Welco Services International t/a Cajetan P Ombere v Jabal & another (Civil Appeal 16 of 2022) [2024] KEELC 7267 (KLR) (17 October 2024) (Judgment)

Neutral citation: [2024] KEELC 7267 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

CIVIL APPEAL 16 OF 2022

AA OMOLLO, J

OCTOBER 17, 2024

BETWEEN

WELCO SERVICES INTERNATIONAL T/A CAJETAN P OMBERE ..... APPELLANT

AND

DR RAJPAL SINGH JABAL ..... 1ST RESPONDENT

REGENT MANAGEMENT LIMITED ..... 2ND RESPONDENT

(Being an appeal from the order and ruling of the learned honorable Peter Gesora, Chief Magistrate dated 28th July 2017 in Nairobi Milimani Com Court CMCC No. 3924 of 2012 between Welco Services International Versus Dr Rajpal Sing Jabal and Regent Management Ltd)

JUDGMENT

Background of Appeal

1. Through an application dated 8th March 2017, the plaintiff, now appellant, sought the following orders from the trial court:

    i. Spent.

    ii. Spent.

    iii. That pending the hearing and determination of this suit the Honourable Court be pleased to issue an order of temporary injunction restraining the defendants from proclaiming, distressing, attaching, carting away, from locking the plaintiff offices and or interfering with the plaintiff tenancy at Uganda House 2nd Floor, Kenyatta Avenue.

    iv. That the Honourable Court do issue an order to the defendants to state why they should not be compelled to issue rent receipt to the plaintiff.

v. That this Honourable Court do issue an order directed to the defendants to state why the plaintiff should vacate from the suite premises.

vi. That the costs of this application be borne by the defendants.

2. The application was supported by the affidavit of Cajetan Phidelis Mbere and on the following grounds inter alia:

a. That on 4/3/2016 this Honourable Court directed that the plaintiff pays his monthly rent of Kshs. 10,000/= to the 2nd defendant and the 1st defendant to pay his portion of the rent to the 2nd defendant and therefore the 1st defendant cannot purport to distress the plaintiff for rent already paid to the 2nd defendant.

b. That the plaintiff has been religiously paying rent to the 2nd defendant as ordered until on the 26/08/2016 when the city court ordered that all tenants, the plaintiff included, not to pay rent and instead arrange to vacate from the suit premises citing that the suite premises is unsuitable for occupation.

c. That the 1st defendant has failed and or refused to pay his rent and has since shifted his obligation to the plaintiff and unlawfully instigated the proclamation against the plaintiff for rent already paid. The 1st defendant is not authorized by the landlord to either demand or receive rent leave alone instigating for distress as in in currently.

d. That the plaintiff has in a number of occasion shown intent to vacate but the defendants by use of security guards have completely refused and or declined to allow him do so.

e. That the order of court dated 28/8/2016 required that all tenants vacate from the suit premises citing health grounds and all tenants do not pay rent to either the landlord and or his caretaker/ agents.

f. That the defendant's distress order dated 1/3/2017 through M/S Tigwoods Auctioneers for Kshs. 110,000/= is not only mischievous, misplaced but also extortious one that must be stopped by this Honourable Court.

g. That the plaintiff having been a joint tenant on the premises and duly paying his rent to the 2nd defendant it would be just and fair to injunct the distress for rent and or any other interference with the plaintiff's business.

3. The 1st Defendant/Respondent filed their Replying Affidavit dated 17th March 2017 stating that the application was bad in law and misconceived in as far as it seeks orders against Regent Management Ltd, the agent of a known and disclosed principal, as it appears in the applicant's exhibit 'CPO 6'. He stated that the application is a gross abuse of the due court process in as far as it seeks orders against Regent Management, an entity not yet made a party to the instant proceedings given the plaintiff's application in that regard dated 8th April 2016 is yet to be heard and determined. He also stated that the applicant is and has at all material times been a sub-tenant to the 1st Defendant/Respondent which fact, the applicant had prior to the institution of the suit always acknowledged.

