REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 1 OF 2000

VICTORIA PUMPS LIMITED.....PLAINTIFF

VERSUS

KENYA PORTS AUTHORITY

INCHARGE SHIPPING SERVICES KENYA LIMITED

OCEANFREIGH (E.A.) LIMITED

MEDITERRANEAN SHIPPING COMPANY (PTY) LTD.

CONSOLIDATED MARINE SERVICE PVT LIMITED.....DEFENDANTS

RULING

1. The 4th defendant is by his application dated 14/10/2015 seeking an order that the plaintiffs suit against it be dismissed for want of prosecution on the basis that the plaintiff had lost interest demonstrated failure to take steps to have the matter heard.
2. The application is expressed to be brought under Order 17 Rule 12(1) as well as section 1A, 1B & 3A of the Civil Procedure Act order 12 Rule 2(1) provides,

"(1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed and if the cause is not shown to its satisfaction may dismiss the suit."

(3) Any party to the suit may apply for its dismissal as provided in sub rule 1..."

3. The application is supported by the affidavit of SAMUEL SHADRACK OUWA whose effect is to show that the matter was last in court before Mwera J on the 16/7/2012 after which the plaintiff h as not taken any steps to have the case heard hence evidence that the plaintiff has lost interest in the matter.
4. To that application the reply was filled with the consequence that under Order 51 Rule 14 (4) the court had the discretion to the deem the application unopposed and deal with it *exparte.*
5. My preliminary view is that the time spent on the application on the 21/12/2015 was quite disproportionate to the matter for determination. I say disproportionate because the court spent in execess of the hours dealing with the matter which only asks this court to establish whether or not the plaintiff or indeed the defendants had with twelve hours presiding the filing of the application in the matter. Taht is regretable but nothing has been lost for I am minded to take I that parties

needed to be heard and the court did afford them the opportunity to be heard.

6. As said before in exercising my discretion to dismissed the matter for want prosecution or for sustain it, the court consider the keeness displayed by the plaintiff and the larger interests of justice in the matter whether, like in this case the plaintiff shall have been totally rendered remediless.
7. Having refused an adjournment and the subsequent application for stay pending appeal, allowed Mr.Gikandi for the plaintiff to address the court on points of law only. In his address he made very strong and concerted submissions to the effect that the law obliges the parties, their advocates and even the will to have the matter effectively deal with and ask the court to consider the provisions of Articles 10, 50 and 159 of the constitution. He urged that the court takes notice that the principles of Natural justice are the connerstones of administration of justice and that the court should guard against a party walkiing out of court with the feeling that it was denied hi right under Artcile 50. Mr. Gikandi then cited to court, the decision of the court of appeal in the case of PETER N. KABIRU – VSO ESTHER WANGARE to the effect that substantial justice dictate that disputes should be heard on the merits.
8. In my view the urge for Kenyan to reform the judicial system and the administration was known to every body concerned. Even before the constitution was promulgated parliament had taken the step to amend our procedural statutes being the Civil Procedure Act and Appellante jurisdictions Act and incorporate therein the overiding objective of the court. That objective prescribes the courts mandate the facilisation of the just expeditous, proportionate and affordable resolution of disputes. Having given the court that obligation the law enjoins parties and their advocates to assist the court further the overiding objective. That development in the law initiated by parlimanet was informed by the concern by Kenyans in the way the court systems operated which was viewed by many as pedanti, lethergic and unduly techinical for removed from substance. In my view Article 159 is fashioned in the same spirit. Provides:

"the purpose and principles of this constitution shall be protected and promoted."

9. I am the pursuation that timely dispatch of court business and indeed any action by any state office or officer is cardinal principle of the constitution the court of appeal in JARED OKELO -VS- FREDRICK OUTA & 3 OTHERS had this to say on the question of timeliness.
"

