



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**MISC. CIVIL APPLICATION NO. 33 OF 2021**

**TUSKER MATTRESSES LIMITED.....APPLICANT**

**VERSUS**

**AMIN JIWA SHAMJI.....RESPONDENT**

**RULING**

1. What has been raised in the Preliminary Objection is that this court has no jurisdiction to entertain the matter before it. The background of this matter is that the Applicant and the Respondent had a lease agreement for the lease of the premises situated at L.R. No. Kisii Municipality/Block II/24 – the lease agreement has been attached by the parties.

2. Upon considering the submissions made it is my considered view that the issue for consideration is the terms of the lease which lease was terminated as per the Respondent. The issue between the parties does not involve the occupation of land but a premises leased to the applicant. Therefore the 1<sup>st</sup> limb of the preliminary objection fails. I find that this court has the jurisdiction to hear and determine the application.

3. On the issue of leave to appeal, the applicant sought leave to appeal after the trial court read its Ruling. Leave was not denied. The trial magistrate indicated that the applicant should file a formal application. In its application, the applicant seeks for enlargement of time with a notice to lodge the Notice of Appeal. This prayer was granted by this court on the 30/7/2021 pending the Ruling.

4. On the issue of stay it is argued that the matter is *sub judice* as a similar application is pending unheard and undetermined before Nairobi HCC JNP No. E018 of 2020. The applicant does not deny this fact.

5. The pleading attached of Case No. E018 of 2020 indicates that the applicant also seeks an order of stay of execution of the Rulings delivered on the 24/3/2021 and 11/5/2021 in KISII MCC MISC 94 of 2020. The applicant also seeks to cite Amin Jiwa Shamji for contempt of court.

6. In the current application the applicant seeks a stay of execution of the Ruling delivered on the 11/5/2021 in KISII MCCMISC 94/2020 and for the court to set aside the Ruling and vacate the terms of the Ruling delivered on the 11/5/2021. What is the meaning of *sub judice*? ***It means that a particular case or matter is under trial or being considered by a Judge or court or it is the subject of a trial in court of law.*** It has been demonstrated that a similar application for stay of execution is before the High Court in Case No. E018/2020 which is yet to be determined. The applicant states that the matter at Milimani is pending Ruling and was filed when the respondent breached a court order that was issued in E018/2020.

7. I note that though the applicant seeks a stay in E018/2020 and also in this matter too. I will not make a finding on the issue of *sub judice* as there is a Ruling that is yet to be delivered by the court. I will grant the applicant time to pursue the Ruling in E018/2020 before I make a finding on the issue of *sub judice*. I do so considering the circumstances of this matter and the matter in E018/2020. The Preliminary Objection lacks merit in part. No order as to costs.

**DATED, SIGNED AND DELIVERED AT KISII THIS 28<sup>TH</sup> DAY OF SEPTEMBER, 2021.**

**R.E. OUGO**

**JUDGE**

**In the presence of**

Mr. Sahil for the Applicant

Miss Kebungo for the Respondent

Rael Court Assistant