



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

HIGH COURT SUIT NO. 149 OF 2014

SAID MAJID SAID.....PLAINTIFF

VERSUS

JAMES TITUS KISIA.....DEFENDANT

RULING

Outline

1. The History of this matter in the relatively short but the period it has been in court is long windy and a bit convoluted and I will not recite that history. It suffices to say that the plaintiff has been the defendant's tenant on those premises known as MOMBASA/BLOCK XVII/450. From past proceedings and pleadings filed, it is apparent that the plaintiff operated a passenger transport business on the premises by virtue of two different leases each for six (6) years and commenting on 1.12.2010 and 1.5.2013 respectively. Besides this suit, there exist HCC No. 98 of 2013 between the plaintiff and the defendant and concerning the said demise.

2. It is apparent from the past proceedings in this matter that sometimes in the year 2013, the landlord commenced extension of the property allegedly without the statutory approval hence the building was condemned as unfit for occupation and criminal charges preferred in Mombasa Municipal Court Criminal Case No. 4930 of 2013.

3. To enforce the planning order the building was cordoned off till November 2014 when the scaffold was removed only for the plaintiff to learn that the premises had been let to two other competing bus companies for purposes of operating booking offices. That development provoked this suit in which according to my perusal of the file has attracted two previous rulings. Kasango J, delivered a ruling dated 5.3.2015 by which it granted to the plaintiff among other orders, a mandatory injunction compelling reinstatement of the plaintiff to the premises. Those orders were never complied with necessitating the notice of motion dated 7.7.2015 which was heard and determined by this court by its ruling of 9.10.2015 which found the defendant in contempt, fined him kshs.500,000 and ordered that compliance with orders of 5.3.2015 be implemented by the defendant not later than 31.10.2015 and in default a bailiff or auctioneer to forceful effect an eviction. It has not been made known to court if the fine was ever paid, but the record reveal that two days before the set deadline for compliance, an application dated 28/10/2015 was filed by by one TAHIR SHEIKH SAID TRANSPORTERS LTD calling itself the necessary party. In it the court was beseeched to grant orders of stay pending the determination of the application; that the necessary party be joined to the suit; that the orders of 9.10.2015 be set aside and that the suit be struck out for having been filed in a court without jurisdiction.

4. The foundation of that application and its prayers are to be found at grounds 3,4,5 6 & 7 as follows:

3. The Necessary Party/Applicant is one such tenant who is liable to be evicted from the suit premises yet he is a lawful tenant of the suit premises having taken possession of the premises on the 1st December, 2014.

4. The court orders issued by the Honorable Court on 5th March, 2015 and subsequent orders issued on 9th October, 2015 are all very prejudicial to the Necessary Party/Applicant and ought to be set aside unconditionally for the following reasons:

a) The orders issued by Hon.Kasango J. on 5th March, 2015 actually have the effect of determining the use and occupation of land namely Plot No. Mombasa/Blcok/XVII/450. To that end those orders were issued without jurisdiction as clearly expressed in Article 165(5) as read with Article 62(2) (b) & (3) of the Constitution and section 13(2) of the Environment and Land Court Act 2011.

b) Both the orders issued by Hon. Kassango J.On 5th March, 2015 and order number (ii) issued by Hon.P.J.O.Otieno J. on 9th October, 2015 violated the Necessary Party/Applicant's right to a fair administrative action and the right to a fair trial as guaranteed by Articles 47 and 50 of the Constitution.

5. The Necessary Party/Applicant has never been made aware of the existence of the suit which was seemingly filed three days prior to the Necessary Party/Applicant taking possession of part of the suit premises. The Necessary Party/Applicant was only made aware of the court case by a letter dated 12th October, 2015 from the Defendant/Responent's advocates which required the Necessary Party/Applicant to give vacant possession by 31st October, 2015.

6. The Necessary Party/Applicant operates a bus service by the name of "TSS Bus Services" which uses the suit premises as its booking office and passenger waiting area. If it is evicted from the suit premises it will suffer immense irreparable losses that cannot be quantified and/or compensated in damages as shown below:

a. Being a bus transport service company, location is everything and that is why the Necessary Party/Applicant has accepted to pay a lot of money as rent to maintain this ideal location.

b. The passenger transport season peaks in November and December which is when the Necessary Party/Applicant expects to receive decent returns on its investment.

7. It is in the interests of justice and fairness that the orders be granted to give the Necessary Party/Applicant an opportunity of being heard as constitutionally guaranteed.

5. The application having been filed under certificate or urgency was placed before a judge on 28/10/2015 when it was ordered to be served on the plaintiff and the defendant for hearing on priority basis. Upon service the plaintiff filed a replying affidavit in which the necessary party is accused of having been a competitor and therefore having been at all times aware of the plaintiffs interests and occupation of the premises prior to the condemnation and that the alleged lease between the necessary party and the defendant was entered into stealthily with sole intention to defeat the plaintiffs vested rights. It was said additionally that the plaintiff and the interest party had fiercely competed for the premises and that he was not only made aware of the plaintiffs claim by a letter dated 1.12.2014 but the issuance of orders of 5.3.2015 by a letter dated 8.6.2015. The Replying Affidavit went on to add that the necessary party has traditionally operated its business at Bondeni on own premises hence location was not an issue and that there is no real prejudice to it even if it were evicted in compliance with the court orders and that the application was bad for having been brought after undue delay.