10. It has bothered me whether the provisions of Article 159 (2) (d) has the effect of indeed should be interpreted to mean that all our procedural laws including those provisions that report case management for the efficient administration of h ave become Otiose. I have also asked myself whether the same article in itself is so supreme as to overshadow and overide all else including other provisions in the constitution in particular the principle of timeless in dispatch of public duty. I am unable to be so pursuaded. Our constitution, as radical as it is fashioned must regarded for what it is the architechture for social engineering purely intended to modernise our way of translating public affairs with in built valve systems that must not be lost sight of some of those values are enacted at Article 10 and include good governance and sustainable development. I have picked those two valves as objects and purposes of the constitution to underscore my view that timeliness is a critical principle of the constitution. I say so with a conviction, that lethergy dilatoriness, indolence and dexterity are not virtue that this court or indeed any public body should condone, encourage or nurture. They are just abhonable vices that should and must discourage. It would be unfortunate, distestible as being inequitble and unconscorable to allow party to be dragged into court and while there be kept in the dark as to his fate in the enligation by a lucklaster and indolence on the part of the plaintiff on the basis of his right to be heard and take an advocate of his choice even if the charge is to circumvent an acrued right.
11. During the argument on adjournment Mr.Gikandi muted for
    i. **That owing to the urgency and for reasons stated service of this application and the summons herein be dispensed with in the first instance.(*spent*)**

ii. **That in the interim this Honourable Court be pleased to restrain the 1st to 4th Defendants/Respondents herein from interfering with the plaintiff/Applicants tenancy or**

altering the condition thereof in disregard of the provisions of the Landlord & Tenant Shops, Hotels & Catering Establishments) Act or altering the state thereof as let to the applicant pending hearing of this application inter partes.(*spent*)

iii. **That the 1st to 4th Defendants be ordered to restore the Plaintiff/Applicant fully into the suit premises on Mombasa/Block XII/82 even as the suit herein awaits determination.**

iv. **That in the event that no auction sale as contemplated by the Auctioneers' Rules has taken place since removal of the plaintiff/Applicants goods from the premises on Mombasa/Block XII/82 the 5th Respondent be ordered to restore the same to the plaintiff and or into the tenancy premises forthwith and any sale in furtherance of such removal be stayed.**

v. **That pending hearing and disposal of the suit filed herein this Honourable Court be pleased to restrain the 1st to 4th Defendants/Respondents herein from interfering with the plaintiff/Applicants tenancy in disregard of the provisions of the Landlord & Tenant (Shops, Hotels & Catering Establishments)Act or altering the state thereof.**

vi. **That meantime the 5th Respondent be ordered, even at the ex parte stage, to furnish the applicant and to file in court within limited period a full inventory of the goods removed from the premises on Mombasa/Block XII/82.**

vii. **That there be an order for costs.**

12. Having read the two applications and with regard to the prayers of both, I will treat the 1st-4th defendant's application together with the grounds as opposition of responses to the plaintiffs application while the plaintiffs replying affidavit and grounds of opposition to the defendant shall be deemed to be part of the application dated 15/5/2015 the Preliminary Objection will also be deemed on apposition to the plaintiff's application dated 15/5/2015 in line with the provisions of order 5 Rule 14.

Arguments by parties and issues for determination:

13. In essence therefore the questions that I am called upon to determined are as follows:

    i) is the plaintiff entitled to orders sought?

    ii) should the suit and the application be struck out.

14. In law, a preliminary objection ought to be dealt with a preliminarily by the court. Although I have deemed the notice of preliminary objection as an opposition to the application, it remains a preliminary objection which I set to deal with prior to the merits of the application.
15. The objection by the 1st-3rd defendant as I understand it is that the suit is bad and should be struck out for failure by the plaintiff to collect summons from the court and serve it upon the said defendants. It is not that the plaintiff failed to prepare the summons and file same with the plaint.
16. To answer that question the court will as of necessity delve into the inquiry as to when the summons were collected or indeed served. Such inquiry would be a factual one. It will not be a pure point of law that is asserted by one side and accepted or incapable of contestation by the other side. Since MUKISA BISCUITS CO. VS- WEST END DISTRIBUTORS LTD, [1969] EA 696 it has become trite that a preliminary objection cannot be raised if facts are to be ascertained.
17. In this matter to establish whether or not the summons have been served I will have to delve into the facts of whether or not the summons mere collected, from court, when they were so collected and whether or not they have been served. That to me disqualifies the point raised as a Preliminary Objection as evidence would have to be adduced one way or the other.
18. True, summons to enter appearance is an integral document for it commands the defendant to exercise his rights to be heard and sets the time within which the defendant must do that. The

question one may need to ask for answers is what other purpose it serves after such defendant enters appearance. Is in a pleading that the court looks at in determining the dispute between the parties? I am of the view that it is not. It is just summons to enter appearance summoning the defendant to enter appearance within the set timelines. To me its purpose is fully served once an appearance is entered. I have read the decisions cited by the 1st-3rd defendant in their submissions immediately and I concur as to what the purpose of summons to enter an appearance is. It is however noteworthy that in all the cited decision none says that failure to serve summons invalidates the entire suit.

