



**REPUBLIC OF KENYA**

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

**ELC NO. 7 OF 2020**

**LEO INVESTMENTS LIMITED T/A**

**MARA CONCORD GAME LODGE.....PLAINTIFF**

**-VERSUS-**

**SAMSON OLOLMAITAI.....1<sup>ST</sup> DEFENDANT**

**KORIATA STANLEY KOINET.....2<sup>ND</sup> DEFENDANT**

**RULING**

The Plaintiff/Applicant has by a Notice of Motion dated 24<sup>th</sup> February, 2020 and 17<sup>th</sup> February, 2020 sought for the following orders: -

(a) spent

(b) That pending the hearing and determination of this application interparties, there issue an interim order of injunction restraining the Defendants/Respondents either by themselves, agents M/S Sanjomu Auctioneers, servants and/or any other person acting under the Defendants/Respondents instructions from attaching, carting away and or selling the plaintiff's movable goods from the suit property Mara Concord Game Lodge situated upon on the Defendants parcel of land known as CIS MARA/LEMEK/173.

(c) That pending the hearing and determination of main suit herein, there be an order of injunction restraining the Defendants/Respondents, either by themselves, agents' M/S Sanjomu Auctioneers, servants and/or any other person acting and or selling the Plaintiff's moveable goods from the suit property Mara concord Game Lodge situated upon on the Defendants parcel of land known as CIS MARA/LEMEK/173.

(d) That pending the hearing and determination of main suit herein, there be an order of injunction restraining the defendants/respondents, either by themselves, agents m/s Sanjomu Auctioneers, servants and/or any other person acting under the Defendants/Respondents instructions from further entering upon, interfering with, evicting, levying distress leasing our to any third party and or otherwise interfering with the plaintiff/applicants free access to the demises premises and use of its goods and stock situate on CIS MARA/LEMEK/173.

(e) That the OCS Narok Police Station be and is hereby directed and/or ordered to enforce and oversee compliance of the orders issued herein.

(f) That the costs of the application be provided for.

The Application was based on the grounds that the Defendants have proclaimed and attached the Plaintiff's goods claiming that the plaintiff is in arrears of rent of kshs. 14,921,706 yet they have no outstanding rents, they filed the instant Application to safeguard their interests and ensure that the proclaimed goods are not sold and further to safeguard themselves against what they termed as illegal distress for rent meant to evict them from the same premises.

When the Application came for hearing the Defendants Applicants raised a Preliminary Objection on points of law invoking the provisions of Section 6 of the Landlord and Tenants (shop, hotels and catering establishment) Act arguing that the court lacks jurisdiction to hear and determine the application and the substantive suit thereunder.

The Respondents further contend that there is no primary suit under which the orders of injunction as sought by the Plaintiff/Applicant may be granted as the plaintiff has not complied with the Provisions of Order 2 Rule 16 of the Civil Procedure Act. The Respondents further stated that the Applicant has abused the process of the court as there is a pending suit being Narok ELC No. 55 of 2018 which is between the parties in the suit herein.

The Respondents in their submissions on the Preliminary Objection contend that the Applicants are the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs respectively in Narok ELC No. 55 of 2018 in which they claim the Applicants have a subsisting lease over the suit land with Ms Furahia Africa Limited and consequently therefore by dint of the operation of Section 6 of the Civil Procedure Act the institution of the instant suit and the application are invalid and an abuse of the process of the court. They further stated that the issue of unpaid rents is what is claimed in Narok ELC No. 55 of 2018 and the current suit and further that the said suit is between the same parties and is being litigated and is pending in court which has jurisdiction in Kenya.

On whether the court has jurisdiction by dint of the provisions of Section 6 of the Landlord and Tenant (shops, hotels and catering establishments), it is the Defendants contention that the Plaintiffs have invoked the provisions of the aforesaid Act and hence this court has no jurisdiction to hear and determine the suit.

The Defendants further contend that there is no subsisting agreement between the parties even though the suit relates to an interest in land and therefore the Plaintiff ought to have filed the instant suit by way of a reference before the business premises rent tribunal and not the ELC court.

The Plaintiff applicant in his submissions contends that by virtue of the provisions of Article 169 (1) and (2) of the constitution of Kenya the jurisdiction of the subordinate courts and by extension the tribunal are merely statutory jurisdictions and are not unlimited jurisdictions.

The Applicant/Plaintiff further averred that any reference to the tribunal can only be made at the instant or option of the receiving or aggrieved party and thus the same is not structured in mandatory terms to have all issues referred to the tribunal. The Applicant also took issues with the pecuniary jurisdiction of the tribunal asserting that it is seeking for compensation for the sum of kshs. 70,000,000 and therefore the amount is substantial and hence the tribunal lacks the requisite jurisdiction to hear and determine any reference made to it.

On the jurisdiction of the court pursuant to the provisions of Section 6 of the Civil Procedure Act, the Applicant contend that their exists another suit being Narok ELC 55 of 2018 however the sub judice rules does not apply even though the parties are the same the subject matter of the instant suit is premised on compensation for improvements done in the suit property where the previous suit is based on a lease agreement and further that Furahia Africa Limited which is the defendant is a legal entity on its own right and is different from Leo Investments Ltd T/A Mara concord Game Lodge which is currently in occupation and has possession of the suit land.