4. He said that pursuant to the order dated 4/3/2016, the applicant was obligated to pay the landlord Kshs. 70,000/= within 10 days of 4/3/2016 and procure the release of Kshs. 250,000/= he had deposited in the High Court to the Landlord. That subsequent to the payment of the aforesaid Kshs. 70,000/= he was to be depositing Kshs. 10,000/= to the landlord's account by the 10th of every month. That the applicant failed to make the said remittances in contravention of the judgment of the High Court.

5. The copy of statement of account dated 15/3/2017 issued by the 2nd Respondent who were the managers of the demised properties showed that as at 15th March 2017 an amount of Kshs. 257,882.51/ = was outstanding in arrears. They stated that for the period between 21/7/2013 to 1/3/2017, rent had been paid as is apparent from the said statement.

6. They informed the court that vide a letter dated 23/2/2017 the landlord demanded from them (1st Respondent) rent arrears in the sum of Kshs. 292,820/= which necessitated them seeking to levy distress for rent as against the applicant. They claimed that the orders of the court dated 4/3/2016 having neither been reviewed nor vacated and the applicant having been in occupation of the suit premises ought to have paid rent in compliance with the said order. They claimed that the applicant has approached the court seeking equitable remedies with dirty hands having not paid rent from April 2016 to March 2017.

7. The trial court in dismissing the application found that no prima facie case had been made out in the circumstances. He also held that joining the 2nd Respondent in these proceedings was un-procedural as leave was not sought and the pleadings had closed. It directed that the applicant and defendant were obligated to honour their obligation by paying rent as directed by the court. It found the application lacked merit and proceeded to dismiss it with costs to the Respondents.

The Appeal

8. The Appellant being dissatisfied with the decision of the trial court raised the following grounds of appeal:

    a. The Magistrate erred and misdirected himself in law in failing to consider all the evidence of copies of cheques, bank deposit slips and certified bank statement submitted in court by the plaintiff and thus erroneously and blatantly ruling that the appellant had not paid rent save Kshs. 50,000/=.

    b. The learned magistrate erred and misdirected himself in law and in his findings when he dismissed the application dated and filed on 8th March 2017 without fully and carefully basing his judgment on the evidence place before him contrary to the rule of law, practice and the *Evidence Act*.

    c. The learned magistrate erred and misdirected himself in law and in fact in failing to stop an intended illegal and or unlawful but rather plainly fraudulent distress order against the appellant alleging that the plaintiff applicant did not prove payments of rent contrary to the plaintiff's averment and evidence both in his supporting affidavit and supplementary affidavit to the Notice of Motion dated 8th March 2017 which included monthly deposit slips of Kshs. 10,000/=, copies of cheques, bank transfer slip of Kshs. 80,000/= dated 9th March 2016 and certified copy of the bank statements all presented as evidence in compliance to the orders of the court dated 4th March 2016 in total violation of the law and the rules of natural justice.

    d. The learned magistrate erred and misdirected himself in law in failing to consider in his findings the appellant's explicit written submission on record filed on 2nd May 2017 in total breach of Law of Evidence read together with Section 3A of the *Civil Procedure Act*.

    e. The learned magistrate erred and misdirected himself in law in lending a hand to the respondents to continue committing the illegality of receiving rent and not issuing receipts for it hence paving way for double taxation in total violation of the Rules of Natural Justice.

9. The Appellant prayed that pending the hearing and determination of this appeal

a. there be stay of proceedings at the lower court in Civil Suit No. 3924 of 2012 and that his appeal be allowed.

b. that the ruling delivered on 28th July 2017 and its findings be set aside and the orders sought in the Notice of Motion dated 8th March 2017 in Civil suit no. 3924 of 2012 be granted.

c. The cost of this appeal and the costs of the Notice of Motion dated 8th March 2017 in the subordinate court Civil Suit no. 3924 of 2012 be granted to them.

Appellant's submissions

10. The Appellant filed their submissions dated 24th November 2023 and submits inter alia that they were in a joint tenancy with the 1st respondent paying rent to the 2nd respondent. He avers to paying his portion of the rent to the 2nd Respondent to the tune of Kshs. 190,000/=. That the evidence of such payments was placed before the trial court. The appellant submitted that the trial court found that he had only paid Kshs. 50,000/= which outrightly contradicted the evidence adduced in form of bank transfers, cheque deposits and bank statements.

