



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS

Civil Case 365 of 2011

SILVER BIRD KENYA LIMITED.....PLAINTIFF

VERSUS

THE JUNCTION LIMITED & 3 OTHERS....DEFENDANT

RULING

The applicant in the Notice of Motion dated 23rd June 2011 is the plaintiff in this suit, filed against the 3 respondents herein together with Century Cinemax Limited, claiming against the 4 defendants jointly and severally, the following reliefs:

- 1. A permanent Order against the defendants restraining them from taking or committing further prejudicial action against the plaintiff, including removing any of the movable and immovable assets of the plaintiff from the suit premises and or otherwise entering into and or effecting any other lease for the property governed by the lease as assigned, and or opening of the cinema theatres by any other party than the plaintiff situate within the Junction Shopping Centres erected on LR No. 330/1271 Dagoretti Corner, Nairobi.***
- 2. A declaration that the plaintiff is the owner of all the fixtures, fittings equipments, machines and all the movables within the suit premises governed the lease situate within the Junction Shopping Centre erected on L.R. No.330/1271 Dagoretti Corner, Nairobi.***
- 3. A declaration that the entire process of the purported distress for rent by the 3rd defendant pursuant to the 2nd defendant's letter dated 16.04.2001 and subsequent notification of sale of 12.5.2011 are illegal.***
- 4. A mandatory injunction directed to the defendants to allow and restore the plaintiff into the suit premises governed by the first lease, situate within the Junction Shopping Centre erected on L.R. No. 330/1271 Dagoretti Corner, Nairobi.***
- 5. Damages for loss of business to be assessed.***

6. *Damages for unlawful distress.*
7. *Interest on (5) and (6) above at commercial rates; and*
8. *Any other or further remedy that the court may deem fit to grant.*

The orders sought under the Notice of Motion are, inter alia, as follows:-

1. THAT an order of temporary injunction do issue against the defendants, their servants and or agents restraining them from taking or committing further prejudicial action against the plaintiff, including trading with and or removing any of the movable assets of the plaintiff from the suit premises and or otherwise entering into and or effecting any other lease for the property governed by the lease as assigned, and or opening of the cinema theatres by any other party situate within the Junction Shopping Centre erected on LR No. 330/1271 Dagoretti Corner, Nairobi pending the inter-parties hearing of this application.

2. THAT an order of temporary injunction do issue the defendants, their servants and or agents restraining them from taking or committing further prejudicial action against the plaintiff, including trading with and or removing any of the movable and assets of the plaintiff from the suit premises and or otherwise entering into and or effecting any other lease for the property governed by the lease as assigned, and or opening of the cinema theatres by any other party other than the applicant situate within the Junction Shopping Centre erected on LR No. 330/1271 Dagoretti Corner, Nairobi pending the hearing and determination of this suit.

3. THAT an order of mandatory injunction do issue directing the respondents to reinstate the applicants into the suit property governed by the lease as assigned, whereat it operated the cinema theatres within the Junction Shopping Centre erected on LR No. 330/1271 Dagoretti Corner, Nairobi pending the hearing and determination of this suit.

The application, which is supported by an affidavit sworn by the applicants' Managing Director, Anthony Ward, on 23rd June 2011 (consisting of 26 substantive depositions), is based on the 5 grounds set out as follows:-

(a) The applicant is the bonafide leaseholder of the upper level of the Junction Shopping Centre erected on LR No. 330/1271 Dagoretti Corner, Nairobi where it has been carries (sic) out the business of Cinema(s) theatres since August 2009.

(b) Having been given instructions by the 1st and 2nd respondents to levy distress on the property of Johnnic Communications (Africa) (Pty) Ltd, for alleged arrears of rent, the 3rd respondent instead despite protestations distrained the property of the applicant.

(c) The same which comprise of the furniture, equipments, machines, projectors etc and situate within the suit premises have now been illegally and fraudulently transferred to the 4th respondent who is about to start operating the same business with the applicant's movables.

