Permanent Fold Ltd v Zhong Wu E-Commerce Kenya Co Ltd (Environment and Land Appeal E063 of 2023) [2023] KEELC 21378 (KLR) (9 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21378 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND APPEAL E063 OF 2023

JA MOGENI, J

NOVEMBER 9, 2023

BETWEEN

PERMANENT FOLD LTD ..... APPELLANT

AND

ZHONG WU E-COMMERCE KENYA CO LTD ..... RESPONDENT

RULING

1. This Court is called upon to determine a Notice of Motion Application dated 13/07/2023 by the Appellant is brought under the provisions of Order 42 Rule 6 of the *Civil Procedure Rules*. The Appellant/Applicant is seeking for the following Orders:

    1. Spent.

    2. That this Honourable Tribunal Court be pleased to issue an Order of stay of the Order of Business Premises Rent Tribunal Tribunal Case No. E1066 OF 2022 *Permanent Fold Limited v Zhong Wu E-Commerce Kenya Co.* pending the Hearing and determination of the appeal.

    3. That this Honourable Tribunal Court be pleased to issue an order of injunction to restrain the respondents through principal auctioneers from attaching advertising, selling and in any way interfering with the appellant quite enjoyment of suit premises pending the hearing and determination of the appeal.

    4. That this Honourable Court be pleased to Issue an Order also directed at the respondent to unlock / and/or open the doors to the appellant business and re-connect the electricity in the Appellant premises pending the hearing and determination of the Appeal.

5. That the costs of this application be in the cause.

2. The grounds are on the face of the present application and are listed as in paragraph 1-10. I do not need to reproduce them here.

3. The application dated 13/07/2023 is supported by the affidavit of Tang Xiaokun, the director of the Appellant Company herein sworn on 13/07/2023.

4. The application is opposed. The Respondent filed a preliminary objection dated 31/07/2023 together with a Replying Affidavit sworn by FEI Zeng on 31/07/2023. The preliminary objection dated 31/07/2023 raised the following grounds:

   a. This court lacks jurisdiction to hear and determine the appellant's application having already heard and dismissed the application dated 9/06/2023 filed by the appellant seeking similar reliefs in a ruling delivered by Hon. Lady Justice Mogeni on 13/07/2023.

   b. This application is therefore an abuse of court process and should be struck out with costs to the respondent.

5. The Court gave directions on filing on written submissions on 24/07/2023. By the time of writing this Ruling, it was only the Respondent who had duly complied. The Respondent filed written submissions dated 6/10/2023 which I have considered.

Issue for Determination

6. The Court has considered the rival affidavit material and the Respondent's submissions made in respect of the motion. I have also considered the Preliminary Objection. The Court finds that the issues that falls for determination are as follows:

   i. Whether the Respondent's Preliminary Objection is merited

   ii. Whether the Appellant has met the threshold for grant of temporary injunction pending appeal.

Analysis and Determination

Whether the preliminary objection is merited.

7. I need to dispose of the preliminary objection first before considering the application on merit should it become necessary. The ingredients of preliminary objections are well settled and the court cannot reinvent the wheel. Preliminary Objection was described in the *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 to mean: -

> "So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration".

8. Counsel for the Respondent asserts that the court lacks jurisdiction to hear and determine the appellant's application having already heard and dismissed the application dated 9/06/2023 filed by the appellant seeking similar reliefs in a ruling delivered by this Court on 13/07/2023. Counsel also asserts that the application is an abuse of court process and should be struck out with costs.

9. To begin with, Ibrahim, JSC in Supreme Court of Kenya Civil Application No. 11 of 2016 *Hon. (Lady) Justice Kalpana H. Rawal v Judicial Service Commission & Others* in demystifying the issue of jurisdiction cited the decision in Supreme Court of Nigeria Supreme Case No. 11 of 2012 *Ocheja Emmanuel Dangana v Hon. Atai Aidoko Aliusman & 4 Others* where Walter Samuel Nkanu Onnoghen, JSC expressed himself as follows:-

> " ...It is settled that jurisdiction is the life blood of any adjudication because a court or tribunal without jurisdiction is like an animal without blood, which means it is dead. A decision by a court or tribunal without requisite jurisdiction is a nullity - dead - and of no legal effect whatsoever, that is why an issue of jurisdiction is crucial and fundamental in adjudication and has to be dealt with first and foremost..."

