



REPUBLIC OF KENYA



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**Watu Credit Limited v Dickson Omondi t/a Dimonde Agencies & Auctioneers & another
(Environment and Land Appeal 29 of 2022) [2023] KEELC 15983 (KLR) (9 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 15983 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL 29 OF 2022**

**EC CHERONO, J
MARCH 9, 2023**

BETWEEN

WATU CREDIT LIMITED APPLICANT

AND

**DICKSON OMONDI T/A DIMONDE AGENCIES & AUCTIONEERS 1ST
RESPONDENT**

BENSON NDIRANGU NGANGA 2ND RESPONDENT

RULING

1. The Applicant/Appellant, Watu Credit Limited vide a Notice of Motion application brought under Certificate of Urgency dated 10th November, 2022 is seeking the following orders;
 - i. (spent)
 - ii. That an Order of temporary injunction do issue restraining the Respondents whether by themselves, their agents, servants, employees or through anybody else whomever acting on their behalf, from advertising for sale, auctioning, selling and dealing with the Appellant's proclaimed goods pending the hearing and determination of this Application.
 - iii. That an order of temporary injunction do issue restraining the Respondents whether by themselves, their agents, servants, employees or through anybody else whoever acting on their behalf, from advertising for sale, auctioning, selling and dealing with the Appellant's proclaimed goods pending the hearing and determination of this Appeal.
 - iv. That an order do issue compelling the Respondents to return the Applicant's proclaimed goods as per the proclamation notice dated 4th November, 2021 in good manner and condition as they were prior to seizure.
 - v. That costs of this application be provided for



2. The application is premised on 10 grounds apparent on the face of the said application and the supporting Affidavit of Rose Osiemo sworn on even date. The application is further supported by numerous annexures to the supporting Affidavit.
3. By way of a response, the Respondent filed a Notice of Preliminary Objection and a Replying Affidavit both dated and sworn on 1st December, 2022. When the application came up for hearing on 6th December 2022, the parties agreed to dispose of the same by written submissions.

Appellant/applicant's Summary Of Facts & Submissions

4. The Applicant deposed that on 2nd December 2020, they entered into a tenancy Agreement for lease of office space at the Ground Floor of Benna Plaza located in Busia town. She further stated that clause 2.(b) of the Lease Agreement required the 2nd Respondent to invoice the Applicant for the rent on a quarterly basis. She stated that sometime in January 2021, She received a Notice from the Kenya Revenue Authority which indicated that the 2nd Respondent had tax arrears amounting to Kshs 8,026,956/= and that the Applicant/tenant should pay the KRA any moneys owed to the 2nd Respondent/Landlord. She said that they promptly informed the 2nd Respondent of the Tax Notice and advised Him to settle the Tax issues with KRA
5. The Applicant also stated that after being notified of the Tax Notice, the 2nd Respondent failed to invoice them for the rents as required by clause 2. (b) of the Lease Agreement.
6. She stated that despite the Tax Notice, the 2nd Respondent instructed the Firm of Obwoye Onsongo & Company Advocates to demand that they(Applicant) pay Kshs 400,000/= in rent and Kshs 5000/ in debt collection fees via a demand letter dated 2nd July, 2021
7. She stated that they instructed the Firm of Nyamogo & Co. Advocates (CNK Advocates) to respond to the demand letter by the Counsel for the 2nd Respondent dated 1st July, 2021 informing him of the Tax Notice
8. The Applicant deposed that before the ink dried up, the 2nd Respondent vide a letter dated 19th May 2021, instructed another firm of Advocates namely Chege Kibathi & Company Advocates to demand from the Applicant payment in rent arrears of Kshs 320,000/= and a further Kshs 64,000/=debt collection fees.
9. In yet another letter through the Firm of Omeri & Associates Advocates dated 26th August 2022, the 2nd Respondent wrote to the Applicant demanding the payment of Kshs 1,440,000/= rent arrears, Kshs 50,000/ debt collection fees and Kshs 5,500/= process server's fees. She stated that in line with the Tax Notice, they subsequently withheld rent owed to the 2nd Respondent and remitted the same to KRA in accordance with the Tax Notice.
10. The Applicant also stated that on 31st October 2022, the trial Court issued substantive and final orders in an ex parte application that was not commenced under a suit and without hearing the Applicant
11. She said that despite the suit premises being in Busia and the matter squarely falling within the Jurisdiction of the Business Premises and Rent Tribunal, the trial Court arrogated both the subject matter and territorial Jurisdiction and issued the impugned orders of 31st October, 2022
12. On the November 4, 2022, the 2nd Respondent through the 1st Respondent broke into the Appellant's premises and seized the Appellant's office furniture, equipment, stationery, laptops, computers with the intent of selling the same to recover the rent due from the Applicant to the 2nd Respondent.



