



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 1 OF 2021

MACKWOODS LIMITED.....PLAINTIFF

=VERSUS=

KELLICO LIMITED.....DEFENDANT

RULING

1. This is the Notice of Motion dated 25th January 2021 brought under section 1A, 1B, 3, 3A & 63(e) of the Civil Procedure Act, Cap. 21 Laws of Kenya & Section 5 of the Judicature Act, Order 40 Rules 1, 2, 3 and 4 of the Civil Procedure Rules.

2. It seeks orders:-

1. Spent.

2. Spent.

3. That a mandatory injunction be issued requiring the defendant, its servants, agents and/or employees to forthwith return all the property of the plaintiff to the demised premises on 2nd floor of LR NO 209/14097.

4. That a proper inventory of the plaintiff's property carted away by the defendant, its servants, agents, and/or employees, with all necessary enquiries and directions for the proper valuation of said property, and the consequential/resultant loss and damage, be carried out by an independent court appointed loss adjuster, and the report be presented to the court for further orders.

5. That all directors of the defendant company be committed to civil jail for six (6) months.

6. That such further or other orders as are necessary for the proper dispensation of justice be issued.

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

3. The grounds are on the face of the application and are set out in paragraphs 1 to 13.

4. The application is supported by the affidavit of Tian Kai Shuo, a director of the plaintiff sworn on the 25th January 2021.

5. The application is opposed. The defendant/respondent filed a replying affidavit through Alex Waituika a director of the respondent sworn on the 5th March 2021. The defendant/respondent also filed a notice of preliminary objection dated 5th March 2021 raising five grounds.

6. On the 24th March 2021 the court with the consent of the parties directed that the Notice of Motion and the Preliminary Objection be heard together. It also directed that they be canvassed by way of written submissions.

The Plaintiff's/Applicant's Submissions

7. They are dated 9th April 2021. It is well established that where there is a question of jurisdiction, this must first be dispensed with before the dispute is heard on its merits. Only the High Court has power to punish for contempt of court orders beyond the face of the Business Premises Rent Tribunal whose powers are limited to punishing for contempt on the face of the court.

8. Section 5(1) of the Contempt of Court Act gives this court power to punish for contempt. Section 6 of the Act has limited the subordinate court to punish for contempt on the face of the court. It has put forward the cases of **Secretary General & Another vs Salah Yakub Farah [2017] eKLR**; **Robert Pukose vs Alwin Chepyagan Sasia & 2 Others [2017] eKLR**.

9. The disobedience of the orders of injunction issued by the Business Premises Rent Tribunal occurred away from the face of the court/tribunal. The procedure for seeking such relief is by filing a simple writ of motion. It has put forward the case of **Aloise Chweya Obaga vs Ouru Power Limited & 2 Others [2017] eKLR**.

10. It is not in dispute that there are injunctive reliefs sought in both this suit and the one before the Business Premises Rent Tribunal. It has put forward the case of **Republic vs Paul Kihara Kariuki, AG & 2 Others Ex parte Law Society of Kenya [2020] eKLR**. Courts of law do not issue orders in vain. When this court finds that the defendant disobeyed a court order therefore in contempt of court, it will for the ends of justice to be achieved, require that the contemnor immediately purges that act of contempt. It has put forward the case of **B vs Attorney General [2004] IKLR 431**.

11. The substance relief from acts of contempt and willful disobedience of court orders. The purpose of *sub judice* rule is to prevent abuse of the court process. How can a party that is seeking to actualize orders issued by a court be said to be abusing the process of the court. *Sub judice* ought not to be confused with *res judicata*.

12. The plaintiff is only required to demonstrate that there was a lawful order of a court of law and that the order was brought to the attention of the contemnor, and that the order was disobeyed. The defendant had knowledge of the order of the Tribunal. The order was specific, that the plaintiff's tenancy was not to be interfered with. It has put forward the cases of **Shimmers Plaza Limited vs National Bank of Kenya Ltd Civ. Appeal No 33 of 2012**. **Republic vs Permanent Secretary Ministry of Defence, Exparte George Kariuki Waitaha [2018] eKLR**; **Refrigeration & Kitchen Utensils Ltd vs Gulabchand Popatlal Shah & Others Civil Appeal No Nai 39 of 1990**; **TSC vs KNUT & 2 Others Pet 23 of 2013**. It prays that the application be allowed in its entirety.

The Defendant's/Respondent's Submissions

13. They are dated 16th April 2021 and 29th April 2021. The defendant is the owner of the premises known as Kellico Complex erected on LR NO 209/14097, Mombasa Road. Section 12 of the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act, Cap 301 Laws of Kenya set out the powers and jurisdiction of the Business Premises Rent Tribunal. There is no written contract between the plaintiff/applicant and the defendant/respondent. The issues raised herein are enough to be determined by the Business Premises and Rent Tribunal. There are proceedings ongoing at the Business Premises Rent Tribunal.

14. This matter is **sub judice** given that the same issues were raised in Business Premises and Rent Tribunal case No 981 of 2020. It has relied on Section 6 and 18 of the Civil Procedure Act. It has put forward the case of **Thiba Min. Hydro Co. Ltd vs Josphat Karu Ndwiga [2013] eKLR**. This suit ought to be stayed. The objective of *sub judice* doctrine is to prevent the courts from handling matters that are similar in subject matter, parties and emanate from same action or omission. This doctrine is meant to aid the court and the parties from contradictory verdicts on the same subject.

