



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 963 of 2007

PROCAR LIMITED..... APPELLANT

VERSUS

CHARTERED VALUERS LTD.....RESPONDENT

(An appeal from the decision of the Chief Magistrate's Court Nairobi (Milimani) –

The Hon. A.N. Ongeri, Principal Magistrate dated 6th November, 2007 in CMCC No.3874 of 2007)

J U D G M E N T

1. This appeal arises from a ruling which was made by a Principal Magistrate in regard to a preliminary objection which was raised by Chartered Valuers Limited (hereinafter referred to as the respondent) in a suit filed against it by Procar Limited (hereinafter referred to as the appellant). The suit was commenced by the appellant by way of a plaint filed in the Chief Magistrate's Court at Milimani on the 8th May, 2007.
2. The appellant claimed that on or about the month of March and April, 2007, the respondent without any lawful authority or justification instructed Ostrich Lion Limited Auctioneers, to levy distress against the appellant in Land Reference No.209/10862 (hereinafter referred to as the suit property). The distress was over an alleged outstanding rent arrears of Kshs.110,000/=. The appellant therefore sought an injunction restraining the respondent or its servants or agents from levying distress against the appellant and or selling the appellant's property and or interfering with the appellant's quiet possession of the suit property.
3. Filed simultaneously with the plaint was a chamber summons brought under Order XXXIX Rules 1, 2 and 9 of the Civil Procedure Rules. The appellant sought an interlocutory injunction, restraining the respondent or its servant or agent, from selling or advertising the appellant's goods, and or levying distress against it, or interfering with its quiet possession of the suit property, pending the hearing and determination of the appellant's suit. The appellant also sought an order of mandatory injunction directing Ostrich Lion Limited Auctioneers, to release the appellant's goods which were unlawfully attached.
4. On the same day the chamber summons was heard *ex parte*, and a temporary order of injunction was issued pending the *inter partes* hearing of the application, which was fixed for 18th May, 2007. Upon being served with the application, the respondent filed a notice of appointment of advocates, as well as a replying affidavit sworn by the respondent's advocate, in which the counsel explained that the application

was overtaken by events as the distrained goods had already been advertised for sale and sold by public auction on the 5th May, 2007. At the request of the appellant's counsel hearing of the application was adjourned to 11th June, 2007.

5. On 31st May, 2007, the appellant filed another chamber summons under Order XXXIX Rules 1, 2 and 9 of the Civil Procedure Rules seeking a similar order of interlocutory injunction as the first application. On the same day, the application was heard *ex-parte* and interim orders issued. An order was further made for the application to be served, and the two applications then pending to be heard together on 11th June, 2007. Between 11th June, 2007 and 14th September, 2007, the applications were adjourned on various occasions as parties pursued out of Court settlement.

6. In the meantime, on 7th June, 2007, the respondent filed a notice of preliminary objection indicating that it would raise an objection at the hearing of the application dated 7th May, 2007. On 26th June, 2007, a replying affidavit sworn by Paul Kaguamba (Kaguamba) a director of the respondent, was filed. Kaguamba deponed that the respondent had express authority from the landlord of the suit property to collect rent and to levy distress for rent in case of arrears, or take possession in accordance with the lease agreement. Regarding the proclamation notice dated 18th May, 2007, Kaguamba deponed that the proclaimed goods were left in the custody of the appellant. Kaguamba swore that the appellants were in arrears of rent, and had by a letter dated 30th May, 2007 admitted being in arrears to the tune of Kshs.125,000/=. Kaguamba further disputed the jurisdiction of the Court to determine the dispute, and indicated that the respondent would raise a preliminary objection in that regard.

7. On 14th September, 2007, the proclamation dated 18th May, 2007 was withdrawn. On 28th September, 2007, the appellant filed yet another chamber summons under Order XXXIX Rules 1, 2 and 9 of the Civil Procedure Rules seeking an order of interlocutory injunction pending the hearing of the suit. The application was fixed for *inter partes* hearing on 1st October, 2007, on which date the respondent filed a notice of preliminary objection, indicating that it would raise a preliminary objection to the hearing of the application dated 27th September, 2007.

