



REPUBLIC OF KENYA



KENYA LAW
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**Wanjohi & 2 others v The Red Apple Limited (Environment & Land
Case 553 of 2018) [2022] KEELC 2210 (KLR) (27 April 2022) (Ruling)**

Neutral citation: [2022] KEELC 2210 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 553 OF 2018**

JA MOGENI, J

APRIL 27, 2022

BETWEEN

ISAAC GATHUNGU WANJOHI 1ST PLAINTIFF

ISABELLA NYAGUTHI WANJOHI 2ND PLAINTIFF

IGAINYA LIMITED 3RD PLAINTIFF

AND

THE RED APPLE LIMITED DEFENDANT

RULING

1. The defendants filed a Chamber Summons dated 6/12/2021 seeking to have the entire suit strike out on the grounds that:
 - i. The plaint, the entire suit and the prayers thereof are scandalous, frivolous, and vexatious and a grave abuse of the process of the court.
 - ii. The plaintiff is guilty of concealment of material facts in his plaint.
 - iii. There is another suit pending being BPRT No. 870 of 2018.
 - iv. It is in the interest of justice that the suit be struck out.
2. The Chamber Summons was opposed through a Replying Affidavit sworn by one Isaac Gathunju Wanjohi on 31/01/2022, 1st Plaintiff with the authority of the co-plaintiffs. They stated that it is the defendants who are concealing material facts such as the reference is against two persons namely Isaac Gathunju Wanjohi and Isabella Nyaguthi Wanjohi and not three persons who issued the notice in the current suit. Further there two applications filed at the Tribunal against the third defendant dated 22/08/2012 and 22/08/2019 which were never served on the plaintiffs herein.



3. That the Reference in the Tribunal BPRT No. 870 of 2018 was against two of the landlords and was not filed by the plaintiffs and that the order issued on 10/09/2019 was dumped on the plaintiffs since they aver that they were never served with the court proceedings. Further the plaintiff avers that there exists two applications at the tribunal filed by the defendant but they are not proceedings because the defendant has failed to serve the applications on the plaintiff since they have sworn an affidavit stating that service of the application on the plaintiff needs to be undertaken by the Tribunal and not the defendant.
4. Counsel for both parties filed their written submissions. It was submitted for the plaintiffs/respondents the application dated 6/12/2021 was brought in bad faith since it was filed the morning when this suit was scheduled for hearing. It was admitted in the submissions that there is an existing reference before the tribunal but the same has never been served on the plaintiffs/respondents. Counsel submitted that the dispute at the Business Premises Rent Tribunal has been stayed by an application by the defendant who is the applicant in this suit pending the hearing and determination of this suit. Further that there two other applications before the tribunal all having been heard *ex parte* and pending to be heard inter partes. The plaintiffs herein have never been served with the said applications.
5. The Counsel for the plaintiffs/respondents submitted that the reference being referred to by the defendant/applicant has never been served on the plaintiff/respondents. Counsel referred the Court to Section 6 and Section 3 of the [Civil Procedure Act](#) and Order 51 Rule 1 and submitted that the application ought to have been brought by way of a Notice of Motion and not Chamber Summons. He also contends that the Reference was not served on the plaintiffs they only came to know about it when they brought the proceedings.
6. The plaintiffs/respondents have relied on the case of [Tropical Foods International & Another vs Eastern and Southern African Trade and Development Bank & Another](#) (2017) eKLR, [Terry Wanjiku vs Equity Bank Ltd & Another](#) (2012) eKLR which the Counsel for the plaintiff contends that the issue of service is at the core of a Reference matter. He also referred to the case of [Prime Rock Company vs Joseph Mwangi Ndegwa](#) (2019) eKLR. The plaintiffs/respondents therefore contend that the defendant/applicant is abusing the court by using it to delay the instant suit.
7. The defendant/applicant on his part avers that there is another matter in court which the plaintiffs/respondents have not disclosed BPRT No. 870 of 2018 which has not been finalized. But he also states that the respondents have acknowledged that the tribunal matter exists and therefore this instant suit cannot continue. The applicant therefore states that the doctrine of subjudice come into play. He refers to Section 6 of the [Civil Procedure Act](#) which addresses the doctrine of *res sub-judice* and he also referred to the HCC No.85 of 2010 – [Eliud Wanyama vs Kenya Plant Health Inspectorate Service](#). He therefore asked that the current suit be struck out for being frivolous and vexatious thus an abuse of the court process.

Analysis and Determination

8. It is not in dispute that there is another matter BPRT No. 870 of 2018 which is before the Tribunal and the plaintiffs/respondents are aware of existence of this matter.
9. Indeed, according to the Reference before the Tribunal, the defendant/applicant has alleged that the plaintiff has refused to receive rent from the defendant/applicant and wants to levy distress on them. The defendant/applicant has chosen to pay the rent to the advocates of the plaintiffs/respondents.



10. The defendant/applicant contend that the plaintiffs/ respondents in the instant suit are not entitled to mesne profits since the defendant/applicant wanted to pay rent but the plaintiffs/respondents refused. Further that the defendant /applicant is the one who is in the suit premises.
11. It was submitted and demonstrated by both the plaintiffs and the defendant that the defendant has actually sought the intervention of the Business Premises Rent Tribunal on the dispute regarding their tenancy. This was not contested by the plaintiffs/respondents' counsel Mr. Mindo who submitted that though the reference was not served on the plaintiffs /respondents they got to know about it when they purchased the documents from the tribunal. The point is that there is already in existence proceedings involving the dispute herein between the parties herein before a competent statutory tribunal. The Plaintiffs are entitled to appear before the said tribunal as parties with genuine concerns and grievances: see Lord Denning in *Attorney General of Gambia –v- Njie* [1961]2 All E R 504. The Plaintiffs would not be joining the fray before the tribunal as mere observers. I would find, as I do, that there is already an alternate forum and procedure where the Plaintiffs grievances can be proportionately adjudicated without disproportionate expenditure. The tribunal is best placed to adjudicate the matter with the possibility that the tribunal's determination may invite an appeal to this court.
12. In the result, I would uphold the defendant/applicant's application dated 6/12/2021but would not strike out the suit. I would direct and order as I hereby do that this suit be transferred to the Business Premises Rent Tribunal to be determined alongside BPRT cases No. 870 of 2018.
13. The costs of the application will be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF APRIL, 2022.

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MOGENI J.

JUDGE

In the presence of:-

Mr. Mindo for the Plaintiff/Respondent

Mr. J. Wachira for the Defendants/Applicants

