REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Suit 215 of 2008

NYALI CONSTRUCTION

& ELECTRICAL SERVICES LIMITED...............................PLAINTIFF

VERSUS

DIVYESHKUMAR INDUBHAI PATEL…........................DEFENDANT

RULING

On 15th August 2008, the plaintiff, a limited liability company, filed suit against the defendant claiming various reliefs, including four (4) declarations, a prohibitory injunction, a mandatory injunction and damages. Simultaneously with the plaint, the plaintiff filed a Chamber Summons in which it sought *inter alia* temporary prohibitory and mandatory injunctions pending the disposal of the suit. That Chamber Summons was withdrawn and a similar one filed on 5th September 2008 seeking similar reliefs.

The application came up before me for inter partes hearing on 18th September 2008. Counsel for the defendant raised a preliminary objection, notice of which, he had given on 1st September 2008. The grounds of objection canvassed are expressed as follows:-

1) That the application and the entire suit are incompetent and unmaintainable for want of compliance with the mandatory provisions of the Landlord and Tenant (Shops, Hotels and Catering establishments) Act Cap 301.

2) That the application and the suit are incompetent and cannot lie for want of jurisdiction.

In his oral submissions in court, counsel for the defendant submitted that the plaintiff had been served with a Notice of termination of tenancy and allege that a reference was made to the Business Premises Tribunal but before the reference was determined, the plaintiffs were evicted from the demised premises. The plaintiff sought a review of the order of the tribunal without success. The defendant had the tribunal's order adopted by the Chief Magistrate's court which then ordered the eviction of the plaintiff. The plaintiff sought a review of the order of eviction issued by the Chief Magistrate's Court without success.

In those premises, counsel argued that the plaintiff is not entitled to invoke this court's original jurisdiction. Rather, the plaintiff should have appealed against the decisions of the Tribunal and the Chief Magistrate's court. Having failed to invoke this court's appellate jurisdiction, it is not open to the plaintiff to seek the reliefs sought in the plaint, so counsel submitted. In counsel's view, whatever defects that may be visited upon the decisions of the tribunal and the Chief Magistrate's Court, the decisions

remain valid until set aside on appeal to this court. Counsel therefore urged that this court has in the premises no jurisdiction to entertain the plaintiff's suit and application. Reliance was placed upon the cases of **Nairobi Housing Development Limited – v – Highridge Corner Bar Limited [1979] KLR 108** and **Lall – v – Jeypee Investments Limited [1972] EA 512** for the proposition that it is the appellate jurisdiction of the High Court which is to be invoked where a challenge is made against the tribunals decision.

The second ground of objection raised by the defendant is that the jurisdiction of this court has not been properly invoked by the plaintiff in the interlocutory application. In his oral submissions in court counsel for the defendant contended that as the plaintiff seeks both prohibitive and mandatory orders of injunction, it should have moved the court by way of a Motion on Notice rather than a Chamber Summons. For that proposition, counsel relied upon the decision of Ringera J as he then was in **Morris and Company Limited – v – Kenya Commercial Bank Limited and others: [2003] 2EA 605 CCK.** In that Ringera J. stated as follows:-

"**An application for a mandatory injunction can only be made pursuant to the provisions of Section 3A of the Civil Procedure Act. And the procedural mode in that case is a motion on notice pursuant to Order L, Rule 1 of the Civil Procedure Rules…..where the plaintiff sought both interlocutory prohibitive and mandatory injunctions it was incumbent on him to do so in a motion on notice."**

A related argument made by counsel for the defendant was that an application for a mandatory injunction cannot be made under Order XXXIX Rules 1 and 2 of the Civil Procedure Rules, as the plaintiff has done, but rather under Section 3A of the Civil Procedure Act. In counsel's view since Section 3A of the C.P.A. has not been cited, the plaintiff's application is incompetent and should be struck out.

