



REPUBLIC OF KENYA



Oketch v Kakamega District Cooperative Union Limited & another (Civil Suit E005 of 2021) [2023] KEHC 2615 (KLR) (24 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2615 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL SUIT E005 OF 2021
WM MUSYOKA, J
MARCH 24, 2023**

BETWEEN

PHAUSTINE OKETCH PLAINTIFF

AND

KAKAMEGA DISTRICT COOPERATIVE UNION LIMITED .. 1ST DEFENDANT

JAMES ALUMASA T/A PAVEMENT AUCTIONEERS 2ND DEFENDANT

RULING

1. The cause herein was initiated by the plaintiff by way of a plaint, dated October 25, 2021, seeking a declaratory order that a distress for rent notice issued by the defendants was illegal null and void for non-compliance with section 4(1) of the *Distress for Rent Act*, cap 293, Laws of Kenya, and general damages for wrongful or Illegal distress. The background was that the plaintiff was a tenant of the 1st defendant, in its premises within Kakamega township, from where he operated a hardware shop. He averred that on October 18, 2021, the defendants raided the shop and carted away goods. He averred that he had not been issued with notice prior to the said act. He accused his landlord of forcing him to close his shop, in a bid to evict him. He averred that the distress for rent was illegal, as it did not comply with the relevant law.
2. Contemporaneously filed with the plaint was a Motion, dated October 25, 2021, seeking stay of sale of the goods distrained in the distress action the subject of the plaint, and a mandatory injunction order for release of the distrained goods.
3. The Motion was placed before me, on October 26, 2021, under certificate of urgency. I directed that it be served, and that it be heard inter partes on a date that I allocated. I also expressed doubt as to whether the High Court was the proper forum for determination of the dispute framed in the suit. When the matter came up subsequently, I granted temporary relief, and time to the parties to file responses.



4. A joint defence was filed on November 29, 2021, dated November 15, 2021. It avers that the plaintiff was in rent arrears, totaling Kshs. 460, 000.00, as at September 1, 2021, and as the plaintiff tenant had persisted, despite demand, in the default, there was no option but to distrain. It is averred that there were other proceedings before other courts and tribunals, for break-in orders and for termination of tenancy, which orders were granted, and the action by the defendants, complained of in the plaint, was founded on the said orders, which were enforced with police assistance. It is further averred that the plaintiff was no longer a tenant, as the tenancy relationship had been terminated after the Business Premises Rent Tribunal allowed the 1st defendant's termination notice.
5. There is also a replying affidavit, in response to the Motion, sworn on November 15, 2021, by Christopher Musamali, the Chairman of the 1st defendant. He avers that a landlord does not have to seek leave of court or the Tribunal before exercising the right to distress for rent. He asserts that the plaintiff was at all material times in default of rent, and had even made offers to settle the same, but failed to, following which default steps were taken to distrain for rent, to recover the arrears, including action at the Tribunal. He has attached copies of letters in the hand of the plaintiff, admitting that rent was in arrears, and offering to settle the same in instalments. There is also an order from the Chief Magistrate's court, in Kakamega CMC Misc. Application No. E049 of 2021, directing the police to provide security to the 2nd defendant for the purpose of distraining for rent. There is also a copy of a landlord's notice for termination of or alteration of tenancy, dated 1st July 2021, and allegedly served on the plaintiff on July 12, 2021. There is also copy of an order by the Tribunal, in Tribunal Case No. E060 of 2021, dated October 29, 2021, allowing the notice, dated July 1, 2021, directing the plaintiff to vacate the premises, allowing the 1st defendant to take possession, and directing the police to assist the 1st defendant in evicting the plaintiff.
6. The other replying affidavit is by James Alumasa, the 2nd defendant, filed on December 23, 2021, and sworn on even date. He avers that the High Court lacked jurisdiction to hear and determine the matter, in view of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, cap 301, Laws of Kenya. He avers that he was instructed by the 1st defendant to levy distress for rent on the premises occupied by the plaintiff. The plaintiff closed the premises to evade the exercise, whereupon he applied for the orders for break-in, in Kakamega CMC Misc. Application No. E049 of 2021, and, upon obtaining the relevant orders, moved in and distrained for rent.
7. Together with the replying affidavit, the 2nd defendant also filed a notice of preliminary objection, dated December 23, 2021, where he raises 2 issues. The first is that jurisdiction on the dispute lay with the Business Premises Rent Tribunal, given that the dispute was over a controlled tenancy, as defined in the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*. Secondly, he argues that the suit was an abuse of court process, and that there was forum shopping.
8. On February 16, 2022, the parties informed me that they had agreed to dispose of the application by way of written submissions. On June 15, 2022, I was informed that they had filed their respective written submissions. The written submissions that I see on record were filed by the plaintiff, on May 11, 2022, dated May 10, 2022, and are limited to jurisdiction. I have not seen written submissions by the defendants. In her written submissions, the plaintiff cites a number of decisions, copies of which were not filed with the written submissions. Her point is that land does not include premises standing on such land, and articles 162(2) and 260 of the *Constitution* only apply to land excluding any developments standing on it.
9. Let me first of all dispose of the argument made in the written submissions. Article 162(2) of the *Constitution* envisages that disputes relating to use, title to and occupation of land be resolved by the court contemplated under that article, and article 165(5) of the same *Constitution*, makes it abundantly



