REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC APPEAL NO. E040 OF 2020

IMED HEALTHCARE LIMITED..APPELLANT

=VERSUS=

KENYA REINSURANCE CORPORATION LIMITED............................RESPONDENT

(Being an appeal arising from the Ruling and Order given on 10th September 2020

by Hon E Kagoni (Mr) Principal Magistrate in Nairobi CMCCC No. E4010 of 2020)

JUDGMENT

1. Sometime in early 2019, the appellant, Imed Healthcare Limited, filed in the Business Premises Rent Tribunal (**the Tribunal**) a reference designated as **BPRT Case No 169 of 2019, (Nairobi).** The reference was an objection to a notice of termination of tenancy allegedly served on the appellant by the respondent. Consequently, the respondent raised a preliminary objection dated 20/3/2019, contending that the Tribunal did not have jurisdiction to adjudicate on the dispute because parties to the tenancy had a formal and subsisting six-year lease, dated 1/9/2014, that did not contain a clause for termination for reasons other than breach of the terms and conditions of the lease. In a ruling rendered on 28/5/2020, the Tribunal found that it did not have jurisdiction owing to the fact that the parties had executed the above lease. Consequently, the Tribunal upheld the objection and struck out the reference.

2. Subsequent to that, in August 2020, the appellant initiated civil proceedings in the Chief Magistrate Court at Milimani, to wit, **Nairobi CMCCC No E4010 of 2020; Imed Healthcare Limited v Kenya Re-insurance Corporation Limited,** seeking an interim measure of protection by way of an injunction, pending the filing of a reference at the Business Premises Rent Tribunal. For avoidance of doubt, the appellant prayed for the following two *verbatim* reliefs in the plaint:

> ***a) An interim measure of protection by way of an injunction be and is hereby issued restraining the defendant by itself, its servants, auctioneers M/s Galaxy Auctioneers, advocates, employees and/or agents from carrying away, advertising for sale, selling, disposing off or interfering in any manner whatsoever with the plaintiff's assets, goods and chatters distrained on 18th January, 2019 and/or whatsoever interfering, levying any distress, altering, selling, and/or evicting the plaintiff or terminating or purporting to terminate the plaintiff's tenancy on the basis of the purported notice dated 11th June 2020 or interfering with the plaintiff's possession and occupation of Land Reference No 209/111260, City of Nairobi, pending the filing of a reference at the Business Premises Rent Tribunal.***
>
> ***b) Costs of the suit.***

3. Together with the plaint, the appellant filed a notice of motion dated 11/8/2020, through which they sought a similar interim measure of protection, pending the hearing and determination of the suit. On 11/8/2020, Hon Mmasi (SPM) granted the appellant a temporary injunctive order in the above terms, pending the *interpartes* hearing of the application.

4. Subsequent to that, the respondent filed a notice of preliminary objection dated 25/8/2020, citing the following verbatim ground:

> ***" (1) The application herein is ab initio incompetent, fatally defective and cannot stand in law before this honourable court because the suit is res judicata thus offending the provisions of Section 7 of the Civil Procedure Act".***

5. The preliminary objection was canvassed before Hon Kagoni (PM). On 10/9/2020, Hon Kagoni rendered a ruling on the preliminary objection in which he upheld the objection and struck out the appellant's suit. The Learned Magistrate rendered himself thus:

> ***"Before a court renders its verdict on any issue, it usually directs its mind over the pleadings, evidence presented and then makes***

its decision. Thereafter, depending on how the court decides, the court, may with respect to that matter, become functus officio. In this case it is not in dispute as it has been submitted by both parties that the Tribunal held that it had no jurisdiction over the matter. The available recourse therefore to the party who had moved the Tribunal lay in moving to the right forum to seek redress. That forum cannot be again the Business Premises Rent Tribunal as the Plaintiff seeks to do in this suit for he seeks an injunction pending the filing of a reference at the Tribunal. To my understanding, once the Tribunal found that it had no jurisdiction, it became functus officio and going back to where the arbiter has spoken and told you he/she has no jurisdiction to hear you cannot be an option. Asking this court to give you reprieve as you plan to go where you have been directed not to go is re-litigating which offends the express provisions of Section 7 of the Civil Procedure Act.

