



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC APPEAL CASE NO. E087 of 2021

MAWORKS INVESTMENTS COMPANY LIMITED.....APPELLANT

VERSUS

MERU CENTRAL COFFEE COOPERATIVE UNION.....RESPONDENT

RULING

1. Before me is a notice of motion application dated 11.11.2021 where the Appellant/ Applicant seeks the following orders:

1. That the application filed herein be and is hereby certified as urgent and service thereof shall be dispensed in the first instance.

2. That there be a stay of execution of the ruling and orders delivered on 22d October 2021 but erroneously dated 29th October 2021 by the Magistrates Court in Milimani Magistrates Court ELC Case No. E237 of 2021 as well as a stay of any other further proceedings in the matter pending hearing and determination of the application filed herein.

3. That there be a stay of execution of the ruling and orders delivered on 22nd October 2021 but erroneously dated 29th October 2021 by the Magistrates Court in Milimani Magistrates Court ELC. Case No. E237 of 2021 as well as a stay of any other further proceedings in the matter pending hearing and determination of the Appeal filed herein.

4. Costs of this application shall abide the outcome of the Appeal.

2. The grounds in support of the application are that:

1. In July 2019 the parties herein entered into a 10 year lease in respect of two spaces at Imenti House in the Nairobi Central Business District. In respect of one of the spaces, a lease is presently pending registration. In respect of the other, the Respondent purported to prematurely terminate it after only 2 years and the same is presently a subject of challenge before the Business Premises Rent Tribunal. Injunction orders are in place restraining the eviction of the Appellant from the space.

2. While the proceedings were pending before the Tribunal, the Respondent filed a claim in Milimani ELC E237 of 2021 seeking the handover of the suit premises. They also filed an application that sought the handover of the premises at interlocutory stage.

3. On 22nd October 2021, the Magistrate Court delivered its ruling on the interlocutory application and allowed the application directing the Appellant to immediately handover vacant possession of the premises.

4. The orders of the Magistrates Court are in conflict with those of the Business Premises Rent Tribunal, which is a court of equal status. While the Magistrates Court has directed the eviction of the Appellant, there is a pre-existing order by the Tribunal stopping the eviction of the Appellant from the premises.

5. In the event the orders sought herein are not granted, the Appellant stands to suffer substantial loss. In taking up the let premises and putting them in their current state, the Appellant has made significant financial investment to the tune of over Kshs 16 million which amount was meant to yield a return of over Kshs 80 Million during the agreed 10 year lease duration.

6. On the other hand, allowing the instant application does not occasion any prejudice to the Respondent. The Appellant has been paying the agreed rent to the Respondent and is will to keep up with the payment.

7. The Appellant is also ready to comply with any directions as to the furnishing of security that this honourable court may impose

8. The instant application has been brought timeously.

9. The interest of justice favour the grant of the orders sought herein.

3. In opposition thereof, the Respondent has availed a replying affidavit dated 18.11.2021 sworn by its Chief Executive officer one Fredrick Mburugu.

4. It is averred that the Respondent is the proprietor of the suit premises known as LR No. 209/2439 situated in the Central Business District. That the Appellant took over a lease dated 25.4.2014 for a space measuring 4535 square feet on first floor and not ground floor. The lease was based on the conditions as Tribeka Investments Ltd had bound themselves.

5. However, the Applicant has been sub-letting the premises to over 50 sub-tenants without the consent of the Respondent. This has in turn compromised the security of the building. The lease in any case lapsed on 30.6.2019 of which Respondents offered the Appellant a 10-year lease but the latter failed to accept the same. They eventually accepted the lease for ground floor and not first floor.

6. In that regard, and due to the disagreements between the two litigants, the Respondent issued a notice of expiry of the lease extension and the Respondent proceeded to enter into a lease with another third party known as Rannet Ltd in respect of a shop on first floor for a period of 8 years.

7. In paragraph 15 of his replying affidavit, the Respondent states that:

“ the 8 year lease is entered between the Respondent and Rannet Ltd is the reason that the Business Premises and Rent Tribunal (the BPRT) lacks jurisdiction to determine the dispute, its jurisdiction being limited to controlled tenancy, hence the interim orders issued therein are of no consequence.”

8. The respondent avers that he filed the case at Milimani Magistrate Court ELC NO. E237/2021 because that was the proper forum to hear and determine the dispute. Thus the Respondent was right in seeking the handover of the suit premises.

9. The Respondent also contends that the Appellant is in rent arrears amounting to Kshs 5,243,326 as at 17.11.2021.

10. In its submissions dated 25.11.2021, the Applicant has reiterated the averments set out in their primary pleadings emphasizing that there are pre-existing orders restraining the eviction of the Appellant from the suit premises in the case Nairobi BPRT Cause No. E198 of 2021 and that the orders of the trial Magistrate have the effect of embarrassing and offsetting the orders in the Tribunal.

11. In support of its case, the Applicant relied on the cases of **Maryane Camere Ojiambo vs Samwel Muchoki (2021)eKLR, Doshi Iran Managers Limited v Kenya Revenue Authority & Another (2020) eKLR** and **Ezekiel Mule Musembi v H Young & Company E.A Limited (2019) eKLR**.

12. Having regard to all the issues, raised herein, I find that the issue for determination is whether the court should grant a stay of execution as well proceedings in respect to the orders issued in the Milimani Magistrate Court Case No. E237 of 2021 in particular the order of 22.10.2021.

13. I find that the Respondent has not denied that he filed the case before the Magistrates court at the back drop of another case that was existing as BPRT Cause No. 198/2021. He has also not denied that there were orders already issued before the Tribunal restraining the Respondent from evicting the Appellant as by the time he filed the case before the Magistrate’s Court. Indeed the Respondent avers that he had a right to seek orders to take over the premises before the Magistrate’s court because the tribunal had no jurisdiction to handle the matter.

14. However, nowhere in its documents does the Respondent state the he ever raised the question of jurisdiction either before the tribunal or before the Magistrate’s Court. This court is at a loss as to whether the Respondent is raising the issue of jurisdiction for the very first time before this court.

15. I find that by filing the case before the Magistrates Court and seeking orders which had the effect of overturning the orders before the BPRT was an abuse of the Court’s process perpetuated by the Respondent.

16. In the case of **Republic v Paul Kihara Kariuki, Attorney General & 2 Others ex-parte Law Society of Kenya (2020)eKLR**, it was stated that:

“ Abuse of the Court process arises.... in the following situations. Instituting a multiplicity of actions on the same subject matter, against the same opponent on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action ”

17. It is now clear that the orders obtained before the Magistrate’s court had the effect of overturning the existing orders before the tribunal. I desist from making pronouncements regarding the entitlements of the parties at this infancy stage of the trial. However, on the other hand, it is quite apparent that the orders issued before the Magistrate Court if left at that have the effect of causing confusion and disorder as well as uncertainty in the administration of justice.

18. In that regard, the application dated 11.11.2021 is allowed. Costs thereof shall abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF FEBRUARY, 2022 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

IN THE PRESENCE OF:-

SIMIYU FOR THE APPLICANT

GICHUI FOR THE RESPONDENT

COURT ASSISTANT: EDDEL BARASA