(d) The illegal conduct of the respondents amount (sic) to termination of the subsisting tenancy without following due process as well, as conversion.

(e) Unless stopped by an order of this honourable court, the respondents will actuate their illegal plot and forcefully terminate the applicant's tenancy, disposes it of it's property worth more than Kshs.64,000,000 as well as takeover it's business without following due process.

The application is opposed on the strength of the 1st to 3rd respondent's Grounds of Opposition dated 30th June 2011 to the effect that:-

1. *The plaintiff/applicant is guilty of non-disclosure of material facts.*
2. *The plaintiff has no proprietary interest over the suit property.*
3. *The plaintiff has no or no longer any proprietary interest over the items or assets that were the subject of the distress of rent.*
4. *The plaintiff has, by issuing cheques that have subsequently been dishonoured committed offences and is not deserving of any equitable relief by way of injunctive orders.*
5. *The plaintiff was not and is not a tenant of the 1st defendant.*
6. *The plaintiff has not come to court with clean hands.*
7. *No prima facie case with a probability of success has been shown.*
8. *The balance of convenience lies in the refusal of the orders sought.*
9. *The plaintiff's remedy, if any, is in damages.*

Alongside the above grounds of opposition, the 1st and 3rd defendant/respondent's filed a Notice of Preliminary Objection the grounds of which are as follows:-

1. *The court has no jurisdiction to hear and determine the matters alleged to arise under sections 5 and 16 of the Distress for Rent Act (Cap 293 of the Laws of Kenya).*
2. *That the admissions and/or facts pleaded in paragraph 23, 24 and 34 of the plaint are a complete bar to the granting of the injunction orders.*
3. *No order for an injunction can lie if its effect is to contravene an existing statute.*
4. *The injunction order will result in unlawfully defeating accrued rights of the 4th defendant.*

On its part, the 4th defendant/respondent also opposes the Notice of Motion on 5 grounds of opposition filed on 5th July 2011 and set out as follows:-

1. *The applicant (?) is bona fide purchaser for value without notice.*
2. *The 4th defendant had no knowledge of the illegal distress for rent at all material time.*
3. *The 4th defendant is not a party to the illegality and fraud (if any) alleged by the applicant.*
4. *The application is clearly an abuse of the court process.*
5. *The 4th defendant has injected very substantial capital investment in the suit premises.*

The facts upon which the plaintiff's claim against the defendants are as set out in the plaint dated 23rd June 2011. As can be deduced from the said plaint the said facts are as follows:-

1. *On or about 6th of July 2004, the 1st defendant/respondent entered into a lease agreement with Johnnic Communication Africa (Plaintiff) Limited, a South African Company (hereinafter called "Johnnic") to use the Upper Level of the 1st respondents' shopping Mall on L.R. No. 330/1271 and to operate Cinema Theatres therein.*