Responding to the Preliminary Objection, counsel for the plaintiff submitted that this court has jurisdiction to entertain the plaintiff's suit as it has unlimited jurisdiction in both criminal and civil matters. The plaintiff who was a protected tenant according to counsel was evicted notwithstanding that it had lodged a valid reference to the Business Premises Tribunal. Counsel contended that the Tribunal did not make any order to evict the plaintiff but the defendant had purported to execute orders made in proceedings which had not been served upon it subsequent to which the Tribunal declined jurisdiction. In the premises, according to counsel the defendant used orders that were null and void to effect the plaintiff's eviction thereby provoking this suit and application. Reliance was placed upon several authorities for the proposition that if an order is a nullity, a party aggrieved need not appeal against the same but can invoke the High Court in its original jurisdiction as the plaintiff has done in this case. One of the cases cited is that of **Pritam – v – Ratilal and Another [1972] EA 560.** In that case Madan J. as he then was held that the High Court may investigate whether a statutory tribunal acted without jurisdiction and in **Pyx Granite Company Limited – v – Ministry of Housing and Local Government [1959] 3 All ER 1,** which was also cited to me, the House of Lords held, *inter alia*, that the jurisdiction of the court to make a declaration was not ousted without clear words having that effect. That seems to have been the position taken in **Vine – v – National Dock Labour Board [1956] 3 All ER 939.** In that case Lord Somervell of Harrow cited the principal laid down in **Cooper – v- Wilson** that "where a statutory body is alleged to have acted without jurisdiction its decision can properly be questioned in an action for a declaration that the decision is null and void."

With regard to the competence of the application counsel for the plaintiff submitted that failure to adopt the correct procedure cannot take away the court's inherent power to consider the application on merits. Indeed, according to counsel, Rule 12 of Order 6 of the Civil Procedure Rules specifically disallows the rising of such objections. That rule is in tandem with Section 72 of Cap 2 of the Laws of Kenya. Reliance was further placed upon several decisions including those of **Johnson Joshua Kinyanjui & Another – v – Rachael Wahito Thande and Others CA No. 284 of 1997 (UR), Joshua Otieno Buyu – v – Petro Ochieng Casaba CA No. 347 of 2000 (UR)** and **Boyes – v – Gathure [1969] EA 385**. The principles that emerge from those decisions seem to be that use of the wrong procedure does not invalidate proceedings and that failure to cite the correct provision of the Law under which an application is brought is not fatal to the application.

The above are the rival submissions made for each side. I have carefully considered them. I have also carefully considered the plaint, the application and the affidavits filed. Having done so, I take the following view of the matter. The plaintiff alleges that it was evicted on the basis of orders that were either null and void or none existent. It contends that on being served with a termination notice, it lodged a reference being reference Number 20 of 2008 with the Business Premises Tribunal. That reference has to date not been considered. Instead the defendant in separate proceedings in the same tribunal, which proceedings were not served upon the plaintiff, obtained orders to the effect that no reference had been lodged and possession could be obtained. The plaintiff further contends that on the basis of those unserved proceedings, the defendant sought the eviction of the plaintiff in the Chief Magistrate's Court, again ex parte, and evicted the plaintiff. The plaintiff's contention that both the Tribunal and the Chief Magistrate's court may have acted without jurisdiction may not be without foundation. In the event that the plaintiff succeeds in establishing that contention, it may obtain the declarations sought in the plaint. That position is not without authority. See for instance the case of **Pritam – v – Ratilal and Another (supra).** The ratio decidendi of the case was that the High Court may investigate whether a statutory tribunal acted without jurisdiction. It is correct as counsel for the defendant submitted that facts in that case are not on all fours with this case. Nevertheless, in my view, the principle would apply in the present case. At this stage determination of whether the plaintiff will succeed is not necessary. It is enough that the plaintiff has basis for moving the high Court to investigate its allegation that both the Business Premises Tribunal and the Chief Magistrate's Court may have acted without jurisdiction. The same principle had been stated in the House of Lords decision of **Vine – v- National Dock Labour Board (supra).** The speech of Lord Somervell of Harrow was lucid that "where a statutory body is alleged to have acted without jurisdiction, its decision can properly be questioned in an action for a declaration that the decision is null and void." The plaintiff's claim is such an action. The plaintiff seeks declarations that the ex parte proceedings, ruling and orders of the Business Premises Tribunal and the Chief Magistrate's Court are a nullity. The plaint further seeks a further declaration that its eviction was unlawful and that it should still be recognized as the defendant's tenant.

