



Apollo Holdings Limited v Westfield Shopping Mall Ltd (Environment & Land Case E319 of 2021) [2022] KEELC 12761 (KLR) (30 September 2022) (Ruling)

Neutral citation: [2022] KEELC 12761 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E319 OF 2021
MD MWANGI, J
SEPTEMBER 30, 2022**

BETWEEN

APOLLO HOLDINGS LIMITED PLAINTIFF

AND

WESTFIELD SHOPPING MALL LTD DEFENDANT

(In respect of the Notice of Motion application dated 30th August 2021, Notice of Motion dated 21st September 2021, Notice of preliminary objection dated 21st September 2021 & Chamber Summons application dated 14th October 2021))

RULING

Background.

1. The Plaintiff in this matter initiated this suit by way of a plaint dated August 30, 2021. In the said Plaint, the Plaintiff avers that it is the registered owner of all that property known as LR No 209/2809 situated at Kilimani Area (hereinafter referred to as ‘the suit property’). Commencing the July 1, 2019, the Plaintiff leased the suit property to the Defendant for a term of 6 years with the rent thereof payable not later than the 5th day of each quarter of the year, amongst other conditions stipulated in the lease.
2. The Plaintiff avers that the Defendant defaulted in rent payment when it failed to pay for the first quarter of the year 2020. The Plaintiff consequently issued the Defendant a notice of termination of the lease on 20.4.2020. The Plaintiff further alleges that the defendant had additionally sublet part of the suit property to third parties contrary to the provisions of their lease agreement.
3. The Plaintiff avers that despite serving the Defendant a notice of termination of lease, the Defendant has failed/refused and or declined to vacate the suit premises and continues to occupy them to-date. The Plaintiff prays for judgment against the Defendant for: -



- a. The sum of Ksh 550,000 per month plus Value Added Tax from 05/01/2020 until the Plaintiff is put in possession of the property known as LR No 209/2809, on account of mesne profits which have accrued and continue to accrue following the termination of the lease on April 20, 2020 and the continued occupation of the demised premises by the Defendant thereafter. Such sums to be escalated as provided for in the terminated lease agreement or in any other manner as this Honourable Court may deem fit to escalate in its computation of the said mesne profits.
 - b. A declaration that any monies paid by the Defendant to the Plaintiff after the termination of the lease on April 20, 2020 constitute mesne profits and the same be utilized towards the sums adjudged due under prayer (a) herein above.
 - c. General Damages for Trespass.
 - d. Costs
 - e. Interest on a, b, c, and d above at court rates
 - f. Any other or further relief that this court may deem fit to grant.
4. Alongside the plaint, the Plaintiff also filed the Notice of Motion Application of even date seeking for orders that: -
- i. That the Plaintiff/Applicant be at liberty to forthwith re-enter repossess and evict the Respondent from all that land known as LR No 209/2809 situated within Kilimani area of Nairobi City County (the suit property).
 - ii. That the Officer commanding station Kilimani Police Station does provide security and keep the peace during the re-entry by the Plaintiff/Applicant and eviction of the Respondent.
 - iii. That the costs of the application be awarded to the Applicant.

Response by the Defendant/Respondent

5. The Defendant in response and upon entering appearance filed a Notice of Motion Application dated 21/9/2021 seeking to strike out the Plaintiff's suit for want of authority to file the suit, a notice of preliminary objection dated 21/9/2021 on the basis that the Plaintiff's suit was filed without due authority as no valid resolution was attached to the plaint to confirm approval of the filing of the suit, and a chamber summons application dated October 14, 2021 seeking for the stay of proceedings in this matter and referral of the matter to arbitration for hearing and determination. The Defendant too filed a replying affidavit sworn on October 14, 2021 in response to the application by the Plaintiff.
6. It is noteworthy that the Plaintiff in response to the Defendant's pleadings filed a replying affidavit sworn on October 15, 2021 in response to the Defendant's Notice of Motion dated 21/9/2021, a replying affidavit sworn on October 15, 2021 in response to the Defendant's Chamber summons application dated October 14, 2021 and a supplementary affidavit sworn on June 23, 2022 in response to the replying affidavit of the Defendant sworn on 14/10/2021. The Plaintiff further filed a supplementary list of documents dated October 15, 2021 containing the Plaintiff company's board of directors' resolution authorizing Ashok Shah to swear the affidavits in cases filed by the Plaintiff.

Court's Directions

7. In order to save on judicial time, the court directed that all the applications filed in this matter as well as the Preliminary Objection be heard together and by way of written submissions. Both parties



have complied and filed their submissions. The court has had the opportunity to read through the submissions by the parties.

Issues for determination.

8. Having read through the pleadings filed by the parties and the comprehensive submissions herein, the court is of the view that the issues for determination in this matter are: -
 - a. Whether the Plaintiff's suit is fatally defective for want of authority/resolution of the company authorizing filing of the suit.
 - b. Whether this suit should be stayed under the provisions of section 6 of the Civil Procedure Act.
 - c. Whether the Plaintiff should be granted the orders of eviction, repossession and re-entry into the suit property against the Defendant at the interim stage before the hearing of the suit.