11. He stated that the court order made on 4/3/2016 directing them to deposit Kshs. 70,000/= to the 2nd Respondent's bank account within 10 days was complied with on 9/3/2016 by the payment for Kshs. 80,000/= through RTGS. He contended that the learned magistrate did not cite that fact in the ruling dated 28/7/2017. He continued that it was wrong and erroneous for the court to have found there was no proof for the payment of Kshs. 70,000/= yet there was an RTGS for Kshs. 80,000/= presented in court during the hearing and there exist no contention over the deposit payment.

12. Further, the appellant affirmed there was a monthly remittance of Kshs. 10,000/= by five cheques and another cheque of Kshs. 50,000/= which all cleared into the 2nd Respondent's account. It is their further submission that if the 1st Respondent did not pay his portion of the rent to the 2nd Respondent, then the inaction should not be visited upon him as each office occupant had an obligation and duty to pay her rent for the respective office space occupied. He concluded that it is evident they were remitting their portion of the rent to the 2nd Respondent as ordered. It was therefore, erroneous for the court to find and rule in the contrary when dismissing the application dated 8th March 2017 on account of non-payment of the rent.

2nd Respondent's submissions

13. The 2nd Respondent filed their submissions dated 30th January 2024 and outlined three issues for determination. On grounds 1, 2, and 3 of the memo of appeal, they submit that the subject matter of the appeal was conclusively canvassed by the trial magistrate who found that the full amount payable at the time of the application had not been paid and rightfully dismissed the application. They said the appellant has failed miserably to prove that he paid the required amount since he did not adduce any proof of the full payment before the lower court to enable it to conclude otherwise.

14. The 2nd Respondent averred that their role was merely to receive rental payments in full from the appellant pursuant to an order issued by the court, which the appellant failed to remit in full. Additionally, it was of no concern to the 2nd Respondent that the property of the appellant was distressed by the 1st Respondent as there was no persisting relationship between the appellant and them.

15. On Ground 3, they submit that the doctrine of privity of contract hypothesizes that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly,

a contract cannot be enforced either by or against a third party. They stated that they were not privy to the contract entered into by the Appellant and the 1st Respondent. They stated that the trial court noted the improper inclusion of the 2nd Respondent as a party to the suit. The Appellant cannot claim any liability allocation when the party should not have been involved in the proceedings from the outset.

16. The 2nd Respondent asserted that they were unaware at the time whether the alleged distress had occurred, and was not made aware of any consent agreement. It was therefore a surprise to be held accountable for a deal it was not involved in, which went awry. They contended that this matter has been litigated upon severally and to entertain the appeal herein would be too wasteful of courts resources.

17. On Ground 5, the 2nd Respondent asserted that it issued receipts for the rent payments made to it and emphasizes that the appellant was responsible for paying rent due to the landlord. They argued that the appeal has been bypassed by time as the lease agreement between itself and the 1st Respondent already lapsed on 1st March 2017. It was their submission that the court order had directed that all monies be paid directly to the landlord and there was no obligation on it to issue receipts of payment where no payment had been made. They called upon this court to find that the appeal lacks merit and dismiss it with costs and free the 2nd Respondent who was wrongfully enjoined in the suit and appeal from suffering unnecessary costs.

Analysis and Determination

18. During the prosecution of this appeal, there was information that the 1st Respondent passed on. The Appellant being unable to substitute the deceased 1st Respondent opted to withdraw the suit as against the said deceased party. The appeal thus proceeds as against the 2nd Respondent. In the amended plaint dated 8th April 2016, the 2nd Respondent was already added as party to the suit hence by the time the application of 8th March 2017 was being prosecuted, they were part of the case although the trial magistrate found their joinder was irregularly done. Having perused the record of appeal and the submissions rendered, I frame the following issues for determination of this appeal:

    a. Whether the appellant complied with the court order dated 4th March 2016;

    b. Whether the 2nd Respondent was properly joined to the suit;

    c. Whether the appellant established a prima facie case;

    d. Who should pay costs of this appeal?