The plaintiff may or may not succeed at the trial but it cannot be shut out of the High Court on the basis that it has not invoked the High Court's appellate jurisdiction. In my view the declarations sought cannot be obtained from the High Court in its appellate jurisdiction.

In the premises, I have come to the conclusion that this court has jurisdiction to entertain the plaintiff's claim. Having come to that conclusion, I can now consider whether the plaintiff's application dated 5th September 2008 is competent. The objection is double barreled. Counsel for the defendant argued that the plaintiff should have moved the court by way of a motion on notice and not a Chamber Summons as it has done. Counsel, so argued, because the plaintiff seeks both prohibitive and mandatory injunctions and the latter are not envisaged under order XXXIX of the Civil Procedure Rules. Consequently, under Order L Rule 1 a motion on notice should have been used. That proposition is not without the support of authority. The one cited by counsel for the defendant is **Morris & Company Limited – v – Kenya Commercial Bank Limited and others (supra).** That was a decision of Ringera J. as he then was. The Learned Judge rendered himself as follows:-

"**An application for a mandatory injunction can only be made pursuant to the provisions of Section 3A of the Civil Procedure Act. And the procedural mode in that case is a motion on notice pursuant to Order L Rule 1 of the Civil Procedure Rules…..So in this application where the plaintiff sought both interlocutory prohibitory and mandatory injunctions it was incumbent on him to do so in a motion on notice for under our procedural law it is established that where a matter partly falls within the scope of a summons in chambers and partly within a motion on notice, the large procedure, namely the motion is to be invoked. Having failed to do so, the plaintiff's application is also incompetent for this additional reason…."**

I have perused the entire decision of **Ringera** J. I note that the point was not argued before the Learned Judge. He took the point *suo motu.* I am not therefore sure that the Learned Judge would have maintained his decision if he had received arguments of counsel who appeared before him. Besides, the Learned Judge notwithstanding his view, still considered the application which was before him on merits. It also appears obvious that the Court of Appeal decision in **Johnson Joshua Kinyanjui and Another –**

v- Rachael Wahito Thande and others (supra) was not brought to the attention of the Learned Judge. In that case the Court of Appeal held that in view of Order L Rules 10 and 11 of the Civil Procedure Rules, no application is to be defeated by use of wrong procedural mode and the Judge has the discretion to hear it either in court or in chambers.

With regard to the last ground of objection that the plaintiff's application is incompetent for failure to cite Section 3A of the Civil Procedure Act, the answer is given in the decision of the Court of Appeal in the case of **Joshua Otieno Buyu – v – Petro Ochieng Wasambwa C.A. No. 347 of 2000 (UR).** At page 5 of that decision, their Lordships stated as follows:

"**Even if the application was not brought under the correct provisions of the Law, that would not be fatal to the application in view of Order L Rule 12 of the Civil Procedure Rules which provides:-**

"**Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule."**

This application does not however suffer from that defect. The plaintiff has invoked the inherent powers of the court. That is exactly what Section 3A of the Civil Procedure Act codifies. In any event, it must be remembered that the court is always vested with that power and even if Section 3A of the Civil Procedure Act is not invoked, where appropriate the power will be exercised.

The upshot is that the defendant's preliminary objection is without merit and is overruled. The plaintiff shall have the costs of the preliminary objection.

Order accordingly.

DATED AND DELIVERED AT MOMBASA THIS 13TH DAY OF OCTOBER 2008.

F. AZANGALALA

JUDGE

Read in the presence of:

M/S Mogaka/Hamza for the plaintiffs and Mr. Odera for the defendant.

FURTHER ORDER:

This Ruling binds the parties in HCCC No. 218 and 219 of 2008 as agreed by counsel.

F. AZANGALALA

JUDGE

13TH OCTOBER 2008