



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

COMMERCIAL DIVISION

COMMERCIAL CASE NO. 24 OF 2018

AL-RIAZ INTERNATIONAL LTD.....PLAINTIFF

VERSUS

GANJONI PROPERTIES LTD.....DEFENDANT

RULING

1. This ruling is in respect of the 2nd Defendant's Preliminary Objection dated 16.4.2018 in respect of the Plaintiff's Notice of Motion application dated 24.4.2018.

2. The Application seeking for orders that:

a) Summary Judgment be and is hereby entered for the Plaintiff against the Defendants, jointly and severally, on the liquidated amount captured in the Plaint, viz, kshs. 146,865,000.

b) The case be set down for hearing of the portion of the main suit that relates to an unliquidated claim.

c) Costs of this Application and of the portion of the main suit that relates to the Summary Judgment be paid by the Defendant, jointly and severally.

3. The Application is anchored on five (5) grounds on its face and supported by the Affidavit sworn on the 24.4.2018 by **Rehan Riaz Malik** who is described as a director to the Plaintiff. He avers that that summons to enter appearance and accompanying process were all served upon the Defendants on the 16.4.2018 and they entered appearance unconditionally on the 16.4.2018 and 19.4.2018 respectively but to-date they have not filed any statement of defence.

4. The Preliminary Objection is based on ten (10) grounds which have been summarized as follows:

a) That the suit was filed without a Board of Directors Resolution authorizing filling of the suit making the suit a nullity.

b) The suit is based on a false verifying Affidavit as it falsely alleges that there are no other suit pending and there have been no previous proceedings in any Court between the parties in respect of the same subject matter.

c) This suit is sub-judice as the following suits are pending before Court: Mombasa HCCC No. 158 of 2014; Mombasa ELC No. 20 of 2018 and Mombasa ELC 458 OF 2017.

d) That suit is *res-judicata* in so far as it concerning Plots No.Mombas/Block XX/350 as it subject matter in Mombasa CMCC No. 317 of 2016.

e) This suit is *sub-judice* in so far as it concerns Plots No. Mombasa/Block XX/350 which is subject to ELC Miscellaneous Civil Application No. 44 of 2017.

f) That this Court has no jurisdiction to hear any aspect of the suit as it arises out of an alleged right to use and occupy land and this Court is prohibited under Article 165 of the Constitution from hearing.

5. The 2nd defendant opposed the Application via an Affidavit in Reply sworn on the 18.4.2018 by Joel Titus Musya who is described as a licensed Auctioneer. He avers that the entity sued does not exist and that the plaintiff is being malicious by making him a party to the suit yet he was an agent of a disclosed principal enforcing lawful orders of ensuring the landlord rights were fulfilled.

6. On the 6.10.18, this Court directed that the 2nd Defendant's Notice of preliminary Objection be dispensed with via written submission.

2. DETERMINATION

7. I have considered the entire Application, the preliminary objection together with the Affidavit in Reply and the written submissions in this matter. The issue for determination in my view is whether the orders sought in the application and the Grounds raised in the preliminary objection are merited.

8. I wish to start with the issue of jurisdiction to entertain aspects of the current claim under Article 165 of the Constitution. It is trite law that jurisdiction is everything, without which the court has no power to make one more step, as was held in the case of; ***Owners of Motor Vehicle Lillian ("S") vs Caltex Oil (K) Limited (1989) 1 KLR***. Indeed, where a court has no jurisdiction, any proceedings taken would be null and void. Therefore, the court must determine the issue of jurisdiction at the outset.

9. Counsel for the Plaintiff submitted that the jurisdiction of the ELC is limited to the areas specified under Article 162 of the Constitution, Section 13 of the Environment and Land Court Act and Section 150 of the Land Act. Consequently, this dispute does not fall within the jurisdiction of the ELC.

10. The 1st Defendant on its part submitted that this Court, under Article 165(5) of the Constitution is expressly prohibited from hearing this suit as prayer (b), (c) and (d) of the plaint relate to the use and occupation of land and paragraph 5 of the Plaint seeks to have the Plaintiff declared as a controlled tenant.

