



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC NO. 87 OF 2020**

**MI-TECH LIMITED .....PLAINTIFF/RESPONDENT**

**VERSUS**

**CATHERINE WAMBUI FELISTUS.....DEFENDANT/APPLICANT**

**RULING**

The Application for determination is the Notice of Motion dated **28<sup>th</sup> October 2020**, brought under **Section 1A,1B,3,3A**, of the **Civil Procedure Act, Order 40 rule 7, Order 51 rule 3 &15** of the **Civil Procedure Rules and Section 9(a)** of the **Magistrates' Courts Act** by the Defendant/ Applicant seeking for the following orders;

- 1. That the orders granted by this Court on 15<sup>th</sup> October 2020, be and are hereby set aside pending the hearing and determination of this suit.***
- 2. That pending the hearing and determination of this suit, the Plaintiff/Respondent be and is hereby ordered to pay rent, as per the terms of the Lease Agreement dated 25<sup>th</sup> January 2018, from the date of the Orders granted by this Honorable Court on 15<sup>th</sup> October 2020.***
- 3. That in the Plaintiff/Respondent's default of prayer number 4 above, the Defendant/Applicant be and is hereby at liberty to distress for rent.***
- 4. That the suit be and is hereby struck out for lack of jurisdiction.***
- 5. Costs be borne by the Plaintiff/Respondent***

This Application is premised on the grounds that on **16<sup>th</sup> October 2020**, the Defendant/Applicant's son was served with Court orders dated **15<sup>th</sup> October 2020**, and Summons to Enter Appearance but without further pleadings or documents filed in Court. That the Defendant/ Applicant consulted her Advocates, who requested the Plaintiff's/ Respondent's Advocates for a copy of the Application that yielded the Orders mentioned. That though the suit was filed in the **Environment & Land Court**, the Same is within the jurisdiction of the **Business Premises and Rent Tribunal** as the disputes is over rent arrears.

Further that the suit lies within the jurisdiction of **Kiambu Law Courts**. That the Plaintiff's/ Respondent's Advocates have refused to serve the Defendant's/ Respondents Advocates with the suit papers claiming they had no obligation to serve them

In his Supporting Affidavit **Oliver Koskey**, averred that he is an Advocate of the High Court of Kenya practicing in the Law Firm of **Gatama & Associates LLP**, which Law Firm has been instructed on behalf of the Defendant/Applicant. He averred that the Auctioneers had obtained Orders under **Misc Application E2641 of 2020**, to proceed with execution as instructed with the aid of the OCS. He further averred that on **23<sup>rd</sup> October 2020**, they entered appearance as the Advocates on record, filed the Memorandum of Appearance and upon perusal of the Court proceedings on **6<sup>th</sup> October 2020**, the Court directed the Plaintiff/ Respondent to serve the Defendant/ Applicant for inter parties hearing on **14<sup>th</sup> October 2020**, but such service was never done.

That service was irregular and the proceedings on **14<sup>th</sup> October 2020**, and orders granted were founded on improper information. That upon perusing the Plaintiff's/ Respondent's process server's Affidavit of service sworn on **13<sup>th</sup> October 2020**, the process server claimed to have served, **a uniformed lady manning the gate who introduced herself as Josephine.....** That the same is in contrast to the letter dated **21<sup>st</sup> October 2020**, from the Plaintiff's/ Applicant's Advocate which stated their Client was duly served within her premises

Further that the Plaintiff/Respondent failed to disclose to the Court that they were no longer in occupation of the suit premises and the **Injunctive Orders** could not be enforced, while they had already been evicted and that it is just and proper that this suit be struck out and in

the alternative ex-parte orders granted on **14<sup>th</sup> October 2020**, be set aside. Further that the Plaintiff/ Applicant omitted to state that it already had been in rent arrears of **10 months** before the closure of the establishment. Further that they have racked an electricity bill of **Kshs.1,334,000/=**. That the Plaintiff/ Applicant has resumed occupation of the suit property with no intention of resuming rent payments and the Defendant/ Applicant continues to suffer great financial harm.