10. Abuse of judicial process is a term generally applied to a proceeding which is wanting in bona fides and is frivolous vexations and oppressive. It also means abuse of legal procedure or improper use of the legal process. The abuse consists in the intention, purpose and aim of person exercising the right, to harass, irritate, and annoy the adversary and interfere with the administration of justice.

11. The Appellant is mainly seeking for an order of stay of execution and a grant of temporary injunction pending determination of the Appeal.

12. Abuse of court process is an obstacle to the efficient administration of justice. In the instant application, I can see an element of abuse of process of Court as stated in the case of *Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 Others* [2009] eKLR.

13. It is true that this Court has already heard and dismissed the Appellant's application dated 9/06/2023. It is however not entirely correct for counsel to assert that the said application was seeking similar reliefs in a ruling delivered by this Court on 13/07/2023. The said application was incomplete and the Court mentioned the same. The only prayer that was sought in the said application was that of stay of execution. To this extent alone, I agree with the Respondent that the Court lacks jurisdiction to apply itself with regard to prayer 2 of the Appellant's application dated 13/07/2023. The prayer is res judicata and seeking the same prayer in another application is an abuse of court process. The said prayer is spent. The issue was heard and decided on merits and so this prayer cannot be sustained.

14. That being said, it is my considered view that this Court does not lack jurisdiction to hear and determine prayers 2-5 of the Appellant's present application as they have not been previously sought for by the Appellant.

15. Ultimately, it is the finding of this Court that the Preliminary Objection dated 31/07/2023 succeeds only in relation to Prayer 2 of the present Application. This means that Prayer 2 is struck out as the same was heard and dismissed under the Appellant's Application dated 9/06/2023 and a decision on the same was delivered on 13/07/2023.

Whether the Appellant has met the threshold for grant of temporary injunction pending appeal.

16. On the question as to whether the Applicant has met the threshold for grant of temporary injunction, pending appeal, this court has discretion to grant the said orders under Order 42 Rule 6(6) of the *Civil Procedure Rules* which provides as follows;

> " Notwithstanding anything contained in Subrule (1) of this Rule, the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such

terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with."

17. Principles for grant of temporary injunction pending appeal are now well settled. In the case of *Patricia Njeri & 3 Others v National Museum of Kenya* [2004] eKLR, the court stated as follows;

    a. "an order of injunction pending appeal is a discretionary which will be exercised against an applicant whose appeal is frivolous.

    b. the discretion should be refused where it would inflict greater hardship that it would avoid.

    c. the applicant must show that to refuse the injunction would render the appeal nugatory.

    d. the court should also be guided by the principles in *Giella v Cassman Brown* [1973] EA 358."

18. Similarly, in the case of *Madhupaper International Limited v Kerr* [1985] eKLR, the court held that it would be wrong to grant a temporary injunction pending appeal where the appeal is frivolous or where the injunction would inflict greater injustice than it would avoid.

19. In the case of *Kenya Commercial Bank Limited v Nicholas Ombija* [2009] eKLR, the court held that an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court.

20. In this case, it is the Appellant's contention that the Respondent has proclaimed the Appellant's movable goods and equipment through Principal Auctioneers and will on the 20/07/2023 attach the same. He avers that respondent has also proceeded to lock the doors of the Appellant business and disconnected electricity.

21. He asserts that is a protected tenant and procedures of termination are set out in the section 4 and 12(1) of the *Landlord Tenant shops Hotels and Catering establishments Act* Cap 301 laws and that the appellant is in contravention of the said act to which this current appeal lies. To him, the current appeal if heard and determined will resolve the issue in dispute between the parties and further, he contended that the Respondent has no legal authority to lock the business premises of the appellant without a valid court order.

22. Conversely, it is the Respondent's case that the application should be struck out as this application seeks interim orders staying the execution of the orders of the Tribunal. He avers that the respondent issued a notice of termination dated 12/11/2022 seeking to terminate the sub-lease agreement for the suit property entered into between the appellant and the respondent. That the appellant thereafter lodged a reference dated 15/11/2022 before the BPRT challenging the notice of termination. The respondent argues that the reference was heard and a ruling was delivered on 2/06/2023. Thereafter, the Appellant filed an appeal and an application for stay dated 9/06/2023 alleging that the Tribunal had issued the orders without hearing the matter and prayed for a stay of execution. The application was heard and a ruling was delivered on 13/07/2023 wherein the Court declined to issue the orders of stay pending hearing and determination of the appeal. The contents of paragraphs 9 & 10 of the Respondent's Affidavit filed in opposition of the present application is illegible.