11. Looking at the undated Plaint filed on the 9.4.2018, the prayers ought to be as follows:

- a) *Special damages for illegal /unlawful eviction;*
- b) *General damages for illegal/unlawful auction sale;*
- c) *General damages for illegal/unlawful Auction sale;*
- d) *General damages for lost Business/income;*
- e) *Cost of this suit*
- f) *Interest on (a) at the current commercial rate w.e.f 7.1.2018 until payment in full;*
- g) *Any other/further relief the honourable Court may deem fit and just to award, in the circumstances.*

12. Section 13 of the Environment and Land Court Act stipulates as follows:-

- a. **The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.**
- b. **In exercise of its jurisdiction under Article 162(2) (b) of the Constitution, the Court shall have power to hear and determine disputes—**
 - i. **relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;**
 - ii. **relating to compulsory acquisition of land;**
 - iii. **relating to land administration and management;**
 - iv. **relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and**
 - v. **any dispute relating to environment and land.**

13. At paragraph 11 of the Plaint, it is stated that the Plaintiff was unlawfully evicted from the issue premises and as a result it has suffered loss of business and unlawful auction sale. It follows therefore that the predominant issue in this matter is the unlawful eviction and auction sale and as a result of the said illegality the Plaintiff suffered loss and damage. I am also alive to the fact that the same matter also invites this court to make a determination regarding the issue of the Plaintiff being a controlled tenant. This matter is therefore one of those hybrid cases

where both the High Court and the Environment and Land Court have concurrent jurisdiction as the issues herein cut across the exclusive jurisdiction reserved for the two courts.

14. In the case of **Suzanne Butler & 4 Others v Redhill Investments & Another (2017) eKLR** the Court stated the test in the following words:

c. "When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-dominant Purpose Test: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works.

d. The Court must first determine whether the pre-dominant purpose of the transaction is the sale of land or construction. Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse.

e. Ordinarily, the pleadings give the Court sufficient glimpse to examine the transaction to determine whether sale of land or other services was the predominant purpose of the contract. This test accords with what other Courts have done and therefore lends predictability to the issue."

15. In view of the foregoing, I find that the issues arising in the instant matter are substantially and predominantly related to unlawful/illegal eviction and auction sale that resulted in the loss of business and damages. It is, therefore, my view that this Court has the unlimited original jurisdiction to decide matters with regard to money, eviction and unlawful auction sale arising out of the landlord-tenant relationship as the ownership of the subject property is not in dispute. In the interest of justice and in light of the principle of expeditious dispensation of justice, it is prudent that this case be heard and determined by this Court, since it is the best forum for the hearing and determination of all the issues arising in this matter exhaustively.

16. The other ground that has been raised by the 1st Defendant in its objection of the plaintiff's application is that the suit is a nullity having been filed without the authority of the Board of Directors.

17. The 1st Defendant submits that there is no resolution by the plaintiff's Board of Directors authorizing and appointing the firm of **Ngonze & Ngonze Advocates** to file this suit and neither is there authority for **Mr. Rehan Riaz Malik** to swear affidavits to be drawn by the aforesaid advocate.

18. The Plaintiff on its part submitted that a company resolution dated 19.1.2018 was filed alongside the Plaintiff on the 9.4.2018 and that a resolution may be filed before the suit is fixed for hearing. (See the case of **Leo Investment Limited vs Trident Insurance Company Limited (2014) eKLR**.)

19. I have gone through the Plaintiff's Plaintiff and I note that the resolution annexed in its submissions was not among the documents filed together with the Plaintiff and the same cannot be introduced via written submissions. Be that as it may, **Order 4 rule 1(4) of the Civil Procedure Rules** provides:

"Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so."

20. It is however apparent, from the above stated provision, that there is no requirement that the authority given to the deponent vide the verifying affidavit must be filed. There is nothing that has been displayed by the 1st Defendant to demonstrate that **Mr. Rehan Riaz Malik**, was not a director of the plaintiff company at the time the suit was instituted and that he had no authority to swear the verifying affidavit. To me, that would be an internal matter in the company and I do not see how an outsider would want to contest that authority, when the company, which is the named plaintiff, has no issue with Mr. Rehan Riaz Malik swearing affidavits on its behalf.

21. I associate myself with the view point taken by Odunga J in the case of **Leo Investments Limited vs Trident Insurance Company Limited (2014) eKLR**, cited by counsel for the plaintiff, where the learned judge stated as follows on the provisions of Order 4 Rule 1 (4) :-

"...nowhere is it required that the authority given to the deponent of the verifying affidavit be filed. The failure to file the same, in my view, may be a ground for seeking particulars assuming that the said authority does not form part of the plaintiff's bundle of documents which common sense dictates that it should. Of course, if a suit is filed without a resolution of a corporation, it may attract some consequences. The mere failure to file the same with the plaintiff does not invalidate the suit. I associate myself with the decision of Kimaru J, in Republic vs Registrar General and 13 Others, Misc. Application NO. 67 of 2005 (2005)eKLR., and hold the position in law is that such a resolution by the Board of Directors of a company may be filed any time before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit. Its absence, is therefore, not fatal to the suit."