That it is in the Interest of Justice that the Defendant/ Applicant be given an opportunity to be heard. Further that it is just that the suit be struck out and alternatively, the orders issued on **14<sup>th</sup> October 2020**, be struck out.

The Application is opposed. The Plaintiff/Respondent through **Boniface Kuria Kibugi** its Managing Director swore a Replying Affidavit dated **1<sup>st</sup> December 2020**, and averred that the said Application and Complaint were duly served upon the Defendant/Applicant by a process server in his presence on **8<sup>th</sup> October 2020**, at the Defendant/Applicant's residential premises along **Kiambu Road**, in a manner set out in the Affidavit of Service of **David Kiama Muicho**, sworn on **13<sup>th</sup> October 2020**. That the Defendant/Applicant denied them access, but accepted service through her uniformed guard known as **Josephine** after the guard talked to the Defendant/ Applicant on phone and informed her the purpose of their visit. That the Defendant/ Applicant has not denied that the said **Josephine** is her employee, or that she had no authority to receive service and the service was proper.

He contended that the Defendant/ Applicant had failed to Enter Appearance in the first instance to stall progress of the hearing of the Application. That upon obtaining the **Conservatory Orders**, the instructed process server served the Defendant/ Applicant on **16<sup>th</sup> October 2020**, and the Defendant/ Applicant only filed the Application on **3<sup>rd</sup> November 2020**, after a period of **20 days**. That the instant Application is an afterthought and the Defendant/ Applicant is guilty of laches.

He averred that he is informed by his Advocate on record, which information he believes to be true that the suit is properly before this Court as it concerns matter specifically set out under **Article 162 (2)(b) and Section 13(2)** of the Environment and Land Court Act. Further that the matters subject of litigation cannot be competently litigated before a Magistrate Court or tribunal as the suit bars eviction, value of subject matter is in excess of Kshs.40 Million, the term of the Lease is fixed, hence does not meet description of a **Controlled Tenancy** as defined under **Section 2 of the Land Lord and Tenant Act**.

That it is in the interest of justice to maintain the status quo and direct that the suit proceed to full hearing, That the Plaintiff/Respondent has previously fallen into arrears and the said arrears are the subject of ongoing negotiations. It was his contention that the Defendant/Applicant has filed a separate suit being **Kiambu CMCC No.481 of 2020**, which ought to cater for concerns relating to issues of rent arrears. That the Defendant/ Applicant will thus suffer no prejudice and it is only just to dismiss the Application.

The Defendant/Applicant filed a Supplementary Affidavit sworn by **Oliver Koskey** on **13<sup>th</sup> January 2021**, who averred that the Court risks being put into disrepute by the Plaintiff's/ Respondent's actions of failing to disclose crucial information and misleading the Court. That the Plaintiffs/Respondent had already moved out of the suit premises prior to moving the Court for orders of Injunction to avoid attachment of goods that had been proclaimed and had the Court been notified, it would not have issued the Orders of injunction. That the value of the subject matter is not value of the suit property, but amount in arrears and that the issue as to whether the tenancy is controlled or not is neither here nor there. That the Defendant/ Applicant has already gained possession and after obtaining the Court Order, the Plaintiff/Respondent moved to regain possession of the suit premises.

Further that the Defendant/ Applicant does not deem it fit to expend time filing Statement of Defence when the main argument is that the Court lacks jurisdiction to determine the matter. That the Plaintiff/ Respondent admitted to being in arrears and that there are no negotiations.

