



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 129 of 2006**

**JASPAR TECH ENTERPRISES LTD. ....  
.....PLAINTIFF**

**VERSUS**

**JOSEPH MATHII NDUNG'U .....1<sup>ST</sup>  
DEFENDANT**

**FARASI POWER LTD .....2<sup>ND</sup>  
DEFENDANT**

**TEX PALACE LIMITED .....3<sup>RD</sup>  
DEFENDANT**

**RULING**

This is an application by the 2<sup>nd</sup> defendant, who seeks to have the suit struck out. In the alternative, the applicant requests that the suit be stayed.

The application is brought pursuant to the provisions of Order 6 rule 13 (1) (b), (c) and (d) of the Civil Procedure Rules, as read together with Sections 3A and 6 of the Civil Procedure Act. It is supported by an affidavit sworn by Mr. Sandeep Retilal Shah, who is a director of the 2<sup>nd</sup> defendant.

It was the applicant's case that these proceedings ought, at least, to be stayed, as there were parallel ongoing proceedings which were before the Business Premises Rent Tribunal, Nairobi.

The applicant did exhibit a Notice of Termination of Tenancy which the plaintiff had filed at the Business Premises Rent Tribunal on 2<sup>nd</sup> December 2005. Upon receipt of the said notice, the 2<sup>nd</sup> defendant filed a reference on 21<sup>st</sup> December 2005, challenging the notice. Again, the reference was exhibited before me.

And the other document which was exhibited before me was an order which was issued by Mrs. Norah Owino, the Chairperson of the Tribunal. The order was issued on 10<sup>th</sup> March 2006, and it directed that the status quo be preserved. The order also directed that the application be heard on 24<sup>th</sup> March 2006.

However, the court was not informed whether or not the application was heard as scheduled, on 24<sup>th</sup> March 2006.

In the meantime, this suit was instituted on 21<sup>st</sup> March 2006. In other words, the suit was filed even

whilst the parties herein were supposed to have been awaiting the interpartes application before the Tribunal. Given those facts, I hold the view that the plaintiff was not justified to institute these proceedings, for two reasons;

**(i) First, it is the plaintiff who issued the Notice of Termination of Tenancy through the Tribunal. By so doing, the plaintiff was acknowledging that the Tribunal has jurisdiction to hear and determine the issues pertaining to the tenancy, including the termination thereof. By necessary implication, the plaintiff must be deemed to have admitted that the tenancies were controlled. Therefore, pursuant to the provisions of Section 4 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, (Cap. 301) the tenancies could not be terminated, nor any terms thereof altered otherwise than in accordance with the provisions of that statute.**

**In effect, the entity which was clothed with the requisite jurisdiction to handle the issues was the Tribunal.**

**(ii) There was already action taken before the Tribunal, and a hearing date had been set down for an application which was pending. In those circumstances, the decision by the plaintiff, to also institute proceedings before this court meant that there would be two sets of proceedings, between the same parties, and in relation to the same subject matter, going on simultaneously.**

**That state of affairs is most undesirable, and calls for the stay of one or the other set of proceedings.**

Therefore, as the matter before the Tribunal was filed before this case; and because the plaintiff has acknowledged the fact that the Tribunal has jurisdiction, I am satisfied that the applicant has made out a case for the stay of these proceedings.

But, the applicant, and the other two defendants are not content to have these proceedings stayed. They all wish to have the suit struck out because the plaint and the verifying affidavit were prepared and filed by an unqualified person.

When the matter came up before me on 6<sup>th</sup> April 2006, the plaintiff was represented by a Mr. William Mulwa. When the court inquired from Mr. Mulwa if he was an advocate, his answer was in the negative. He explained that he was representing the plaintiff, by virtue of fact that he was a director of the plaintiff.

The said Mr. William Mulwa also confirmed that he had drawn up the Plaint. However, it is noteworthy that in an affidavit which Mr. Mulwa swore on 21<sup>st</sup> March 2006, in support of the plaintiff's application dated 21<sup>st</sup> March 2006, he did not describe himself as a director of the plaintiff. Instead, he described himself as "**the Property Manager and Legal Representative for the Applicant.**"

Elsewhere in his said affidavit, Mr. Mulwa described himself as "the proprietor" of the suit property.

Clearly therefore, if all the various descriptions of Mr. Mulwa are accurate, he is a man who wears many hats. However, notwithstanding those descriptions of the status of Mr. William Mulwa, the defendants believe that he was an unqualified person, for purposes of drawing and filing the Plaint. He was also deemed to be unqualified to draw and file the Verifying Affidavit.

In that regard, the defendants asserted that by virtue of the provisions of Section 34 of the Advocates Act, unqualified persons could not draw up Plaints or Verifying Affidavits, both of which were "**documents or instruments relating to any other legal proceedings,**" as envisaged by Section 34 (1) (f). That section reads as follows;

**"No unqualified person shall, either directly or indirectly, take instructions or draw or prepare any documents or instruments –**

**(a) .....**

- (b) .....
- (c) .....
- (d) .....
- (e) .....
- (f) **relating to any other legal proceedings."**

To the extent that Mr. Mulwa was not an advocate, he would be deemed to be an unqualified person. Therefore, in principle, he would not be entitled to draw up the Complaint or the Verifying Affidavit. However, it must also be noted that pursuant to Section 83 of the Advocates Act;

**"Nothing in this Act or any rules made thereunder shall affect the provisions of any other written law empowering any unqualified person to conduct, defend or otherwise act in relation to any legal proceedings."**

So, I must ask myself whether or not there are any other written laws which would empower Mr. Mulwa to draw the Complaint and Verifying Affidavit.

Order 3 rule 2 of the Civil Procedure Rules does stipulate that an authorised agent of a party can make any application to or appearance or act in any court, except where otherwise provided by any law. And, in relation to corporations, an officer of the corporation duly authorised under the corporate seal, is deemed to be a recognised agent.

In this case, Mr. William Mulwa simply says that he is the plaintiff's "legal representative". He does not explain how he became the legal representative. Therefore, the court is unable to tell whether it is by virtue of his being a director, the property manager or the proprietor of the suit premises. In the circumstances, as the person who drew both the Complaint and the Verifying Affidavit has not satisfied me that he is the plaintiff's recognised agent, I hold that the said Complaint and Verifying Affidavit were drawn by an unqualified person. The said documents cannot therefore be allowed to stand. Accordingly, I hereby strike out both the Complaint and the Verifying Affidavit, with costs to the defendants.

In awarding costs to all the three defendants, I have taken into account the fact that although the application herein was brought by the 2<sup>nd</sup> defendant, the other two defendants had also lodged Notices of Preliminary Objection citing the very grounds that have led to the striking out of the suit. Therefore, all the three defendants are entitled to the costs of the suit.

It is so ordered.

Dated and Delivered at Nairobi this 21<sup>st</sup> day of June 2006.

**FRED A. OCHIENG**

**JUDGE**