6. Aggrieved by the above decision, the appellant brought this appeal through a memorandum of appeal dated 1//10/2020 citing the following 18 grounds of appeal.

1. The Learned Magistrate erred in law and fact by granting orders which had not been prayed for in the defendant's notice of preliminary objection.

2. The Learned Magistrate erred in law and fact by finding that the suit instituted vide the plaint dated 7/8/2020 seeking an interim injunction pending the filing of a reference at the Business Premises Tribunal is res judicata notwithstanding the fact that the plaintiff had placed sufficient material before him to demonstrate that it had attempted to file an application before the Business Premises Tribunal to set aside the order of 28th May 2020 striking out its reference but it could not do so because the sitting of the Tribunal had been suspended and its offices closed due to the order issued by the Employment and Labour Relations Court in ELRC Petition No 100 of 2020.

3. The Learned Magistrate erred in law and fact by holding that once the Tribunal found that it had no jurisdiction it became functus officio.

4. The Learned Magistrate erred in law and fact by finding that asking this court to give you reprieve as you plan to go where you have been directed not to go is re-litigating which offends the provisions of section 7 of the Civil Procedure Act.

5. The Learned Magistrate erred in law by failing to appreciate that striking out is a drastic remedy which must be exercised with caution and only in the clearest of circumstances.

6. The Learned Magistrate erred in law by striking out the plaintiff's suit notwithstanding the fact that the defendant had not even filed a defence to the claim.

7. The Learned Magistrate erred in law by failing to appreciate that the court should aim at sustaining rather than terminating a suit and that a suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment.

8. The Learned Magistrate erred in law and fact by considering extraneous issue that were not the subject matter of the notice of preliminary objection.

9. The Learned Magistrate erred in law and in fact in failing to exercise his discretion or at all and or exercising the discretion in the wrong manner and or failing to follow the correct principles of law on the doctrine of res judicata and or precedents cited in exercise of his discretion and hence struck out the appellant's suit.

10. The Learned Magistrate erred in law and fact by failing to appreciate that the pleadings filed therein raised issues that could only be determined by the court.

11. The Learned Magistrate erred in law and fact by striking out the appellant's suit with costs.

12. The Learned Magistrate erred in law and fact by striking out the appellant's suit on technicalities without giving the appellant a chance to be heard on merit.

13. The Learned Magistrate erred in law and facts by giving an order without evaluating the issues raised in the plaint.

14. The Learned Magistrate erred in law by failing to appreciate that striking out is a drastic remedy which must be exercised with caution and only in the clearest of circumstances.

15. The Learned Magistrate erred in law by making and/or purporting to make conclusive findings of fact and law during an interlocutory application.

16. The Learned Magistrate totally erred in law by failing to refer to, and consider the authorities relied upon by the plaintiff's counsel at the hearing.

17. The Learned Magistrate erred in law by failing to consider the submissions by the plaintiff's counsel.

18. The Learned Magistrate erred in law by failing to refer to and follow the various binding decisions of the High Court which were cited and relied upon by the plaintiff in opposition to the defendant's preliminary objection.

7. The appeal was canvassed through written submissions dated 29/12/2020 and filed through the firm of Kipngeno & Associates. Counsel for the appellant elected to condense the eighteen grounds of appeal into the following two grounds: (i) that the Learned Magistrate erred in law and in fact in failing to exercise his discretion or at all and or exercising his discretion in the wrong manner and or failing to follow the correct principles of law on the doctrine of *res judicata* and or precedents cited in exercise of his discretion; and (ii) that the Magistrate erred in law and fact by granting orders which had not been prayed for in the preliminary objection.

8. Counsel submitted that the doctrine of *res judicata* was underpinned by **Section 7** of the **Civil Procedure Act**. He added that the issue in the Tribunal was whether the respondent's notice to terminate the tenancy was valid while the issue before the Magistrate Court was the legality of the distress carried out by the respondent. He added that both the issue of legality and the issue of distress for rent were never determined by the Tribunal. Counsel argued that the Magistrate made a serious misdirection of law when he held that once the Tribunal found that it had no jurisdiction, it became *functus officio*.

