



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC APPEAL NO. 29 OF 2019

ENKARE HOTEL LIMITED.....APPELLANT

=VERSUS=

MUCHEWA LIMITED.....1ST RESPONDENT

DAVID CHEGE THUO.....2ND RESPONDENT

ADDER COMPANY LIMITED.....3RD RESPONDENT

(Being an appeal from the Ruling of Hon.D.A Ocharo Principal Magistrate delivered on 4th April 2019 in Milimani CMCC No. 759 OF 2019)

JUDGEMENT

Background.

1. The Appellant was a subtenant of the 1st Respondent in respect of part of premises on LR NO.209/3788 along Moktar Dadah Street in Nairobi which is owned by the 3rd Respondent (suit premises). Sometime in 2016, the Appellant ran into rent arrears in respect of the suit premises. The 1st Respondent moved to levy distress for rent. The Appellant moved to the Business Premises Rent Tribunal (BPRT) where it filed BPRT No. 168 of 2016.
2. The Tribunal granted the Appellant restraining orders and directed the Appellant to pay rent directly to the 3rd Respondent. The Orders were however later on varied and the Appellant was directed to pay rent to the 1st Respondent. The Appellant was unable to pay rent as directed by the Tribunal. The Tribunal later vacated the restraining orders that the Appellant was enjoying.
3. After the Tribunal vacated the restraining orders, the Appellant moved to the Chief Magistrate's Court at Milimani where it filed CMCC No. 1198 of 2018. The Appellant obtained injunctive orders restraining the 1st Respondent from levying distress or leasing out the suit premises. The 1st Respondent was aggrieved with the ruling of the chief magistrate. An appeal was filed against the ruling through ELC appeal No. 26 of 2018.
4. The interlocutory appeal was heard by Justice Eboso who in a judgement delivered on 17th December 2018 vacated the injunction orders which had been given by the Chief Magistrate. It is after this that the Appellant filed notices of withdrawal of all pending cases before the Tribunal, including CMCC 1198 of 2018 as well as ELC No 20 of 2019 before filing CMCC 759 of 2019 in which it sought injunctive orders among other prayers.
5. When the application for injunction in CMCC 759 of 2019 came up for hearing, the 1st and 2nd Respondents raised a preliminary objection on the grounds that the application as well as the entire suit were an abuse of the process of the court and that the suit offended the provisions of section 6 and 7 of the Civil Procedure Act. The trial magistrate upheld the preliminary objection and proceeded to strike out both the application and the suit. This is what provoked this appeal.

The Appeal.

6. The Appellant filed an appeal and raised the following grounds;-

1. *The learned Magistrate erred in both law and fact in holding that the injunctive orders issued by the Business Premises Rent*

Tribunal and the prayers sought in the Appellant's Notice of Motion dated 11th February, 2019 are similar.

2. The learned Magistrate erred in both law and fact in holding that the orders issued in CMCC No.1198 of 2018 and orders sought in the Appellant's application dated 11th February, 2019 are similar.

3. The learned Magistrate erred in law and in fact in failing to read the Appellant's pleadings and to appreciate that the suit filed on 11th February, 2019 was based on a cause of action that arose on 14th January, 2019 when the 1st and 2nd Respondent accompanied by police and impersonating one Stevens K Nganga/A Gladsom Auctioneers carried away the Appellant's goods and purported to evict the Appellant by locking and welding the doors to the premises.

4. The learned Magistrate erred in law and in fact in failing to appreciate that the ELC Civil Appeal No.26 of 2018 and the issues raised in CMCC No.759 of 2019 are totally different and that the Judgement in the said appeal cannot render the CMCC No.759 of 2019 res judicata.

5. The learned Magistrate erred in law and in fact in failing to appreciate that the issues in CMCC No.1198 of 2018 and the issues in CMCC No.759 of 2019 were totally different and in any event CMCC No.1198 of 2018 had already been withdrawn before the filing of CMCC No. 759 of 2019.

6. The learned Magistrate erred in law and in fact in striking out the Appellant's application dated 11th February, 2019 and the entire suit purportedly for offending Section 6 and 7 of the Civil Procedure Act and which is not the case.

7. On 9th October 2019, the parties were directed to file written submissions in respect of the Appeal. The Appellant was directed to file and serve its submissions within 30 days. The Respondents were also granted 30 days to file their submissions from the date of service. The Appellant did not file its submissions. The Respondents filed their submissions on 7th February 2020.

Analysis.

