



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC MISC. APPLICATION NO. E322 OF 2021

GURVIR BHABRA.....1ST APPLICANT

RASHMINDER BHABRA.....2ND APPLICANT

VERSUS

JOHN MOLOGO NDERITU.....RESPONDENT

RULING

INTRODUCTION:

1. Vide Chamber summons Application dated the 1ST September 2021, the Applicants herein have sought for the following Orders:

- a.(Spent).
- b. An Order do issue directing the Respondent to clear all Rent arrears as at September 2021 in the sum of Kshs.1, 456, 000/= only and to continue paying the Rents when due and in default the Applicants be at liberty to re-enter and re-take possession of unfurnished house No. 41 in the Building erected on Land Reference Number 209/7153/42 pending the hearing and determination of this Application.***
- c. An Order do issue in terms of prayer 2 hereof pending the hearing and determination of the Arbitration Proceedings.***
- d. In the event of default by the Respondent in complying with orders granted in terms of prayer 2 and/or 3 herein, the Officer Commanding Muthangari Police Station in Nairobi do ensure the enforcement of the re-entry orders issued herein and that peace and order prevails.***
- e. The Costs of this Application be borne by the Respondent.***

2. The subject Application is premised on the grounds contained at the foot thereof and same is supported by supporting affidavit of one Gurvir Barbra sworn on the 1st September 2021 and to which the deponent has annexed a total of eight (8) anextures.

3. Upon being served with the subject Application, the Respondent herein filed a Preliminary Objection dated the 8th October 2021, in respect of which same raised three pertinent issues, inter alia, that the Honourable Court was not seized and/or possessed of Jurisdiction to hear and determine the subject matter in the first instance.

4. Besides, the Respondent has also contended that the suit/matter herein, was also Sub-judice, to the extent that same was pending before the Rent Restriction Tribunal.

DEPOSITIONS BY THE PARTIES:

DEPOSITION BY THE APPLICANTS:

5. Vide Supporting Affidavit sworn on the 1st September 2021, the 1st Applicant herein has averred as hereunder;

6. The Applicants herein are the registered owners and/or proprietors of the unfurnished house No. 41, in the premises erected on **Land Reference Number 209/7153/42**, which same let and/or demised to the Respondent for a period of two years.

7. It was further averred that the lease term over and in respect of the suit property, commenced on the 1st July 2020, but the terms were however contained in the Lease Agreement entered into and executed on the 29th July 2020.

8. Further, it has been averred that the Respondent herein has accrued and/or accumulated Rents amounting to Kshs. 1, 456, 000/= Only, as at September 2021, and which rents continue to accumulate.

9. Be that as it may, the deponent has further averred that based on the rent arrears, the Applicants, were obliged to and indeed issued and served the Respondent with a Notice to vacate the premises and surrender same to the Applicants. However, the Respondent has since failed to vacate the suit premises and surrender vacant possession thereof to the Applicants.

10. Premised on the foregoing, the deponent has averred that it is therefore apparent that the Respondent is keen to continue remaining in occupation of the suit property, albeit without paying the rents.

11. Based on the foregoing, the Applicants have since commenced recovery proceedings by issuing a letter to the Respondent for the appointment of an Arbitrator and hence there is need to grant the reliefs sought on the basis of the subject application, pending hearing and determination of the arbitration proceedings.

RESPONSE BY THE RESPONDENT:

12. The Respondent filed a Notice of Preliminary Objection dated the 8th October 2021, wherein same raised the following grounds;

a. The Application should be struck out as this court has no Jurisdiction to hear and determine this matter in the first instance.

b. The Matter is Sub-judice as it is currently active and pending before the Rent Restriction Tribunal.

c. The Application is an abuse of the Court Process.

SUBMISSIONS:

13. Upon the filing of the subject Application same was placed before this court, differently constituted, which court proceeded to and ordered that the Application herein be transferred to and be heard by the Chief Magistrate's Court at Milimani.

14. Subsequently, the Applicants filed and/or lodged another Application, namely, the Notice of motion application dated the 14th September 2021, and in respect of which same sought to have the orders

transferring the Application dated 1st September 2021, to be heard and disposed of by the chief magistrate court, to be reviewed and varied.

15. For clarity, the said Application, namely, the application dated 14th September 2021 was heard and disposed of vide ruling rendered on the 18th November 2021.

16. Following the delivery of the ruling rendered on the 18th November 2021, the Application dated 1st September 2021, was reverted back to this court and same was ordered to be canvassed and/or disposed of by way of written submissions.