15. The plaintiff/applicant concedes that the lease agreement they are seeking to rely on is between Skyworld International (Kenya) Ltd and the respondent herein. The general rule on privity of contract has been well settled in the case of **Dunlop Pneumatic Tyre Co Ltd vs Selfridge & Co Ltd [1915] AC 847**. It has also put forward the case of **Agricultural Finance Corporation vs Lengetia Ltd [1985] KLR 765**. The applicant has no *locus standi* before this court.

16. The applicant has failed to disclose to the court that they have not complied with the court order issued by the Tribunal which provided that the applicant do pay rent to the respondent from the month of January 2021. It has put forward the case of **Republic vs Kenya Power & Lightning Co. Ltd Ex-parte Corner Electrical Contractors Limited & 3 Others JR NO 277 of 2014**.

17. The applicant is guilty of material non disclosure and that it should not be allowed to benefit from the judicial discretion of this honourable court. It prays that the preliminary objection be upheld and the notice of motion dated 25th January 2021 be dismissed with costs.

18. In their supplementary submissions the defendant/respondent states that section 14(1) of the Cap 301 provides that an order issued by the tribunal should be lodged with a subordinate court for it to be enforced. It has put forward the case of **Travel Planners Ltd vs the Managing Director, Kenya Railways Corporation & Another [2008] eKLR**.

19. The alleged contempt has not been proven. There is no disobedience. The suit and the application are premature and defective.

20. I have considered the notice of motion and the affidavit in support. I have also considered the replying affidavit and the preliminary objection, the written submissions filed in respect of the parties and the authorities cited. The issues for determination are:-

(i) **Whether the preliminary objection is merited.**

(ii) **Whether the notice of motion dated 25th January 2021 is merited.**

(iii) **Who should bear costs?**

21. The preliminary objection dated 5th March 2021 the grounds are:-

1. *That the plaintiff/applicant is forum shopping and there are live and active proceedings in the Business Premises and Rent Tribunal Case No. 981 of 200 Nairobi between same parties litigating in the same capacity in respect of the same subject matter and seeking the same remedies prayed.*

2. *That this court does not have jurisdiction to entertain this matter by virtue of section 12 of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Cap 301 as the tenancy is a controlled tenancy there being no executed lease between the parties.*

3. *That the issues sought to be litigated before the High Court are res sub judice the issue raised in Business Premises and Rent Tribunal Case NO 981 of 2020, Nairobi and the mounting of these proceedings contemporaneous with the matters in the Business Premises and Rent Tribunal are aimed at unnecessarily vexing the applicant in multiple forums to obscure the fact that the applicant is in arrears of rent and also to avoid recovery of rent.*

4. *That the Notice of Motion application dated January 25th, 2021 is misconceived, scandalous, frivolous, vexatious and otherwise an abuse of the court's process and the same should be dismissed with costs.*

5. *That the plaintiff being an illegal sublet to a lease entered into with Skyworld International Limited is a stranger to the terms of the lease dated September 1, 2014 and cannot seek to benefit from its terms.*

22. It is not in dispute that there are proceedings in the Business Premises and Rent Tribunal in Tribunal Case NO 981 of 2020 involving the same parties. Those proceedings are live. In fact the plaintiff/applicant seeks contempt was for disobedience of orders issued by the Tribunal. There are therefore proceedings before the tribunal which make the suit herein *sub judice*. Section 6 of the Civil Procedure Act provides that:-

“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.”

23. In the case of the **Thiba Min. Hydro Co. Ltd vs Josphat Karu Ndwiga [2013] eKLR**. the court stated thus:-

“It is not the form in which the suit is framed that determines whether it is sub judice rather it is the substance of the suit and looking at the pleadings in both cases....and there can be no justification in having the two cases being heard parallel to each other. That would not only be an affront to the sub judice rule but would also be in violation of the overriding objective of the Civil Procedure Act which require under Section 1B that there be an effective use of the available judicial and administrative resources”.

24. As per Section 12 of Cap 301, this court clearly has no jurisdiction to hear and determine the suit herein. I find that the preliminary objection is merited and it is upheld.

25. The Notice of Motion dated 25th January 2021 seeks in prayer 2, 3 and 4 the same prayers sought on the Business Premises and Rent Tribunal except prayer No 5.

26. In the supporting affidavit of Tian Kai Shuo director of the plaintiff; in paragraph 12 he avers *“That the order was extracted on 14th December 2020, but on 11th December 2020, I verbally informed the defendant Alex Waituika and Elizabeth Wanyeki of the granting of the said order.”*

In paragraph 13 he avers:-

“That in order to defeat the said order before it could be extracted and served upon it, the defendant, in the company of goons and vagabonds, on 12th December 2020 (a public holiday) broke its own welding and seals, and unlawfully entered into the demised premises. The felons forcefully removed the properties of the plaintiff and loaded them in to three tracks, then attempted to drive away.”

27. It is clear from the foregoing averments that the directors of the defendant were not served with the orders from the tribunal as the same were extracted on the 14th December 2021 while the goods were allegedly taken away on 12th December 2020.

28. There is no evidence that the said directors had knowledge of the said orders. The deponent said he verbally informed them. It is his word against theirs. Before one can be cited for contempt, he/she must have willfully disobeyed the said orders. There is no evidence to this effect.

I find no merit in this application and the same is dismissed with costs to the defendant.

29. In view of the earlier findings that the preliminary objection is merited I find the application and the suit herein to be premature and they are struck out with costs to the defendant/respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 22ND DAY OF JULY 2021.

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L. KOMINGOI

JUDGE

In the presence of:-

No appearance for the Plaintiff

Ms Mbiri for Mr. Odhiambo for the Defendant

Phillis - Court Assistant