 2021**

**MD MWANGI, J  
JUNE 15, 2023**

**BETWEEN**

**DIXONS ELECTRONIC LIMITED ..... APPELLANT**

**AND**

**UNITED HOUSING ESTATE LIMITED ..... RESPONDENT**

**JUDGMENT**

**Background**

1. This appeal was filed by way of the Memorandum of Appeal dated 1<sup>st</sup> July 2021. It is an appeal against the ruling of Hon. Senior Resident Magistrate M.W. Murage in Nairobi Milimani CMCC E7420 of 2020 delivered on 4<sup>th</sup> June 2021. The Appellant listed 8 grounds against the ruling appealed from, and prayed that the ruling be set aside, the Notice of Motion application dated 11<sup>th</sup> day of December 2020 to be allowed as prayed and that the Civil Suit No. E7420 of 2020 proceeds for hearing before any other court other than Hon. M.W. Murage.
2. This court in a ruling delivered on 30<sup>th</sup> June 2022 granted the Appellant an order of temporary injunction against the Respondent pending the hearing and determination of this appeal but on condition of payment of the sum of Kshs 1,997,920/- within 14 days and filing the record of appeal within 60 days. Additionally, the court ordered the Appellant to continue paying the undisputed amount of monthly rent to the Respondent on the due date and in accordance with their lease agreement without fail.
3. Upon the Appellant filing its record of appeal dated 22<sup>nd</sup> July 2022, the court with the agreement of the parties directed that the appeal be heard by way of written submissions. Both parties complied and the court has had the opportunity to read the submissions which now form part of the court record.



### Submissions by the parties.

4. The Appellant in its submissions starts by restating the factual grounds to the effect that the Appellant and the Respondent had entered into a lease agreement dated 10<sup>th</sup> May 2013 in respect of shop No. 3 on the ground floor of the building erected on L.R No. 209/5812, Nairobi for a term of 6 years commencing on 15<sup>th</sup> January 2013 and expiring on 15<sup>th</sup> January 2019 at the monthly rent of Kshs 190,000/-. Upon expiry of the lease, the parties herein on 4<sup>th</sup> February 2019 renewed the lease for a further term of 6 years at the reserved rent outlined in clause 3 of the lease and the 2<sup>nd</sup> schedule.
5. The Appellant alleges that on 1<sup>st</sup> December 2020, the Respondent purported to levy distress for rent claiming outstanding rent arrears of Kshs 3,979,268/-. That was what prompted the Appellant to move to court on the basis that the purported levying of distress for rent was illegal. The Appellant sought injunctive orders against the Respondent.
6. The trial court delivered a ruling on 4<sup>th</sup> June 2021 whereby it ruled that the Appellant had not established a prima facie case with a probability of success and proceeded to dismiss the Appellant's application with costs.
7. In support of its submissions, the Appellant makes reference to the court of Appeal decision in Mbogo –vs- Shah (1968) E.A 93 where the court pronounced the principle that should guide an appellate court in considering whether to interfere with the discretion of a trial court. The holding in the case was that an appellate court should not interfere with the discretion of the trial court unless it is satisfied that the trial court in exercising its discretion has misdirected itself in some matter and as a result arrived at a wrong decision. The second reason would be if it is manifest from the case as a whole that the trial court had been clearly wrong in the exercise of its discretion resulting into an injustice.
8. A similar holding was made in the case of United India Insurance Co. Ltd, Kenindia Insurance Co Ltd & Oriental Five & General Insurance Co. Ltd –Vs- E. African underwriters (K) Ltd, Civil Appeal No. 36 of 1983. In the said case Madan J (as he then was) enumerated the 5 conditions that would entitle an appellate court to interfere with the discretion of a trial court as follows;
  - a. Where a court misdirected itself in law;
  - b. Where a court misapprehended the facts;
  - c. Where a court took account of considerations that it should not have taken into account.
  - d. Where a court failed to take account of considerations that it should have taken into account of; and
  - e. Where the decision of the court is plainly wrong.
9. The Appellant compressed its grounds of appeal into three, namely: -
  - i. The Learned Magistrate erred in failing to properly interpret clause 3.1 of the renewed lease with the result that the trial court failed to appreciate that the reserved monthly rent of Kshs. 300,000 was inclusive of VAT.
  - ii. The Learned Magistrate erred in law in failing to appreciate that VAT and other taxes don't constitute rent for which a Landlord can levy distress.
  - iii. The Learned Magistrate failed to appreciate that on the basis of the contested accounts as to what is due and owing, there was clear need to order the Respondent to furnish the Appellant with the statement of Accounts.