19. From the 1st Respondent's replying affidavit dated 17th March 2017, it detailed that the order of 4th March 2016 directed that the appellant pay the landlord Kshs. 70,000/= within 10 days. That they were to procure the release of Kshs. 250,000/= deposited in the High Court to the Landlord and subsequently pay Kshs. 10,000/= to the landlord by 10th of every month. The Appellant has outlined that they paid Kshs. 80,000/= to the 2nd Respondent on 9/3/2016 via RTGS and annexed a copy of the transaction receipt issued by Cooperative Bank Ltd. On 15/4/2016, he deposited Kshs. 10,000/=; on 10/5/2016, deposited cheque for Kshs. 10,000/=; on 7/6/2016, deposited Kshs. 10,000/=; on 8/7/2016, deposited Kshs. 10,000/=; on 10/8/2016, deposited Kshs. 10,000/=; on 8/3/2017, paid Kshs. 50,000/=; and on 11/4/2017, paid Kshs. 10,000/=.

20. These documents/evidences of the above payments were annexed to supporting affidavit. The learned trial magistrate stated in his ruling thus, "on 7.3.2017, the Plaintiff had deposited a cheque of Kshs 50000 in account no 010006447XXXX in the name of the 2nd Respondent. If we calsulate the amount

that ought to have been deposited in the account from 4.3.2016 until the application was filed would be in excess of Kshs 100000 and not Kshs 50000 clearly the applicant has not complied with the order. There is also no proof that he paid Kshs 70000 and the amount deposited in the High Court has not been released to the 2nd Respondent. To me no prima facie case has been made out in the circumstances."

21. The 2nd Respondent has argued that there was no privity of contract between it and the 2nd Respondent hence the Appellant cannot and should not have joined them in the proceedings. The Appellant was paying rent into the account of the 2nd Respondent pursuant to a court order issued on 4.3.2016 therefore whether there was privity of contract was neither here nor there when the learned magistrate was handling the impugned application. The learned magistrate found the Appellant had no prima facie case because he had not complied with the previous directions/order of the court. The question is whether this was a correct finding made while dismissing the application of 8.3.2017 in light of the deposit of Kshs 80000 made on 9.3.2017 to the 2nd Respondent's account.

22. The learned magistrate held that the joining of the 2nd Respondent to the suit was un-procedural as leave of court was not sought. Order 1 rule 10(2) of the said Rules provides that:

> " The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added."

23. The typed proceedings of the trial court were not part of the record of appeal so there is no way of telling if an application to join the 2nd Respondent to the suit was made orally. In their plaint dated 13th July 2012, it is the 1st Respondent listed as the only defendant. There is no evidence from the record of appeal filed that the 1st Respondent had filed a defence which would then require the Appellant to seek leave to amend the plaint with the last amendment dated 8th April 2016 joining the 2nd Respondent to the suit.

24. Order 8 Rule 3(1) of the Civil Procedure Rules reads: Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.

25. Thus, if the pleadings before the trial court had not closed, the Appellant did not require leave of the court to amend the plaint and a party can be added by way of amendment. Further, Order 1 Rule 9 provides that no suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. Though the 2nd Respondent was not procedurally joined to the suit, their presence was necessary to shed light on some of the issues before the trial court. I hold that if there any mis-step in the joinder of the 2nd Respondent, the same was curably by Article 159 of *the Constitution* as it did not go to the root of the matter.

26. On issue no. 3, was the application of 8.3.2017 merited? The guiding principles for granting of orders of temporary injunction has been reiterated in numerous decisions from Kenyan courts and more

particularly in the case of Nguruman Limited versus Jan Bonde Nielsen & 2 others *CA No.77 of 2012* (2014) eKLR where the Court of Appeal held that;

> "in an interlocutory injunction application, the Applicant has to satisfy the triple requirements to a). establishes his case only at a prima facie level, b). demonstrates irreparable injury if a temporary injunction is not granted and c). allay any doubts as to (b) by showing that the balance of convenience is in his favour.

