



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. E1187 OF 2020

SUSAN WAMUYU MUKARA.....CLAIMANT/APPLICANT

-VERSUS-

GENERAL PLASTIC LIMITED.....RESPONDENT

P.V.R. RAO (ADMINISTRATOR).....INTERESTED PARTY

RULING

1. Through the application dated 27th October 2020, the Claimant/Applicant seeks the following orders: -

1. Spent.

2. Leave be granted to the Claimant/Applicant to proceed and continue with the suit against the Respondent in ELRC Cause No. 27 of 2020.

3. The Administrator, P.V.R. Rao, be joined in ELRC Cause No. 27 of 2020 as an interested party for the purpose of continuing the suit.

4. The costs of this application be in the cause.

2. The application is supported by the applicant's affidavit and is premised on the grounds that: -

1. The Claimant/Applicants filed suit against the respondent being ELRC Cause No. 27 of 2020.

2. The Claimant/Applicants filed suit on 21st January, 2020 at the Employment and Labour Relations Court.

3. The Claimant/Applicant then tried to effect service of the plaint together with the summons upon the respondent but the respondent declined service. Copies were left at the company.

4. The Claimant/Applicant then proceeded to effect service upon the respondent on 10th February, 2020 via registered post.

5. The respondent has never entered appearance in the said suit.

6. That on or about 13th February, 2020 the Claimant Applicant learnt through former colleagues that the respondent company had been placed under Administration by I & M bank effective 15th January, 2020.

7. That the Claimant also learnt that P.V.R. Rao had been appointed as the administrator.

8. That the Claimant in her claim seeks over Kenya Shillings Six Million (Kshs 6,000,000/=) for unlawful termination.

9. That it is only fair and just that the Claimant/Applicant be allowed to proceed with the suit in ELRC Cause No. 27 of 2020 to conclusion for justice to be served upon her.

3. The application is opposed by the respondent through the replying affidavit of its Administrator **Ponangi Palli Venkata Ramana Rao** who avers that the applicant herein has made an application in ELRC Cause No. 27 of 2020 to address the issues herein.

4. He states that the instant application contravenes Section 430 of the Insolvency Act, is a gross abuse of the court process and does not establish a prima facie case with probability of success.

5. The respondent also filed grounds of opposition dated 10th November 2020 wherein it lists the following main grounds: -

a) That this honourable court is not vested with jurisdiction to hear and determine the application.

b) That the subject matter of the application and the suit herein are under judicial consideration before another court of competent jurisdiction in High Court ELRC cause No. 27 of 2020.

c) That the prayers sought in the application and the said suit contravene the provisions of Section 430 of the Insolvency Act No. 8 of 2015 Laws of Kenya.

d) That the application and the suit are premature in view of the pending administration and negate the objectives of administration as specifically laid down under the Insolvency Laws.

6. Parties canvassed the application by way of written submissions which I have considered.

7. The main issues for determination are:

a) Whether this court has the jurisdiction to entertain the application and;

b) Whether the applicant can institute proceedings/execution against a company under administration.

Jurisdiction.

8. It was the respondent's case that since the dispute herein revolves around an employer/employee relationship for which a suit has been filed in ELRC No. 27 of 2020, this court lacks jurisdiction as the Employment and Labour Relations Court has the exclusive jurisdiction over the matter.

9. For this argument the respondent cited the decision in the case of *DAC Aviation (EA) v Stevenson Kibara Ndungu & 8 Others [2020] eKLR* wherein it was held: -

"....21. Ordinarily the High Court lacks jurisdiction to entertain disputes between employer and employee. Under Article 169(2) of the Constitution as read with section 12(1) of the Employment and Labour Relations Act, 2011, the ELRC has exclusive jurisdiction to hear appeals from courts and tribunals on labour and employment disputes. The exclusivity of the jurisdiction of the ELRC vis-à-vis the High Court in relation to disputes between employer and employee was recently buttressed by the Supreme Court in Republic v Karisa Chengo & Others, SCK Petition No. 5 of 2015120171eKLR. It would therefore be improper for this court to permit the Respondents to circumvent the strictures of jurisdiction in order to have their claims resolved by the High Court exercising insolvency jurisdiction.

