



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**MISC. CIVIL APPL. NO. E 11 OF 2021**

**ENDOROS ENTERPRISES LIMITED.....APPLICANT**

**VERSUS**

**WILD LIVING BUSINESS HUB CO. LTD.....RESPONDENT**

**CORAM: Hon. Justice R. Nyakundi**

**Gikandi Ngibuini Advocate for the Applicant**

**Wachira King'ang'ai Advocate for the Respondent**

**RULING**

The issues which arise on the Motion filed in Court on 17.3.2021 can be summarized as follows; -

- 1. Whether the applicant has complied with the orders of the Court issued on 23.2.2021 with regard to deposit of the rent arrears as a condition precedent to canvass the appeal.***
- 2. Whether the injunction can issue to restrain the respondents from interfering with the applicant quiet and peaceful occupation of the suit premises.***
- 3. In the Court's view whether this Court is the appropriate forum of convenience to determine the parties' cause of action.***
- 4. Whether Varison Limited should be admitted as an interested party to the instant proceedings.***

In these circumstances, the Court will pay attention to the above issues to its determinative role in granting order declining the reliefs in the pending applications. In support of the Notice of motion the Court has an affidavit sworn by Gerald Kissinger Enane. In essence the applicant depones that the lawful and the binding order in the ruling of 23.2.2021 has been fully complied with. That is a matter of great regret that the Respondent is yet to give vacant possession of the rentable premises. In response to the application, the Respondent filed a replying affidavit dated 22.3.2021 contesting the averments in the affidavit sworn by the Applicant.

Secondly the application by the Interested party dated 4.3.2021 seeks leave of the Court to be enjoined in the pending proceedings under order 1 rules 10 (2) of the Civil Procedure Rules. The basic rationale is that the intended interested party is the Proprietor and Head Lessor of the parcel of land known as **KILIFI GROUP V/282** by virtue of Lease of Agreement subject matter between the Applicant and the Respondent.

Besides the respective affidavits each learned counsel canvassed their positions by way of oral submissions. Having considered the necessary material and reliefs sought by the two applicants, I take advantage of my previous ruling to determine the issues herein before this Court.

**Determination**

In the first instance there is a jurisdictional issue, in light of the subject matter pending between the parties to this purported appeal. In the two applications the applicants place reliance on this Court ruling dated 23.2.2021 which ruled that predominantly there was no merit in the original motion on dismissal of injunctive orders against the Respondent.

In the alternative the court in exercising inherent powers and oxygen principle under section 3A, 1A and 1B of the Civil Procedure Act granted leave to the applicant to deposit ascertained amount of rent arrears in a joint earning interest account of both counsels to the suit or with the Deputy Registrar of the High Court within 21 days of today's date. To the extent of compliance with the order on deposit of the rent arrears the distressed goods were to remain in the Auctioneer's yard.

In this regard, I gather from the Respondent's affidavits evidence that none of the orders on deposit of rent has been complied with by the applicant within the stipulated period of 21 days. The applicant has stood his ground that the arrears of rent of Kshs.180, 000 for the month of February - March, 2021 has been fully deposited in the respondent's account. Second, on the aspect of the outstanding rent payable for the premises being ascertained at Kshs.569,997/- as of 4.3.2021 been deposited in the said joint account of **Gikandi & Company Advocates and Wachira King'ang'ai & Company Advocates**. Therefore, an injunction should be issued restraining the Respondent from interfering with the Applicant's quiet and peaceful occupation of the suit premises.

