



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Suit 365 of 2011**

**SILVERBIRD KENYA LIMITED.....PLAINTIFF/APPLICANT**

**V**

**THE JUNCTION LIMITED.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**KNIGHT FRANK VALUERS LTD t/a**

**KNIGHT FRANK.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**SANNEX AUCTIONEERS.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**CENTURY CINEMAZ LIMITED.4<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants application dated 19<sup>th</sup> June 2012 is brought under Section 3(3) of the Law of Contract Act, Cap 23 Laws of Kenya Order 2 Rule 15(1) (d) and Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A and 1B of the Civil Procedure Act and seeks the following orders:-

1. That the plaint dated 23<sup>rd</sup> June 2011 be struck out.
2. That the costs of the application be provided for.

The application is supported by the affidavit of Patrick Walker a director of the 1<sup>st</sup> Defendant dated 19<sup>th</sup> June 2012 which details the grounds in support of the application. The Defendants case is that the plaintiff's claim is based on a letter dated 19<sup>th</sup> August 2009 which the Defendants contend did not constitute a lease and further did not transfer any interest to the plaintiff from the existing tenant (Johnnic Communications Africa Property Ltd). The letter, the defendants argue could not pass any interest in land as the mandatory provisions of the law of Contract Act require that a contract for the disposition of land should be in writing, signed by all the parties and attested. The defendants contend that the letter dated 19<sup>th</sup> August 2009 does not satisfy the mandatory requirements under Section 3(3) of the Law of contract Act Cap 23 laws of Kenya and therefore cannot lawfully create an enforceable lease and/or tenancy relationship.

The defendants aver that the change of leaseholder from Johnnic Communications Africa Ltd to the plaintiff could only have been legally effected if Johnnic Communications Africa Property Ltd, the plaintiff and the 1<sup>st</sup> Defendant had executed an assignment of the agreement to lease. It is the Defendants case that neither the plaintiff nor Johnnic Communications Africa Property Ltd executed the assignment.

The Defendants maintain that in the absence of any signed agreement for lease and/or assignment, there is no interest that the plaintiff can claim in the present suit as the claim lacks any foundation.

The defendants written submissions on the application are dated 19<sup>th</sup> December, 2012 and were filed in court on the same date. The thrust of the Defendants submissions is that the letter of 19<sup>th</sup> August 2009 that the plaintiff relies upon and basis its claim on did not satisfy the mandatory provisions of Section 3(3) of the Law of Contract Act so as to convey and/or pass an interest on the property the subject of the dispute. The Defendants contend that the plaintiff has not disputed the failure to fulfil the conditions and requirements of the said provisions. The defendants contend that to the extent that the document relied upon by the plaintiff to found the contract did not comply with the provisions of Section 3(3) of the Law of Contract the Court lacks the jurisdiction to entertain and/or hear this case.

The Defendants have referred the court to their list of authorities dated 14<sup>th</sup> November, 2012 and has singled out the cases of **Humprey Olwisi Muranda vs. Yakobet Nechesa Wabuko (2008) eKLR** and the case of **Owners of Motor Vessel "Lilians" vs. Caltex Oil [1989] KLRI** where the courts have held that a court must be satisfied that it has jurisdiction to hear a matter before embarking on the hearing of any matter on the basis that where there is no jurisdiction there would be no basis for continuation of proceedings to take further evidence as it could be an exercise in futility.

On the objection taken by the plaintiff on the application being resjudicata and on estoppel the Defendants submit the objection has no merit since the present application deals with the substantive jurisdiction of the court and the court has to determine the issue of jurisdiction before it can proceed to hear the suit on merits.

The Plaintiff opposes the application and has filed written submissions dated 21<sup>st</sup> January, 2013. The plaintiff submits that the grounds and evidence in support of the instant application by the defendants is similar in all material particulars to the evidence and grounds the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants adduced in court while opposing the plaintiff's application for injunction dated 23<sup>rd</sup> June 2011. The plaintiff also avers the defendants took a preliminary objection during the hearing of the injunction application in which the defendants raised similar grounds.

