



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**CIVIL CASE NO.252 OF 2018**

WASH –TECH KENYA LIMITED.....1<sup>ST</sup> PLAINTIFF

JURGEN FUKS.....2<sup>ND</sup> PLAINTIFF

VERSUS

VIVO ENERGY KENYA LIMITED .....RESPONDENT

**RULING**

1. Through the application dated 5<sup>th</sup> March 2019, the defendant/ applicant seeks orders to strike out the plaint dated 25<sup>th</sup> June 2018 and to dismiss the suit against the defendant. The applicant also prays for the costs of the application and the main suit.

2. The application is supported by the affidavit of the defendant's Company Secretary **Naomi Assumain**, and is premised on the grounds that:

*a) The proceedings herein seek to recover damages for an attachment carried out in execution of warrants issued elsewhere and by a licensed auctioneer who is not a party hereto;*

*b) The defendant is non-suited.*

*c) The 2<sup>nd</sup> plaintiff, as a director of the 1<sup>st</sup> plaintiff, was at the material time not a Lessee of the defendant and cannot therefore sustain proceedings at the defendant.*

*d) The proceedings herein are not an appeal from decisions and/or orders issued by the Business Rent Tribunal and are thus an abuse of the process of this Honourable Court.*

*e) The reliefs sought herein are only enforceable against a party not before this Honourable court.*

*f) This Honourable court's jurisdiction cannot be invoked to reward a party in breach of a contractual obligation.*

*g) The continued pendency of these proceedings is otherwise an abuse of the process of this Honourable court.*

3. The applicants deponent avers that the defendant is the registered owner of LR No. 3734/605 Nairobi (hereinafter "**the suit property**") a portion of which it leased to the 1<sup>st</sup> plaintiff for monthly rent of Kshs 250,000. She states that the 1<sup>st</sup> plaintiff defaulted in rent payments thereby falling into arrears to the tune of Kshs 1,250,000 thus prompting the defendant to engage an auctioneer to levy distress for rent so as to recover the rent due. The auctioneer promptly executed by obtaining an order from the Business Premises Rent Tribunal Nairobi BPRT 335 of 2017. The auctioneer then proceeded to attach the 1<sup>st</sup> plaintiff's goods which attachment the 2<sup>nd</sup> plaintiff did not object to and that there was no appeal against the order of the Chairman of the Tribunal.

4. She further states that the defendant is not the auctioneer and that the instant suit should have been filed against the auctioneer who executed the warrants. She further avers that the 1<sup>st</sup> plaintiff is an admitted rent defaulter and that the instant suit is therefore an abuse of the court process.

5. At the hearing of the application, **Mr. Luseno**, learned counsel for the applicant, submitted that the 1<sup>st</sup> plaintiff's goods were attached and sold pursuant to default in rent payment and therefore an order for refund of the value of the goods cannot arise. It was submitted that under

Section 26 of the Auctioneers Rules, any party aggrieved by the acts of an auctioneer has a right to recover damages from the auctioneer directly. Counsel submitted that the auctioneer is not a party to this suit yet all the reliefs sought ought to be directed to the auctioneer. Counsel cited the decision in **Hirji Shamji Vishran & 4 Others –V- Nairobi County Government Nairobi ELC N. 3066 of 1006** for the argument that proceedings under special tribunals cannot be ignored and that the reliefs sought in this suit ought to have been sought before the tribunal.

6. The plaintiffs/respondents opposed the application through the 2<sup>nd</sup> plaintiffs replying affidavit sworn on 26<sup>th</sup> April 2009. He confirms that the 1<sup>st</sup> plaintiff was the defendant's tenants in the suit premises wherein it has installed a highly computerized car washing machine and generator valued at Kshs 30,000,000.