Analysis and Determination.

A. Whether the Plaintiff's suit is fatally defective for want of authority/resolution of the company authorizing filing of the suit.

9. Vide its Notice of Motion application dated 21.9.2021, the Defendant prays that the plaint dated August 30, 2021 be struck out with costs on the basis that the same was filed without due authority of the Plaintiff company as no valid resolution was exhibited even authorizing the law firm of K Kibiku & Co Advocates to institute the suit for and on behalf of the Plaintiff. It was the Defendant's case that the Plaintiff's suit had therefore contravened the provisions of order 4 rule 1(4) of the Civil Procedure Rules as the deponent of the verifying affidavit, one Ashok Kumar, did not have the requisite authority from the board of directors to sign and swear it.
10. The Defendant too filed a Preliminary objection also dated September 21, 2021. The Preliminary objection in essence summarizes the issues raised in the Notice of Motion Application. Both the Plaintiff's application and the Notice of Preliminary Objection address the same issues. The grounds listed thereunder are that: -
 - a. The Plaintiff's suit does not meet the mandatory requirements of the law, having been filed without due authority from the Plaintiff company as there is no resolution or valid resolution of the Plaintiff company approving the institution of the suit.
 - b. The Plaintiff's suit is a non-starter as there is no resolution or valid resolution of the Plaintiff company appointing the firm of K Kibiku & Co Advocates to institute the suit for and on behalf of the Plaintiff company.
 - c. The filing of the suit by the said firm of Advocates is invalid for want of authority from the Plaintiff company.
 - d. The suit has been filed in contravention with order 4 rule 1(4) as Ashok Kumar Mepa Shah does not have the requisite authority to sign and swear the verifying affidavit on behalf of the Plaintiff company.
 - e. The Honourable court lacks the jurisdiction hear and determine the suit.
11. While the position may have been as stated by the Defendant at the time of filing suit, it has since been rectified. The Plaintiff filed a supplementary list of documents dated October 15, 2021 containing the



Plaintiff company's board of directors resolution authorizing Ashock Shah to swear the affidavits on its behalf.

12. In any event, the absence of such a board of director's resolution will not ordinarily lead to the striking out of the suit. It is an omission that is rectifiable without leading to the striking out of a suit.

13. The Court of Appeal while dealing with a similar situation in the case of *East African Safari Air Ltd v Anthony Ambaka Kegode & another* [2011] eKLR, stated that:

“It is our view that the proper thing for the High Court to have done was not to strike out the proceedings, but to stay the same pending ratification if it was of the view that the evidence of ratification was not clear.”

14. The Court cited with approval, the procedure set out in '*Palmer's Company Law*, 24th Edition' when an objection has been raised about the validity of proceedings before court on the basis of lack of a resolution to institute them. It states that,

“If an individual shareholder without authority to do so initiates litigation in the name of the company, the normal practice upon a motion to strike out the company's name is for the court to adjourn, whilst ordering that a meeting of the shareholders be held to see if the company supports the litigation. If it does not, the motion will succeed and the solicitor who commenced the proceedings without authority of the company will be personally liable for the defendant's costs”

15. The court further made reference to '*Cordery's Law Relating to Solicitors*' which states that,

“proceedings will not be set aside because the solicitor acted without authority, if the party on whose behalf they were taken adopts what has been done, but ratification of an agent's act can only be effective where, at the time of the act, the principal was himself competent to perform it, or to authorize its performance and a plaintiff cannot so adopt an action after having apparently repudiated it to the defendant.”

16. Gikonyo J in *Fubeco China Fushuu v Naiposha Company Ltd & 4 others* [2014] eKLR cited the Ugandan case of *United Assurance Co Ltd v Attorney General*, SCCA No 1 of 1998 by the Supreme Court of Uganda stated that,

“It does not require a board of directors, or even a general meeting of members to sit and resolve to instruct counsel to file proceedings on behalf of the company. Any director, who is authorized to act on behalf of the company, unless the contrary is shown, has the powers of the board to act on behalf of that company.”

17. That is the position of the law. Accordingly, I dismiss the Defendants Notice of Motion Application dated August 30, 2021 and the Preliminary Objection dated August 30, 2021 as well with costs.

B. Whether this suit should be stayed under the provisions of section 6 of the *Civil Procedure Act*

18. The existence of the case before the Chief Magistrate Court is not disputed. The case, Nairobi MCCC No E070/2021 was filed by the Defendant in this case seeking inter alia a permanent injunction against the Plaintiff barring it from interfering with its quiet possession of the suit property LR No 209/2809. This was after the Plaintiff issued the Defendant with a termination notice on or about May 2020.



