



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO 255 OF 2018**

**TIARA VILLAS MANAGEMENT LTD.....1ST PLAINTIFF**

**COTTERS BROOK VILLAS 1 MANAGEMENT LIMITED.....2ND PLAINTIFF**

**MUGUMO HEIGHTS MANAGEMENT COMPANY LIMITED.....3RD PLAINTIFF**

**MARY WANJA IBUTU.....4TH PLAINTIFF**

**SHARADCHANDRA MANHARLAL KALIDAS DAVE.....5TH PLAINTIFF**

**- VERSUS -**

**HON. JOE MUTAMBU.....1ST DEFENDANT**

**SOLOMON GICHINA.....2ND DEFENDANT**

**NAIROBI CITY COUNTY GOVERNMENT.....3RD DEFENDANT**

**NATIONAL ENVIRONMENT**

**MANAGEMENT AUTHORITY (NEMA).....4TH DEFENDANT**

**RULING**

1. The Plaintiffs brought this suit against the four defendants through a plaint dated 30/5/2018. They contended that the 1st, 2nd and 3rd plaintiffs were management companies in which reversionary interests in various properties around Mugumo Road, Lavington, Nairobi, were vested. They added that the 4th and 5th plaintiffs were proprietors of properties and residents in the same neighbourhood. The 1st defendant is a tenant of the 2nd defendant in relation to **Land Reference Number 3734/812 (the suit property)** which is located in Mugumo Road neighbourhood.

2. The plaintiffs were aggrieved by the activities which were being undertaken on the suit property. They alleged that the 1st and 2nd defendants were changing user of the suit property without due process and/or approval, and developments were being undertaken on the suit property in contravention of the requirements of the relevant statutes, among them, **The Physical Planning Act** (now repealed), and **The Environmental Management and Co-ordination Act [EMCA]**.

3. Upon hearing the plaintiff's application for interlocutory relief, the court through a ruling rendered on 18/7/2018, granted them interlocutory relief in the following terms:

**“1. That a temporary order of injunction is issued restraining the 1st and 2nd defendants from continuing to undertake any further developments, construction and/or other works on the property known as LR 3734/812 located along Mugumo Road, Lavington, Nairobi and the adjoining areas pending the interpartes hearing and determination of the suit.**

**2. That the applicants shall have costs of the application dated 30th May 2018”**

4. Two years subsequent to the grant of the above interlocutory relief the 2nd defendant brought a notice of motion dated 18/6/2020 seeking the following orders:

**1. That the application be certified urgent and be heard ex-parte in the first instance.**

**2. That this honourable court be pleased to clarify the meaning, intent, implication and purport of the court order made on the 18th day of July, 2018 and in particular clarify as to whether it prohibited and restrained any party from the use, occupation and operation of business as claimed by the 1st defendant/respondent.**

**3. That this honourable court be pleased to order the 1st defendant/respondent to deposit the arrears of rent in respect to the suit premises in terms of the lease agreement dated the 28th day of February, 2018 and in particular the arrears running from the month of June, 2018 to date and to continue depositing the subsequent monthly rent in court pending determination of this suit.**

**4. That in the alternative, and without prejudice to the foregoing, this honourable court be pleased to order the 1st defendant/respondent to vacate and hand over possession of the premises comprised in L R No. 3734/812 Lavington Area in Nairobi back to the 2nd defendant/applicant forthwith and failing which, he be forcefully evicted from the said premises.**

**5. That this honourable court be pleased to make and or issue any other orders it may consider appropriate in the circumstances.**

**6. That costs of this application be provided for.**

5. The application was supported by the 2nd defendant’s affidavit sworn on 18/6/2020. The case of the 2nd defendant in the application dated 18/6/2020 was that the 1st defendant had declined/refused to pay the agreed monthly rent since June 2018 despite continuing to occupy the suit property. The 2nd applicant further contended that the 1st defendant was hiding under the above court order to avoid his contractual obligations to pay rent, despite enjoying use, occupation and business operations within the said premises.

