



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MILIMANI**

**ELC CASE NO. E211 OF 2021**

**KENYA HARLEQUIN FOOTBAL CLUB.....APPLICANT**

**=VERSUS=**

**QUACO TWO HUNDRED AND THIRTY-TWO LTD.....RESPONDENT**

**&**

**ENCORE LOUNGE & GRILL.....INTENDED INTERESTED PARTY**

*(Notice of motion dated 24<sup>th</sup> November 2021)*

**RULING**

**Background**

1. The Applicant, Kenya Harlequin Football club moved the court by way of a Notice of Motion application dated 24<sup>th</sup> November 2021 filed under a certificate of urgency. The said application was brought under the provisions of Sections 1A, 1B, & 3A of the Civil Procedure Act & Order 42 Rule 6 of the Civil Procedure Rules. The Application seek orders: -

**a) Spent**

**b) Spent**

**c) Spent**

**d) Spent**

**e) THAT there be a stay of execution of the Ruling delivered on 23<sup>rd</sup> November 2021 by Honourable Patricia May, Chairperson of the Business Premises and Rent Tribunal and the resultant Order pending the hearing and determination of the intended substantive appeal.**

**f) THAT the status quo ante, that is the Applicant's possession of the suit premises, be maintained pending the hearing and determination of the intended substantive appeal.**

**g) THAT the Applicant be at liberty to apply for further orders and /or directions as this Honourable Court may deem fit and just to grant.**

**h) THAT the costs of this application do abide the outcome of the appeal.**

2. The application is based on the grounds on the grounds on face of it, the supporting affidavit, the further affidavit and the supplementary affidavit all sworn by one, Michael Mbirira Wanjala.

3. The Applicant's case was that the Respondent was its former tenant with whom they had had a case before the Business Premises Rent Tribunal (hereinafter referred to as the 'Tribunal') being BPRT case No. 473 of 2020. The said case was finally determined and a judgement delivered on 4<sup>th</sup> December 2020 directing the Respondent to pay the Applicant rent arrears amounting to kshs.3,195,539/= within 30 days.

4. The Applicant avers that the Respondent did not comply with the terms of the Judgement of the Tribunal. Consequently, the Applicant therefore commenced the process of levying distress. The Applicant states that the Respondent merely paid Kshs.1,069,500/= out of the decreed sum of Kshs.3,195,539/=.
5. Surprisingly, and despite non-compliance with the Judgement of the Tribunal, the Respondent filed an application dated 25<sup>th</sup> January 2021 before the Tribunal seeking orders for contempt of Court against the Chairperson of the Applicant Club, alleging disobedience of Court orders. That Application was however dismissed by the Tribunal for want of jurisdiction.
6. The Applicant alleges that, the Respondent, in a bid to frustrate it, filed an application dated 15<sup>th</sup> October 2021 before the Tribunal and obtained ex-parte orders directing the Applicant to re-open the premises the subject matter of the tenancy, pending the hearing and determination of that application inter-partes. The ex parte orders were issued on the 19<sup>th</sup> October 2021.
7. The Applicant being aggrieved by the ex parte orders filed an application dated 22<sup>nd</sup> October 2021 before the Tribunal seeking to review/set aside the ex-parte orders of 19<sup>th</sup> October 2021. The application was to be heard on 23<sup>rd</sup> November 2021. However, on the 23<sup>rd</sup> November 2021, the Tribunal instead amended the ex parte order of 19<sup>th</sup> October 2021, directing that the OCS, Jamhuri Police Station to aid the Respondent in the re-opening of the suit premises, the subject matter of the tenancy.
8. The Applicant was aggrieved by the Tribunal's orders of 23<sup>rd</sup> November 2021, which the Applicant claims were issued despite the fact that its application for review had not been dispensed with. The Application sought review of the orders of 19<sup>th</sup> October 2021 on the basis of material non – disclosure of facts by the Respondent.
9. The Applicant states that it intends to appeal against the order of 23<sup>rd</sup> November 2021 to the Environment and Land Court. The Applicant avers that its intended appeal is meritorious and enumerates the five (5) grounds upon which its appeal would be grounded on.
10. The Application by the Applicant/intended Appellant was opposed by the Respondent by way of a replying affidavit sworn by one, Lemi Mwendar.
11. The Respondent avers that there is a pending application by the Applicant before the Tribunal which it has been exhibited. The application is a Notice of Motion application dated 22<sup>nd</sup> October 2021 seeking for orders that, “*....this Honourable Tribunal be pleased to set aside /vacate/vary of review its interim orders of 19<sup>th</sup> October forthwith*”.
12. The Respondent is of the view that the application before this Court is therefore sub judice, in view of the other application pending before the Tribunal.
13. It is the Respondent's case that the application by the Applicant is fatally incompetent, for the reason that the Environment and Land Court only exercises appellate jurisdiction from the Tribunal. In the instant case, there is no appeal before the Court from the orders of the Tribunal issued on 19<sup>th</sup> October 2021. The Respondent states that the orders of 23<sup>rd</sup> November 2021 were merely consequential orders. The Principal order is the one issued on 19<sup>th</sup> October 2021.
14. The Respondent confirms that indeed a Judgement was made by the Tribunal on 4<sup>th</sup> December 2020. Contrary to the allegation by the Applicant that the decretal amount was not fully settled, the Respondent states that it was allowed by the Tribunal to deduct from the amount payable to the Applicant, a surcharge of Kshs.2,126,000/=. So, the Respondent's position is that the amount that was payable to the Applicant was indeed fully paid after the deduction of the surcharge.
15. The Orders of the Tribunal have since been adopted as orders of the Court before the Milimani Chief Magistrate's Court.
16. The Respondent opposed the application by the Applicant praying for its dismissal.
17. Before the Application could be heard, an additional party, Encore Lounge & Grill Ltd made an application to be joined into these proceedings as an interested party. This Court, after considering the application inter partes, on 10<sup>th</sup> December 2021 allowed the application and admitted Encore Lounge & Grill Limited as an interested party in these proceedings.
18. The Court gave directions on the same date in respect of the Applicant's application dated 24<sup>th</sup> November 2021, allowing the Interested Party to participate in the proceedings and leave to file a replying affidavit in response to the said application.
19. The interested party filed a replying affidavit sworn by one Shadrack Oriah. The Interested Party supports the Applicant's application seeking a stay of the Ruling of 23<sup>rd</sup> November 2021 by the Tribunal as prayed for by the Applicant.
20. The Applicant too filed an additional supplementary affidavit in support of its application dated 24<sup>th</sup> November 2021.

