



**REPUBLIC OF KENYA**

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

**CIVIL DIVISION**

**HIGH COURT CIVIL CASE NO. 115 OF 2008**

**SUPER COSMETICS LIMITED ..... PLAINTIFF/RESPONDENT**

**VERSUS**

**JUBILEE INSURANCE COMPANY LTD ..... DEFENDANT/APPLICANT**

**RULING**

1. The application dated 7<sup>th</sup> February, 2017 seeks orders that pending the hearing and determination of this suit there be stay of proceedings and orders in Business Premises Rent Tribunal Case No. 216 of 2008.
2. The application is predicated on the grounds stated therein and is supported by the affidavit sworn by the Applicant's counsel. It is stated that the Plaintiff/Respondent sued the Defendant/Applicant herein on 2<sup>nd</sup> April, 2008. That the Defendant filed a defence and counter claim seeking orders *inter alia* for vacant possession and Mesne profits.
3. It is further stated that subsequently on 23<sup>rd</sup> April 2008 the Plaintiff filed BPRT No. 216/08 which is still pending. The Defendants contention is that the Plaintiff's suit before the Business Premises Rent Tribunal offends the principles of *res judicata* and *subjudice*. It is further stated that the suit herein raises weighty and substantial issues that cannot be adequately addressed by the tribunal.
4. The application is opposed. It is stated in the replying affidavit that at the time the suit herein was filed, the Tribunal was not sitting. That the Plaintiff was therefore forced to institute the proceedings herein due to the urgency of the matter and owing to the fact that the Defendant had illegally and unlawfully locked up the Plaintiff's business premises being shop No. 1 situate on LR No. 209/4914, Jubilee Exchange, Mama Ngina Drive. It is further averred that the dispute herein relates to a controlled tenancy under the Landlord and Tenant (shops, Hotels and Catering Establishments) Act Cap 301 Laws of Kenya.
5. The Plaintiff's assertion is that the Tribunal has original and exclusive jurisdiction to determine the dispute herein. It is further stated that although the Plaintiff is willing to withdraw the suit herein, the counterclaim filed by the Defendant stands in its way. That the Prayers sought in the counter claim are for vacant possession of the suit premises, *Mesne* profits and general damages amongst others. That the said prayers in the counter claim differ from the prayers sought by the Plaintiff save for the prayer for vacant possession and that therefore there is no replication of the orders sought before the Tribunal. The Plaintiff saw this application as a delaying tactic and a ploy to mislead the court.
6. The application was disposed of by way of written submission which I have considered.
7. It is not in dispute that the Tribunal has already made a determination vide its ruling in BPRT 216/08. In the said ruling, the Tribunal has held that it has the primary jurisdiction to determine whether there is a controlled tenancy relationship between the parties herein. The said ruling which was delivered on 29<sup>th</sup> April, 2016 stands to date. The parties should therefore await the determination of the dispute before the Tribunal.
8. It has been argued by the Defendant's counsel that the suit before the Tribunal is *res judicata* or *subjudice* the suit herein.

Section 6 Civil Procedure Act provides as follows

**“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”**

Section 7 Civil Procedure Act provides as follows

**“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court. ”**

9. Undoubtedly, the parties before this suit and before the Tribunal are the same and the subject matter is the same. As observed above, the Tribunal has already made a determination on the question of it's jurisdiction regarding the tenancy relationship. The Tribunal has already issued orders restraining the Defendant from accessing the suit premises and compelled it to remove the locks from the premises. There are also orders herein fashioned in a similar manner. However, the Plaintiff has explained that it is impossible to withdraw it's case due to the counter-claim by the Defendant for *inter alia* Mesne profits and general damages which do not form part of the proceedings before the Tribunal.

10. On whether the suit herein raises weighty and substantial issues that cannot be determined by the Tribunal, the legislature in its wisdom created the Tribunal to deal with matters provided for under the Landlord and Tenant (Shops, Hotels and Catering of Establishment) Act Cap 301 Laws of Kenya.

11. With the foregoing, this court's conclusion is that the application herein has no merits. Consequently, I dismiss the same with costs to the Plaintiff/Respondent.

**Date, signed and delivered at Nairobi this 2<sup>nd</sup> day of August, 2018**

**B. THURANIRA JADEN**

**JUDGE**