Analysis and determination.

6. To this court, the issues that present themselves for determination are whether this court has the jurisdiction to determine or entertain the suit and whether or not the orders of 9.10.2015 deserve being set aside.

7. Before determining the two issues however, there is the prayer for joinder by the applicant. Premised upon Order 1 Rule 10 Civil Procedure Rules which provide:-

Substitution and addition of parties [Order 1, rule 10.]

(1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.

(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent in writing thereto.

(4) Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants

8. Before court grants an application by a party to be joined the fundamental considerations is whether or not the participation of such party would be necessary to enable the court effectually and effectively determine the issues in controversy. In the suit as filed and later consolidated with NO. 98 of 2013 the issue and dispute is centered and grounded upon the tenancy between the two parties. Without detraction that is the sole issue the court must focus upon for determination . I have therefore asked myself what, how and to what extent the participation of the applicant will add towards fair and just determination of that original claim in the plaint. Is it that the necessary party is in a better position to explain the genesis of the disagreement between the plaintiff and the defendant?

9. An applicant seeking to be joined in proceedings to qualify under Order 1 Rule 10(2) must be able to fit in the capacity of either a plaintiff or defendant. He must not only be a necessary but also a proper party against or for whom a remedy must flow to or from the other side; whose presence is necessary for the court to effectually and completely adjudicate the matter and without whose presence any resultant decree cannot be enforced. **See Technomatic Ltd t/a Promo pack Company -vs- Kenya Wine Agencies Ltd. & Another.[2014]eKLR**

10. On the facts pleaded and submitted I am unable to be find that the applicant is a necessary party to the proceedings.

Does the court have jurisdiction to entertain the suit?

11. The defendants contention is that this matter, being a land related, it ought to have been filed at the

Environment and Land Court created under the Environment and Land Court Act and that by dint of Article 165(5) the High Court has no jurisdiction to entertain the suit. The effect of the submissions by the applicant are to the effect that it is only the Environment and Land Court and not the High Court with Jurisdiction to entertain this matter.

12. The suit as as framed is designed and intended to enforce the plaintiff interest as a tenant to the Defendant by way of an injunction. On the basis that the suit seeks to enforce the right to protect and regain possession of demised premises the Necessary Party contends that the court lacks jurisdiction and therefore all the orders issued herein on the 5.3.2015 and 9.20.105 be set aside and the suit struck out for want of jurisdiction.

13. The grounds for the orders of striking out is that the court has nor jurisdiction to determine the suit. Having determined the prayer for joinder. I would hold that the applicant is not the competent person to ask that the suit be struck out the suit on account of lack of jurisdiction. Noting that such orders are known to be very draconian and should be only issued in the clearest of the clear of cases and where the matter as pleaded is hopelessly unmerited and totally incapable of injection with life even by an amendment. In this matter, I and Judge Kasango, have separately held that the plaintiff seem to have a *prima face* case meriting consideration at trial.

14. With the state of the record of the court it would be an undesirable contradiction to strike out. If however I found that indeed this court is divested of jurisdiction, the just thing would be to have the matter transferred to the appropriate court. That to me would be the substantive way to meet the justice of the case.

15. On the question of whether a dispute on a lease and its terms falls within the exclusive jurisdiction of the Environment and Land court, I hold that, the all important considerations is that contract, to lease that then derives and bestows upon the tenant the right to take occupation and peaceful enjoyment of the demised premises. The Landlord interest in that contract is the rental income while the tenants interest is the assurance of peaceful user while the contract lasts. To that extent I find that such is the situation that a plaintiff may chose which court to approach.

16. To this court such is the commercial transaction albeit grounded upon the occupation of such demised premises. I have said elsewhere and repeat here that the purpose of creation of the Environment and landlord was to expedite resolution of legal disputes. I take note that in its current establishment that court is manned by no more than 15 judges country wide. My position in this regard is informed by my belief that the Environment and Land Court as well as this court are institutions created by Kenyans to work for the good of the sovereign and in performing such duty vigilance is called upon, so that the core purpose of the court is not lost sight of. In the instant case, striking out the suit or transferring it would dictate that it takes its que before that court as a new matter. That to the mind of this court would affront the timely disposal of the dispute as a constitutional principle.

17. In coming to the foregoing conclusion I am persuaded that no all legal disputes will always have clear-cut boundaries as falling before the High Court or the Courts of Equal Status. There would always be borderline cases and at times multi faceted claims that would not definitely and distinctively fall for determination by any particular court. In such cases my view is that the court in which the matter is filed would have to answer to the need to have the matter determined based on the law applicable without the undue regard to any legal or procedural technicalities. This however is not to say that matters jurisdiction are procedural. They are indeed substantive.

18. The application therefore fails and is dismissed with costs to the plaintiff who opposed it.

Dated, signed and delivered at Mombasa this 7th day of July 2016.

In the presence of:-

Ms.Nyange for the plaintiff.

Mr.Omondi for the IP.

No appearance for defendant.

Ruling read in the presence of the parties as above.

Mr.Omondi: I pray for stay of execution and leave to appeal against the dismissal.

Mrs. Nyange: I do not oppose the application for leave to appeal.

Court: Leave is granted to the Necessary Party to appeal against the ruling just delivered. On the prayer for stay, there is nothing to stay for the orders just made do not compel any positive action to merit stay.

P.J.O.OTIENO

JUDGE