10. In respect to the 1<sup>st</sup> ground, the Appellant submitted that the clause 3.1 of the renewed lease defined rent reserved by the lease to include: The rent set out in the 2<sup>nd</sup> schedule, payable without deductions; The fair proportion of the aggregate annual sum payable to the local authority under the Rating Act by way of additional rent. The extra-ordinary expenses by way of additional rent.
11. The Appellant's case was that, unlike the expired lease, the renewed lease did not distinguish between rent and VAT leading to the inescapable conclusion that the rent payable was inclusive of VAT and other taxes. The Appellant accused the trial court of failing to take into consideration its exhaustive submissions on the interpretation of clause 3.1 of the renewed lease.
12. The dispute between the parties herein is whether the rent of Kshs 300,000/- was inclusive of VAT or not. The Appellant insists that it is inclusive of VAT, while the Respondent holds that it does not include VAT.
13. The Appellant submits that the trial court failed to properly interpret the clause 3.1 of the renewed lease thereby arriving at a wrong decision.
14. In respect to the 2<sup>nd</sup> ground, the Appellant reiterates that the levying of distress by the Respondent was illegal. The Appellant submits that the Respondent is seeking to levy distress on the basis of unlawful VAT charges and other taxes. Allowing the Respondent to proceed with that would amount to rewriting the contract midstream and also permitting levying of distress on claims extraneous to rent. The Appellant contends that the Respondent in its submissions before the trial court had admitted that the levying of distress was in respect to outstanding land rents, which it argues is not equivalent to rent.
15. On the 3<sup>rd</sup> ground, the Appellant submitted that in the Supplementary Affidavit filed before the trial court it exhibited varying statements of account from the Respondent which went uncontested. The Appellant therefore argues that the trial court failed by failing to grant the injunction sought in view of the uncontested evidence before it.

#### **Submissions by the Respondent.**

16. The Respondent in its submissions narrates the history of the matter before the trial court and highlights the ruling of the Hon. Magistrate to the effect that the Plaintiff/Applicant (now Appellant) failed to establish a prima facie case with a probability of success thereby dismissing the application with costs. The trial noted that the Appellant had first denied owing the Respondent but in the Supplementary Affidavit filed thereafter admitted owing a sum of Kshs 1,466,580/- as at 16<sup>th</sup> December 2020.
17. The Respondent submits that the trial court rightly dismissed the Plaintiff/Appellant's application for injunction dated 11<sup>th</sup> December 2020. It avers that, it is the Appellant's misinterpretation of the facts regarding the monthly rent of Kshs. 300,000/- payable to the Respondent that has given rise to this present appeal/suit.
18. The Respondent just like the Appellant makes reference to the decision in *Mbogo & Another –vs- Shah* (1968) EA 93.
19. The Respondent further submits that the principles governing the grant of an interlocutory injunction are clear beyond peradventure as espoused in the case of *Giella –vs- Cassman Brown* (1973) EA 358; and reiterated by the Court of Appeal decision in *Nguruman Ltd – vs- Jan Nielsen & 2 others* (2014) eKLR.



20. It is the Respondent's case that by admitting indebtedness, the Appellant failed to establish a prima facie case. The Respondent asserted that where there is a clear case of default, the Appellant is not entitled to any of the injunctive orders sought. Citing the case of *Alghussein Establishment –vs- Eton College* (1988) 1 ELR 587 which was cited with approval in the case of *Simon Njoroge Mburu –vs- Consolidated Bank of Kenya Ltd* (2014) eKLR, the Respondent asserted that a party would not be allowed to ground his action on his own wrong as against the other party.'
21. The Respondent submitted that the trial court was right having found that the Appellant failed to prove a prima facie case with a probability of success, not to proceed to consider whether the Appellant would suffer irreparable injury, should the temporary injunction not be granted, and whether damages would have been an adequate remedy.
22. The Respondent further submitted that the dispute whether the rent of Kshs 300,000/- was inclusive of VAT or not is an issue that can only be determined at the hearing though their position is that, that figure was exclusive of rent. Accordingly, the Respondent asserts that they had a right to levy distress for rent which is a remedy provided for in law for a landlord against a tenant in case of default in payment of rent. The right to levy distress for rent was also reserved in the renewed lease.
23. The Respondent was categorical that the Appellant deliberately failed to pay the VAT in addition to the monthly rent of Kshs 300,000/- and the Respondent was well within its right to levy distress for rent hence the action was lawful.
24. In regard to the furnishing of statements of accounts, the Respondent asserts that it furnished the Appellant with rental payment schedules which were sufficient and adequate as they gave updated information regarding the amount of rent payable each month, total outstanding and all amounts received.