Taking into account the first order on deposit as contained in rent arrears and the approach applied by the applicant it is clear to the Court that there is no meeting of minds on that issue with the respondents. Before all those actions of depositing of Kshs.180, 000 as rent for February – March and a further drawn Bankers Cheque of Kshs.569, 997 the basis of it ought to have been ascertained. The general objective of that order on deposit of rent arrears was to enable the parties to go to the drawing board to analyze the indebtedness of the applicant on rent due and owing to the Respondent. I observe that once the rent dispute was filed before the magistrate court and the high Court had dispensed with the interlocutory appeal the parties should have approached the trial Court for a case management direction to ascertain the actual rent due capable of being paid to the Respondent under the lease agreement. Making full use of the Court to litigate the claim is a constitutional and statutory dictate arising out of the cause of action. One of the stark realities there is no suit pending before the high Court. I am convinced that the parties should look to the magistrate's court in the first instance to help peacefully resolve the dispute without necessarily vexing the high Court. The order on deposit of the outstanding rent arrears was meant to tailor the timing of the settlement in the litigation. Logistically it shouldn't be an excuse for the applicant to create concurrent jurisdiction between the high Court and the trial Court as a means to resolve the dispute. It is also clear from the material before Court that although the applicant has deposited the supposedly accrued rent, by the Respondent affidavit he still owes a balance way above Kshs. 569,997. That to me is a moot question. Thus, the trial Court, has the jurisdiction to conduct the trial with a possibility of settlement or pronouncement of a judgement. In addition, the second aspect concerns non-payment of Auctioneers fees in respect to the proclaimed and attachment of goods. In procedural law these fees are a major component in our legal system on proclamation and attachment to accord what is due to the Auctioneer as prescribed in the rules. The method that has been used is to assess the bill of cost and the relevant party liable to meet the expenses and cost of attachment. Given that legal position the frustration on return of goods is depended upon meeting the Auctioneer's fees.

A closer look of the entire litigation by the Applicant shows that he is keen to litigate this dispute concurrently in the two system of Court in a procedure which is unfortunate and regrettable. Why do I say so? As correctly pointed out by the Respondent there is no appeal or prospectus of an intended appeal sought to be canvassed by the Applicant.

In the instant case apart from issuing both the payment of rent for February – March, 2021 and deposit of the stated amount in the banker's cheque there is uncontroverted evidence from the Respondent that in the letter of the order an outstanding amount of Kshs.964, 997.25 was in the circumstances in conformity with the order issued by the Court on 23.2.2021.

The orders on payment of rent and the deposit of the purported partial rent arrears is prima facie contempt of Court. For the applicant is guilty for non-compliance with the terms of the ruling dated 23.2.2021 to first ascertain and thereafter deposit the quantified amount.

In the case of **North Tetu Farmers Co. Ltd V Joseph Nderitu Wanjohi(2016)EKLR Lord Mativo** of the High Court at Milimani had this to say to the test and elements of civil contempt taking the approach by learned authors of the book contempt in **Modern New Zealand** stated that:-

- a. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases; - the terms of the order (or injunction or undertaking were clear and unambiguous and were binding on the defendant.**
- b. The defendant had knowledge of or proper notice of terms of the order.**
- c. The defendant has acted in breach of the terms of the order**
- d. The defendant's conduct is deliberate.**

Another problematic aspect of the current proceedings is that the Court highlighted clearly the twenty-one day period for the parties to ascertain the deposit. In **Arawak Woodworking Establishment Ltd V Jamaica Development Bank Ltd (2010) JMCA** like a checklist it was necessary for the applicant to bear in mind the following words by **Harnsen J A**.

**“The time requirements laid down by the rule are not mere targets to be attempted but they are rules to be observed in achieving the overriding objective for litigants are entitled to have their cases resolved with a reasonable expedition otherwise such delay as has been shown to have taken place in the instant case will indeed cause prejudice to the other party involved in the litigation”.**

I take note of these words by the Court and by the sequence of events in this litigation the time consideration goes to the heart of exercising discretion in favour of the applicant. From the foregoing, the reason for the failure of the applicant not to comply with the requisite order is neither sufficient good cause to grant an equitable remedy.

In light of the circumstances explained by the applicant leave of the court could have been sought to enlarge time to purposely ascertain the rent due and outstanding before drawing the banker's cheque. This Court has to state firmly that there is no room to vary the order of the court in a ruling or judgement save in review or inherent jurisdiction of the Court.

On the basis of the material placed before the Court in support of the application by the Applicant the threshold test for the grant of injunction laid down in *Giella Vs Cassman Brown & Company Limited (1973) EA 358* in which the Court held that;

***“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”***

On this issue no doubt such a relief is in violation of section 7 of the Civil Procedure Act on *res judicata*. Again as this litigation is being prolonged there is some degree of prejudice to the parties whichever way the Court views the entire dispute. It is clear the applicant commenced the initial proceedings at Kilifi – Magistrates Court. That is the Court with the subject matter jurisdiction. Being aggrieved with the interlocutory ruling the applicant preferred an appeal before this Court. The Court in safeguarding the rights of the parties dismissed substantive application challenging the decision by Hon Kituku of Kilifi dated 27-7-2021. In the latter proceedings at the inter partes hearing, the matter was kind of conclusively determined. The parties only became conflicted with the order on deposit of rent as presumptive evidence of the Court assumption of jurisdiction.