9. Counsel further submitted that it was not open for the subordinate court to strike out the appellant's suit considering that no party had prayed for a striking out order. Counsel argued that the preliminary objection only related to the appellant's notice of motion dated 7/8/2020 and did not seek the striking out of the whole suit. Counsel urged the court to allow the appeal with costs, set aside the impugned decision and reinstate **Nairobi CMCCC No E 4010 of 2020**.

10. The respondent opposed the appeal through written submissions dated 21/1/2012 and filed through the firm of Mwaura & Wachira Advocates. Counsel for the respondent submitted that the single issue falling for determination in the appeal was whether the trial judge (sic) erred in law and in fact in striking out **Milimani CMCCC No E4010 of 2010**. Counsel added that the rationale behind the doctrine of *res judicata* was to ensure the finality of litigation; the efficient use of court resources; and the timely conclusion of court matters. It was further argued that through the enactment of **Section 7** of the **Civil Procedure Act**, Parliament intended to make the doctrine of *res judicata* one of general application and inclusive because it was founded on public policy.

11. Counsel for the respondent added that the Learned Magistrate properly directed himself because at the heart of the application and the suit before the Magistrate Court was the appellant's plea for interim measures of protection pending the filing of a reference in the Tribunal and it was clear from the prayers in the plaint that the appellant wanted to go back to the Tribunal and have the Tribunal address a dispute it had already declared was out of its jurisdiction.

12. Lastly, counsel for the respondent submitted that the wording of the preliminary objection covered both the application and the main suit and therefore the Learned Magistrate properly directed himself in dismissing the suit. Counsel urged the court to dismiss the appeal.

13. I have considered the record of the subordinate court; the grounds of appeal; and the parties' respective submissions. I have also considered the relevant legal frameworks and the relevant jurisprudence. The key issue in this appeal is whether the Magistrate Court had jurisdiction to entertain **Nairobi CMCCC No E4010/2020** given the pleadings before it and the preceding findings of the BPRT in **Nairobi BPRT Case No 169 of 2019.**

14. It is observed at this stage that this appeal falls for disposal when circumstances have fundamentally changed. First, the Business Premises Rent Tribunal is now constituted and operational. The necessity for interim measures of protection pending resumption of sittings by the Tribunal no longer exists. Put differently, the substantive suit from which this appeal arose has been overtaken by events. Secondly, the formal lease over which the tenancy dispute arose was to run from 1/9/2014 to 31/8/2020. The said term lapsed at the end of August last year.

15. I will make brief pronouncements on the above broad key issues within the context of the two condensed grounds of appeal on which counsel for the appellant addressed the court. Before I do so, I will make a brief outline of the legal framework and the prevailing jurisprudence on the doctrines of *res judicata* and jurisdiction.

16. *Res judicata* is a jurisdictional doctrine which is underpinned by **Section 7** of the **Civil Procedure Act** which provides thus

> ***" 7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."***

17. The Court of Appeal in **John Florence Maritime Services Limited & Ano. v Cabinet Secretary for Transport and Infrastructure & 3 Others (2015) e KLR** cited with approval the following holding in **Henderson v Henderson (1843) 67 ER 313** in relation to the tenor and import of the doctrine of *res-judicata*:

> ***"……where a given matter becomes the subject of litigation in any adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward, as part of the subject in contest, but which was not brought, only because they have from negligence, inadvertence or even accident, omitted part of their case. The plea of res judicata applies, except in special cases not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time….."***

18. The Court of Appeal summarized the rationale behind the doctrine of *res judicata* in the following words;

> ***"The rationale behind res judicata is based on the public interest that there should be an end to litigation over the same matter.***

Res judicata ensures the economic use of the court's limited resources and timely termination of cases. It promotes stability of judgments by reducing the possibility of inconsistence in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law."

