



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC APPEAL CASE NO. 26 OF 2018**

**MUCHEWA LIMITED.....APPELLANT**

**VERSUS**

**ENKARE HOTEL LIMITED.....1ST RESPONDENT**

**ADDER LIMITED.....2ND RESPONDENT**

**(Being an appeal from the ruling of the Honourable Gesora , Chief Magistrate,**

**in Nairobi CMCC Number 1198 of 2018 delivered on 16th May 2018)**

**JUDGMENT**

1. This interlocutory appeal arises from a ruling delivered on 16/5/2016 by Honourable P Ngare Gesora (CM) in Milimani CMCC No 1198 of 2018. From the trial court's record, the impugned ruling relates to two applications. The first application was a Notice of Motion dated 22/2/2018 by Enkare Hotel Limited (the **1st respondent**) in which it sought interim injunctive orders against Muchewa Limited (the **appellant**) and Adder Limited (the **2nd respondent**) restraining the appellant against levying distress or attaching the 1st respondent's property in relation to a tenancy in respect of premises it occupied on Land Reference Number 209/3788 situated along Muktar Daddah Street, Nairobi. The second application was a Notice of Motion dated 23/2/2018 by the appellant seeking to stay/discharge/vary the interim ex parte restraining order issued by Honourable Mbeja pending the interparties hearing and determination of the first application alluded to above.

2. In its application dated 22/2/2018, the 1st respondent contended that it was a subtenant of the appellant who had leased the entire building on the suit land from the 2nd respondent and it had paid the requisite rent but the appellant had not remitted the rent to the 2nd respondent and as a consequence of the non-remittance, the 2nd respondent had levied distress. The 1st respondent contended that as a consequence, it lodged a case in the Business Premises Rent Tribunal (the **BPRT**) and the BPRT allowed him to make direct remittance of rent arrears to the 2nd respondent but it was not able to remit the rent arrears in a single installment as ordered by the BPRT. It contested the subsequent notice of distress by the appellant and sought to restrain the appellant against levying distress.

3. On its part, the appellant had opposed the application and contended that the Business Premises Rent Tribunal was seized of the tenancy dispute at the instance of the 1st respondent and had vacated its injunctive orders after the 1st respondent failed to pay rent as directed by the Business Premises Rent Tribunal. It further contended that the suit lodged and the ex parte orders obtained by the 1st respondent in the Chief Magistrate Court amounted to an appeal against, and a review of the orders of the Business Premises Rent Tribunal, and was untenable as it was an abuse of the process of the court. It added that the suit in the Chief Magistrate Court was *res judicata*.

4. Parties canvassed the two applications and on 16/5/2016 , Honourable Gesora made the following findings:

***“It is therefore clear that this court is properly seized of the matter. It is true that there are proceedings before the Business Premises Rent Tribunal but the same have not been concluded and the doctrine of res judicata is not applicable herein. As observed hereinabove, the plaintiff herein is seeking injunctive orders. Those are the same orders sought in the plaint herein. The orders granted by Honourable Mbeja SRM on 22nd February 2018 have since lapsed and the objection is therefore of no consequence. In the end, I find merit in the application herein and proceed to allow the same as prayed for”***

5. Aggrieved by the said ruling, the appellant brought this interlocutory appeal seeking the following orders:

***1. That the decision of the Learned Magistrate be set aside with costs.***

**2. That CMCC No 1198 of 2018 be struck out with costs as an abuse of the court process.**

6. The interlocutory appeal was canvassed through written submissions. Mr. Richard Mutiso, counsel for the appellant, submitted that the learned magistrate had no jurisdiction to hear the matter and had failed to consider the fact that the issues raised in the suit were issues relating to a dispute between a landlord and a tenant in relation to commercial premises and the proper forum for adjudication was the Business Premises Rent Tribunal. Secondly, counsel submitted that the learned magistrate overlooked the fact that the Business Premises Rent Tribunal was seized of the same dispute and issues and had issued orders which the 1st respondent had sought to overturn through the suit in the court.

7. Counsel further submitted that the suit in the Chief Magistrate Court offended Section 6 of the Civil Procedure Act in that the 1st respondent had filed two cases in the Business Premises Rent Tribunal and one case in the Environment and Land Court raising the same issues and seeking the same orders. Thirdly, counsel submitted that the 1st respondent had not satisfied the criteria for grant of an interlocutory injunctive order. Counsel urged the court to allow the appeal as prayed.

8. In response, Mr Njenga, counsel for the 1st respondent, submitted that the 1st respondent's tenancy was not controlled tenancy and therefore the Business Premises Rent Tribunal lacked jurisdiction to hear the dispute. Counsel further submitted that besides seeking a restraining order against the appellant, the 1st respondent also sought to recover Kshs. 13,550,000 which it had lent to the appellant hence the Chief Magistrate Court was the proper forum for resolution of the dispute. Counsel also submitted that the Business Premises Rent Tribunal does not have jurisdiction to grant injunctive orders hence the need to seek redress in the Chief Magistrate Court.

9. Counsel argued that the suit in the Chief Magistrate Court did not offend Section 6 of the Civil Procedure Act because the Business Premises Rent Tribunal lacked jurisdiction to issue an injunctive order. Lastly, counsel submitted that the appellant had dwelt on the issue of jurisdiction and upon determining that the Chief Magistrate Court had jurisdiction, the learned magistrate properly found that the 1st respondent had satisfied the criteria for grant of an interlocutory injunctive order. Counsel urged the court to dismiss the appeal.