#### **Court's Directions.**

21. The Court's directions were that the Application dated 24<sup>th</sup> November 2021 be canvassed by way of written submissions within the stipulated timelines. The Applicant and the interested party complied and filed their submissions. The Respondent did not file any submissions. The court has perused the submissions and the authorities cited in support of the arguments by the respective parties.

## **Issues for Determination.**

22. Having keenly perused the pleadings by the parties in this matter, the issue of jurisdiction prominently glares at me. I must determine the issue whether I have the jurisdiction to entertain the Applicant's application before proceeding to any other issue. It is that determination that will dictate whether I will go farther than that in these proceedings. I say this bearing in mind the pronouncement in the now famous case of, '**The Owners of Motor Vessel Lilian S Vs Caltex Kenya Ltd (1989) KLR**, where the court held that:-

***“It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”***

## **Analysis and Determination**

### **Whether the court has jurisdiction to entertain this matter.**

23. The Applicant commenced this matter by way of a Misc. Application. The Notice of Motion application is therefore being heard as a Misc. application.

24. The Applicant has invoked the appellate jurisdiction of this Court. The Applicant's application is brought under the provisions of order 42 rule 6 and prays that ***“...there be a stay of execution of the Ruling delivered on 23<sup>rd</sup> November 2021 by Honourable Patricia May, Chairperson of the Business Premises and Rent Tribunal and the resultant Order pending the hearing and final determination of the intended appeal.”***

25. The Applicant also prays that the status quo ante be maintained pending the hearing and determination of the intended appeal.

26. As already pointed out earlier at paragraph 13 (above), the Respondent has raised the issue of the jurisdiction of this Court. The Respondent terms the application before the Court as fatally incompetent. The Respondent further states that the Environment and Land Court exercises appellate jurisdiction only in respect of matters originating from the Tribunal. In the instant case, there is no appeal before the Court. Simply put, the Court doesn't have the jurisdiction to entertain the application now before it.

27. I have carefully read the replying affidavit of the Interested Party and the supplementary affidavit of the Applicant as well as their submissions. None of them has responded to the issue of jurisdiction raised by the Respondent.

28. It is clear, even from the wording of the application by the Applicant that no appeal had been filed against the Ruling of the Tribunal delivered on 23<sup>rd</sup> November 2021 and the resultant order at the time of filing the appeal. The Applicant in all their documents refer to the '**intended appeal**'. That is indeed the reason why the application is filed as a Misc. Application. Under the provisions of order 42 Rule 1(1), appeals to the High Court are in the form of a Memorandum of Appeal signed in the same manner as a pleading.

29. In the High Court, unlike the Court of Appeal, no 'Notice of Appeal' is required. All that a party who intends to appeal is merely required to do is to prepare a Memorandum of Appeal setting forth concisely and sequentially the grounds of appeal and file it accordingly. He is not even required to attach a certified copy of the order or decree appealed against at the time of filing the memorandum of appeal.

30. I fail to understand why the Applicant, if it was keen on filing an appeal, could not simply have filed a memorandum of appeal prior to, or together with the application of 24<sup>th</sup> November 2021. Interestingly, the Applicant enumerated five (5) grounds it intended to rely on in appeal on the face of the application and in the supporting affidavit.

31. This Court cannot arrogate jurisdiction on itself. The Court's appellate jurisdiction can only be invoked where an appeal has been filed in accordance with the law. At the time of filing the application dated 24<sup>th</sup> November 2021, there was no appeal that had been filed before this Court. This Court therefore doesn't have the jurisdiction to entertain the application by the Applicant. The Court therefore finds that the application is incompetent ab initio. The same is hereby struck out with costs.

32. Having found that it has no jurisdiction the Court cannot must down it tools at this point.

*It is so ordered.*

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF JANUARY 2022.**

**M.D. MWANGI**

**JUDGE**

In the Virtual Presence of:-

Sunday Memba for the Applicant

Kethi Kilonzo for the Respondent

Okeyo for the Interested Party

Court Assistant: Hilda

**M.D. MWANGI**

**JUDGE**