6. The 1st defendant opposed the application through a replying affidavit sworn on 28/7/2020. He deposed that the issues raised in the application were raised in Nairobi CMCCC No 174 of 2019 and the applicant’s application was rejected by the lower court. He further deposed that the 1st defendant was acting maliciously, dishonestly and unfairly by seeking his eviction while aware of the court order restraining him against carrying out any business or works on the premises. He deposed further that he had “fully paid” for the lease relating to the suit property and contended that he had invested more than Kshs 15,000,000 in the suit property. He added that the business was neither operating nor generating any income hence his non-payment of rent. The 1st defendant added that the 2nd defendant had misrepresented to him that the premises were suitable for his business and that the user of the premises had changed. He further deposed that the issues raised in the application were for the Business Premises Rent Tribunal and for the Commercial Courts.

7. The application was canvassed orally on 29/9/2020. Mr Mwangi, counsel for the applicant/ 2nd defendant submitted that the applicant sought clarification because the 1st defendant had declined to pay rent contending that the court order issued in this suit had stopped him from using the demised premises.

Counsel argued that according to the 2nd defendant, the order merely restrained the 1st defendant against constructing illegal structures on the suit property and the defendant was required to honour his contractual obligations. Counsel said that it was because of this that the 2nd defendant sought the court's interpretation of the order.

8. Mr Mbuvi, counsel for the 2nd defendant, submitted that a similar application by the 2nd defendant had been dismissed by the lower court in Nairobi CMCCC No 174 of 2019. Counsel added that there was an order restraining the defendants against carrying on any business on the premises hence the 1st defendant was entitled not to pay rent. Further, counsel argued that the 2nd defendant did not have a counter-claim against the 1st defendant and was therefore not entitled to the prayers sought in the motion.

9. In his rejoinder, Mr Mwangi argued that there was a lease of 5 years and 3 months hence the dispute relating to the lease was outside the jurisdiction of the Business Premises Rent Tribunal. He added that there was no dismissal order from the lower court relating to the same subject matter.

10. I have considered the notice of motion together with the response thereto and the parties' respective submissions. I have also considered the relevant legal frameworks and jurisprudence. The following are the two key issues falling for determination in this motion: (i) whether, in the current circumstance of this case, this court is the right adjudicatory authority to answer the issue raised in prayer No 2 of the notice of motion dated 18/6/2020; and (ii) whether, in the absence of a counter-claim, the 2nd defendant is entitled to orders requiring the 1st defendant to deposit rent in court or to vacate the suit property? I will make brief sequential pronouncements on the two issues in the above order.

11. Prayer 2 of the notice of motion dated 18/6/2020 reads as follows:

**2. That this honourable court be pleased to clarify the meaning, intent implication and purport of the court order made on the 18th day of July, 2018 and in particular clarify as to whether it prohibited and restrained any party from the use, occupation and operation of business as claimed by the 1st defendant/respondent.**

12. This court would have no difficulties on pronouncing itself on the issues raised in prayer 2 of the motion were it not for the facts disclosed in the evidential materials placed before court. What emerges from the evidential materials placed before court is that, on 16/1/2019, the 2nd defendant sued the 1st defendant in **Nairobi CMCCC No 174 of 2019** claiming unpaid rent for the period running from June 2018. On 23/5/2019, the 1st defendant filed a statement of defence in the said suit, in which he contested the 2nd defendant's claim and contended that he was not obliged to pay rent to the 2nd defendant because the two parties had been sued in Nairobi ELC No 255 of 2018 (the present) and had been restrained against carrying on business on the suit premises. The 1st defendant further contended that the 2nd defendant had misrepresented to him that the suit premises were suitable for car wash business. The 1st defendant totally denied liability to pay rent in Nairobi CMCCC No 174 of 2019.