Notwithstanding that order the main claim still stands unresolved in *Cmcc No. E 63 of 2020*. Both parties are in contestation on issues surrounding distress for rent and the vacant possession of the as premised in the lease agreement. It goes without saying that the issue of prejudice would affect both the applicant and the respondent if this litigation is prolonged further by any of the parties. Matters likely to prejudice a fair trial involve the strong applicant’s interest in ensuring both Courts are seized of jurisdiction on the same cause of action concurrently. According greater weight to the magistrate’s court as a forum of convenience and with jurisdiction will determine the valid cause of action to realistically produce a remedy for the parties.

I am satisfied that if the High Court continues to be seized of jurisdiction having determined the interlocutory application, both parties would suffer prejudice which cannot be remedied by an award of costs. To support their original choice of forum of litigation the applicant and the respondent accepted jurisdiction over the claim on distress for rent. Despite the holding of the Court on the question of deposit it did not in my opinion lead to affirm it’s forum to hear the dispute on rent claims. One of the doctrinal canon in our system of Court is first for the Court to establish both personal and subject matter jurisdiction over the claim. The whole object of distress for rent proceedings is to make them expeditious, to keep them as free from technicalities as possible and to keep them as simple as possible. It is essentially a procedure within the arena of jurisdiction to determine the terms of the lease agreement. In my view, on the evidence before the court the opportunity to pursue the litigation at Kilifi Magistrate’s Court would be the best forum of convenience on the cause of action. Apparently, the order on deposit and security in an attempt to resolve the issue raised also a tricky jurisprudential question. As already explained indeed in the context of that ruling there is no preferred appeal directly from the applicant. Relying upon the said decision in my opinion the applicable application was conclusively resolved.

Nothing, in either the constitution 2010 and the Civil Procedure Rules can be taken to have expounded the jurisdiction. If there was a redeeming feature of this litigation is for this Court to invoke the overriding objective under section 1A, 1B and inherent power to re-order the trial in the pending proceedings to revert back to Kilifi Magistrate’s Court. The Court in *Beverley Levis V Ken Satis, Marketing Ltd [2008] UKPC* stated as follows:-

***“On inherent jurisdiction of the Court that, it’s a jurisdiction of the court which is comprised within the term inherent and it enables it to fulfil, properly and effectively, its role as a Court of law. It must be distinguished from the exercise of judicial discretion and it may be exercised even in circumstances governed by the rules of the Court. In sum, it may be said that the inherent jurisdiction of the Court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers as the court may draw upon as necessary, whenever it is just or equitable to do so, in particular to ensure the observance of due process of law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them. In short, inherent jurisdiction, among others, empowers a superior court to regulate its proceedings in a way that secures convenience expeditiousness and efficiency in the administration of justice.”***

In the instant case to allow the parties to continue appearing before the High Court in absence of an appeal would be tantamount with vexing the court on non-existence appeal. It must be borne in mind that an application for joinder by the interested party in this context is an application for the joinder of the purported proceedings before this Court. For the present purposes joinder means adding the interested party as a new claimant or defendant to those on record before the Court. Undoubtedly the interested party seems to conceive that there is an existing cause of action to pursue against the applicant. Whether is aggrieved or likely to be aggrieved by the outcome of the litigation to the extent on the dispute between the applicant and the respondent is nonsuited issue before this Court. The real contest is generally speaking pending before the trial court. There can be of course no appeal in absence of the record of appeal and a serious arguable issue with a prospect of success. In this respect the order on deposit of rent arrears shall remain *insitu* with a rider that the trial court moves with speed to hear and determine the dispute on distress for rent as between the applicant and the respondent. As of now in the case at hand the Court is to down tools and cede jurisdiction to the Court of first instance.

For all those reasons and based on the above, I decline the motion by the applicant and that of joinder by the interested party. The parties are hereby directed to appear before the Senior Principal Magistrate’s Court at Kilifi for hearing and determination of the suit. I also add that the effect of the permitted particulars on deposit of Rent is in the circumstances for the trial court to take judicial notice with respect to the pending proceedings. Consequently, both applications are dismissed with costs.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 15<sup>TH</sup> DAY OF JUNE 2021.**

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**R. NYAKUNDI**

## **JUDGE**

**NB:** In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.