8. On the 16th October, 2007 the respondent filed two affidavits one sworn by Simon Samainga Lesrima (Lesrima) who claimed to be the owner and landlord of the suit property. Lesrima swore that the appellant was in arrears of rent and explained that he personally instructed the auctioneer to levy distress for rent. The second affidavit was sworn by Paul Kaguamba where he reiterated that the respondent was wrongly sued. The hearing of the preliminary objection finally proceeded before the Principal Magistrate on 5th November, 2007.

9. Referring to the notice of objection filed on 1st October, 2007, Mr. Wayiaki who argued the preliminary objection for the respondent submitted that the respondent was wrongly enjoined in the suit and the application. He pointed out that the appellant had indicated in the annexures that the suit property belonged to Simon Lesrima, and that an affidavit was sworn by Lesrima confirming that position, and the fact that he, Lesrima, was the one who gave instructions for the levy of distress. Mr. Wayiaki therefore submitted that the suit and the application were bad for misjoinder.

10. Mr. Wayiaki argued that the application dated 27th September, 2007 was bad in law and incurably defective as the same was brought under wrong provisions and further that the application was an abuse of the Court process, as the applicant had filed several similar applications, the one of 7th May, 2007 having been abandoned, whilst the one of 31st May, 2007, was still pending and seeking similar relief as the one of 27th September, 2007. Further Mr. Wayiaki submitted that the Court had no jurisdiction to hear the matter as the lease agreement signed between the appellant and the landlord had an arbitration clause providing that any dispute be referred to a single arbitrator.

11. Mr. Omwenga who appeared for the appellant in the lower Court maintained that the alleged misjoinder was not fatal to the suit. He relied on order 1 Rule 9 of the Civil Procedure Rules. Mr.

Omwenga further contended that the respondent was properly sued and had even responded by withdrawing the offending proclamation. He pointed out that the respondent had no business withdrawing the proclamation if he was a stranger to the matter. He maintained that the respondent had no business dictating to the appellant as to whom he should sue.

12. Mr. Omwenga argued that the issue as to whether Lesrima gave him instructions to the auctioneer is a matter which was to be canvassed at the hearing of the application. He maintained that the application was properly brought under Order XXXIX Rule 2 which was still existing in the rules. Counsel further contended that the plaint filed revealed a good cause of action against the respondent. Mr. Omwenga maintained that the appellant had sued the respondent for giving instructions when it knew it was not the right party. Finally Mr. Omwenga submitted that that the preliminary objection could only be raised on a pure point of law and that since the respondent relied on matters deponed on the affidavits, his preliminary objection was not based on a pure point of law.

13. In her ruling, delivered on 6th November, 2007, the Principal Magistrate set out the grounds raised in the preliminary objection as follows:

(a) *That the case is a non party as that the defendant has been wrongly sued. The defendant not a party to the lease agreement and he is a stranger to this case.*

(b) *That the application is brought under Order XXXIX rules 1, 2 & 9 instead of Order XXXIX rule 1 & 2A(1) CPR*

(c) *That under clause 8 of the lease agreement this matter ought to have been referred to arbitration and therefore this court has no jurisdiction to entertain the suit.*

(d) *That the applicant is an abuse of the court process as the applicant had filed 2 other similar applications which are still pending.”*

14. The trial Magistrate overruled the first ground finding that the suit could not be defeated by reason of misjoinder. The trial Magistrate also rejected the submission that the application was brought under the wrong provision. The trial Magistrate found that there was a lease agreement exhibited by the parties which provided that any dispute should be referred to arbitration. She therefore upheld the objection on the issue of jurisdiction and ordered that the suit be struck off with costs to the respondent.

15. Being aggrieved by that ruling, the appellant has filed this appeal raising six grounds as follows:

(i) The learned trial Magistrate erred in law and in fact in striking out the appellant's suit.