Parties canvassed the Application by way of written submissions. The Defendant/Applicant put in her written submissions dated **13<sup>th</sup> January 2021**, while the Plaintiff/Respondent submissions are dated **5<sup>th</sup> March 2021**. The Court has also considered the pleadings in general and the annexures thereto and finds the issue for determination are;

**1. Whether the Court has jurisdiction**

**2. Whether the Defendant/ Applicants is entitled to the orders sought.**

**1. Whether the Court has Jurisdiction**

It is trite that jurisdiction is everything and without it, a Court has no option but to down its tools. It is not in doubt that once an issue of jurisdiction has been raised, the same must first be determined, since if the Court has no Jurisdiction, then it cannot determine any issues. See the case of **Owners of the Motor Vessel 'Lillian' (S) ... Vs... Caltex Oil (Kenya) Ltd [1989] KLR1**, where the Court held that ;

***"Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court had no jurisdiction, there would be no basis for a continuation of proceedings pending other 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..."***

It is the Defendant's/ Applicant's contention that this Court has no jurisdiction to hear and determine the matter as the same falls within the jurisdiction of the Business Premises & Rent Tribunal. However, the Plaintiff/Respondent has contended that the tenancy between the parties is not a controlled tenancy and therefore the tribunal is not clothed with the requisite jurisdiction. Section 12 of the Act provides;

***"A Tribunal shall, in relation to its area of jurisdiction have power to do also things which it is required or empowered to do by or under the provisions of this Act, and in addition to and without prejudice to the generality of the foregoing shall have power."***

It is evident that the tribunal is vested with jurisdiction to deal with issues in a Controlled tenancy .**Section 2 (1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Chapter 301 of the Laws of Kenya (the Act)**. Provides

**“controlled tenancy” means a tenancy of a shop, hotel or catering establishment—**

**(a) which has not been reduced into writing; or**

**(b) which has been reduced into writing and which —**

**(i) is for a period not exceeding five years; or**

**(ii) contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or**

**(iii) relates to premises of a class specified under subsection (2) of this section:**

**Provided that no tenancy to which the Government, the Community or a local authority is a party, whether as landlord or as tenant, shall be a controlled tenancy;”**

In the instant suit, there is a lease agreement that is in writing, the Lease is for 10 years and without any termination clause providing for termination before the lapse of 5 years. Therefore, the Court finds and holds that the same is not a **Controlled Tenancy**, and does not fall within the jurisdiction of the tribunal.

The jurisdiction of this Court is to be found under **Article 162 (2) (b) of the Constitution 2010**, which mandates Parliament to establish Courts with the status of the High Court to hear and determine disputes relating to among others, the environment, use and occupation of and title to land. It is pursuant to this mandate that Parliament enacted the **Environment & Land Court Act No. 19 of 2011**. The preamble of the Act reads as follows:-

**“An Act of Parliament to give effect to Article 162 (2) (b) of the Constitution; to establish a superior Court to hear and determine disputes relating to the environment and the use and occupation of, and title to land, and to make provision for its jurisdiction, functions and powers and for connected purposes.”**

**Section 13** thereof sets out the jurisdiction of the Court. It provides in part as follows:-

**“The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provision of this Act or any other law applicable in Kenya relating to environment and land.**

**(2)In exercise of its jurisdiction under Article 162 (2), (b) of the Constitution, the Court shall have power to hear and determine disputes.....**

**(a) Relating to environmental planning, and protection, climate issues, conduct planning, title, tenure, boundaries rate, rents, valuation, mining, mineral, and other natural resources;**

**(b) Relating to compulsory acquiring of land;**

**(c) Relating to land administration and management;**

**(d) Relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land.**

**(e) Any other dispute relating to the environment and land**

**.....”**

In the case of **Kaka Mohamed ....Vs... Mohamed Ali [2018] eKLR** the Court held that ;

**“It is generally true that this Court has jurisdiction in matters of tenancy. But in matters of controlled tenancy, the first port of call is not this Court. Under Section 2(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, (cap 301), a tenancy agreement or arrangement that is not in writing is a controlled tenancy. The tenancy between the parties herein seems to be one such tenancy because no written agreement has been availed. A person with a complaint or grievance relating to or surrounding such tenancy is duty-bound to go to the tribunal set up under the Act. This Court is not one such tribunal.”**

The Court therefore finds and holds that it has jurisdiction to deal with the matter.

