Tusker Mattresses Limited v A Jiwa Shamji Limited (Civil Appeal E011 of 2022) [2024] KEHC 1240 (KLR) (15 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1240 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E011 OF 2022

PN GICHOHI, J

FEBRUARY 15, 2024

BETWEEN

TUSKER MATTRESSES LIMITED ..... APPELLANT

AND

A JIWA SHAMJI LIMITED ..... RESPONDENT

(Being an appeal from the ruling and orders in Kisii CMCC 94 of 2020 by Hon. E.A.Obina (PM) on 11th May, 2021)

JUDGMENT

1. The background of this appeal is that Tusker Mattresses Limited (Appellant) was a tenant of A Jiwa Shamji Limited (Respondent) on premises situated on land known as LR Kisii Municipality/Block II/24 (suit premises).

2. The Appellant fell into arrears and by an order dated 26th November, 2020 issued in Kisii Civil Misc. Application No. 94 of 2020, the court directed the Respondent to move out of the suit premises within3 days and also allowed the Respondent to re-enter the premises.

3. Subsequently and by a Notice of Motion dated 08th February, 2021, the Appellant sought orders to set aside the orders issued on 26th November, 2020, find that Notice to terminate the lease was unlawful and orders to restrain the Respondent from auctioning, selling, offering for sale, re-entering, terminating and/or dealing in any manner with the suit premises.

4. The application as based mainly on the ground that there was pending Liquidation Cause No. HCCCOMMINP/E018 OF 2020 in which the Court had granted an order staying any attachment, sequestrations, distress and executions against the property of the Appellant which order was in force as at 26th November, 2020 when the court directed the Appellant to move out of the suit premises within 3 days and also allowed the Respondent to re-enter the premises.

5. The Respondent opposed the application on grounds among others that the application had been overtaken by events, re-entry having taken place and further on the ground that the orders in the liquidation cause did not affect the Respondent's right to terminate the lease and re-enter the premises.

6. By a ruling dated 24th March, 2021, the court agreed with the Respondent and dismissed the Appellant's Notice of Motion dated 08th February, 2021.

7. Subsequent to the dismissal, and Appellant not having vacated the suit premises, the Respondent filed another application dated 24th March, 2021 seeking to be allowed to remove Appellant's goods from the suit premises and to deliver them at Appellant's last known address under police escort to ensure their safety and safe delivery.

8. The Appellant opposed the application mainly on the same grounds stated at paragraph 4 of this judgment which order it was averred had been extended up to 26th May, 2021.

9. By a ruling dated 24th March, 2021, the court agreed with the Respondent and dismissed the Appellant's Notice of Motion dated 08th February, 2021.

10. By a ruling dated 11th May, 2021, the court found that the order sought was not barred by the orders in the Liquidation Cause and thus allowed the Appellant to remove the Appellant's goods from the suit premises and take them to their last known address for safe keeping.

11. Aggrieved by the ruling dated 11th May, 2021, the Appellant has appealed to this Court mainly on the ground that the orders issued were contrary to the stay order issued in the Liquidation Cause.

12. This being a first appeal, this Court mindful that the duty of this Court as set out in the decision of *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123 is to reconsider the evidence, evaluate it and draw our own conclusion of facts and law, and will only depart from the findings by the trial Court if they were not based on evidence on record; where the said Court is shown to have acted on wrong principles of law as was held in *Jabane v Olenja* [1968] KLR 661, or where its discretion was exercised injudiciously as held in *Mbogo & Another v Shah* [1968] EA 93.

13. This court has noted that despite the analysis above, the Appellant is clear on the heading as framed in the Record of Appeal that it is Appealing against the:-

> " Ruling and Orders of Hon. E.A. Obina (Mr.) Principal Magistrate at Kisii Law Courts delivered on 11th May 2021
>
> In the Chief Magistrates Court at Kisii Misc. Civil Application No. 94 of 2020 "In the matter of an application for provision of police security for purposes of re- entry into those premises appurtenant upon that parcel of land known as LR No. Kisii Municipality/ Block II/24
>
> A Jiwa Shamji Limited .....Applicant
> v
>
> Tusker Mattress Limited.....Respondent"

14. It is only on the grounds of appeal, as framed in the Memorandum of Appeal, that it included the Ruling delivered on 26th November 2020 as one of the rulings it is aggrieved of and then proceeded to argue on both.

15. Be that as it may, and in the ruling delivered on 11th May 2021, the learned trial magistrate still referred to the order he had made on 26th November 2020.

16. It is also notable, from the Record of Appeal, that in reference to the Respondent's letter dated 15th January 2021, the Appellant had written to the Respondent's Advocates on 16th January 2021 on termination of the Lease Agreement over the suit premises by re-entry and stated:-

> " We are ready to vacate the premises we occupy in the above-mentioned location. However, we would like to ask for fourteen (14 days) from the date of this letter in order to clear from the premises and hand back your client as requested.
>
> The three days given are not enough to clear the merchandise from the premises as the process involves a lot of logistical planning to execute."

17. Despite the Appellant herein clinging to the insolvency proceedings, it wrote the above letter during the pendency of the insolvency proceedings where it says there are stay orders and which he maintains in this appeal.

18. In his Ruling dated 11th May 2021 in regard to A. Jiwa Shamji Limited's application dated 24th March 2021, the trial magistrate found the application merited and in doing so held:-

> " This Court has been told that there are interim orders issued by Justice Tuiyot, staying any attachment, distress or execution against the Respondent; but the application is not attaching, distressing and/or executing anything against the Respondent. If I understand the Applicant right, they are the owners of the premises on which the Respondent has been conducting business. The Respondent owes them arrears and the same continue to accrue. They are not asking for rent at the moment. They just want re-entry into their premises , vacant possession...they are not even asking for rent arrears...they are not disposing the Respondent's property."

19. Having considered the facts of the case as reiterated hereinabove, this Court agrees with the Respondent's submissions and the learned trial magistrate's finding that Liquidation Cause No. HCCCOMMINP/E018 of 2020 stayed any attachment, sequestrations, distress and executions against the property of the Appellant but did not stay the termination of the lease or re-entry into the suit premises by the Respondent.

20. The ruling dated 11th May, 2021 and orders thereof were, in the circumstances of this case, merited and are upheld.

21. As a result, this Appeal is without merit and it is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT KISII (VIRTUALLY) THIS 15TH DAY FEBRUARY,2024.

PATRICIA GICHOHI

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:

N/A for Appellant

N/A for Respondent

Laureen Njiru / Aphline , Court Assistant