7. He states that sometime in the year 2016, the car wash business became low and that the 1<sup>st</sup> plaintiff approached the defendant to negotiate tenancy exit terms whereupon the parties agreed that the 1<sup>st</sup> plaintiff would procure a buyer for its machines within 1 year during which period the 1<sup>st</sup> plaintiff would enjoy quiet occupation of the suit premises but that in a surprising turn of events, an advertisement for the sale of the 1<sup>st</sup> plaintiff's car washing machine was posted in a local daily. The 1<sup>st</sup> plaintiff then filed an application before the Business Premises Rent Tribunal case No. 335 of 2017 for orders to restrain the defendant and its agents from dealing with the car washing machine and that in a ruling delivered on 26<sup>th</sup> January 2018 the tribunal dismissed the application for lack of jurisdiction as the parties no longer had a landlord/tenant relationship.

8. He further avers that the attachment was never completed as the car washing machine was completely destroyed by the 1<sup>st</sup> plaintiff's agents. He contends that the auction of the 1<sup>st</sup> plaintiff's property never took place as the auctioneer has never filed returns of how much, if any, was realized from the sale. It is the plaintiff's case that the defendant is responsible for the actions of the auctioneer who acted as its agents in the entire process.

9. He contends that even if the 1<sup>st</sup> plaintiff was a rent defaulter, it was still entitled to the due process of the law and that any execution or recovery of rent should have been done in strict compliance with the law governing the landlord and tenant relationships.

10. At the hearing of the application, **Mr. Mwesingwa**, learned counsel for the plaintiffs submitted that the application lacks merit and that the claims that the 2<sup>nd</sup> plaintiff was an unnecessary party to the suit and non-joinder of the auctioneer to the suit are factors that cannot defeat a suit or warrant the striking out of the plaintiff.

11. Counsel submitted that the pertinent issue in this suit is that the attached goods were not sold and that the plaintiffs' rights to the reliefs sought had not been extinguished. Counsel submitted that the plaintiff's suit discloses triable issues which ought to be determined at a hearing.

12. It was submitted that an auctioneer acting on distress for rent is an agent of the landlord and that the defendant was therefore a proper party in these proceedings.

13. I have considered the application, the plaintiffs' response, the submissions by counsel and the authorities cited.

14. The main issue for determination is whether the defendant/applicant has made out a case for the striking out of the plaintiffs' suit. Order 2 Rule 15 of the Civil Procedure Rules stipulates as follows:

**1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—**

**(a) it discloses no reasonable cause of action or defence in law; or**

**(b) it is scandalous, frivolous or vexatious; or**

**(c) it may prejudice, embarrass or delay the fair trial of the action; or**

**(d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.**

**(2) No evidence shall be admissible on an application under subrule (1) (a) but the application shall state concisely the grounds on which it is made.**

**(3) So far as applicable this rule shall apply to an originating summons and a petition.**

15. In the instant case, the defendant raises the issues of its joinder and non-joinder of the auctioneer as one of the reasons for seeking the striking out of the plaintiff. The defendant also raises the issue of the 1<sup>st</sup> plaintiff's admitted default on paying rent as another ground for striking out of the plaintiff.

16. On misjoinder and non-joinder of parties, I find that Order 1 Rule 9 of the Civil Procedure Rules comes into play. The said provision stipulates as follows:

**“No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the**

*matter in controversy so far as regards the rights and interests of the parties actually before it.”*

17. Having regard to the above cited case of **Blue Shield Insurance Company Ltd V Joseph Ogutu Mboya** (supra) and without going to the merits of this case at this stage, I find that the plaintiff's case cannot be said to be a sham. The plaintiff's case raises pertinent questions regarding the manner in which the attached goods were dealt with by the auctioneer who, they allege, acted at the instance of the defendant. The plaintiff has also raised the question of whether the landlord/tenant relationship that it had with the defendant was still in existence as at the time the plaintiff's property was attached.

18. My take is that the issues raised in the plaint are triable issues that can only be canvassed at the full hearing of the case. Needless to say, courts have taken the position that striking out of pleadings is a very drastic measure which ought to be taken very sparingly and in the clearest of cases. My finding is that this is not one of those clear cases as I find that there are valid questions that ought to be interrogated at the hearing.

19. For the above reasons I find that the instant application is not merited and I therefore dismiss it with orders that costs shall abide the outcome of the main suit.

**Dated, signed and delivered in open court at Nairobi this 13<sup>th</sup> day of February 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Luseno for the defendant.

No appearance for the defendant

Court Assistant – Sylvia