22. Since I have established that the special resolution authorizing **Mr. Rehan Riaz Malik** was not filed together with the Plaintiff, in my view, the mere failure to file the same with the Plaintiff does not necessarily invalidate the suit. And, unless there is serious contention by an insider in the company, that the company could not have issued a resolution to institute the suit, then the court ought to be slow to infer that the company which has commenced the suit, had no authority to do so, especially where a director or directors have sworn affidavits affirming that they have indeed authorized commencement of the case. If a director of the company has said so, and nobody else within the company has contested such statement, I do not see how an outsider, or the court, can now infer that no such authority exists. (See **Private Development Co. Ltd v Rebecca Ngunyo & 2 others [2018] eKLR**).

On the issue of sub-judice.

23. **On the issue of sub-judice**, for a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The salient features of a valid preliminary objection were reiterated in **Oraro v Mbaja [2005] eKLR** where Ojwang J (as he then was) stated:

“I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. I am in agreement with learned counsel, Mr. Ougo, that “where a Court needs to investigate facts, a matter cannot be raised as a preliminary point.”

24. In the present case, the preliminary objection raised by the 1st Defendant can only be argued on the assumption that facts as pleaded by the plaintiff are correct. The 1st defendant cannot seek to introduce evidence to support the preliminary objection. Grounds 2, 3, 5,7,8,9 and 10 of the preliminary objection boil down to whether or not suit offends the provisions of Section 6 of the Civil Procedure Act thereby rendering it *sub judice*. Section 6 of the Civil Procedure Act. The section provides as follows:

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

25. I would need to receive evidence to enable me determine whether or not the matters in issue in this suit are also directly and substantially in issue in the previously instituted Mombasa HCCC No. 158 of 2014, Mombasa ELC 20 of 2018 and ELC 458 of 2017 and whether or not parties in both matters are the same or litigate under the same title. Such evidence would include but not limited to copies of pleadings, proceedings, rulings and or judgment in the said cases. The Plaintiff has furnished this Court with pleadings in HCCC No.158 of 2014 and I note that the substantive prayer was an injunction order to restrain the Defendant from evicting the Plaintiff from plot No. Mombasa/Block XX/350 and a declaration that the Plaintiff is a controlled tenant. Yet in this suit, the Plaintiff is seeking general and specific damages as a result of illegal and unlawful eviction and as a result I hold that this current suit is not sub-judice. No such evidence has been placed on record by the plaintiff as at the date the preliminary objection was filed in relation to ELC 20 of 2018, ELC Miscellaneous Civil Application No. 44 of 2017, ELC 458 of 2017 and Mombasa CMCC No. 317 of 2016(res-judicata). Similarly, ground 9 of the preliminary objection seeks to show that the suit amounts to forum shopping and a gross abuse of the court process. All these allegations need to be established by way of evidence.

26. Evidence cannot be introduced later to bolster a preliminary objection. If the 1st defendant wished to have the plea of *sub- judice* and the other issues raised by the preliminary objection properly adjudicated, the 1st defendant ought to have brought an application to that effect with the appropriate supporting evidence.

27. For the time being, I have no hesitation in holding, as I hereby do, that the preliminary objection has no merit and proceed to dismiss the same with costs to the respondent.

28. Further, I direct that:

- a) the parties take directions with regard to hearing of the Application dated 24.4.2018 within thirty(30) days from the date of this ruling;
- b) the plaintiff to have the company’s properly introduced into evidence before this matter is set down for hearing.

DATED, DELIVERED & SIGNED at NAIROBI THIS 13th day of MAY, 2020.

D.O. CHEPKWONY

JUDGE

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic, and in light of the directions issued by His Lordship, the Chief Justice, on 15th March 2020, this ruling/judgment has been delivered to the parties online with their consent. They have waived compliance with Order 21 rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159 (2) (d) of the Constitution which requires the court to eschew technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 18 of the Civil Procedure Act, Cap 21, Laws of Kenya, which impose on this court the duty to use, inter alia, suitable technology to enhance the overriding objective, which is to facilitate just, expeditious proportionate and affordable resolution of civil disputes.