In my view and reading the cited case, the same are distinguishable as follows:-

I. **EQUITORIAL COMMERCIAL BANK LTD. -VS- MOHANSONS (K) LTD. The question was whether or not the summons to enter appearance as taken out were valid and whether or not the defendant having acted on the summons by filing an appearance and defence beside taking other steps had waived his right to challenge the validity of the summons. The court of appeal in fact held that the defect in the summons was a mere irregularity that did not occasion any harm to the defendant. The court said:-**

"We may add that there is no allegation that such actions have caused any prejudice to the respondent either in law or in equity. We shall emphatically decline to so find. We shall find that the Respondent, having openly and unconditionally followed the process in the manner in which it did, especially prompting the appellant to believe in the actions taken by both parties."

19. The case of **KASIMILU SHARIFU MOHAMED -VS- TUMBI LTD** is equally distinguishable for it dealt with originating summons and in particular the fact that the originating summons did not limited the time within with the Respondent was to enter appearance to it hence the default judgment was set aside.
20. In the matter before the court, it has not been alleged that by the alleged failure to serve summons, itself yet to be proved, and there being a notice of appointment to the suit 1st-3rd defendants have suffered any prejudice in law or equity.
21. The question of prejudices when considered in the light of the purpose of summons to enter appearance in my view determines the preliminary objection before me. As a standard document, the summons, gives the defendant the timelines within which to enter appearance, acknowledges receipt of the damages it, gives notice of the consequences for failure to enter appearance, ways of how to enter appearance options to admit the claim and how to settle the claim in the event of admission.
22. In totality the sole purpose of a summons is to bring to the attention of the defendant the plaintiffs claim against it so that that right to be heard before condemnation is not contravened. If I be wrong, and I am convinced am not, then the decision in the case of **Equatorial Commercial Bank Ltd.** (*supra*) will come to my aid where the Court of Appeal Judges said:

"Ours is an adversarial system of law. A notice of the claim (a "plaint" as is called in our system) is prescribed to be served on the defendant by way of summons which is a document issued by the court to call upon the defendant to submit to the jurisdiction of the court and bring forth his side of the case, so that the court, after hearing both sides, can determine the matter. The salient principle of law that "no one shall be punished or prejudiced unheard" has led to the Rules Committee to make comprehensive provision vide order V of the Civil Procedure Rules."

23. I am equally bound under the provisions of Article 159(2)d as read with section 1A, 1B and 3A of the Civil Procedure Act to do substantial justice unhindered by procedural technicalities. To strike out the suit before me when all the defendants have been notified of the plaintiffs claim and indeed filed papers and attended by court, to me would be to sacrifice the substance and very purpose of justice system on the alter of procedural requirements under Order 5. What is more the same provisions under Rule 5 give the summons a life time of upto twelve months. Indeed copies of the summons is the court file confirm that they were signed by the Deputy Registrar on 25/5/2015.

Their life is still valid and if the same have indeed never been served, then they can still be served.