**2. Whether the Defendant/Applicants is entitled to the orders sought.**

The Defendant/ Applicant has sought for the setting aside of the orders granted to the Plaintiff/ Respondent *ex parte*. Through her Advocate on record, she has contended that she was never served with the Application nor was she served with the hearing notice, but was only served with the Orders.

The Plaintiff/ Respondent has relied upon the Affidavits of Service sworn by **David Kiama Muicho** on **13<sup>th</sup> October 2020**, which the Court has carefully perused and notes that the said process server contended that the same were served upon one **Josephine**, who informed him that she had the authority of the Defendant/Applicant to accept service. Further the Court notes that in the said Affidavit of service, the process server indicates that he served a Notice of Motion Application, Certificate of Urgency & accompanying documents. It is thus not clear whether the hearing Notice was served upon the Defendant/ Applicant .

Further the Court has seen letters of protest from the Defendant's/ Applicant's Advocate on the issue of service. As to whether or not the same is true, this Court finds that the same would need thorough investigation. However it is the Court's considered view that even though service may or may not have been proper, there are other factors that can be considered by the Court in deciding whether or not the Orders of **15<sup>th</sup> October 2020**, ought to be set aside.

In order to allow the Application to set aside the Orders, the Defendant/ Applicant needs to satisfy the Court that it acted without inordinate delay in bringing the said application. See the case of ***Haile Menkerios ...Vs...Francis Mureithi & another [2019]eKLR***, where the Court held that;

***“This Court is keenly aware that where there is no proper service of summons on a Defendant, then the Defendant would be entitled to setting aside of a default judgement as a matter of right. Where however the service of summons is proper then the Defendant must demonstrate that his or her failure to file defence on time was caused by reason which is excusable and further that it has an arguable answer to the claim that is an arguable defence. The discretion of the Court is wide but must not be exercised in a way that causes undue hardship or prejudice to the Plaintiff.”***

Further the provision is buttressed by **Order 51 Rule 15 of the Civil Procedure Rules** which provides:-

**"The Court may set aside an order made *ex parte*"**

The Court must then interrogate whether the Defendant/ Applicant is deserving of the orders sought of **setting aside**.

It is the Defendant's/ Applicant's contention that she was served with copy of Summons to Enter Appearance and with no pleadings attached. The Court issued its orders on **15<sup>th</sup> October 2020**, and the instant Application was filed on **3<sup>rd</sup> November 2020**. Therefore, it is this Court's considered view that there could not have been inordinate delay from the time the Applicant may have found out about the **ex parte orders** to the date that the instant Application was filed.

As already held above, there was no inordinate delay in bringing the instant Application. Further the Court having noted that it could not definitively find whether or not all the documents were served as the process server did not indicate the same, then it is inclined to exercise its discretion in favour of the Defendant/ Applicant .

There is no doubt that the Plaintiff/Respondent herein is a tenant of the Defendant/Applicant having been offered a lease agreement dated **25<sup>th</sup> January 2018**. There is also no doubt that the Rent payment was stipulated in **Clause 3** of the said Lease. There is no doubt that the Defendant/Applicant instructed **Mbeki Auctioneers** to levy distress upon the Plaintiff/Respondent. Further there is no doubt that the Plaintiff/ Respondent is in arrears on the payment of the said rent.

It is important for the Plaintiff/Respondent to show that indeed they have been paying rent to the Defendant/Applicant as per the undertaking given to Court on **9<sup>th</sup> December 2020**. The Plaintiff/Respondent has admitted that it has rent arrears and has not placed any material or commitment to show that it has complied with the Orders of the Court to pay rent neither has it provided a schedule to portray how payment will be done to enable the Court extend the interim orders in place.