The plaintiff contends that the Honourable Lady Justice Ougo heard the application for injunction and made rulings and/or findings on the issues that the defendants now raise in the instant application. Further the Honourable Lady Justice Mugo had earlier on overruled the preliminary objection. Against the foregoing background the plaintiff contends that the defendants are by virtue of Section 7 of the Civil Procedure Act Cap 21 Laws of Kenya barred from bringing the instant application on the same basis and grounds that they had sought the court's decision. The plaintiff argues the Honourable Lady Justice Ougo's ruling on 5<sup>th</sup> September, 2012 on the injunction application dealt with and decided the issues that the defendants wish to be once more determined on in the present application. The plaintiff seeks reliance on the case of **Housted & Others vs. Taxation Commissioner (1925) ALL ER** where the court held that parties are not permitted to begin fresh litigation because of new views they may entertain or new versions which may present what should be a proper apprehension by the court of legal result. The Plaintiff also cites the case of **Yat Tuing Investment Co. Ltd vs. Dao Ling Bank Ltd & Another (1975) AC 582**.

Where the court held that it is an abuse of the court process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings.

The plaintiff has further submitted that the Defendants are estopped from rearguing the same grounds they argued before Honourable Justice Ougo and places reliance on the case of **Trade Bank Ltd vs. LZ Engineering Construction Ltd (2000) IEA 266** where the court held that the issue of estoppel bars a party from re-litigating matters already ruled upon by the court. The plaintiff further referred the court to several other authorities **Sande Investments Ltd & another vs. KCB & others Milimani HCCC No. 167 of 2004; Solomon K. Munyoki & others vs. Park Towers Ltd & others Milimani HCCC No. 167 of 2004; and Republic vs. KRA Nairobi HC Misc. Civil Application No. 946 of 2004** where the gist of

the decisions was that a subsequent application amounts to an abuse of the court process if the facts relied on are exactly the same.

I have in brief outline set out what the rival positions of the contesting parties in this application is and it now turns on me to evaluate the contrasting view points and determine firstly, whether the defendants instant application is resjudicata and/or whether the defendants are estopped from bringing the same in the face of the earlier application for injunction ruled upon by Honourable Lady Justice Ougo and Secondly, whether this court has jurisdiction to hear and determine this case.

Section 7 of the civil Procedure Act provides as follows:-

***“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”.***

In essence therefore, for a suit or issue to be rejudicata, the matter directly and substantially in issue in the subsequent suit or application must have been heard and finally decided by the court in the earlier suit or application. Kuloba Judge (as he then was) in his text ***“Judicial Hints to Civil Procedure”*** states that the expression ***“Resjudicata”*** means a thing or matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment.

The Court of Appeal has expressed itself variously on what constitutes ‘res judicata’ in the case of **Kibogy vs. Chemweno (1981) KLR 35** the Court of Appeal expressed itself thus:-

***“True the matter directly and substantially in issue before Mead J had been directly and substantially in issue before Platt J between the same parties but it was still an open issue, it was not res judicata not having been finally decided by the court which is a condition precedent to res judicata as required in Section 7 of the Civil Procedure Act”.***

In the case of **Lawi Duda & others vs. Bamburi cement Ltd (2006 eKLR** the court cited with approval the case of **Anaj Warehousing Ltd vs. National Bank of Kenya Ltd and another Mombasa HCCC No. 311 of 2000** where the court held:-

***“A matter is res judicata when it has been heard and finally decided. And a matter is heard and finally decided when the court which heard it has exercised its judicial mind on the matter in controversy after it has heard arguments, considered it and come to a decision on it”.***

In the application before Honourable Justice Ougo the court had been invited to consider whether the applicant/plaintiff had established a prima facie case to entitle the court to grant a restraining order (injunction). The court did not grant an injunction. The Defendants as the Respondents in the application before Hon. Justice Ougo placed whatever material evidence they had before the court to resist the application for injunction.

In my view the question of the jurisdiction of the court was not directly in issue before Honourable Justice Ougo and neither was the issue of jurisdiction finally determined by the judge. I therefore hold and find the application by the defendants before me is not res judicata and that the court can properly consider the same on merits.