(ii) The learned trial Magistrate erred in law and in fact in not considering the submissions of the appellant hence arriving at the wrong decision.

(iii) The learned trial Magistrate erred in law in not finding that there was no defence filed by the defendant.

(iv) The learned trial Magistrate erred in law and in fact in considering the lease agreement which was not the subject of the suit or the application.

(v) The learned trial Magistrate erred in law and in fact in entertaining an objection which did not raise any point of law as required.

(vi) The learned trial Magistrate erred in law in not dismissing the objection and to allow the appellant to proceed with his application.

16. Following a consent agreed upon by the parties, written submissions were filed and it was

agreed that the appeal be disposed of on the basis of those written submissions. For the appellant, it was submitted that the respondent's preliminary objection dated 1st October, 2009 raised only two grounds namely;

(i) That the defendant is not a party to plaintiff's application dated 27th September, 2007 and is wrongly sued.

(ii) That the application herein dated 27th September, 2007 is an abuse of the process of this Honourable Court, bad in law and incurably defective.

17. It was pointed out that in her ruling the trial Magistrate misdirected herself by introducing new grounds of objection and therefore dealing with four grounds instead of the two contained in the notice of preliminary objection. It was argued that the respondent did not raise the issue of jurisdiction in the notice which was before the Court. It was pointed out that the appellant had denied in his plaint having entered into any lease agreement with the respondent; and the Magistrate was therefore wrong in considering the lease agreement.

18. Counsel for the appellant maintained that no lease agreement was exhibited or displayed before the trial Magistrate. Thus the trial Magistrate was wrong to hold that the lease agreement had an arbitration clause which ousted the Court's jurisdiction. It was argued that even if the issue of arbitration was to arise, the Court should have stayed the proceedings and not struck out the suit. It was contended that the respondent ought to have filed an application referring the matter to arbitration instead of a notice of appointment of advocate. Counsel relied on ***Charles Njogu Lofty vs. Bedwin Enterprises Ltd Civil Appeal No. 253 of 2003***, where the Court of appeal held that the trial Court had a duty to hear a suit if a party does not apply for it to be referred to an arbitrator. Finally it was pointed out that the respondent was sued for an injunction amongst other prayers and the issue before the Court was not that of a landlord/tenant relationship.

19. For the respondent it was submitted that the trial Magistrate relied on the lease agreement which was duly executed on the 1st August, 2005 by the appellant and the landlord Lesrima. The suit in the lower Court being entirely based on the contents of the lease agreement, the appellant is estopped from disassociating himself from the terms of the lease. It was pointed out that the lease agreement was annexed by the respondent to the affidavit of Lesrima, and that in the affidavit of Paul Kaguamba due notice was given of the intention to raise a preliminary objection on the issue of jurisdiction.

20. Counsel for the respondent argued that the preliminary objection dated 1st October, 2007 included the grounds that the application dated 27th September, 2007 was an abuse of the Court process, bad in law and incurably defective, and the issue of jurisdiction could be brought in under that ground. It was noted that clause 81 to 84 of the lease agreement expressly provided for reference of any dispute to an arbitrator. It was maintained that the respondent did not need to file a defence to the appellant's suit because it did not wish to invoke the jurisdiction of the Court. ***Civil Appeal No. 43 of 1981 Agip (Kenya) Limited vs. Kibuthu*** was relied upon for that proposition.

21. I have carefully reconsidered the proceedings in the lower Court which I have deliberately extensively adverted to above. I have also considered the pleadings and the submissions which were made in the lower Court as well as the written submissions which were filed in this Court. Although there were several applications pending before the trial Magistrate the application coming for hearing on the 5th November, 2007 was the application dated 27th September 2007. It was in respect of that application that a notice of preliminary objection dated 1st October, 2007 was filed. Indeed in his argument, counsel for the respondent referred to that particular notice of objection. The objection related to the application and not the entire suit. Although the trial Magistrate properly noted that the notice of preliminary objection dated 1st October, 2007 was against the application dated 27th September, 2007, the trial Magistrate misdirected herself by proceeding to order the striking out of the suit as her mandate at that stage was the application and not the entire suit.