From the above analysis, the Court finds and holds that to fail to give the Defendant/ Applicant an opportunity to ventilate its case while the Plaintiff/Respondent is sitting on injunction orders without making payments would not be in the interest of justice. The Plaintiff/ Respondent has not shown any prejudice that it will suffer if the order are set aside. Consequently the Court finds and holds that the Defendant/ Applicant has satisfied it to enable it exercise its discretion and set aside the orders made on **15<sup>th</sup> October 2020**. The Defendant/Applicant is therefore entitled to the orders sought.

It is imperative that the Court further deals with the issue of the Affidavits sworn by the Defendant's/ Applicant's Advocate. Under **Rule 8 of the Advocates (practice) Rules, 1966** it is provided:-

***"No advocate may appear as such before any Court or tribunal in any matter in which he has reason to believe that he may be required as witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear.”***

Having gone through the said Affidavits, the Court notes that while the said Advocate has deponed to matters of legal positions, he has also averred on disputed facts and therefore the same puts the Court at cross roads on whether to totally disregard the same or cherry pick matters within his knowledge and allow the same . In the case of **Magnolia PVT Limited ...vs... Synermed Pharmaceuticals (K) Ltd (2018) eKLR**, the Court dealing with similar issue states as follows:-

*"Whereas there is nothing barring an advocate from swearing an affidavit in appropriate cases, where the matters deposed to are agreed or on purely legal positions, advocates should refrain from the temptation of being the avenue through which disputed facts are proclaimed. The rationale for the said principle is to insulate the advocate, an officer of the Court, from the vagaries of litigation which, on occasions may be very unpleasant. By swearing an affidavit on such issues an advocate subjects himself to the process of cross-examination thus removing him from his role of legal counsel to that of a witness, a scenario which should be avoided like plague. In my view, however innocent an averment may be, counsel should desist from the temptation to be the pipe stem through which such an averment is transmitted."*

Further in the case of **International Community of Women Living With HIV Registered Trustees v Non-Governmental Organizations Co-ordination Board & 2 others; Teresia Otieno(Proposed Interested Party)** [2019] eKLR the Court held that ;

*In the instant matter, I find that no reason has been advanced as to why the petitioner in this case was unable to swear a Replying affidavit but be as it may be, I find that the matter deposed upon by the petitioner's Advocate to be contentious matters, for which I find that there is no basis for considering the same. I find the affidavit to be defective and it should not be given any weight. I find and hold the affidavit sworn on 23<sup>rd</sup> August 2018 by the Advocate for the petitioner on contentious matters of fact which he is not privy to is not sustainable in law and should not be given any weight at all.*

As the Affidavits by the Defendant's/ Applicant's Advocate bordered on both contentious legal and factual; issues within his knowledge, the Court has considered the same and further cautions the Advocate.

Having carefully considered the instant Notice of Motion application dated **28<sup>th</sup> October 2002**, the Court finds that it has Jurisdiction to hear and determine this matter and will not strike out the suit.

However, the Defendant/Applicant is deserving of the other prayers and consequently, this Court allows **prayers nos. 3, 4 and 5** of the instant Notice of Motion dated **28<sup>th</sup> October 2020**, with costs being in the cause.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT THIKA THIS 27TH DAY OF MAY 2021.**

**L. GACHERU**

**JUDGE**

**27/5/2021**

**Court Assistant – Lucy**

**ORDER**

In view of the declaration of measures restricting Court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15<sup>th</sup> March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

**With Consent of and virtual appearance via video conference – Microsoft Teams Platform**

**Mr. Kosgey for the Defendant/Applicant**

**Mr. Wachira for the Plaintiff/Respondent**

**Court: Ruling read to the above advocates**

**L. GACHERU**

**JUDGE**

**27/5/2021**