



Motion Industrials Limited v Ashray Holdings Limited & another (Environment and Land Appeal E222 of 2024) [2025] KEELC 3499 (KLR) (30 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3499 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E222 OF 2024**

JG KEMEI, J

APRIL 30, 2025

IN RESPECT OF THE APPELLANT’S APPLICATION DATED 17/12/2024

BETWEEN

MOTION INDUSTRIALS LIMITED APPELLANT

AND

ASHRAY HOLDINGS LIMITED 1ST RESPONDENT

ZASHA AUCTIONEERS 2ND RESPONDENT

RULING

1. The Appellant/Applicant through its Notice of Motion dated 17/12/24 seeks Orders that;
 - a. Spent.
 - b. Pending the interpartes hearing of the application the court to make an order of status quo or in the alternative and without prejudice.
 - c. Pending hearing interpartes of the application the court to grant temporary injunction restraining the respondents whether by themselves their servants’ employees ands’ or agents or such other agents they may purport to appoint from distressing proclaiming evicting or in any manner interfering with the applicants quiet possession of the premises known as Go-Down Number A10 together with Parking Bay Nos. 037, 038, 039 & 040 (hereinafter called the suit property)
 - d. The OCS Industrial Area Police Station does ensure compliance of these orders and maintain peace around the suit premises.
 - e. That the appellant be allowed 60 days to file and serve its record of appeal



- f. That pending the hearing and determination of the application an order be and is hereby made allowing the appellant/tenant to continue meeting its monthly rental obligations by depositing the monthly rent and service charge to the 1st Respondent in accordance with the impugned agreement between the 1st Respondent and the appellant
- g. Costs of the application to be provided for
2. The application is premised on the grounds on the face of it and the supporting affidavit of Brian Muchenditsi Mukolwe, a director of the applicant company sworn on the 17/12/24.
 3. He avers that the applicant is a tenant in the premises of the 1st Respondent. That due to the harsh economic conditions occasioned by COVID 19, the applicant faced challenges in meeting its rent obligations whereupon the 1st Respondent without leave of the court attempted to levy distress as shown by the proclamation notice marked MIL-2.
 4. That respondents jointly and unfairly forced the auctioneer's fees in the sum of Kshs 486,910/- upon the applicant. This prompted the applicant to file a reference in the BPRT on 22/2/24. In response the 1st Respondent filed a preliminary objection dated the 8/4/24 in the main that the tenancy agreement is not a controlled tenancy. The court allowed the objection, which ruling they have requested for a copy from the court. That it is apprehensive that the respondents shall forcefully evict the applicant from the suit premises and interfere with its quiet possession of the suit premises unless temporary orders are issued. further that they have filed an appeal which risks being rendered nugatory should the applicant be evicted from the premises.
 5. The application is opposed by the 1st respondent only through the replying affidavit of Kamal Bhatt sworn on the 27/1/25.
 6. He stated that the application is a ploy by the applicant to avoid its rent paying obligation while occupying the premises for free to the detriment of the 1st Respondent. That the applicant and the 1st respondent entered into a lease agreement on 20/9/21 over the suit premises. It was a term of the said lease agreement that the applicant was to pay a monthly rent of USD 2300 with an escalation of 5% p.a together with service charge of Kshs 20,000/-. That from the month of August 2022 the applicant defaulted in the payment of rent and despite several demands and reminders and false promises to pay the applicant persisted in default leading to the build up of rent arrears in the sum of USD 62,898.96 and service charge of Kshs. 253,286.76 which sums continue to accrue monthly yet the applicant has been hiding behind court orders to avoid its obligations under the lease. The state of affairs led to the levying of distress for purposes of recovery of the rent and service charge arrears
 7. He further deponed that the lease does not fall under a controlled tenancy hence the BPRT decision to dismiss the applicant's reference.
 8. That the applicant has since paid a sum of USD 950 as of 12/2/24 which is negligible given the outstanding arrears which is now constraining its cash flow. That since the applicant has not denied rent arrears and its only argument is that the penalties for rent default was computed at a rate higher than that contained in the lease agreement which argument is false since the terms of the lease have been adhered to. He argues that the Applicant has not come to court with unclean hands and cannot endear itself to equitable reliefs. The court was urged to dismiss the application.
 9. The court directed that the application be disposed of by way of written submissions. Both parties complied and filed their respective submissions. The Applicant's submissions are dated 26/02/2025 whereas the 1st Respondent's submissions are dated 4/03/2025. The court has had the opportunity to peruse the same together with the cited authorities and considered them in its determination.



10. The key issue for determination is whether there is a substantive application for determination by the Court and who meets the cost of the application
11. It is imperative at this early time to point out that parties are bound by their pleadings. Parties must plead their case before proceeding to proof them. In *Daniel Otieno Migore v South Nyanza Sugar Co. Ltd* [2018] eKLR, Justice A C Mrima stated that:

“It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must align with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded.”
12. The Court of Appeal in the case of *Independent Electoral and Boundaries Commission & Ano. v. Stephen Mutinda Mule & 3 others* (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) v. Nigeria Breweries PLC* SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

“.....it is now(settled) principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”
13. The 1st Respondent contends that the Applicant only prays for an order of injunction strictly pending the hearing of this application and not pending the appeal. It argues that parties are bound by their pleadings and the court can only grant that which is pleaded for.
14. I have indeed perused the instant application and I note that all the prayers are in the interim (pending inter-parties hearing of the application) save for the prayer to be granted leave to file a record of appeal and costs. There is no prayer for grant of interim injunction pending the hearing and determination of the appeal.
15. Although it is clear that from the grounds in support of the application, the supporting affidavit and the submissions by the applicant, the application herein seeks an injunction pending the hearing and determination of the appeal herein, the applicant sought not to specifically pray for it. Such an omission is not curable by invoking the provisions of Article 159 (2) (d) of the *Constitution of Kenya*.
16. It is therefore my finding that the Appellant’s application is overtaken by events. The prayers sought are all spent and there is nothing pending for the court to determine. The application is therefore dismissed with costs to the 1st Respondent.
17. I also note the objection raised by the 1st Respondent on the status of the 1st Respondent. It contends in its Replying Affidavit that the Application and the appeal herein are fatally defective for want of leave pursuant to Section 560 of the *Insolvency Act* before instituting proceedings against an entity under administration. The Appellant did not respond to this issue.
18. Section 560 (1) (d) of the *Insolvency Act* provides: -
 - (1) While a company is under administration—



(d) a person may begin or continue legal proceedings (including execution and distress) against the company or the company's property only with the consent of the administrator or with the approval of the Court.”

19. My take on the provisions of Section 560 (1) of the said Act is that the sanction of the court or the administrator is required when a litigant institutes a suit or wishes to continue with a suit against the institution which has been placed under administration. The 1st Respondent has adduced a Notice of Appointment of Joint Administrators of Ashray Holdings Limited under the provisions of Section 563 (2) (b) of the Insolvency Act, 2015. The Notice was with effect from 14/05/ 2024.
20. I say no more since the appeal is yet to be heard.
21. Parties are directed to list the appeal for directions and hearing expeditiously
22. In the end, I find that the Appellant's application dated 17/12/2024 is overtaken by events. It is dismissed with costs to the 1st Respondent.
23. It is so ordered

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF APRIL, 2025 VIA MICROSOFT TEAMS.

J.G. KEMEI

JUDGE

Delivered Online in the presence of:-

Mr. Mburu h/b for Mr. Opiyo for the Applicants

Mr. Waiyaki h/b for Mr. Mumbi for the 1st Respondent

NA for the 2nd Respondent

CA – Ms. Yvette