19. The Defendant herein in its submissions has explained the sequence of events leading to the filing of that suit before the Chief Magistrate's Court.
20. The Defendant submits that the Plaintiff purported to terminate their lease agreement vide letters dated March 3, 2020 and April 20, 2020, claiming rent arrears. This forced the Defendant to move to the Business Premises Tribunal where it filed case No 483 of 2020, seeking to prohibit the Plaintiff from unlawfully evicting it and interfering with its quiet occupation of the suit property. The suit was however, dismissed for want of jurisdiction.
21. The Defendant then moved to the Chief Magistrate's Court in order to protect its interests and filed the case thereon. The Magistrate's Court granted the Defendant an interlocutory injunction ex-parte.
22. The Defendant submits that the Plaintiff herein filed an application before the Magistrate's Court seeking to have the matter referred to arbitration pursuant to the provisions of clause 5.11 of the lease agreement between the parties. The court allowed the application and indeed made an order referring the matter to arbitration.
23. The Plaintiff filed this suit after and in spite of the existence of the suit before the chief Magistrate's court.
24. The Plaintiff in his submissions while acknowledging the existence of the suit before the Chief Magistrate's Court and the order referring the matter to arbitration submits that the issue(s) raised in Nairobi MCCC 5 070/2021 (Westfield Shopping Mall Ltd v Apollo Holdings) are completely different from the subject matter before this court, though the parties are the parties are the same. The Plaintiff avers that the Defendant in the Magistrate's Court case was disputing the Plaintiff's ownership of the demised property which position has since changed since in the suit before this court, the Defendant has in its pleadings unequivocally admitted that the Plaintiff is the registered owner of the suit property.
25. The Plaintiff therefore submits that the dispute that was before the Magistrate's court and that was referred to arbitration has been admitted and settled thus rendering the ruling before the trial magistrate otiose!
26. Section 6 of the [Civil Procedure Act](#) prohibits a court of law from proceeding a case where that matter(s) in issue is directly and substantially in issue in another case between the same parties. It provides that"-

"No court shall proceed with the trial of any suit or proceedings in which the matter in issue is directly and substantially in issue in a previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim, litigate under the same title, where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."
27. The Plaintiff has attached a copy of the Plaint filed before the Chief Magistrate's Court to its Supplementary Affidavit. The premise of the case before the Chief Magistrate's Court is the lease between the parties over the suit property, LR No 209/2809. The Defendant (who is the Plaintiff in that case) averred that despite signing the lease with the Plaintiff and paying rent for the months of July & August 2019, some third parties had laid a claim of ownership over the suit property and again that in December 2020, the suit property was alleged to have been grabbed property in one of the local television stations. Additionally, the Defendant alleged that the Plaintiff had in the month of May 2020 issued it with a Notice to terminate the lease without justifiable reasons and despite receiving money from it. The Plaintiff had threatened to evict the Defendant from the suit premises necessitating the filing of that suit to restrain the intended eviction amongst the other reliefs sought therein.



28. As I stated at the beginning of this ruling, the Plaintiff's case in this matter is premised on the alleged default by the Defendant on the terms and conditions of the lease between the parties. The Plaintiff's averment is that despite serving the Defendant with a notice to terminate the said lease, the Defendant has failed/refused and or adamantly declined to vacate the suit premises.
29. This court's finding is that the matter in issue in the suit before it, is directly and substantially the matter in issue in the suit before the Chief Magistrate's Court. The filing of this suit by the Plaintiff is an attempt to run away from the arbitration process ordered by the court upon the Plaintiff's own application.
30. The Plaintiff's submissions that the ruling by the Magistrate Court has been rendered otiose should be made before that same court and not before this court. This court is not sitting on appeal of the said ruling. It is an abuse of the process of court.
31. The court in the case of *Satya Bhama Gandbi v DPP & 3 others* [2018] eKLR observed that,
- “It is settled law that a litigant has no right to pursue pari pasu two processes which will have the same effect in two courts either at the same time or at different times with a view to obtaining victory in one of the processes or in both. Litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different positions clearly, plainly and without tricks.”
32. The court in the above cited case went on to point out that all courts have an inherent jurisdiction to prevent their processes from being used “as an instrument of oppression” and to take necessary steps to prevent abuse of the court process.
33. I fully associate with the above findings. Courts must at all times be vigilant to guard against being used to abuse the court process to perpetuate an injustice or to frustrate the due process at the whim of one party in litigation.
34. Guided by the provisions of section 6 of the *Civil Procedure Act* and exercising this court's inherent power to prevent abuse of the process of court, I hereby order a stay of the proceedings in this matter pending the outcome of the proceedings in Nairobi MCMC E & L No E070 of 2021- Westfield Shopping Mall v Apollo Holdings Ltd.
35. Having arrived at the above finding, this court will not proceed to make a determination on the issue number 3 in order not to prejudice the proceedings before the magistrate's court or the arbitration process for that matter.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON 30TH SEPTEMBER 2022.

MD MWANGI

JUDGE

In the presence of:-

Mr Kibiku for the Plaintiff.

Ms Sheunda h/b for Mr. Osundwa for the Defendant.

Court Assistant- Hilda



MD MWANGI
JUDGE

