



Flamingo Towers Limited & another v Homeland Media Group Ltd (Environment and Land Appeal E081 of 2021) [2022] KEELC 2914 (KLR) (9 June 2022) (Ruling)

Neutral citation: [2022] KEELC 2914 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E081 OF 2021**

JA MOGENI, J

JUNE 9, 2022

BETWEEN

FLAMINGO TOWERS LIMITED 1ST APPLICANT

CIITISCAPES VALUERS & ESTATE AGENTS LIMITED 2ND APPLICANT

AND

HOMELAND MEDIA GROUP LTD RESPONDENT

RULING

1. Before this court for determination is the application dated October 12, 2021 duly filed under section 1A, 1B, 3A of *Civil Procedure Act* cap 21 and order 51 rule 1 of the *Civil Procedure Rules* 2010. The two (2) appellants are seeking orders infra; -
 1. Spent.
 2. Spent.
 3. That this honourable court be pleased to order the respondent herein to pay its rent of Kshs 25,956,424.50 and service charge of Kshs 535,624/= and continue doing so as provided in the lease agreement dated 15/05/2018 between the 1st appellant and the respondent pending the hearing and determination of the Appeal filed herein.
 4. That in the alternative and without prejudice with prayer 3 above, the respondent be ordered to deposit the entire balance of the purchase price in the interest earning escrow account of both counsel for the applicants and respondent pending the hearing and determination of the appeal.
 5. That the honorable court do grant the applicants any other reliefs as it deems fit and just in the circumstances.



6. That cost of this application be provided for.
2. The motion is premised on the supporting affidavit of one of the Directors of the 1st appellant/ applicants, Samuel Warugu Kimotho and grounds (a) to (q) set out on its face.
3. This application is opposed. There is a replying affidavit sworn by Joe Musyimi Mutambu dated October 27, 2021.
4. On 27/4/2022, the parties agreed to canvass with the matter through written submissions and a ruling date was reserved.

Applicants' Case

5. The applicants' motion is anchored on the fact the 1st appellant is the owner and proprietor of Flamingo Towers, a commercial building in Upper Hill and the 2nd appellant is the property manager of Flamingo Towers
6. The respondent is a tenant in the 1st appellant's property *vide* a lease agreement dated 9/01/2019. That although the respondent was initially a tenant, they made an offer to purchase the premises it occupied at a consideration of Kshs 89,546,670/- and a letter of offer "subject to contract" was executed between the 1st appellant and the respondent on September 27, 2019.
7. That due to breach the letter of offer was terminated and withdrawn through a letter dated June 30, 2020 and then the 1st appellant exercised its right pursuant to clause 14 and treated the already paid monies of Kshs 4,500,000 as rent and service charge.
8. The respondent filed a suit in the subordinate court for injunctive orders CMCC No 4077 of 2020 which were granted *ex parte* and confirmed after inter partes hearing on November 25, 2020.
9. That the subordinate court acted ultra vires when it entertained both the suit and the application because the respondent had asserted to being the purchaser of the suit property whose contractual value was Kshs 89,564,760/= and so the lower court should have dismissed the matter summarily due to the lack of pecuniary jurisdiction for the Magistrate's court which is limited.
10. The appellants had through an application dated 9/12/2020 sought to have the suit filed dismissed but this was dismissed on September 24, 2021.
11. The appellants further aver that the respondent has continued to default on its obligation to pay rent hiding behind the injunctive order of November 25, 2020 where the appellants were restrained from evicting the respondents.
12. The appellants contends that it is in the interest of justice and fairness that the application should be heard on priority and the orders granted.

Respondent's Case

13. The respondent filed a replying affidavit sworn by one Joe Musyimi Mutambu who is a director of the respondent and does not deny that they are in occupancy of the suit property.
14. They contend that the application is baseless and a mere abuse of the court's process.
15. That the applicants do not have any judgment against the respondent for them to demand payment of monies indicated. That all the applicants' applications in the lower court were heard on merit and were all dismissed with costs *vide* ruling dated November 25, 2020 and ruling dated September 24, 2021.



