



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**ENVIRONMENT & LAND COURT**

**ELC APPEAL NO. 10 OF 2017**

**INTERCOUNTRIES IMPORTERS AND EXPORTERS LTD....APPELLANT/APPLICANT**

**VERSUS**

**TOTAL SECURITY LIMITED.....1<sup>ST</sup> RESPONDENT**

**LE MOLOK LIMITED.....2<sup>ND</sup> RESPONDENT**

**TELEPOSTA PENSION SCHEME REGISTERED TRUSTEES.....3<sup>RD</sup> RESPONDENT**

**COMMISSIONER OF LANDS.....4<sup>TH</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....5<sup>TH</sup> RESPONDENT**

**JUBILEE INSURANCE COMPANY LIMITED.....6<sup>TH</sup> RESPONDENT**

**PARK AVENUE INVESTMENTS LIMITED.....7<sup>TH</sup> RESPONDENT**

**TRUST BANK LIMITED (IN LIQUIDATION).....8<sup>TH</sup> RESPONDENT**

*(Being an Appeal from Business Premises Rent Tribunal Reference No. 902 and 903 (Consolidated) of 2016*

*at Nairobi given by Mbichi Mboroki, Chairman Business Premises Rent Tribunal on 10<sup>th</sup> February, 2017)*

**BETWEEN**

**TOTAL SECURITY LIMITED.....TENANT/APPLICANT**

**LE MOLOK LTD.....TENANT/APPLICANT**

**VERSUS**

**TOTAL SECURITY LIMITED.....1<sup>ST</sup> RESPONDENT**

**LE MOLOK LIMITED.....2<sup>ND</sup> RESPONDENT**

**TELEPOSTA PENSION SCHEME REGISTERED TRUSTEES.....3<sup>RD</sup> RESPONDENT**

**COMMISSIONER OF LANDS.....4<sup>TH</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....5<sup>TH</sup> RESPONDENT**

JUBILEE INSURANCE COMPANY LIMITED.....6<sup>TH</sup> RESPONDENT

PARK AVENUE INVESTMENTS LIMITED.....7<sup>TH</sup> RESPONDENT

TRUST BANK LIMITED (IN LIQUIDATION).....8<sup>TH</sup> RESPONDENT

## **RULING**

### **BACKGROUND**

1. The Appellant/Applicant filed a Notice of Motion dated 19<sup>th</sup> March, 2018 in which it seeks the following orders that:-

- 1. The Appellant be and is hereby given leave to file a supplementary Record of Appeal.***
- 2. The Supplementary Record filed herewith be deemed duly filed.***
- 3. This appeal be consolidated with High Court Environment and Land Cause No. 1343 of 2016 between the same parties.***
- 4. The costs of the application be in the cause.***

2. The Applicant filed an appeal to this Court on 10<sup>th</sup> March, 2017 against the Ruling of the Chairman of the Business Premises Rent Tribunal delivered on 10<sup>th</sup> February, 2017. A Record of Appeal was filed on 5<sup>th</sup> April, 2017. An application seeking admission of the appeal was filed on 20<sup>th</sup> April, 2017. This application also sought other prayers. A Ruling in respect of the Notice of Motion filed on 20<sup>th</sup> April, 2017 was delivered on 14<sup>th</sup> February, 2018. The parties to the appeal were directed to file Written Submissions in respect of the appeal. Highlighting of submissions was set for 11<sup>th</sup> April, 2018.

3. On the date which had been set for highlighting of submissions, M/s Kethi Kilonzo for the Applicant indicated to Court that they had filed an application dated 19<sup>th</sup> March, 2018 for which she sought directions of the Court. M/s Kilonzo also indicated that prayer 3 of that application had been spent.

The Court directed that the application be heard on 28<sup>th</sup> May, 2018. Come 20<sup>th</sup> May, 2018, the application could not proceed as the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had not filed their Replying Affidavit. The Applicant also sought leave to file a Further Affidavit. The application was set down for hearing on 26<sup>th</sup> September, 2018 when the same proceeded as scheduled.

### **APPLICANT'S CONTENTION**

4. During the hearing of the application, M/s Kethi Kilonzo argued that there was need for the Appellant to be granted leave to introduce additional documents in the form of a Supplementary Record of Appeal. Already the Applicant had filed a Supplementary Record of Appeal and one of the prayers in the application was that the filed Supplementary Record of Appeal be deemed as duly filed.

5. The Applicant contends that materials relating to ELC 1343 of 2016 are relevant to the appeal herein and that the Applicant was not aware of the existence of the case as it had not been served; that the Applicant only came to know about the existence of the case when a Notice to Show Cause why it should not be dismissed was received by them and that since parties are the same, it is important that the proceedings from that case be put before this Court.

6. The Applicant further argues that the proceedings in HCCC No. 1400 of 2014 show that the leases which were entered into by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and the 3<sup>rd</sup> Respondent were not part of the evidence adduced in the suit as the same were entered into after a date for Judgement had been reserved.

### **OPPOSITION BY 1<sup>ST</sup> AND 2<sup>ND</sup> RESPONDENTS**

7. The Applicant's application was opposed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents through a Replying Affidavit sworn on 28<sup>th</sup> May, 2018. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents contend that the Applicant's application is an abuse of the process of the Court; that the materials sought to be introduced are not relevant to the appeal herein and that the Supplementary Record of Appeal seeks to introduce new materials which were not before the Business Premises Rent Tribunal.

8. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents further argue that ELC 1343 of 2016 was withdrawn and the materials in the withdrawn case had not been placed before the Tribunal. It is further contended by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents that the Applicant has already appealed against the Judgement in HCCC No. 1400 of 2004 and to bring the proceedings in that case is akin to this Court entertaining a review of the Judgement when the matter is already before the Court of Appeal.