clear that the High Court would have no jurisdiction to hear any matter that falls under article 162(2). Leases and tenancies are agreements to occupy and use land and premises standing on such land. Anything affixed on the land forms part of the land, and occupation and use of any premises, standing on such land, amounts to occupation and use of the land. Use of land includes user or utilization of the premises that stand on the land. It would be ludicrous to hold that premises standing on the land do not form part of the land. Anything that is planted or affixed on the surface of the land is part of the land. A dispute on a contract to occupy and use premises on land belonging to another brings the matter squarely under article 162(2) of the Constitution, and the High Court would have no jurisdiction to wade into that dispute, according to article 165(5) of the Constitution.

10. The other argument on jurisdiction is that articulated in the preliminary objection, that the tenancy between the parties was governed by the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, as it was controlled. It appears that the same was a month-to-month tenancy, and, therefore, it was controlled. To that extent, it was subject to the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, and jurisdiction over the matter lay, in the first instance, with the Business Premises Rent Tribunal. Under the Constitution, the High Court is vested, under article 165 of the Constitution, with unlimited civil jurisdiction. Without prejudice to my holding in paragraph 9, hereabove, a dispute over the right to occupy land and over rent accruing with relation to such occupation or possession of land or premises, is a civil matter, and a broad reading of Article 165 would mean that the High Court would have jurisdiction over such disputes. However, that has to be read together with article 162(2) of the Constitution, which I have discussed above. Secondly, that unlimited jurisdiction is also chipped away at by legislation, such as the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, which creates other tribunals, and gives them specific and dedicated jurisdiction over certain disputes. The High Court ought not compete with such tribunals over jurisdiction, and such tribunals should exercise jurisdiction in the first instance. So, in this case, the Business Premises Rent Tribunal has jurisdiction in the first instance. That ought to be the first port of call for the parties. They should not leap over the Tribunal and rush to the High Court. If that were to be allowed, the Tribunal could, in the long run, end up being rendered useless.
11. It would appear that the dispute was before the magistrate's court and the Tribunal. Indeed, the defendants had authority from the magistrate's court and the Tribunal to move into the premises, for the purpose of distressing for rent, and eviction of the plaintiff. Whether the orders, given by the magistrate's court and the Tribunal, were proper or lawful, is not an issue before me. My point is that, if the plaintiff had issues with that process or those processes, then he should have moved either or both the magistrate's court and the Tribunal to challenge the orders made, and should have come to the High Court only, if at all, by way of Judicial Review or appeal. Parties cannot be litigating in various courts or tribunals at the same time, over the same issues. I note that the plaintiff has been careful not to mention the existence of those other proceedings. It is plain that the plaintiff acknowledges the debt, in his correspondence, displayed in the replying affidavits, which he has not contradicted.
12. Overall, I find and hold that the suit herein ought not have been filed at the High Court. For one, it relates to use and occupation of land, and the High Court has no jurisdiction over such disputes. Secondly, it is a dispute over a tenancy, and jurisdiction, over such disputes, lies with the Business Rent Premises Tribunal in the first instance. Thirdly, the issues were subject to processes before another court and Tribunal. Consequently, I hereby strike out the suit herein. The temporary orders, made on October 28, 2021, are hereby discharged. The defendants shall have the costs.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS 24th DAY OF March 2023

WM MUSYOKA



JUDGE

Erick Zalo, Court Assistant.

Mr. Munyendo, instructed by Oscar Wachilonga & Associates, Advocates for the plaintiff.

Messrs. Ombeta Ogunyo & Company, Advocates on record for the 1st and 2nd defendants.

Mr. Mulama, instructed by Samba Odeck & Mulama, Advocates for the 2nd defendant.