19. With regard to the doctrine of jurisdiction, it cannot be gainsaid that jurisdiction is what gives courts and other adjudicatory bodies the mandate to determine disputes presented before them. Without jurisdiction, they labour in vain. The **Supreme Court of Kenya** underscored the centrality of jurisdiction in dispute resolution in the case of **Samuel Kamau Macharia v Kenya Kenya Bank Ltd [2012] eKLR** in the following words:

" A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."

20. Prior to the above pronouncement by the Supreme Court of Kenya, the Court of Appeal [Nyarangi JA] stated the following on jurisdiction in **Owners of Motor Vessel Lillian "S" v Caltex Oil (Kenya) Limited:**

"Jurisdiction is everything. Without it, a court has no power to take one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending the evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

21. My interpretation of the preliminary objection and the submissions culminating in the impugned ruling is that the Learned Magistrate was invited to determine whether he could exercise jurisdiction to grant the interim measure of protection on the basis of the pleadings before him and in the circumstances of the case.

22. The foundation of the appellant's case in the subordinate court was that the legal forum for substantive adjudication of the dispute was the Tribunal. Because of that, all that the appellant sought in the Magistrate Court was an order of interim measures of protection by way of an interim injunction restraining the respondent against interfering with their possession and occupation of the demised premises, pending the filing of a reference at the Tribunal.

23. Through the suit, the appellant invited the court to exercise the above Jurisdiction. The invitation was made soon after the Tribunal had rendered a ruling dated 28/5/2020 in which it held that disputes relating to the lease/tenancy between the appellant and the respondent were outside its jurisdiction. There was no evidential material placed before the Magistrate Court to demonstrate that the above finding by the BPRT had been set aside or varied.

24. Before a court of law exercises jurisdiction to grant an interim measure of protection, it must satisfy itself that there is a dispute to be adjudicated upon by another legally competent adjudicatory body. Secondly, it must satisfy itself that it has the requisite jurisdiction to entertain the plea for interim measure of protection. In the present appeal, the Tribunal had already laid down its tools for lack of jurisdiction. The appellant nonetheless wanted the court to exercise the limited jurisdiction of granting an interim measure of protection pending the hearing and determination of the dispute by the very Tribunal which had said it did not have jurisdiction to entertain disputes relating to the particular lease/tenancy. Without saying much, this was clearly a case of blatant abuse of the process of the Court. The Magistrate Court had no jurisdiction to entertain the suit as framed and in those circumstances.

25. Secondly, the appellant having made it clear by way of pleadings that they wanted an interim measure of protection pending the hearing and determination of the dispute by the Tribunal, which according to the appellant, was the body with jurisdiction to adjudicate on the dispute, it was clearly erroneous to invite the Magistrate Court to exercise original jurisdiction over the dispute by granting an interim measure of protection. I say so because the Magistrate Court has limited jurisdiction. The Magistrate Court does not have unlimited original jurisdiction to grant interim relief in disputes reserved for the Tribunal or other adjudicatory bodies. The only court with unlimited original jurisdiction over disputes reserved for the Business Premises Rent Tribunal is the Environment and Land Court. That unlimited original jurisdiction is granted by **Section 13** of the **Environment and Land Court Act**. Even then, that unlimited original jurisdiction is invoked only when it is demonstrated that the Tribunal is not properly constituted or quorated.

26. Lastly, once the Learned Magistrate found that he did not have jurisdiction to grant the orders that were sought in the main suit, he was obligated to lay down his tools. Laying down tools is effected through an order striking out the suit, regardless of whether there is a specific prayer in the preliminary objection for an order striking out the suit. I do not therefore find a proper basis for faulting the Learned Magistrate on account of the striking out order.

27. In the end, my finding on this appeal is that it has no merit. Secondly, the substantive suit which the appeal sought to reinstate has been overtaken by events because the Business Premises Rent Tribunal is now quoarated and operational. Consequently, the appeal is dismissed. Parties shall bear their respective costs of this appeal and the suit in the Magistrate Court.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 10TH DAY OF MARCH 2021.

B M EBOSO

JUDGE

In the Presence of: -

Mr Maina holding brief for Mr Okech for the Respondent

Court Assistant: June Nafula