22. With regard to the preliminary objection, although the issue of jurisdiction was not specifically stated in the notice, ground 2 stating that the application was an abuse of the process of the Court, bad in law and incurably defective, was sufficiently broad, as to encompass the application being bad in law for want of jurisdiction. In considering the issue of jurisdiction, the trial Magistrate did not therefore go outside the grounds of the preliminary objection which were raised.

23. The question is whether that issue of jurisdiction could be raised as a preliminary objection. It is necessary at this stage to consider the commonly accepted description of a preliminary objection as set out in the case of *Mukhisa Biscuits Manufacturing Company Ltd. vs. Westend Distributors Ltd [1969] E.A. 696*:

“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.It raises a pure point of law which is argued on the assumption that all the facts 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.”

24. In this case, only the appellant had filed a plaint in which he admitted having entered into an agreement with Lesrima, but denied having entered into any contract with the respondent. Although the respondent filed replying affidavits, there was a dispute as to whether the respondent was party to the lease agreement and whether the terms of the agreement were binding on the respondent. Thus although the issue of jurisdiction was a point of law, it could not proceed as a preliminary objection on the basis that all facts pleaded by the appellant were correct as the facts were in dispute.

25. Further Section 6 (1) of the Arbitration Act (1995) states as follows:

“6(1). A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters an appearance or files any pleading or takes any other step in the proceedings, stay the proceedings and refer the parties to arbitration unless it finds –

(a) That the arbitration agreement is null and void, inoperative or incapable of being performed; or

(b) That there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.”

26. In this case, although the respondent raised the issue of jurisdiction, no application was made to the Court to stay the proceedings. Instead the respondent took steps in the proceedings by filing replying affidavits to the appellant’s application. In the case of *Agip (Kenya) Limited vs. Kibuthu [1981] KLR 20*, it was held that an order for stay of proceedings is an essential prerequisite before a matter can be referred to arbitration as set out in section 6 (1) (b) of the Arbitration Act. The application for stay must be made before any step is taken in the suit and further that application for stay of proceedings pending the enforcement of the clause should be made by way of notice of motion supported by an affidavit. It cannot be disguised as a point of law in a pleading. In this case, the respondent not having sought to stay the proceedings in the High Court, it cannot fall back on the arbitration clause as it has apparently submitted to the jurisdiction of the Court. On this ground it is evident that the trial Magistrate was wrong in striking out the appellant’s suit.

27. With regard to the application, it is evident that the application dated 27th September, 2007 was the third application filed by the appellant wherein the appellant sought similar orders. That application was clearly an abuse of the process of the Court as one of the other earlier applications was still pending. Although the application is related to different proclamations, all the proclamations related to distress for rent in respect to the same premises in regard to outstanding rent arrears which were cumulative. With regard to the filing of the application under Order XXXIX Rule 1, 2 & 9, it is clear that although rule 2A ought to have been cited, the omission was a mere irregularity and not fatal. Finally on the allegation that the respondent was wrongly sued, that was an issue which was not a pure point of law as it was an issue

based on facts. The facts before the Court being in dispute, the issue could not be properly raised as a preliminary objection. Moreover, Order 1 Rule 9 provides that a suit cannot be defeated by reason of the joinder or misjoinder of a party.

28. The upshot of the above is that I find that the application dated 27th September, 2007 was an abuse of the process of the Court. Accordingly, I allow the appeal to the extent of setting aside the order made by the lower Court, striking out the appellant's suit, and substituting thereof an order striking out the application dated 27th September, 2009. The appellant having partly succeeded in this appeal, he shall be entitled to half its costs.

Orders accordingly.

Dated and delivered this 23rd day of September, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Maina holding brief for Omwenga for the appellant

Wayiaki for the respondent

Eric, court clerk