8. I have carefully considered the record of appeal as well as the submissions of the Respondents. This being a first Appeal, I am expected to evaluate the evidence which was placed before the trial magistrate and arrive at my own conclusion. What was before the trial court and which is the subject of this appeal was a preliminary objection by the 1st and 2nd Respondents. The preliminary objection was upheld on two grounds, namely, that the application and the entire suit was an abuse of the process of the court and that the suit offended the provisions of sections 6 and 7 of the Civil Procedure Act.

9. A reading of the proceedings from the record appeal and the grounds of appeal show that there are two issues for determination. The first is whether the suit and the application before the lower court was an abuse of the process of the court and the second is whether the suit offended the provisions of Section 6 and 7 of the Civil Procedure Act.

10. On the first issue, there is no doubt that the Appellant had filed BPRT No.168 of 2016 and later filed BPRT No. 831 of 2017. In BPRT 168 of 2016, the Tribunal had granted injunctive orders in favour of the Appellant. The Injunctive orders which had been granted were later on discharged. The Appellant moved to the Chief Magistrates Court where it filed CMCC 1198 of 2018. It obtained injunctive orders which were subsequently vacated on appeal in ELC Appeal No.26 of 2018.

11. The Appellant moved to the Environment and Land Court where it filed ELC No. 20 of 2019. When this file went before Justice Eboso, the Judge noticed the similarity of this case with the previous appeal which he had handled. It is at this stage that the Appellant decided to file notices of withdrawal of the cases before the Tribunal and those in the lower Court as well as ELC No. 20 of 2019 before filing CMCC No. 759 of 2019.

12. In all the cases, the Appellant was seeking injunctive orders. The filing of these many cases though they were subsequently withdrawn was an abuse of the process of the Court. The trial magistrate was right in observing that the orders sought in these cases were similar and she applied the correct principles in arriving at her finding that CMCC No. 759 of 2019 was an abuse of the process of court. The trial magistrate was guided by a court of Appeal decision in **Muchanga Investments Ltd Vs Safaris Unlimited (Africa) Ltd & 2 others (2009)eKLR** which gave instances of abuse of judicial process to include:-

a) “ instituting multiplicity of actions on the same matter against the same opponent on the same issues or multiplicity of actions on the same matter against the same opponent on the same issues or multiplicity of actions on the same matter between same parties even where there exists a right to begin the action.

b) instituting different actions between the same parties simultaneously in in different courts even though on different grounds.

c) Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and a respondent's notice.

d) where there is no lots of law supporting a court process or where it is premised on frivolity or recklessness....”.

13. The Appellant was clearly abusing the process of court. Besides filing a multiplicity of suits, it went ahead to commence criminal prosecution against the 2nd Respondent in criminal case No. 480 of 2019 where affidavits in that case clearly show that the Appellant was being frivolous and vindictive to an extent of lying on oath that its goods had been stolen and the investigating officer had sworn an affidavit that the goods could not be traced.

14. On the issue of whether the Appellant offended the principle of res-judicata, it is clear from the ruling of the trial magistrate that she was alive to the fact that the Appellant had been granted an injunction before the Tribunal. The Appellant then moved to the Chief Magistrate's Court where it filed CMCC No. 1198 of 2018 which sought injunction. The injunction was granted and on appeal, it was discharged. The Judgement of Justice Eboso was clear that the issue was res-judicata . The Judge determined the issue of injunction with finality. The Appellant could not therefore raise the same issue in a subsequent case. The trial-Magistrate was therefore right in holding that the suit in as far as it was seeking injunctive orders was res- judicata.

15. There is no evidence to show that the notices of withdrawal were brought to the attention of the trial magistrate. The Notices for withdrawal were filed on 8th February 2019. The Appellant filed its submissions on 11th March 2019. There was no mention in the submissions that the pending cases had been withdrawn. The trial magistrate was therefore right in stating in her ruling that ELC 1198 of 2018 was still pending ad therefore was contrary to section 6 of the Civil Procedure Act. In any case even if the withdrawal notices were to be brought to the attention of the trial magistrate, still the Appellants suit would have failed on grounds of abuse of the process of Court.

Conclusion.

16. From the above analysis, it is clear that the Appellants Appeal lacks merit. The same is dismissed with costs to the 1st and 2nd Respondents.

Dated, signed and delivered at Nairobi on this 5th day of May 2020

E.O.OBAGA

JUDGE

In the absence of parties who had been duly notified that Judgement was to be delivered virtually through Microsoft teams.

Court Assistant: Hilda

E.O. OBAGA

JUDGE