#### **Analysis and Determination.**

25. This being a first appeal, the court reminds itself of its primary role as a 1<sup>st</sup> appellate court, namely to re-evaluate, re-assess and re-analyze the evidence before determining whether the conclusions reached by the Learned Magistrate are to stand or otherwise and give reasons either way. (*Abok James Odera t.a. A.J. Odera & Associates –vs- John Patrick Machira t.a. Machira & Co. Advocates* (2013) eKLR.
26. In this instance, the appeal herein is against a ruling of the Magistrate's court. The main suit is still pending before the Magistrate's court. This court therefore has a responsibility in making this judgment not to delve into the issues that are to be determined by the Magistrate's court in order not to embarrass the trial before that court. I must point out that both parties in this appeal have gone to great lengths in their submissions as if this were an appeal against a judgment. They have actually gone into the merits of the case.
27. I will therefore be deliberately economical with my words, conscious of the pending suit before the Magistrate's court.
28. The main basis of the ruling by the Learned Magistrate was her finding that the Plaintiff had not established a prima facie case.
29. A prima facie as defined in the case of *Mrao –vs- First American Bank of Kenya Ltd and 2 others* (2003) eKLR, is one which on the material presented before the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the Respondent.



30. In the *Nguruman Ltd –vs- Jan Bonde Nielsen & 2 others* (2014) eKLR, the court stated that in determining whether a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely, except to see that the Applicant has a right which has been or is threatened with violation.
31. Having carefully considered the submissions of the parties filed in this matter and before the magistrate’s court, the main issue in contention between the parties is whether the rent payable under the renewed lease was inclusive of taxes or not. Basing its arguments on the previous lease with the Respondent, the Appellant argues that the rent is inclusive of taxes while the Respondent argues to the contrary.
32. That is the dispute that the trial court is called upon to determine between the parties.
33. There was also the issue of the rent in arrears. The Hon. Magistrate found that since the Appellant had admitted being in some arrears then it had not made a prima facie case. The admitted arrears have since been paid by the Appellant after this court in its ruling of 30<sup>th</sup> June 2022, directed the Appellant to pay the said sum of Kshs 1,997,920/- within 14 days as one of the condition for the grant of a temporary injunction pending the hearing and determination of this appeal.
34. Going by the definition of a prima facie case in the case of *Mrao –Vs- First American Bank of Kenya Ltd and 2 others* (Supra) and considering the previous tenancy relationship between the party, I would have no difficulty finding that the Appellant has a prima facie case.
35. On that basis alone, I would fault the findings of the Learned Magistrate.
36. On the 2<sup>nd</sup> hurdle that an Applicant for an order a temporary injunction must surmount, Warsame J (as he then was) in the case of *Joseph Siro Mosioma –vs- Housing Finance Company of Kenya & 3 others* (2008) eKLR stated that damages is not an automatic remedy when deciding whether to grant an injunction or not. He proceeded to note that,  

“damages is not and cannot be a substitute for the loss, which (may) be occasioned by a clear breach of the law. In any case, the financial strength of a party is not always a factor to refuse an injunction. Moreso, a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an injunction.”
37. My finding is that the Appellant was deserving of the order of a temporary injunction.
38. I therefore allow the appeal and set aside the ruling of the Magistrate’s court delivered on 4<sup>th</sup> June 2021 In Nairobi Milimani Civil Suit No. E7420 of 2020 (Dixons Electronics Ltd –Vs- United Housing Estate Limited) and the subsequent order. The Appellant is therefore granted an order of temporary injunction pending the hearing and determination of the case, Nairobi Milimani Civil Suit No. E7420 of 2020 (Dixons Electronics Ltd –Vs- United Housing Estate Limited).
39. The Appellant shall continue paying the undisputed monthly rent to the Respondent as and when it falls due.
40. On the issue of the costs of this appeal however, considering the circumstances of this matter, each party shall bear its own costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15<sup>TH</sup> DAY OF JUNE 2023.**

**M.D. MWANGI**



**JUDGE**

**In the virtual presence of:**

Ms. Migiro for the Appellant.

Ms. Kavata holding brief for Shah for the Respondent.

Court Assistant – Yvette.

**M.D. MWANGI**

**JUDGE**