13. On November 7, 2022, the Applicant filed an application for setting aside the said Orders and at the hearing date, the Counsel for the Applicant urged the trial Court to set aside the orders on grounds of want of jurisdiction and the fact that the Applicant was not heard prior to the issuance of the orders.
14. The Applicant deposed that the trial Court pronounced itself as being functus officio and advised the Applicant to appeal if aggrieved by the decision
15. The Applicant filed submissions on three issues as follows;
 - i. Whether the trial Court had Jurisdiction to entertain the matter in the first instance and give the order dated 31st October 2022
 - ii. Whether the Applicant was right to pay the rent to the KRA as opposed to paying the 2nd Respondent in compliance to the Tax Notice
 - iii. Whether this Honourable Court has Jurisdiction to handle this appeal from the trial court
16. On whether the trial court has jurisdiction to entertain the matter in the first instance and give the orders dated 31st October 2022, the Applicant submitted in the negative. First, the Applicant argued that the subject matter of the suit was a dispute arising out of a lease Agreement for premises situated in Busia but the suit was instituted in the Magistrates Court at Bungoma.
17. She further submitted that the suit ought to have been instituted in the Business and Premises Rent Tribunal as opposed to the Magistrates Court since the Lease Agreement;
 - i. Had a term of 5years; and
 - ii. Had a provision for early termination after a terminating party to the Lease Agreement served a 90-day written notice to the other party that was not hinged on a breach of the lease Agreement.
18. The Applicant further submitted that the Business Premises and Rent Tribunal is established under Section 11 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* which have Jurisdiction over rent Disputes for controlled tenancies not exceeding 5 years and which contain a provision for early termination other than for breach of covenant within 5 years from the commencement of the tenancy as is the case here. She cited the following decided cases in support of the application;
 1. *CJ Haroon & Sonja Karen T/A Manfridays Mida Cove v Principle Magistrate’s Court At Malindi & Another* (2013) eKLR
 2. *Beatrice Nduta Kiarie v John Mwangi Thuo* (2013) eKLR
 3. *Mary Njambi Karuga T/A Prime RoseSalon & Kinyozi v Samuel Mwai Nyaga Muchiri & Another* (2016) eKLR

Respondent’s Summary of Facts & Submissions

19. The 2nd Respondent in his Replying Affidavit deposed that this application is misconceived and clearly an abuse of the court process for reasons that the Applicant has filed a similar Application (Misc. Civil application No. E334 of 2022) in the trial Court which is pending inter parte hearing. He stated that the trial court issued orders of temporary injunction against the applicant herein pending the determination of the said application which is to be heard on 2/2/2022. The Respondent further deposed that the issues being raised in the present application are premature as they are to be deliberated before the lower court and Business and rent Tribunal before coming to this court.



20. In conclusion, the 2nd Respondent stated that this Honourable Court lacks Jurisdiction to entertain this matter at this juncture and that the suit in the lower Court was simply for orders for security during distress for rent which distress was duly executed.
21. In his submissions, the 2nd Respondent averred that his Notice of Preliminary Objection is based on the point of subjudice and therefore the court lacks Jurisdiction to entertain the application and Appeal. He referred the following Citation and cases;
 1. *Ann v R M K* (2021) KLR
 2. *Mukisa Biscuit Manufacturing Co. Ltd v West-end Distributors Ltd*
 3. *Owners of Mv "lillian S v Caltex Oil Kenya Ltd*
 4. Section 6 CPR
 5. Section 3 of the [Distress for Rent Act](#) Cap. 293