24. If I were to strike out the suit only to be told that the summons were served say, a day before my ruling, I would be left wondering whether I have done justice to the parties by determining their dispute presented before me. In that event I shall only have postponed the execution of my duties as a judicial officer as the plaintiff would still reprint the same documents and file a fresh suit. File a fresh suit at a cost and seek to be afforded judicial resources including time. This matter shall in that even have been accorded two slots (doubt slots) within the very constrained judicial time resources. That to me would be unjust, untimely, and amount to disproportionate administration of justice. As an individual judicial officer I would, not have used myself and judicial time, as a resources, in the most efficient and beneficial manner.
25. I decline to strike out the suit and I would decline even if it had been proved that summoned had not been served for I am convinced that the summons are available for service till their validity come to expire sometimes in mid-2016. I may only add that Order 5 being a procedural enactment cannot override the provisions of the Act that command me to do substantial justice. Procedural/rules are and will remain hand maids of justice not to lord over it and in the cause of it blur my view and purpose to do justice. The objection lacks merit and is dismissed.
26. On the plaintiff's application for injunction, the principles applicable are not in doubt. The plaintiff has to demonstrate a prima facie case with a probability of success, demonstrate that damages would not be an adequate remedy and if the court be in doubt, the balance of convenience is weighed between the parties.
27. The facts leading to this matter as pleaded in the plaint are that, the plaintiff was at all material times the tenant of the 1st-3rd defendant upon that parcel of land known as Mombasa/Block XLI/82 at monthly rent of kshs.65,000. That tenancy is a controlled one under Cap 301 and by the time this suit was filed there was a dispute between the parties before the BUSINESS PREMISES RENT TRIBUNAL in case No. 22 of 2015. It is pleaded and alleged that while the matter was pending before the Tribunal, the defendants invaded the suit premises, removed the plaintiffs both stock in trade and tools of trade in a manner the plaintiff contends was contrary to the provisions of the Distress for Rent Act and Auctioneers Act and further that in an attempt to evict the plaintiff the defendants locked the doors to the premises and it heaped building materials on site. From the pleadings the plaintiff's reads a design by the 1st - 3rd defendant to disposes him of possession so as to complete the sale agreement to the 4th defendant. It is therefore contended on behalf of the plaintiff that the fact of the pendency of the suit, the proclamations on tools of trade and the dispossession contrary to Cap 301 point to a *prima facie* case and that an injunction is desirable so as to forestall unlawful acts but also to obviate irreparable damage to him.
28. In opposition to that application the 1st-3rd Defendants filed Notice of preliminary objection dated 3rd June 2015 after filing a notice of appointment of advocate. The preliminary objection seeks the striking out of the suit for failure to comply with the provisions of order 5. I find this to be an appropriate response under order 50 Rule 14(1) a. Having determined the Notice of Preliminary Objection in the manner I have above, nothing remains for the 1st-3rd defendant in opposition to the application.
29. The 4th Defendant on his part filed Replying Affidavit and a Notice of Motion. That notice of motion seeks that it be heard together with the plaintiff application, that the interim order granted *exparte* be set aside varied or dismissed and that the plaintiff provides security for costs in the sum of kshs.6,000,000. As said I will treat both the replying affidavit and the application filed under certificate of urgency dated 27/5/2015 as responses to the plaintiff's application for injunction dated 15/5/2015.
30. The gist of the opposition by the 4th Respondent/Defendant is that, it is not a party to the matter before BPRT, that the interim orders have the effect of ordering the 4th defendant to accept a tenant he never had in the beginning, that he has been in possession of the premises after he acquired same by purchase and is in fact carrying out renovation works, that he was unaware of both the case at BPRT and the tenancy of the plaintiff and that it is only fair that the plaintiff files an undertaking for security for costs. It is added that to buy the property, the 4th defendant sought and obtained a bank facility in the sum of kshs.30,000,000 which it repays at the rate of kshs.538,631 per month.
31. In fact the 4th defendant contends that the premises are vacant and that same are still under

renovation before a tenant is allowed in as the apparent tenant on the ground had left by the time the 4th defendant took over and that it shall be offering the premises to any party with whom they shall agree on terms. The said defendant adds that on 13/3/2015 when they inspected the premises they were empty of all movables and that the 5th defendant may have cartel away the proclaimed items and that the premises have been torn down and ripped for purposes of repairs and that this suit does not lie against it for being a bonafide purchaser for value without notice.

Determination on the application.

32. Whether or not to grant to the applicant orders of injunction the plaintiff has a duty to present to court:-
    a. A *prima facie* case with a probability of success.

b. Prove that it stands to suffer damage incapable of remedy by an award of damages.

c. If the court ends up in doubt after the proof of the two above items the court decides the matter on the balance of convenience.

Has the plaintiff established a prima facie case with a probability of success?