17. For coherence, the Applicants herein filed their submissions on the 17th February 2022, whereas the Respondent relied on the previous submissions which had been filed in support of the Preliminary objection. For clarity, the two sets of submissions are on record.

18. Briefly, the Applicants herein have submitted that the Applicants leased and/or demised the suit property to and/or in favor of the Respondent on the basis of a 2- year Lease and that the Respondent was obliged to pay rents to and in favor of the Applicants.

19. Nevertheless, the Applicants have further submitted that despite having executed the Lease Agreement, the Respondent herein has failed and/or neglected to pay the rents in respect of the suit Property and that same has since accumulated Rent arrears amounting to Kshs.1. 456, 000/= only as at September 2021.

20. Based of the accumulation of rent arrears, the Applicants have submitted that they proceeded to and served the Respondent with a Notice to vacate the suit premises, but however, the Respondent has failed to vacate and hand over vacant possession in respect of the suit property.

21. As a result of the foregoing, the Applicants have submitted that same were thus constrained and/or obliged to commence arbitration proceedings, by issuance of a letter to the Respondent. In this regard, the Applicants have thus approached the court vide Section 7 of the Arbitration Act, 1995, for the issuance of interim protection pending the hearing and determination of the arbitral proceedings.

22. In a nutshell, the Applicants have thus contended that the orders sought herein, have been sought in the interim and that same are meant to subsist during the pendency of the arbitration proceedings.

23. On the other hand, the Respondent has submitted that by the time the Applicants were filing the subject proceedings, there was a pending suit before the Rent Restriction Tribunal vide Tribunal Cause No. E020 of 2021, which was pending between the Parties herein. In this regard, the Respondent has submitted that the filling of the subject proceedings was therefore barred by the Doctrine of sub-judice.

24. Secondly, the Respondent has also submitted that the nature of the orders sought at the foot of Application dated 1st September 2021, are substantive in nature as opposed to interim and hence the same do not fall within the jurisdiction of the court.

25. For clarity, the Respondent has pointed out that there is a clear dichotomy between interim orders and substantive orders and that what the court is being asked to grant are substantive orders.

26. Finally, the Respondent has also submitted that during the pendency of the subject proceedings, the Applicant herein proceeded to the Chief Magistrates' Court and procured orders of Eviction and thereafter proceeded to and evicted the Respondent from the suit premises.

27. In view of the foregoing, the Respondent has submitted that the continuation of the subject proceedings constitutes and/or amounts to an abuse of the Due process of the court and that the court should proceed to dismiss same so as to protect her dignity from being misused.

ISSUES FOR DETERMINATION:

28. Having reviewed the Application dated the 1st September 2021, the affidavit in support thereof, the Notice of Preliminary Objection dated the 8th October 2021 and the submissions filed by the respective Parties, the following issues do arise and are thus germane for determination:

a. Whether the subject Proceedings are barred by the Doctrine of Sub-judice, Pursuant to the Provisions of Section 6 Of the Civil Procedure Act.

b. Whether the orders sought at the foot of the Application dated 1st September 2021 are Interim in nature as envisaged under Section 7 of the Arbitration Act, 1995 or otherwise.

ANALYSIS AND DETERMINATION

ISSUE NUMBER 1

Whether the Subject Proceedings are barred by the Doctrine of Sub-judice, Pursuant to Section 6 of the Civil Procedure Act.

29. Vide the supporting affidavit sworn by the 1st Applicant, same has annexed various documents, including annexure GB7, which is a copy of the Plaint filed before the Rent Restriction Tribunal between the Respondent, as the Plaintiff and the Applicants herein as the Respondent.

30. Clearly, it is evident that as at the time of the filing of the subject Application there was an active suit before the Rent Restriction Tribunal between the Parties herein touching on and/or concerning the same subject matter.

31. However, it is also important to note that vide the same supporting affidavit, the 1st Applicant herein has also attached a copy of the Lease Agreement between the Respondent and the Applicants and from clause 1 thereof, it is evident that the Monthly Rents was agreed at the sum of kes.210, 000/= only.

32. Based on the Monthly rents, that was payable over and in respect of the demised premises, one wonders how a suit touching on and/or concerning the suit premises, for which Monthly Rents was Kshs. 210, 000/= only, could be filed and/or mounted before the Rent Restriction Tribunal.

33. Nevertheless, it is common ground that by the time the subject Application was filed, the said suit before the Rent Restriction Tribunal was pending and the question to be answered is whether the pendency of such proceedings, before a Tribunal without Jurisdiction, would render the current proceedings *Subj-judice*.

