



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL SUIT NO. 98 OF 2018

ABDIHAMID SHEIKH ABDULLA T/A JAMBO MATT SUPERMARKET.....1ST PLAINTIFF

RAMZAN MUHAMMAD T/A INTERNATIONAL MOTORS.....2ND PLAINTIFF

HUSSEIN HEMED SIMBA T/A MPANJI AFRICAN COMPANY LTD.....3RD PLAINTIFF

-VERSUS-

TECNO HOLDINGS LIMITED.....1ST DEFENDANT

NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES.....2ND DEFENDANT

DIKEMWA AUCTIONEERS.....3RD DEFENDANT

RULING

1. For determination is the notice of motion dated 23rd April 2018 brought by the plaintiffs under the provision of section 3A, 1A, 1B & 63 (e) of the Civil Procedure Act and Order 40 rule 1 of the Civil Procedure Rules as well as the Distress for Rent Act seeking the following orders:

i. Spent

ii. Spent

iii. That a permanent order do issue restraining the 3rd Respondent from attaching the plaintiff's goods in plot No L.R Mombasa BLOCK/XX/328/329 as contained in the backdated proclamation notice issued by the 3rd Respondent pending the hearing of this suit.

iv. Costs be provided for.

2. The application is supported by the affidavits of Abdihamid Abdullah and the grounds listed on the face of it. In brief, the applicants plead that they are subtenants of the 1st defendant. The applicants deposed that under section 23 of the Distress for Rent Act, should the head landlord (2nd defendant) require an under tenant to pay him rent directly then the head landlord is obligated to issue a notice to the tenant instructing the under tenant to do so. The applicants further aver that the 1st defendant has no beneficial interest in the proclaimed goods. The applicants also deposed that the goods proclaimed are tools of trade and if the illegitimate distress is undertaken, they stand to be hugely prejudiced having committed no wrongdoing.

3. The application is supported by the 1st defendant who swore a replying affidavit through Omar Mohamed Abdille. Mr Abdille deposed that they have a dispute over rent between him and the 2nd defendant, which dispute can only be resolved through arbitration. For this reason, the 1st defendant argues that the 2nd defendant is not entitled to levy distress for rent.

4. The 2nd defendant through his advocate on record swore a replying affidavit dated 7th May 2018 in opposition to the application. Mr Wafula deposed that the present application is bad in law as there is a similar matter pending regarding the same subject matter i.e. *ELC No 377 of 2017, Tecno Holdings Ltd & others vs NSSF*. Mr Wafula deposed further that the 1st defendant here sought injunction in ELC 377 of 2017 which application was dismissed after hearing on merit on 10th April 2018. That there is an appeal lodged against this ruling in the

Court of Appeal. Mr Wafula urged the Court to dismiss the application for being subjudice and or res judicata.

5. The advocates rendered oral submissions in support and opposition to the application. Mr Wafula in his opening submissions stated that the issue of sub tenancy was determined in the ruling delivered on 10.4.2018. That the appeal against the said decision was also determined and a ruling delivered on 12th July 2018 where the Court of Appeal found that the tenant defaulted in paying rent. NSSF was granted liberty to proceed with the distress. He also submitted that the application lacks merit since consent to sublet was not obtained in writing from the 2nd defendant. He described the applicants as trespassers that have no right capable of protection. That the applicants cannot sue under the contract of lease between the 1st defendant & 2nd defendant. Lastly that the issue of investments by the applicants is not a principle for granting injunction. He urged the Court to dismiss the application.

6. Mr Opolu advocate for the applicants submits that the lease agreement provided for renovation and it granted exemption of 2 years non-payment of rent. That the applicants have been paying rent to the 1st defendant. The applicants denied the matters in issue here to be similar to the matter in issue in ELC Case No 377 of 2017. Further that ELC Case No 377 of 2017 has not been determined. Mr Opolu submitted that Courts can re-write contracts where injustice would occur. That the principle of equity considers as done that which ought to be done. That it would be unconsciable to let NSSF enjoy the benefits after renovations have been undertaken.

7. The Court has considered the pleadings filed and the submissions rendered. I pick 3 issues for my determination of the application:

i. Whether or not this application is res judicata.

ii. Whether or not the application is subjudice.

iii. If answer to (i) and (ii) are negative is the application merited.

8. In ELC Case No 377 of 2017, the 1st defendant alongside 4 of his subtenants sued the 2nd defendant seeking 4 prayers inter alia;

a. A declaration that all the intended levying of distress by the NSSF against the 1st, 2nd, 3rd & 4th plaintiffs is illegal.

b. A permanent injunction to issue against the defendant from levying any distress against the 1st – 4th plaintiffs.

9. Together with the suit was filed an application seeking temporary relief of injunction restraining the said defendant from levying distress against the 1st – 4th plaintiffs. This application after being heard, the trial Judge Komingoi rendered her ruling on 10th April 2018. In her decision, the Judge found that the defendant had a right to levy distress for the recovery of rent. She proceeded to dismiss that application with costs. The applicants not being satisfied with this finding moved to the Court of Appeal. Mr Wafula submitted that the Court of Appeal rendered itself on 12th July 2018 and still granted the defendant liberty to proceed with distress.

10. Mr Opolu on his part submitted that the present application is not res judicata because the parties and the issues are not the same. However from the pleadings in ELC Case No 377 of 2017, 4 of the plaintiffs were described as subtenants challenging the levying of the distress by the current 2nd defendant. The plaintiffs in this suit are equally subtenants and had the former application succeeded, they would have used that order to bar the 2nd defendant from carrying out the levying of distress on their goods which form the basis of the subject matter in this suit.

11. I am therefore persuaded to hold that the current applicants fall under the group of persons who may litigate through the plaintiffs in ELC Case No 377 of 2017 under section 7 of the Civil Procedure Act. Given that an application seeking similar orders had been determined, I find the current motion dated 23.4.2018 as res judicata the application dated 17th October 2017. For this reason this application is a candidate for striking out.

12. Further the issues raised herein can be raised in ELC Case No 377 of 2017. This makes the current suit as filed to contravene the doctrine of subjudice set out under the provisions of section 6 of the Civil Procedure Act. The filing of the current application after the earlier application had been dismissed is abuse of the Court process that should be frowned upon. For this reason, I suo moto make an order striking out this suit that is newer. The plaintiffs herein can ventilate their claim by joining ELC Case No 377 of 2017. I am guided by the Court of Appeal decision in **Malindi Court of Appeal No 99 of 2017 Abud Abdalla & 28 others vs Kenya Ports Authority & Another** where Court of Appeal held that “*instituting two suits over the same cause of action cannot be judicious use of Courts time and reiterate that it is abuse of the Court process which must be frowned upon*”.

13. In light of my finding, that the application is res judicata and the entire suit is subjudice ELC Case No 377 of 2017, I find no reason to determine the 3rd issue of merit of the application. The order which commends itself to be given and which I hereby issue is that:

The application dated 23.4.2018 and the entire suit be and is hereby struck out with costs to the 2nd defendant.

Dated, signed & delivered at Mombasa this 22nd February 2019

A. OMOLLO

JUDGE