33. It has not been controverted that there is a controlled tenancy between the plaintiff and 1st-3rd defendant subject to the provisions of Cap 301 and that there is a case before the Business Premises Rent Tribunal. In fact in the agreement between the 1st-3rd defendant and the 4th defendant that fact is acknowledged and the onus placed on the 4th defendant to evict if it wished to. It is also contended that the defendants are complying the right to distress to evict which itself would be contrary to law under the Act, Cap 301, as well as decided cases. Additionally I have looked at the proclamation and it reveals that included in the goods distrained upon are beds and mattresses, counter, tables, television sets fridges and water tanks. From the pleadings it is apparent that the plaintiff carried on the suit premise the business of Bar and Restaurant and as a lodge house. If that be true, and it has not been contested, then fridges, Tvs, tables, chairs are bed and mattresses are tools of trade necessary for the plaintiffs trade and are thus except and immune against distress under section 16 (1) g of the Distress for rent act as well as section 44 (1) of the Civil Procedure Act.
34. I find that the distress upon the goods I consider tools of trade, the existence of a tenancy whose termination is the subject of litigation at the Business Premises Rent Tribunal and allegations that distress is being employed to evict the plaintiff and thus terminate the tenancy, present a *prima facie* case and therefore the 1st test has been established in the affirmative.
35. I have it coming to this conclusion, taken into account and appreciated the fact that the 4th defendant has filed a defence and a replying affidavit in which it avers that at the time they took over, the premises were devoid of any movables and adds that the 5th defendant might have removed them prior to that taking over. If that be true, and it would be determined at trial, by evidence, then it would buttress the assertion by the plaintiff that distress is being used to evict the plaintiff.

Would there result upon the plaintiff irreparable loss incapable of compensation by an award of damages?

36. The plaintiff contends, and it has not been disapproved, that there exist BPRT No. 22 of 2015 being a reference by the plaintiff challenging the notice by the 1st-3rd defendants notice to terminate the tenancy. It is now established that that tribunal does not have jurisdiction to grant an injunction. Equally this is a matter in which if no injunction is granted the plaintiff would not only lose the premises but also the right to present its case before the tribunal with the result that his right to be heard shall have been circumvented.

37. In those circumstances I find that the plaintiffs loss as far it touches on his right to be heard goes

to the very root of administration of justice and that the defendant or any them ought not to be allowed to disregard the law with abandon merely because they are capable of paying damages. To me that would create a situation and state where the financially strong would be above the rule of law merely by courtesy of their ability to pay damages. That to me would ran affront the provisions of Article 27 of the Constitution. I therefore find and hold that the plaintiff's injury in this regard would be incapable of adequate compensation by an award of damages.

38. In coming to this conclusion I have taken into account that the 4th defendant has averred that he is carrying out repairs and shall upon conclusion negotiate with a tenant on terms. On this position, I am of the view that position is not tenable in law as the plaintiffs tenancy being a controlled one, the 4th defendant in buying premises brought subject to the tenancy and its terms pursuant to section 28(f) Land Registration Act. To vary those terms the provisions of sections 4 & 7 of Cap 301 would have to be complied with.

39. I am satisfied, without entertaining any doubt that the plaintiff is entitled to an injunction and therefore I need not address the balance of convenience. The only issue I must address is whether the plaintiff has given an undertaking as to damages.

Order 40 Rule 2(2) provides

"The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit."

40. The plaintiff is thus enjoined to provide an undertaking as to the damages the defendant may suffer as a result of the grant of a temporary injunction. In this case I have found that there is a valid controlled tenancy the plaintiff seeks to protect as an interest. That tenancy imposes upon the plaintiff obligation to pay rent. In the circumstances, the only damages the defendant may suffer is loss of rent if the plaintiff was to use the order of injunction I grant to him in this matter as a excuse not to pay rent. For avoidance of doubt the plaintiff is only protected against unlawful actions but must meet his obligations as a tenant.

Conclusion

41. Consequently I grant to the plaintiff orders in terms of prayers 3,4,& 5of the application dated 15/5/2012 pending the hearing and determination of the suit but on terms that it shall continue to pay the reserved rent on due date and not later than the 5th of each relevant mouth pending the hearing and determination of the suit. Should there be a default on rent payment, the 4th defendant shall be at liberty to exercise his right under the Distress for Rent Act.

42. I further direct that the parties files all the relevant pleadings and comply with the requirements of order 11 Civil Procedure Act within 30 days from today. The plaintiff must attend court within 60 days from today and fix a hearing date for the suit.

43. I grant to the plaintiff/applicant costs of the application dated 15/5/2015 as against the defendants.

44. The application by the 4th defendant by virtue of the orders I have made is disallowed with costs to the plaintiff as well as the notice of preliminary objection by the 1st-3rd defendants.

Dated, signed and delivered at Mombasa this 23rd day of November 2015.

P.J.O. OTIENO

JUDGE

In the presence of

Mwakisha for the plaintiff/applicant.

N/a for the 1st – 3rd defendant/Respondent.

Gikandi for the 4th defendant/Respondent.