The 1<sup>st</sup> and 2<sup>nd</sup> Respondent further argue that the Applicant has not sought leave to adduce additional evidence and the Applicant cannot be granted what it did not ask for.

## **OPPOSITION BY 3<sup>RD</sup> RESPONDENT**

9. The 3<sup>rd</sup> Respondent opposed the Applicant's application based on a Replying Affidavit sworn on 25<sup>th</sup> April, 2018. The 3<sup>rd</sup> Respondent contends that the issues in ELC 1343 of 2016 and HCCC No. 1400 of 2004 were quite different from the issue in this appeal which is whether the Tribunal had jurisdiction. The 3<sup>rd</sup> Respondent argues that ELC 1343 of 2016 was withdrawn on 7<sup>th</sup> November, 2017. The 3<sup>rd</sup> Respondent further argues that HCCC No. 1400 of 2004 is subject of an appeal to the Court of Appeal where the parties have recorded a consent which has never been set aside or varied.

## **APPLICANT'S FURTHER CONTENTION**

10. In a Further Affidavit by the Applicant sworn on 20<sup>th</sup> September, 2018 the Applicant contends that the Memorandum of Appeal filed herein makes reference to HCCC No. 1400 of 2004 and that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed and relied on a copy of Judgement in HCCC No. 1400 of 2004 during the proceedings before the Tribunal. The Applicant therefore argues that the proceedings in HCCC No. 1400 of 2004 are pertinent in this appeal. The Applicant argues that the proceedings in HCCC No. 1400 of 2004 were not ready as at the time the Tribunal case was filed.

## **ANALYSIS**

11. I have considered the Applicant's application as well as the opposition thereto by the 1<sup>st</sup> and 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. I have also considered the oral submissions by the Counsel for the parties as well as the authorities filed herein. The prayer for consolidation of this appeal with ELC 1343 of 2016 having been spent, the only issue for determination is whether the Applicant should be allowed to file a Supplementary Record of Appeal.

12. Though the Applicant did not expressly state in the application that it was seeking to introduce additional evidence, it is clear that the purpose of seeking to be allowed to file a Supplementary Record of Appeal was to introduce additional evidence. In the case of **Mohamed Abdi Mahamud Vs Ahmed Abdullahi Mohamad & 3 Others [2018]eKLR** the Supreme Court of Kenya referred to a decision of the Supreme Court of Uganda in **Attorney General Vs Paul Kawanga Ssemwogerere & Another, Constitutional Appeal No. 2 of 2004[2004] UGSC 3** where the Supreme Court stated as follows:-

***“An Appeal Court may exercise its discretion to admit additional evidence only in exceptional circumstances which include:-***

- (i) Discovery of new and important matters of evidence which, after the exercise of due diligence, was not within the knowledge of, or could not have been produced at the time of the suit or petition by, the party seeking to adduce the additional evidence;***
- (ii) It must be evidence relevant to the issues;***
- (iii) It must be evidence which is credible in the sense that it is capable of belief;***
- (iv) The evidence must be such that, if given, it would probably have influence on the result of the case, although it need not be decisive;***
- (v) The Application to admit additional evidence must be brought without undue delay.”***

13. In the case of **K. Tarmohamed Vs Lakhani, Sir Kenneth O' Connor P** quoted a passage from the judgment of Denning L.J. in **Ladd Vs Marshall (v) [1954] 1 W.L.R. 1489 at P. 1491** which stated as follows:-

***“To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; Secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.”***

14. As I said hereinabove, the appeal to this Court was filed on 10<sup>th</sup> March, 2017. The Record of Appeal was filed on 5<sup>th</sup> April, 2017. The present application was filed on 19<sup>th</sup> March, 2018 a year after the appeal had been filed. The delay in filing the application for leave to adduce additional evidence is not explained. However, this notwithstanding I have to consider whether the application has met the threshold for grant of leave to adduce additional evidence on appeal.

15. The proceedings in HCCC No. 1400 of 2004 which are sought to be introduced as additional evidence were ready and certified as at 14<sup>th</sup> November, 2016. The application which triggered this appeal was filed before the Tribunal on 24<sup>th</sup> November, 2016. Even before the application in the Tribunal was filed, the Judgment in HCCC No. 1400 of 2004 was the subject of an appeal in the Court of Appeal where a consent was entered vide a letter dated 27<sup>th</sup> September, 2016. If the Applicant was keen, it could have had the proceedings in HCCC No. 1400 of 2004 availed before the Tribunal as the same were ready as at the time the application at the Tribunal was made. The Applicant has therefore failed the first test in the decision by Denning L.J as quoted in the **K. Tarmohamed case** (Supra) and the **Attorney General Vs Kawanga** as quoted in the case of **Mohamed Abdi Mahamud (Supra)**.

16. The judgment in HCCC No. 1400 of 2004 is subject of an appeal to the Court of Appeal. The proceedings which resulted in the judgement cannot therefore be of influence in the decision in this appeal. If the matter pending in the Court of Appeal was to be overturned

and the evidence would have been admitted, it will not augur well.

**CONCLUSION**

17. It is clear from the above analysis that the Applicant was not only late in bringing the application but has failed the first and crucial test which demands that the Applicant demonstrate that he was unable to adduce the evidence before the trial if it had exercised due diligence. I therefore find that the application by the Applicant lacks merit. The same is hereby dismissed with costs to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

It is so ordered.

Dated, Signed and delivered at **Nairobi** on this **27<sup>th</sup>** day of **March 2019**.

**E.O.OBAGA**

**JUDGE**

In the presence of M/s Muthama for M/s Kethi Kilonzo for Appellant and M/s Jemutai for M/s Mathenge for 3<sup>rd</sup> Respondent.

**E.O.OBAGA**

**JUDGE**