Analysis And Decision

22. I have considered the Notice of Motion application dated 1st December 2022, the supporting Affidavit and the annexures thereto as well as the Replying Affidavit and the Notice of Preliminary Objection. I have also considered the submission by both the Applicant and the Respondent and the applicable law.
23. In response to the said application, the Respondent filed a Replying Affidavit as well as a Preliminary objection both dated 1st December, 2022. The Notice of Preliminary Objection is based on two grounds namely lack of Jurisdiction and the doctrine of subjudice. On the issue of subjudice, Section 6 of the [Civil Procedure Act](#), Cap 21 Laws of Kenya provides as follows-

No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having Jurisdiction in Kenya to grant the relief claimed.”
24. In order to sustain an objection of a suit or proceeding on grounds of subjudice, the person wishing the court to uphold on that objection must establish the following elements;
 - a. There is a previous suit or proceedings between the same parties or between parties under whom they or any of them claim, litigating under the same Title
 - b. The previous suit or proceeding is pending in the same or any other court
 - c. The previous suit or proceeding is before a court having Jurisdiction to grant the relief claimed.
 - d. The subject matter before the previous suit or proceeding is directly and substantially in issue in the subsequent suit or proceeding
25. In paragraph 3 of the Replying Affidavit, the Respondent deposed that the Applicant has filed a similar Application being Misc. Civil Application No. E334 of 2022) in the Trial Court which is pending hearing. Copies of the previous suit or proceeding is not annexed and or attached.
26. My understanding of a suit is a claim commenced by way of a Petition, Plaint, Originating Summons or Notice of Motion. There is no claim or dispute commenced by way of Misc. Civil Application that can determine rights and obligations between parties. Since the Respondent has not annexed copies



of proceedings in Misc. Civil Application No. E334 of 2022 to determine whether it can pass for a competent suit. My view is that there is no evidence adduced by the Respondent of the existence of a previous suit between the same parties over the same subject matter before a court of competent jurisdiction.

27. On the second issue that this Honourable Court lack Jurisdiction, the Respondent averred that the application before the lower court was for provision of security and breaking in when necessary.
28. A cursory look at the impugned order issued by the trial Court on 31st October 2022 and the draft Memorandum of Appeal annexed to the supporting Affidavit and marked RO8 & RO11, it is clear that the impugned orders which are the subject of this application were issued in a Misc. Civil Application NO. E334 of 2022(Cm-Bungoma) and not a conventional suit.
29. It is clear from the supporting Affidavit that the relationship between the Applicant and the 2nd Respondent is Landlord and tenant. The numerous demand letters issued by the Respondent's advocates to the Applicant was for arrears of rent. The Business Premise and Rent Tribunal is established under Section 11 of the Landlord and Tenant (Shops Hotels and Catering Establishments) Act which have Jurisdiction over rent disputes for controlled tenancies not exceeding 5 years and which contain a provision for early termination other than for breach of covenant within 5 years from the commencement of the tenancy.
30. These in my view are serious triable issues which have been raised by the applicant in his draft Memorandum of Appeal annexed to the supporting Affidavit.
31. One of the Orders which the Applicant is seeking in this application is a mandatory order compelling the Respondent to return the Applicants proclaimed goods as per the proclamation Notice dated 4th November 2021. If the said order is granted, it will render the Appeal superfluous.
32. For the aforesaid reasons, I find the Notice of Motion Application dated 10th November 2022 partially succeed and the same is allowed in the following terms;
 1. That an order of temporary injunction be and is hereby issued restraining the Respondents by themselves, their agents, servants, employees or through anybody else whoever acting on their behalf, from advertising for sale, auctioning, selling and dealing with the Appellant's proclaimed goods pending the hearing and determination of this Appeal
 2. Costs of this application to abide the Appeal.

READ, DELIVERED AND SIGNED VIRTUALLY/IN THE OPEN COURT AT BUNGOMA THIS 9TH MARCH, 2023

HON. E.C CHERONO

ELC JUDGE

In the presence of;

1. A. Onyango for Applicant/Appellant
2. Mr. Onyango H/B for Omeri for Respondent
3. Joy C/A

