



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC CASE NO. 49 OF 2019**

**CITY SQUARE PROPERTIES LTD.....PLAINTIFF**

**VERSUS**

**UCHUMI SUPERMARKET LTD.....DEFENDANT**

**RULING**

1. The appellant herein is the owner of the suit premises known as L.R No. Meru municipality block 11/311. Vide a lease agreement of 1.6.2013, the applicant leased the suit premises to the defendant. However, defendant was put under liquidation vide an **insolvency suit Petition No. 25 of 2018 Nairobi High Court** of which the case is on going.

2. On 3.9.2019, the applicant filed this suit contemporaneously with an application (filed under a certificate of urgency). The plaintiff/applicant contends that defendant has not paid rent for the last 26 months resulting in accumulated rent of Ksh.32,443,228/= as of July 2019. Defendant's Meru branch has also apparently remained closed for the last 7 months. Against this background, the plaintiff in his pleadings wants inter alia to exercise his right of re-entry of the suit premises, a declaration that defendant is in breach of the lease agreement, damages for breach of contract and costs.

3. The notice of motion filed on 3.9.19 is the subject of this ruling. In it, the applicant is seeking orders to take over the suit premises and for the respondent to give vacant possession thereof.

4. The application is supported by the grounds on the face of it and on the supporting affidavit of one Alice Muthamia, a director of the applicant. The applicant, contends that under cause 5 (b) of the lease, it is entitled to exercise its right of re-entry of the suit premises as respondent is in breach of the said lease agreement, that respondent has arrears in rent amounting to Kshs.32,443,228.57 at as July 2019 and that the suit premises are closed.

5. In support of the application, the applicant has availed several annexures including a copy of the lease

6. In opposition to the application, the respondent has filed a replying affidavit on 15.11.19 through its legal manager one Judith Matata. The respondent contends that there is an **insolvency petition NO. 25 of 2018 in Nairobi High Court Commercial Division** against it which is pending final determination. It is averred that the applicant, herein has filed a similar application against the respondent in the insolvency suit and the same is pending before that court for determination, hence the present application is res-subjudice.

7. It is also contended that on 2/10/18, the court in the insolvency suit issued an order staying all legal and execution proceedings against the respondent pending the determination of the winding up cause. The orders were affirmed on 26.9.2019. The respondent therefore prays for the dismissal of the suit.

8. The application was argued orally on 18.11.2019.

**DETERMINATION**

9. I have considered all the arguments raised herein as well as the cited authorities and the skeleton submissions of the respondent. I find that whereas the applicant has disclosed the existence of the insolvency petition, he was mute on the existence of orders issued by that court which are in conflict with the prayers sought herein. The applicant is also mute on the existence of a similar application in that other suit. It is the respondent who has alerted the court the existence of these documents.

10. The respondent has availed exhibit "JM1" which is a copy of the application filed by the present applicant on 21.3.2019 in the insolvency suit. There in, the applicant had sought to be enjoined as a party in that suit. He then sought similar prayers to the ones in the present matter with slight variation here and there.

11. Section **6 of the Civil Procedure Act** provides that:

***“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”.***

12. The respondent avers that this aforementioned application is still live. It can therefore be said that that application is still under judicial consideration before the insolvency suit and hence the present application is subjudice.

13. In this era of **Sustaining Judiciary Transformation (SJT)**, Litigants cannot have and cannot be allowed to have the luxury of limitless litigation where parties litigate on similar issues in different courts. Judges also sign performance management and measurement understanding contracts commonly known as PMMU’s where there are set timelines on various events. Even an application has a lifespan. It was therefore not open to the applicant to leave the application of 21.3.19 just lying there in the insolvency suit hoping to prosecute the same issues before this court.

14. It is also evident that the court in the insolvency suit had issued injunctive orders on 2.10.18 (see respondents annexure JM 2a) restraining the eviction of the current respondent from any of the premises it occupies pursuant to a lease, tenancy agreement licence etc. The import of the order is aptly captured in paragraph 9 of the affidavit of Alice Muthoni in the application of 21.3.19 before the insolvency court where she has responded that:

***“Accordingly, the order of this honourable court of 2/10/2018 aforesaid effectively restrains and/or prohibits the applicant herein from exercising its power of re-entry under the lease or power to terminate the said lease aforesaid unless ordered by this honourable court”***

15. Having established that the orders in the insolvency suit had the effect of curtaining the applicant rights under clause 5 (b) of their lease, then recourse thereof was in lodging an appeal or application for review. As the matter stands now, it would appear that this court is sitting as an appellate court regarding the orders issued in the insolvency suit.

16. The jurisdiction of the ELC Court is set out **under Article 162 (2) (b)** of the constitution and **Section 13 of the ELC Act**. In reality though, the Environment and Land Court and the High Court sometime handle what can be termed as mixed grill cases with cross cutting issues.

17. In the case of **Salesio Mati Mwirichia vs Fredrick Mugambi and another (2017) EKLR**, It was held that

***“It is good practice and correct thing for judges to respect judgements delivered by their brothers and sister judges ..... I find that I have no jurisdiction to set aside the judgement delivered by a judge who then had both concurrent and horizontal jurisdiction similar to the jurisdiction I have .....”***

18. While in the case of **Jeremiah M’Njogu vs Janet Tirindi Kathungari (deceased) and 5 others (2016) EKLR**, it was held that:

***“Hearing suits concerning the same subject matter may lead to court of horizontal and concurrent jurisdiction reaching diametrically opposed rulings and judgements”***

19. And in **Alvin Mbae and 2 others vs Kinyua Muketha and 2 others (2018) eKLR** the court had this to say on matters jurisdiction.

***“I find that I have no authority to decide in favour of the plaintiffs when another court which had horizontal jurisdiction similar to mine had found the issues concerning the suit land as having been heard and determined on their merits.....”***

***A studious by stander watching the court doing so would surmise that he is beholding veritable judicial phantasmagoria. A decision made by a judge seized of concurrent and/or horizontal jurisdiction with another judge having his decision juxtaposed against that of another of similar status!, he would think that the judiciary is a house of babel. I think that this would spawn judicial anarchy and chaos. I opine that the plaintiffs have been involved in a forum shopping misadventure.”***

20. It is crystal clear that there is an inexorable nexus between the orders issued by the insolvency court and the prayers sought by the applicant herein. Allowing the present application would certainly amount to juxtaposing the said orders upon the orders issued in the insolvency court.

21. I must add that as rightly submitted by the respondents, in the **ideal locations limited case (supra)**, there was no order staying other matters and there was no similar application pending before the insolvency suit.

22. In the final analysis I proceed to strike out the application of 3/9/19, noting that this application has not been determined on its merits: Reasons, being the existence of a similar application along with orders in the insolvency suit.

23. As to costs, I have taken into account the fact that applicant has advanced an unchallenged averment that the premises are closed and respondent is not carrying out any business there on. It would be unjust to condemn the applicant to pay costs in such circumstances. Each party is to bear their own costs of the application.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 12<sup>TH</sup> FEBRUARY, 2020**

**IN THE PRESENCE OF:-**

C/A: Kananu

Mutegi holding brief for Gitonga Martin for plaintiff

Mutuma holding brief for Kieti for defendant – present

Michael Juma (a representative for Uchumi) present

Plaintiff absent

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**