13. From the foregoing, it does emerge that through this application, the applicant (2nd defendant) is inviting this court to determine a substantive issue that is pending determination before the Chief Magistrate Court in Nairobi CMCCC No 174 of 2019. I would decline to do so for three key reasons. First, the dispute before this court relates to allegations of unapproved land use and unapproved land development. It does not relate to the current obligations of the parties under the lease between the 1st and 2nd defendants. Secondly, there is no claim before me by the 2nd defendant against the 1st defendant relating to rent, from which the issue in prayer 2 can be properly drawn and determined. Thirdly, it would be improper for this court to use this suit as a forum to determine an issue which is pending determination before the Chief Magistrate Court, more so in the absence of pleadings relating to that issue. For those reasons, I decline to exercise the jurisdiction which the 2nd defendant has invited me to exercise. Let that issue be determined by the adjudicatory authority seized of it.

14. The second issue raised in this application is whether, in the absence of a counter-claim, the 2nd defendant is entitled to orders requiring the 1st defendant to deposit rent in court or, in the alternative, to vacate the suit property. This issue arises from prayers (3) and (4) of the motion which reads as follows:

**“3. That this honourable court be pleased to order the 1st defendant/respondent to deposit the arrears of rent in respect to the suit premises in terms of the lease agreement dated the 28th day of February, 2018 and in particular the arrears running from the month of June, 2018 to date and to continue depositing the subsequent monthly rent in court pending determination of this suit.**

**4. That in the alternative, and without prejudice to the foregoing, this honourable court be pleased to order the 1st defendant/respondent to vacate and hand over possession of the premises comprised in L R No. 3734/812 Lavington Area in Nairobi back to the 2nd defendant/applicant forthwith and failing which, he be forcefully evicted from the said premises.”**

15. The 2nd defendant filed his defence against the plaintiffs’ claim in the present suit on 26/8/2019. He did not bring a counter-claim against the 1st defendant. It does emerge that at the time of filing his defence in this suit, he had already filed a separate suit (**Nairobi CMCCC No 174 of 2019**) to ventilate his claim relating to unpaid rent under the lease between him and the 1st defendant. This court is therefore not seized of the dispute relating to rent. The 2nd defendant nonetheless urges this court to issue the above orders.

16. Jurisdiction to grant relief in a civil suit is exercised on the basis of pleadings. The Supreme Court of Kenya emphasized this legal principle in **Presidential Petition No 1 of 2017: Raila Amolo Odinga & another v. Independent Electoral & Boundaries Commission & 2 Others** through the following extract from the decision of the **Supreme Court of India in Arikara Narasa Reddy Venkata Ram Reddy v Reddygari & another, Civil Appeal Nos 5710-5711 of 2012 [2014] S.C.R:**

**“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.”**

17. The **Court of Appeal of Kenya** similarly underscored the cardinal function of pleadings in **Dakianga Distributors (K) Ltd v Kenya Seed Co Ltd [2015] eKLR** in the following words quoted from *Bullen and Leake & Jacob’s Precedents of Pleadings, 12th Edition, London Sweet & Maxwell (the common Law Library No 5)*:

**“The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two-fold purpose of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial”**

18. In a nutshell, without a counterclaim by the 2nd defendant against the 1st defendant, this court has no basis upon which to exercise jurisdiction to grant the orders sought in prayers (3) and (4) of the notice of motion. Similarly, this being an adversarial civil adjudication system, this court will not exercise jurisdiction to grant unspecified reliefs as sought under prayer 5 of the motion without a proper basis being laid.

19. In light of the above findings, the 2nd defendant’s notice of motion dated 18/6/2020 is rejected. Costs shall be in the cause.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 8TH DAY OF OCTOBER 2020**

**B M EBOSO**

**JUDGE**

**In the Presence of:-**

Ms Agutu for the 1st Defendants

Mr Mwangi for the 2nd Defendants

Ms June Nafula- Court Clerk