2. *On or about 30.03.2005, a subsidiary of Johnnic, Nu Metro Kenya Ltd (herein referred to as “Nu Metro”) signed a licence to use the foyer on the ground floor of the shopping mall, with the 1st defendant providing ingress and egress to the cinema theatres through a media store on the ground floor area.*
3. *On the same date the said Nu Metro Kenya Limited and the 1st defendant entered a 10 year lease to give effect to their arrangement.*
4. *On or about 19th October 2007 Johnnic changed its name to Avusa Ltd (hereinafter known as “Avusa”) and published its intention to disinvest from Kenya. It then invited bids to take over its operations and assets.*
5. *Under a sale agreement dated 19th September 2008, Silverbird Africa Holdings Limited (hereinafter referred to as “Silverbird”) acquired the Kenya assets for Avusa and the entity called Nu Metro, taking over all the cinemas in the country and the media stores at the Junction and Westgate Shopping Malls (Nairobi) for a consideration of \$2000000.*
6. *On or about 26th June 2009 Nu Metro Kenya Limited changed its name to Silverbird Kenya Limited.*
7. *Upon the takeover Silverbird made proposals with all existing landlords (including the 1st defendant) for the assignment of the existing leases. Extensive representations and correspondence were made and/or exchanged with the 1st and 2nd respondents in this regard.*
8. *By a letter dated 19th August 2009, the 2nd respondent, as agent for and on behalf of the 1st respondent, granted the applicant unconditional approval for the take over of Nu Metro’s lease by the applicant, in fulfilment of the requirements of clause 6 of the lease agreement which required that the landlord’s approval be obtained in those circumstances.*
9. *The applicants’ position is that upon the granting of the said approval, Nu Metro’s lease terminated and was effectively taken over by the applicant who paid, and the 1st respondent who accepted rent for the years 2009, 2010 and 2011 respectively.*
10. *On 16th April 2011, the 2nd respondent instructed the 3rd respondent to levy distress on the property of Johnnic for arrears of rent.*
11. *The applicant protested against the distress on the ground that the distressed assets no longer belonged to Johnnic but to the applicant.*
12. *The 1st respondent, through the 2nd responded to the applicants’ protest vide a letter dated 27th April 2011, stating that the applicant had not executed the requisite assignment of lease despite “numerous attempts made” in that respect.*
13. *The applicant’s position is that the executing of the assignment was not a precondition to the applicants’ tenure and possession and that the consent and approval by the 1st respondent, coupled with the fact that the applicant had been in possession for over 21 months, were sufficient to effect a takeover (by the applicants) of the remaining term of the lease.*
14. *On 5th April 2011, the 1st and 2nd respondents locked the entries to disputed premises thereby shutting down the business.*
15. *On 12th May 2011, despite the applicant’s persistent protestations, the 3rd defendant published (in the Daily Nation newspaper) an auctioneers notice of sale of the distressed assets in citing the assets as*

belonging to Johnnic.

16. A sale was conducted on 25th May 2011 whereby the distressed assets were sold to a director of the 1st respondent, or a company in which he has an interest, for a sum of 17,000,000/=.

17. On 21st June 2011 the 4th respondent published in the Daily Nation Newspaper that it had taken over the suit premises and the cinema business and that it was due to open doors to the public on 24th June 2011.

Against the above background, the applicant filed the suit herein and the Notice Motion (the subject of the 1st to 3rd respondents' preliminary objection) being of the view that the actions of the 1st and 2nd defendant respondents had brought about enormous ramifications and had exposed the applicant to negative publicity in the eyes of its suppliers, landlords and creditors, resulting in the collapse of its business and the ruination of the plaintiff/applicants' business with Silverbird Holdings Limited. Further the applicant holds the view that the taking over and operation of the cinema business by the 4th Respondent in the suit premises would be most prejudicial to the applicant in that it had the effect of defeating the applicants' leasehold interest which would terminate technically, before the remainder of the term assigned to it.

The preliminary objection proceeded by way of written submissions. Counsel for the applicant and for the 1st, 2nd and 3rd respondents made brief highlights thereof while counsel for the 4th respondent opted to leave matters to the court. The submissions tendered, together with the authorities cited to support the opposing position have been carefully considered.

The objection as to this court's jurisdiction challenges both the Notice of Motion and the entire suit. On the basis thereof, the 1st, 2nd and 3rd Defendants/respondents pray that the Plaint be struck out with costs. They have invited the court to look at paragraphs 23, 24 and 34 of the Plaint and find that the same "are a complete bar to the granting of the injunction orders". I am unable to understand how such an inference can be made from the said paragraphs which read as follows:

"23. On 12th May 2011 the 3rd Defendant purported to cause to be published an Auctioneers Notice of Sale of the property in the suit premises which appeared in the Daily Nation citing the same as due to debt owed by Johnnic Communications Africa (Property) Ltd despite protests by the Plaintiff.

24. Despite protests by the Plaintiff who had now been locked out of the suit premises, the defendants proceeded unabated and with disregard (sic) with the illegality of the sale (sic).

34. There is no suit pending or determined before any court between the same parties on matters arising from the same cause of action".