34. Before venturing to answer the foregoing question, it is appropriate to consider the provision of the law that deals with *Res-sub judice*. In this regard, it is appropriate to reproduce Section 6 of the Civil Procedure Act Chapter 21 Laws of Kenya, which provides as hereunder;

6. Stay of suit.

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

Explanation.—The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court.

35. On the other hand, it is also important to take cognizance of the Decision in the case of **Kenya National Commission on Human Rights v Attorney General; Independent Electoral and Boundaries Commission & 16 Others (Interested Parties) (2020) eKLR**, where the Supreme Court at paragraph 67 held as hereunder;

“The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit.

A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.

36. In respect of the subject matter, it cannot be gainsaid that the Rent Restriction Tribunal does not and did not have the jurisdiction to deal with and/or entertain the dispute placed before it, and hence even if the proceedings were pending before it, I would find it difficult to return a verdict that the subject proceedings are sub-judice.

37. Clearly, one of the pre-requisite conditions to be fulfilled before the Doctrine of Sub- Judice does apply, has not been met or established.

38. Notwithstanding the foregoing, it is also important to take note of the Provisions of Section 7 of the Arbitration Act, 1999, which provides as hereunder;

7. Interim measures by court:

(1) It is not incompatible with an arbitration agreement for a Party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.

(2) Where a Party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the Application.

39. Clearly, even if the Rent Restriction Tribunal had Jurisdiction to deal with the proceedings before it (*which I have found that it did not*) by dint of Section 7 (*supra*), the Applicants would still have been constrained to approach this court for interim protection.

40. In a nutshell, I find and hold that the Doctrine of Res-sub judice does not apply to the subject proceedings and in any event the provisions of Section 7 (*supra*), sanctioned the filing of the Application before this Honourable court.

ISSUE NUMBER 2

Whether the orders sought at the foot of the Application dated 1st September 2021, are Interim in nature as envisaged under Section 7 of the Arbitration Act, 1995 or otherwise.

41. By dint of the provisions of Section 7 of the Arbitration Act, this honourable court is only obliged to grant an Injunction or other Interim Orders pending the arbitration proceedings. For clarity, the nature of

the orders and/or reliefs that the court is mandated to grant, must be those orders that are disposed to preserve the subject matter of the arbitration proceedings.

42. Put differently, the Court is neither mandated nor authorized to grant any substantive and precipitate orders, which ought to be the subject of arbitration proceedings and in this case, issues pertaining to whether or not there are Rent arrears, the Quantum of such arrears, the breach of the terms of the tenancy, the exercise of the right of re-entry and Eviction of the Respondent, if at all, are indeed issues that must be addressed by the arbitrator and not otherwise.

43. In my humble view, the nature of the Reliefs that the Applicants have sought at the foot of the Application dated the 1st September 2021, do not fit within the prescription of what amounts to Interim measures, envisaged vide and/or pursuant to Section 7 of the Arbitration Act, 1995.

44. In support of the foregoing observation, I adopt and endorse the holding in the case of **Alison Jean Louis v Rama Homes Ltd (2020) eKLR**, where the Court stated as hereunder;

(1) It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.

The Law grants an Applicant an opportunity to apply to the Court to grant interim orders to preserve the subject matter and/or maintain status quo so as to ensure that there is a dispute for hearing and determination before the Arbitrator.

The interim orders envisaged are in form of injunctions, deposit and/or holding of funds and any other relevant and legal interim order to freeze/stop/ remain as is situation so as to enable parties pursue Arbitration proceedings. In fact once Arbitration proceedings commence, the Arbitrator on hearing the dispute may amend, set aside and/or enforce and maintain the interim order.

45. In my humble view, what the Applicants have sought for are beyond the scope of the provisions of Section 7 of the Arbitration Act, and same would no doubt, form the basis of the issues, if any, to be ventilated before the arbitrator, once same shall have been duly appointed.

FINAL DISPOSITION:

46. Having reviewed the issues which were outlined for determination, I come to the conclusion that the Chamber Summons Application dated the 1st September 2021, is beyond the scope and/or expectation of Section 7 of the Arbitration Proceedings Act, 1995.

47. Premised on the foregoing, I find and hold that same is not only Misconcieved , but is Legally Untenable. Consequently, same be and is hereby dismissed with costs to the Respondent.

48. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF APRIL 2022.

HON. JUSTICE OGUTTU MBOYA

JUDGE

IN THE PRESENCE OF;

JUNE NAFULA COURT ASSISTANT.

MR. KAHARA H/B FOR MS. NJERI MUCHERU FOR THE APPLICANTS.

MR. MBICHIRE FOR THE RESPONDENT.