27. It is not a requirement that a party must prove all the three headings rather, proof of any of them will be sufficient to allow for the grant of orders of temporary injunction. In a bid to establish a prima facie case for the granting of the orders they sought the appellant stated that they paid rent as per the court order of 4/3/2016 until the subsequent city court order of 26/8/2016 which directed them not to pay rent and instead vacate the premises as it was unsuitable for occupation. That they secured office space elsewhere (Gilffian House) and tried to vacate but they were barred by the 1st Respondent. Subsequently, on 10/3/2017, the 1st Respondent sent auctioneers to distress for Kshs. 110,000/= alleged rent arrears.

28. The 1st Respondent alleged that as per the court order of 4/3/2016, the appellant only deposited Kshs. 80,000/= in rent to the landlord. He said that the account purported to be with CFC Stanbic Bank in name of the 2nd Respondent where some cheques were purportedly deposited by the Appellant were strange to him. There was evidence of the distress for rent annexed to the impugned application. The Appellant annexed copies of payment slips in favour of the Respondent. It is my considered opinion and I so hold that the Appellant having presented such evidence laid a prima facie that would warrant stopping the distress for rent and the veracity of the payments presented could only be challenged during the trial of the case.

29. The Court of Appeal in Mrao Ltd Versus First American Bank of Kenya Ltd (2003) EKLR gave a determination on a prima facie case. The court stated that:

> "... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

30. The appellant was also required to show the irreparable damage they would suffer if the order of temporary injunction was not issued. The Appellant has stated that if the orders were not issued, his business stood to suffer permanent damage. The case of Pius Kipchirchir Kogo Vs Frank Kimeli Tenai (2018) eKLR discussing irreparable loss it stated;

> "Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.

31. The Court of Appeal in Nguruman Limited Vs Bonde Nielsen & 2 Others (2014) eKLR held that: -

> "On the second factor, the applicant must establish that he might otherwise suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate prima facie, the

nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the Applicant."

32. The Appellant stated that he was conducting business in the suit premises. He stated that he secured alternative office to move to and when he tried to vacate, the 1st Respondent together security gaurds stopped him from vacating the suit premises. Yet still, they (Respondents) were keen on levying distress for rent. Going by the hostility between the parties, the relationship had soured and keeping the Appellant in the impugned premises was definitely not good for his business. No wonder one of the prayers sought in the application of 8th March 2017 was to allow him vacate the premises. There is evidence of loss resulting from attachment of goods as well as loss of a suitable business environment.

33. The last limb was proof that the balance of convenience tilted in favour of the Appellant. In the case of Paul Gitonga Wanjau Vs Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR, the court dealing with the issue of balance of convenience expressed itself thus:-

> " Where any doubt exists as to the Applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right..."

34. The Appellant has demonstrated the effort they made towards the payment of the rent every month. Though the same is not reflected in the statement of accounts of the 2nd Respondent, the payments were made into the bank accounts that was supplied by the 1st and 2nd Respondents and the evidence of the bank slips and cheques were shown to court. The 2nd Respondent has not denied that the bank accounts belong to them. Hence the balance of convenience tilted in favour of the appellant.

35. Can any order issue against the 2nd Respondent? The 2nd Respondent was a party to the impugned application and it is described as the Landlord by the order of 4.3.2016. Despite the death of the 1st Respondent, if the Appellant is still in the suit premises, then the 2nd Respondent is in control of who enters and leaves those premises. Although it informed the court that the lease agreement existing between the 1st and 2nd Respondent has already expired, their counsel did not concede to this appeal.

36. In light of the foregoing, I hold that the learned trial magistrate mis-apprehended the facts contained in the affidavit in support of the motion dated 8.3.2017 and reached a wrong finding that the said application was without merit. I proceed to hold that the learned magistrate erred in law and in fact by dismissing the Appellant's application. Consequently, I find merit in this appeal and allow it. Following this, I make the following orders:

    a. that the ruling delivered on 28th July 2017 by Hon. P.N Gesora esq. CM and his findings be and is hereby set aside.

    b. The orders sought in the Notice of Motion dated 8th March 2017 in Civil suit no. 3924 of 2012 is granted in terms of prayers 3, 4 and 5 of the said application with costs.

    c. Each party to meet the cost of this appeal.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF OCTOBER, 2024.

A. OMOLLO

JUDGE