Even if the 1st, 2nd and 3rd Defendant/Respondents' position is that the actions stated in paragraphs 23 and 24 of the Plaint have since taken place, which was not clarified by the submissions tendered, the court notes that the Plaintiff/applicants complainants and reliefs sought go beyond the said actions as is seen from prayers 4, 5,6,7 and 8 of the plaint.

To buttress the argument that the jurisdiction to deal with the matter (since it challenges the distress for rent carried out as per the plaint) the respondents rely on Section 5(1) of the Magistrates Courts Act which states inter alia, that:-

"(1) subject to any other written law the resident magistrate's court shall have and exercise jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter in dispute does not exceed one hundred thousand shillings or three hundred thousand shillings where the court is held by a principal or senior resident magistrate and five hundred xxxxx"

In furtherance of the above argument and based on the above limitation, the 1st, 2nd and 3rd defendant/respondents have submitted that under the distress for Rent Act (Cap 293) the jurisdiction to deal with matters of distress is vested with the subordinate court and is not limited in pecuniary terms. The 1st, 2nd and 3rd respondents position is that the sole issue for determination is whether the distress for rent carried out by the 1st defendant was lawful. On that ground, they have submitted that only the subordinate court can order the restoration of illegally distrained goods and only after a claimant has filed a declaration of ownership with the landlord. They have cited sections 19 and 20 of Cap 293 in that regard. For case law, the 1st, 2nd and 3rd defendant/respondents have cited the following authorities:-

1. GERALD WAMBUA MAKAU -vs- LUKENYA FARMING CO-OPERATIVE SOCIETY LTD & ANOTHER H.C.C.C No. 80 of 2003 (unreported)

2. OWNERS OF THE MOTOR VESSEL “LILLIAN’S” -vs- CALTEX OIL (K) LTD [1989] KLR 1

I do not think provisions of Section 19 and 20 of the Act as to declaration do apply to the present case since the applicant’s claim is not one by an under tenant, a lodger or a person who is neither a tenant nor a person without a beneficial interest in the tenancy of the premises or part thereof as envisaged in sections 19(1) (a) (b) and (c) and 20 of Cap 293.

The plaintiff/applicant has submitted that the Preliminary Objection is misconceived and an abuse of the process of the court since the provisions of the distress for Rent Act do not expressly oust the jurisdiction of this court to deal into matters in which distress for rent is in issue. They contend that the subordinate court would not have the pecuniary jurisdiction to hear and determine this suit since the highest its pecuniary jurisdiction goes is Kshs.3 Million, yet the value of chattels in question exceed Kshs.67,000,000/=.

The applicant has submitted further that in view of the dispute between itself and the 1st respondent as to whether the goods belonged to the plaintiff or Johnnic, whether the lease to the latter was terminated and whether , by the 1st respondent accepting rent from the plaintiff for the years 2009, 2010 and 2011, a tenancy in favour of the plaintiff can be deemed to have been created (even in the absence of a formal execution of assignment of the lease to the plaintiff/applicant) the matter is complex and a preliminary objection cannot lie. To support this the plaintiff/applicant relies on the case of SELEX SISTEMI INTEGRATI .VS. THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD (NRB HCC MISC APPL. NO. 1260 OF 2007).

The 1st, 2nd and 3rd defendant/respondents have cited the celebrated Court of Appeal for East Africa’s decision of MUKISA BISCUIT COMPANY LTD –vs- WESTEND DISTRIBUTORS LTD [1969] EA 696 to support their contention that the preliminary objection is tenable since, according to them, the correctness as to facts as arising from the pleadings is not disputed.

In explaining the circumstances in which a preliminary objection may be raised, Sir Charles Newbold P is recorded in the said authority to have commented as follows:-

“A preliminary objectionraises a pure point of law which is argued on the assumption that all the facts as pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

In the same decision, LAW J’s is position as regards the nature of a Preliminary Objection is recorded as follows:-

“As for as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.”