16. That the appellants cannot lodge an appeal and pray of what was not pleaded in the lower court to be awarded before the draft appeal is admitted.
17. That the applicants never filed a defence or counter claim against the respondent. Further that the applicants only responded to the respondent's application in the lower court and then filed an application to set aside the orders of the court dated November 25, 2020 and the application was dismissed vide a ruling dated September 24, 2021.
18. They reiterate that the applicants never raised the matter of jurisdiction. They further aver that the application herein directly and indirectly prejudices their defence and that the appeal is yet to be heard, further that they have valid orders from the lower court restraining the appellants from harassing or blocking the respondents from accessing the office and business.
19. That there is no valid lease agreement therefore the application has no merit.

Analysis and Determination

20. I have thoroughly considered the entire application alongside the replying affidavit and the parties' respective submissions herein. In that regard, this court is of the considered view that the only issue falling for determination is whether the applicants' motion is merited. I will proceed to analyze the legal and jurisprudential framework on the issue.
21. It is not in dispute that the 1st applicant is the owner of the suit property. It is also not in dispute that the respondent is a tenant in the suit property by virtue of the lease agreement dated 9/01/2019 and car park licence dated 9/01/2019. The parties later signed a letter of offer "subject to contract" dated September 27, 2019 for the purchase of the suit property for Kshs 89,564,760.00.
22. From the record, clause 3.1 of the lease agreement read together with the first and third schedule to the lease indicated that the respondent was obligated to pay rent through quarterly payments in advance every 1st day of January, April, July and October and a monthly service charge of Kshs 159,350.00 payable quarterly in advance. The respondent was also required to pay the car park licence fee by quarterly payments in advance.
23. It is the applicants' case that the respondent failed to pay rent, service charge and car park licence fees since 1/01/2018 to date which arrears are now standing at Kshs 25,956,424.50 as rent and Kshs 535,624.00 as service charge.
24. From the record, the parties entered into a late rent payment agreement dated March 13, 2019. Therein, the respondent acknowledged that as at 1/02/2019, they owed the applicants Kshs 6,893,417 being the outstanding rents in respect of the suit premises.
25. The letter of offer dated 27/9/2019 provided that the respondent was to pay a deposit of Kshs 20,000,000.00 by 3/03/2020 and the balance of the purchase price together with the outstanding rent owed totaling to Kshs 83,633,313.00 was to be paid within 36 months from 3/04/2020. It was a condition of the letter of offer that in the event the respondent failed to complete the purchase price, the payments made shall be forfeited to the applicants as rent payment. The same condition was to be applied in the event the applicants rescinded the agreement.
26. The applicants stated that the balance of the purchase price was Kshs 69,564,760. From the record then, it appears the outstanding rent as per the letter of offer as at September 29, 2019 was Kshs 14,068,553.00.