23. The respondent states that it is necessary for the court to decline to grant the interim orders sought as there has been material non-disclosure by the Appellant and is therefore not entitled to any interim reliefs. The respondent stands to suffer serious prejudice if the orders are granted. The appellant has failed and continues to fail to make any payments of the rent or the outstanding arrears as accrued. The matter has already been determined conclusively by this court and by this application, the appellant is mischievously trying to have the court re-hear the matter. Lastly, the respondent avers that it is only

fair that the court declines to grant the reliefs sought as the appellant has failed to approach the court with clean hands and in good faith.

24. I must point out that at this stage, this Court does not consider what was considered by the lower court, as that will be done at the main hearing of this appeal. The role of this court at this stage is to consider whether the Appellant has demonstrated having an arguable appeal. In short, the question before court now is not whether the Applicant has demonstrated a prima facie case of what was expected of him in the lower court, but whether his grounds of appeal raise an arguable case in light of the lower court's decision viewed against the evidence presented by the Appellant in that court.

25. An applicant must demonstrate the criteria set out in the case of *Giella v Cassman Brown Ltd* (1973) EA 358. The applicant must establish a prima facie case with high chances of success and that damages would not be adequate compensation if the injunction was not granted. From the record, it is not disputed that there is a sublease dated 10/02/2022 between the Appellant and the Respondent. It is also not in dispute that the Respondent issued the Appellant with a notice of termination and thereafter the Appellant filed a reference which the Tribunal purportedly heard and determined and delivered a ruling on the same. The said decision is the subject of this Appeal.

26. The fact that the Appellant has outstanding rent arrears is not disputed. What is in issue is the amount owed. It has been established that the Appellant has failed to pay rent and continues to fail to make any payments of the rent and/or the outstanding arrears. The Appellant has also not demonstrated that they have reached out to the Respondent to agree on terms of payment on the repayment of money owed. The Applicant by rushing to court and not paying rent, has come to equity with dirty hands. See *Olive Farm Ltd v Forty Bank Ltd* HCC.215/2015. The court cannot exercise discretion in favour of such a litigant who has no respect for the rule of law.

27. The application for injunction being an application seeking equitable relief must fail the moment the Court finds the applicant's hands are tainted. This is what was stated in the case; *Caliph Properties Limited v Barbel Sharma & Another* [2015] eKLR, where the Court stated:

> " Secondly, the injunction sought is an equitable remedy. He that comes to equity must come with clean hands and must also do equity. The conduct of the Plaintiff in this case betrays him. It does not endear him to equitable remedies. ... He who comes to equity must fulfill all or substantially all his outstanding obligations before insisting on his rights. The Plaintiff has not done that. Consequently, he has not done equity."

28. Furthermore, it is my finding that the even though the Appellant's goods are sold, the monetary value of the commodities can be ascertained and the loss can always be made good by an appropriate award of monetary compensation. The Appellant is only a tenant in the premises. It is true that if an order of injunction is not given the Appellant's goods will probably be sold by the Respondents before the intended appeal is heard. However, the Appellant has not shown that the respondent has no financial means to compensate the applicant's if the appeal ultimately succeeds. The applicant therefore has not persuaded this court that the appeal would be rendered nugatory.

29. Accordingly, having considered the affidavit evidence, the Respondent's written submissions and the case law that the parties relied upon, this court comes to the conclusion that the applicant has not demonstrated that it is entitled to an injunction pending the hearing and determination of the appeal. A careful perusal of the applicant's affidavit evidence showed that they did not demonstrate that they had established a prima facie case with high chances of success and that damages would not be adequate compensation if the interlocutory injunction was not granted.

30. For the foregoing reasons, I find and hold that the Notice of Motion application dated 13/07/2023 lacks merit and the same is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF NOVEMBER 2023.

MOGENI J

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the virtual presence of: -

Mr. Makori for the Respondent

Mr. Ojienda for the Respondent

Caroline Sagina: Court Assistant