The issue of jurisdiction no doubt arises out of the pleadings filed in view of the reliefs sought by the applicant and the reference to Sections 5 and 16 of the Distress for Rent Act in the Notice of Motion. There being more issues for determination over and above the question of whether the distress was lawful or not, I am hesitant to accept the submission by counsel for the 1st, 2nd and 3rd defendant respondents that distress is central to the suit. I find the issue of legal and/or contractual relationships between the plaintiff/defendant and the respondents to be predominant.

Note is taken of the fact that the preliminary objection was filed subsequent upon the filing of Grounds of Opposition to the Notice of Motion on behalf of the 1st, 2nd and 3rd defendant/respondents. The said grounds are set out as follows:-

1. ***The plaintiff/applicant is guilty of non-disclosure of material facts.***
2. ***The Plaintiff has no proprietary interest over the suit premises.***
3. ***The plaintiff has no or no longer has any proprietary interest over the items or assets that were the subject of the distress of rent.***
4. ***The plaintiff has, by issuing cheques that have subsequently been dishonoured, committed offences and is not deserving of any equitable relief by way of injunction orders.***
5. ***The plaintiff was not and is not a tenant of the first defendant.***
6. ***The plaintiff has not come to court with clean hands.***
7. ***No prima facie case with a probability of success has been shown.***
8. ***The balance of convenience lies in refusing the order sought.***
9. ***The plaintiff's remedy, if any, lies in damages.***

The 1st, 2nd and 3rd defendant/respondents do not appear to have filed a defence to the action. The issue of jurisdiction is not one of the grounds advanced to challenge the Notice of Motion although the court is alive to the fact that the same may be raised at any time. This notwithstanding, it is clear from the leading authority of Mukisa Biscuits (Supra) that such a ground, when raised, should be adequate to defeat the action purely on a legal point. It is quite evident from the grounds of opposition, that issue is joined as to the legal relationship between the applicant and the 1st, 2nd and 3rd defendant/respondents, and that the court will be called to determine the same over and above the determination as to whether or not the distress was lawful. As is seen from Ground 9 the 1st, 2nd and 3rd defendant/respondents appear to recognise that the plaintiff/applicant may well have a remedy (but in damages if at all).

The 4th preliminary point to wit: That the injunction order if granted would defeat the rights accrued to the 4th defendant hinges upon the same determination of the contractual relationship between the applicant and the 1st, 2nd and 3rd respondents, since a question clearly arises as to how those rights arose. If an illegality was committed by the 1st defendant/respondent in taking over the leased property, it would follow that the said illegality would affect the 4th respondents' assumed rights.

Clearly from the above, several facts remain to be ascertained and the preliminary objection as raised cannot be deemed to fall within the threshold of the **MUKISA BISCUIT** principals. I am in doubt whether the 1st, 2nd and 3rd defendant/respondents believe in the strength of their arguments as to jurisdiction seeing that they have neither filed a defence and did not include the same in their Grounds of Opposition. A party who strongly believes that a suit is filed without jurisdiction would ordinarily move the court (by way of an application) to have the same struck out at the first instance.

In view of the above I find that the Preliminary Objection is not well founded. My perusal of the bulky record has revealed several other relevant factors, such as the existence of another related suit H.C.C.C. No. 162 of 2011, another one in the Industrial Court and a notice of Motion dated 14th July 2011 filed by some 75 interested parties (employees of the plaintiff) against the plaintiff and the 1st defendant among others.

The complexity of the action is obvious and the ends of justice would not be served if the preliminary objection

as filed were to be upheld. For all the above reason, the same is hereby overruled. Costs shall be in the cause.

DATED, SIGNED and DELVIERED at NAIROBI this 11TH DAY OF May, 2012.

M.G. MUGO

JUDGE

In the presence of :

Mr. Ogola holding brief for Mr. Tiego for the plaintiff/applicant.

Mr. Gachuhi for 1st, 2nd & 3rd for the defendant/respondent.

Mr. Chege for the 4th defendant/respondent.