10. I have considered the entire record of appeal, the grounds upon which the appeal is predicated, and the parties' rival submissions. I have also considered the relevant legal framework and jurisprudence on the key questions in this appeal. Because this is an interlocutory appeal, my pronouncements on the issues raised in the appeal will be restricted to the grounds of appeal set out in the memorandum of appeal. I will also refrain against making definitive pronouncements on issues pending before the Chief Magistrate Court and the Business Premises Rent Tribunal.

11. The first ground of appeal relates to the jurisdiction of the Chief Magistrate Court to issue the injunctive order in respect of a dispute that the Business Premises Rent Tribunal was seized of. There is common ground that the tenancy dispute in question was before the Business Premises Rent Tribunal at the instance of the 1st respondent and the Business Premises Rent Tribunal had granted the 1st respondent interim restraining orders. The said interim restraining orders were vacated by the Business Premises Rent Tribunal after the 1st respondent failed to honour the terms of the interim injunctive orders which the Business Premises Rent Tribunal had granted it. Without withdrawing the case at the Business Premises Rent Tribunal, the 1st respondent having lost the benefits of the interim orders due to its failure to pay rent as ordered by the Business Premises Rent Tribunal opted to file a fresh suit in the Chief Magistrates Court whereupon the Chief Magistrates Court granted it the very orders it had lost in the Business Premises Rent Tribunal. In my view, the plea for interim injunctive orders in the Magistrates Court was an abuse of the process of the court and violated the provisions of Section 6 of the Civil Procedure Act. The Business Premises Rent Tribunal was seized of the same dispute and had discharged the restraining orders which the Chief magistrate was being invited to grant. If the 1st respondent was aggrieved by the discharge, it ought to have appealed against the decision of the Business Premises Rent Tribunal, not to file a fresh plea for the same interim relief in the Chief Magistrates Court.

12. This view is partly informed by the framework in Article 169 of the Constitution which categorizes local tribunals as subordinate courts. By dint of this framework, the Magistrates Court is not allowed to conduct parallel proceedings in respect of a dispute which is already subsisting before the Business Premises Rent Tribunal or review orders of the Business Premises Rent Tribunal. I am therefore satisfied that the Chief Magistrate erred in assuming jurisdiction and proceeding to issue interlocutory injunctive orders in respect of a dispute which was before the Business Premises Rent Tribunal and in which the Business Premises Rent Tribunal had discharged similar injunctive orders on account of the litigant's failure to pay rent.

13. The contention that the application in the Chief Magistrate Court was necessitated by money lent by the 1st respondent to them is not tenable because a claim for money lent is a distinct cause of action involving the two parties to the alleged lending agreement. It can properly be pursued in a civil court without involving non-parties to the alleged debt and without mixing it with disputes relating to controlled tenancy which are reserved for the BPRT.

14. In the same vein, the contention by the 1st respondent that the BPRT did not have jurisdiction is rejected because it is the 1st respondent who initiated proceedings in the BPRT. It cannot be that as long as the 1st respondent enjoyed interim injunctive orders the BPRT had jurisdiction but as soon as it discharged the orders, it ceased to have jurisdiction. Moreover, there is no evidence that the 1st respondent had withdrawn the dispute(s) in the BPRT at the time of seeking restraining orders in the magistrate's court.

15. The last ground of appeal relates to the question as to whether the criteria for grant of the injunctive order was satisfied in the circumstances of the case. I have carefully examined the impugned ruling. It largely dealt with the issue of jurisdiction. All that the learned magistrate said about the plea for an injunction in his determination is as follows:

***“In the end I find merit in the application herein and proceed to allow the same as prayed”***

16. In a plea for interim injunctive relief, the court is obligated to pronounce itself on the question as to whether the criteria in **Giella v Cassman Brown (1973) EA 358** has been satisfied. In the present dispute, the 1st respondent admitted that he was a subtenant of the appellant and that the 2nd respondent was the head landlord. It also expressly admitted that it was in rent arrears. Evidence was placed before the Chief Magistrate to demonstrate that the 1st respondent was seeking restraining orders in the Chief Magistrates Court after it failed

to pay rent and after the Business Premises Rent Tribunal had consequently discharged similar restraining orders which it had granted to the 1st respondent. In my view, without evidence that the rent arrears had since been paid to either the appellant or the head landlord, the Magistrate was not justified to grant the injunctive relief. The consequence of granting the injunctive order in the circumstances was to allow a subtenant who had admitted being unable to pay rent to continue occupying the suit premises without pay requisite rent. That in my view was inequitable.

17. The upshot of the above findings is that the appeal herein is allowed in terms of prayer 1 of the Memorandum of Appeal. Prayer 2 is declined because there was no plea before the magistrate court seeking the striking out of the entire suit. To allow that plea in this appeal would be unprocedural. If the appellant wishes to have the suit struck out, it ought to take an appropriate motion to the magistrate court.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17TH DAY OF DECEMBER 2018.**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

Mr Kiiru holding brief for Mr Njenga for the 1st Respondent

Mr Wachira holding brief for Mr Mutiso for the Appellant

June Nafula - Court Clerk