I am in agreement with the defendants that a jurisdiction issue can be taken at any time in the course of the proceedings but to the extent possible the issue of jurisdiction should and ought to be raised at the earliest possible moment so that the same can be determined as a preliminary issue.

On the part of the court also once a jurisdictional issue is raised the court ought to consider the same at the earliest opportunity and to make a determination of the same to obviate the necessity of continuing

with proceedings which could end up being a nullity and/or voidable on account of want of jurisdiction.

The defendant's instant application seeks to strike out the plaint for being in contravention to the provisions of Section 3(3) of the Law of Contract Act. Section 3(3) of the Contract Act provides as follows:-

***“No suit shall be brought upon a contract for the disposition of an interest in land unless:-***

***(a)The contract upon which the suit is found:-***

***(i) Is in writing***

***(ii)Is signed by all the parties thereto; and***

***(b)The signature of each party signing has been attested by a witness who is present when the contract was signed by such party”.***

The foregoing provision was introduced as an amendment to the previous Section 3 of the Law of Contract Act and was implemented with effect from June 2002. The previous Section 3 of the Law of Contract Act that was replaced with the amendment provided as follows:

***“No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded, or some memo random or note thereof is in writing and is signed by the party to be charged or by the party to be charged or by some person authorized by him to sign it.***

***Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract:-***

***(i)Has in part performance of the contract taken possession of the property or any part thereof; or***

***(ii)Being already in possession continues in possession part performance of the contract and has done some other act in furtherance of the contract”***

The Court of Appeal in the cases of **Morgan vs. Stubenitsky (1973) KLR 188** and **Wagichiego vs. Gerald (1988) KLR 406** held that in the absence of an agreement in writing duly signed by the party to be charged in accordance with the previous Section 3(3) of the Law of Contract Act, there was no enforceable contract between the parties.

The High Court decision in **Rainald Schumacher vs. Aubrey Garth Monsely (2008) eKLR**, **Patrick Tarzan Matu & another vs. Nassim Sharrif Nassir Abdulla & 2 others (2009) eKLR Laikipia Mifugo Ranching Co. Ltd vs. Nanyuki Ranching Ltd (2007) eKLR** and **John Michael Wanjao vs. Alubala Abonayo Andambi (2011)** the various judges have dealt with Section 3(3) of the Law of Contract Act as amended and have all been consistent that a party seeking to enforce a contract relating to disposition contract relating to a disposition of an interest in land such a contract has to have been in writing and signed by the parties to it and witnessed as required under Section 3(3) of the Contract Act.

The judges have not shield away from striking out suits where compliance with the provisions of Section 3(3) has been lacking.

In the present case the plaintiff's claim is based on the letter of 19<sup>th</sup> August 2009 that offered the plaintiff an assignment of the lease previously held by the former tenant. The assignment of the lease never materialized such that as the commencement of the suit the plaintiff did not have a contract that satisfied the mandatory provisions of Section 3(3) of the Law of Contract Act. In my view it matters not that the plaintiff had been let into possession of the premises if the contract pursuant to which the plaintiff was granted possession was not validated in accordance with the law. The letter of 19<sup>th</sup> August 2009 in my

view does not satisfy the requirements of Section 3(3) of the law of Contract Act to be the foundation of the Plaintiff's claim against the defendants. Section 3(3) of the Law of contract Act is indeed couched in mandatory terms and does infact divest the court of jurisdiction in instances where there is no compliance as in the instant case. In the circumstances and by reason of the Law of Contract Act, the plaintiff's suit must fail for being in contravention of Section 3(3) of the Law of Contract Cap 23 Laws of Kenya.

It is therefore my decision that the plaintiff's cause of action offends and is in contravention of the clear provisions of Section 3(3) of the Law of contract Act and the suit is an abuse of the process of the Court. The plaintiff's suit is hereby ordered struck out with costs to the defendants

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6<sup>TH</sup> DAY OF MAY 2013.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

..... for the Plaintiff

..... for the 1<sup>st</sup> Defendant

..... for the 2<sup>nd</sup> Defendant

..... for the 3<sup>rd</sup> Defendant

..... for the 4<sup>th</sup> Defendant