It is the Plaintiff/Applicants further contention that on the issue of whether the agreement between the parties is unwritten, the provisions of Section 3 (6) of the law of contract Act relates to contracts for the disposition of land. Even though they don't deny the same they explained that that is how the parties had conducted their relationship.

Further on whether the court's jurisdiction is ousted by virtue of the provisions of Order 2 Rule 16 of the Civil Procedure Rules in which the Plaintiff upon which the Application is anchored is unsigned. The Applicants invited the court to exercise its discretion and not to strike out the plaint and be guided by the overriding objectives as set out under Section 1A and 1B of the Civil Procedure Rules to facilitate the just expeditious and proportionate resolution of disputes. The Applicant further invoked the provisions of Article 159 (2) (d) of the Constitution of Kenya asking the court not to rely on procedural technicalities over substantive justice.

I have considered the Notice of Motion dated 24/2/2020 and 17/2/2020 and the Defendants Preliminary Objection on points of law. As a matter of procedure and in line with the rules of practice of the ELC and other courts of equal jurisdiction I must determine the issues raised in the Preliminary Objection and the issues for determination before me are:

- (i) Whether this court has jurisdiction to hear and determine the suit herein and the instant notice of motion by virtue of the provisions of section 6 of the Landlord and Tenant (shops, hotels and catering establishments Act).
- (ii) Whether there is a primary suit upon which the orders sought exists by virtue of the provisions of order 2 Rule 16 of the Civil Procedure Rules.
- (iii) Whether the instant suit offends the provisions of section 6 of the Civil Procedure Rules.

On the first issue it is the Defendant's contention that it lacks the requisite jurisdiction to hear the application before the court and the entire suit as its jurisdiction has been ousted by the provisions of Section 6 of the Landlord and Tenants (Shops, hotels and catering establishment Act) Cap 301 Laws of Kenya.

The issue of what constitutes a Preliminary Objection is now settled. It is now known that Preliminary Objection should constitute pure points of law which must be pleaded or arises by clear implication from the pleadings and if argued will dispose of the suit. The above position was clearly captured in the case of **MUKISA BISCUIT MANUFACTURING COMPAMY LIMITED –VERSUS- WESTEND DISTRIBUTERS LIMITED (1969)EA 696** where the court held that preliminary objection raises a pure points of law which is argued on assumption that all facts pleaded on the other side are correct. It cannot be raised if any fact has been ascertained as if what is sought is the exercise of judicial discretion.

In the instant Preliminary Objection, going by the holding the Mukisa Biscuit manufactures (Sipra) it is clear that the Preliminary Objection as framed are pure points of law and not one that seeks the exercise of judicial discretion by the court. The Defendant contends that the relationship between the parties is that of a tenant and landlord and therefore the right forum in which the disputes herein could be referred and litigated is the business premises tribunal and not the ELC court. The applicant states that even though the reference can be made to the tribunal the same is not mandatory and a dispute may be referred to the tribunal by the aggrieved party or the receiving party. Further the applicant states that the tribunal lacks the requisite pecuniary jurisdiction to hear and determine the dispute.

I have considered the plaint and the application and I find that the plaintiff applicant suit is entirely premised on a tenant landlord relationship

between the applicant and respondent, if the suit or the application relates to unpaid rents or on compensation or costs incurred, the operating statute under which this relationship is premised in the Landlord Tenant (shop, Hotels and catering establishment) Act and by extension therefore the provisions of Section 6 of the Act directs the jurisdiction of this court to hear and determine the dispute herein.

The Applicant ought to have filed his reference under section 6 of the Act before the Business Premises Rent Tribunal. In the case of **HEBTULLA PROPERTIES LTD (1979) KLR 96** the court stated that

**“Under Section 12 of the Landlord Tenant (shops, hotels and catering establishment) Act, the tribunal powers are restricted to its jurisdiction under section 6.**

The above being the position obtaining in the instant suit and where the parties have invoked the provisions of Section 6 of the Act I find that this court lacks the requisite jurisdiction to hear and determine the suit herein.

In the case of the owners of **MOTOR VESSEL LILIAN ‘S’ –VERSUS- CALTEX OIL KENYA LTD (1984) KLR 1** the court found that jurisdiction is everything and without it the court must down its tools and it is my finding that having determined that the court has no jurisdiction to hear and determine the application and the suit herein I will not make any other findings on the other issues as the same will be merely an academic exercise and I consequently strike out and dismiss the suit and the notice of motion dated 17/2/2020 and 24/2/2020.

Orders accordingly.

**DATED, SIGNED and DELIVERED in open court at NAROK on this 13<sup>TH</sup> day of MARCH, 2020.**

**Mohammed Kullow**

**Judge**

**13/3/2020**

In the presence of:

CA:Chuma/Kimiriny

Mr Omondi for the plaintiff/applicant

Mr Kinyanjui for the defendant

**Mohammed Kullow**

**Judge**

**13/3/2020**