22. The Respondents have claimed that the Company is disposing of properties and that is why they have sought the protection of this court. In my view, the ELRC, like the High Court has jurisdiction to issue quia timet remedies in an appropriate case in order to protect the Respondents. This cannot be a reason to invoke the jurisdiction of the High Court."

10. The respondent further submitted that the applicant cannot rely on the fact that the respondent is under administration to invoke this court's jurisdiction.

11. For this argument, reference was made to the decision in *Ideal Locations Ltd V Nakumatt Holding Ltd & Another [2018] eKLR* where it was held:

12. The jurisdiction of the High Court has been taken away by the Environment and Land Court specifically in matters of Environment and Land. Article 165(5) provides as follows:

"(5) the High Court shall not have jurisdiction in respect of matters —

a. Reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

b. Falling within the jurisdiction of the Courts contemplated in Article 162(2)."

I am aware that Section 2 of the Insolvency Act defines 'Court' to mean High Court. In my view, that definition must be interpreted and understood within the meaning of Article 162 (2)(b) of the Constitution and Section 13 of the Environment and Land Court Act to the extent that where the dispute revolves around use and occupation of land, then the right Court to seek redress is the Environment and Land Court. The Constitution has not prohibited this Court from hearing the dispute over use

and occupation of land where there is a pending insolvency cause involving one of the parties,

The dispute herein is about landlord/ tenant relationship. It relates to non-payment of rent for the premises that 1st Defendant leased from the Plaintiff. The same clearly relates to use and occupation of land. Therefore, under Article 162(2)(b) of the Constitution and Section 13 (2)(a) of the Environment and Land Court Act, this Court has jurisdiction to hear the Suit and the application and issue the orders sought by the Plaintiff. In my view, the Plaintiff's action does not in any way contravene Section 430 of the Insolvency Act as the Plaintiff in this case is not undertaking or seeking to undertake any of the actions listed in Section 430. The Plaintiff has not taken any action against the assets of the 1st Defendant, whether attachment, sequestration, distress or execution. The Plaintiff is only seeking to exercise its rights to peaceable re-entry which in my view, is not prohibited by Section 430 of the Insolvency Act. Accordingly, I hold that the Preliminary Objection by the Respondent is not merited and the same is hereby dismissed with costs to the Plaintiff."

12. Article 162(2) of the Constitution and Section 12(1) of the Employment and Labour Relations Court Act stipulate as follows: -

Article 162(2) of the constitution

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a) employment and labour relations; and

(b) the environment and the use and occupation of title to land

13. Section 12(1) of the Employment and Labour Relations Court Act

“Statement on disciplinary rules

(1) A statement under section 10 shall—

(a) specify the disciplinary rules applicable to the employee or refer the employee to the provisions of a document which is reasonably accessible to the employee which specifies the rules;

b) specify the person to whom the employee may apply—

(i) if dissatisfied with any disciplinary decision relating to the employee; and

(ii) for the purpose of seeking redress of any grievance relating to his employment and the manner in which an application shall be made; and

(c) where there are further steps to be taken consequent to any such application, explain the steps or refer the employee to the provisions of a document which is accessible to the employee which explains the steps.”

14. Having regard to the above cited cases and the provisions of the Constitution and Employment and Labour Relations Court Act, I find that the Employment and Labour Relations court has the exclusive jurisdiction to hear and determine the application and it was therefore erroneous for the applicant to file the same before this court.

15. Having found that this court lacks jurisdiction to entertain the application, I do not find it necessary to delve into the issue of determining the issues of whether the applicant can institute proceedings against a company that is under administration. Be that as it may even if this court was to consider the merits of the applicant's prayer on the basis that the respondent is under administration court have taken the position that this court's jurisdiction cannot be invoked merely because the respondent is under administration as the Employment and Labour Relations Court can still determine the issue at hand.

16. For the above reasons, I find that the instant application is misconceived for want of jurisdiction and therefore strike it out with no orders as to costs.

Dated, signed and delivered via Microsoft Teams at Nairobi this 1st day of July 2021 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Wanda for the Applicant.

Mr. Muoka for the Defendant/Respondent

Court Assistant: Sylvia.