27. The applicants aver that they issued a demand letter dated June 30, 2020 to the respondent informing them their default by not paying rent, service charge and car park licence fees from 1/01/2018 to 1/01/2020. The applicants allege that from the above, the accumulated sum owed to them was Kshs 17,903,953.00.
28. The applicants averred that they also issued the respondent with a 30 days' termination notice dated June 30, 2020 after the respondent failed to meet the prerequisite conditions on payment of the deposit.
29. It is the applicants' case that the respondent had only paid Kshs 4,500,000.00 towards the purchase of the suit property. In the said termination notice, the applicants informed the respondent that the sum of Kshs 4,500,000.00 had been applied to offset the outstanding rent as per clause 5 of the letter of offer.
30. The applicants further used the deposit paid by the respondent as per clause 3.2.1 of the lease to also offset the outstanding rent owed. The applicants averred that the respondent had paid a deposit in the amount Kshs 2,713,275.00.
31. It is the respondent's case that the allegations and confirmation of holding the respondent's Kshs 8,113,275.00 and demand letter are issues for the trial within the jurisdiction of the lower court. Further, the respondent averred that he has orders from the lower court restraining the applicants from harassing and/or blocking the respondent from accessing the office and his business.
32. It is my understanding that the orders issued by the lower courts did not direct the respondent not to pay rent in the premises in which he is in occupation and possession. The respondent has not denied that he is still in occupation and possession of the suit premises.
33. The parties entered into a lease agreement, a late rent payment agreement and a subsequent letter of offer for the purchase of the suit property. They were both reduced into writing and signed by all the parties. Section 3(3) of the Contract Act provides that:
- 3(3) No suit shall be brought upon a contract for the disposition of an interest in land unless—
- (a) the contract upon which the suit is founded—
- (i) is in writing;
- (ii) is signed by all the parties thereto; and
- (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:
- Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (cap 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.
34. The court has carefully perused the lease agreement, the late rent payment agreement and letter of offer produced as SK1, SK2 and SK3 respectively by the applicants and noted that the same are in writing and are signed by the parties. They thus met the requirements of section 3(3) of the Contract Act. Further the said agreements contain the names of the parties, the property size and the amounts payable which is the consideration thereto. A look at the said agreements confirms that the same are valid agreements which are enforceable by the parties. See the case of *Nelson Kivuvani v Yuda Komora & Another*, Nairobi HCCC No 956 of 1991.



35. It is trite law that courts cannot re-write contracts for parties, neither can they imply terms that were not part of the contract. In the case of *Rufale v Umon Manufacturing Co (Ramsboltom)* [1918] LR 1KB 592, Scrutton LJ. held as follows:

“The first thing is to see what the parties have expressed in the contract and then an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in the contract.”

36. Equally in the case of *Attorney General of Belize et al v Belize Telecom Ltd & Anoter* [2009], 1WLR 1980 at page 1993, citing Lord Person in *Trollope Colls Ltd v Northwest Metropolitan Regional Hospital Board* [1973] I WLR 601 at 609, held as follows:

“The court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves. If the express terms are perfectly clear and from ambiguity, there is no choice to be made between different meanings. The clear terms must be applied even if the court thinks some other terms could have been more suitable.”

37. Based on the above decisions, the starting point for me will be the letter of offer dated September 27, 2019 that the parties signed and the terms therein. According to the agreement, the outstanding rent owed to the applicants as at September 27, 2019 was Kshs 14,068,553.00. After deducting Kshs 4,500,000.00 and Kshs 2,713,275.00, the outstanding amount owed therefore becomes Kshs 6,855,278.00.

38. Section 3A of the *Civil Procedure Act* provides that;

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

39. It is trite law that section 3A is applicable by the courts where there is a vacuum. Section 3A of the *Civil Procedure Act* relates to the wide powers of the court to exercise its discretion to the end of justice between the parties. In the case of *Wachira Karani v Bildad Wachira* [2016] eKLR, the court stated that:

“The fundamental duty of the court is to do justice between the parties..... The court is not powerless to grant relief when the ends of justice and equity so demand, because the powers vested in the court are of a wide scope and ambit”

40. I agree with the applicants’ submissions herein that the guiding principle of the overriding objective is that the court should do justice to the parties before it and their interests must be put on scales.

41. Based on the facts before me and relying on the legal provisions cited above, it is the finding of this court that the motion is merited.

42. Ultimately, in the upshot, I am of the view that the applicants has proved its case on a balance of probabilities. Accordingly, I allow the Application dated October 12, 2021 in the following terms: -

- a. The respondent be and is hereby ordered to deposit Kshs 6,855,278.00 together with accrued unpaid rent, service charge and car park licence fees from September 27, 2019 to date in an



interest earning escrow account of both counsel for the applicants and respondent pending the hearing and determination of the Appeal.

b. Costs shall be in the cause.

43. Orders Accordingly.

DATED AT NAIROBI THIS 9TH DAY OF JUNE 2022

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MOGENI J

JUDGE

In the Presence of

..... for the appellants/applicants

..... for the Respondent

Mr. Vincent Owuor.....Court Assistant

