



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC CASE 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 TRUSTEE.....2ND DEFENDANT

DIKEMWA AUCTIONEERS.....3RD DEFENDANT

RULING

(Application to have funds deposited in an account released to applicants; applicants having been subtenants; applicants suing head lessor to stop the levy of distress of their goods and/or their eviction; applicants filing an application for injunction; applicants ordered to deposit rent payable while the application for injunction was being considered; application for injunction and suit dismissed; applicants now arguing that they deserve the deposited money returned to them; money cannot be returned as the same was similar to security for an injunction; applicants having utilized the premises for the duration of the application for injunction and thus derived benefit from the premises; application dismissed; money to be transmitted to the owner of the premises)

1. The application before me is that dated 25 March 2019 filed by the plaintiffs. The application seeks orders that some monies ordered to be deposited in a joint account pending the hearing of an application for injunction be released to the applicants.

2. The background leading to the application is that through a plaint filed on 24 April 2018, the applicants commenced this suit where they averred that they were lessees of the premises situated on the land parcel Mombasa/Block XX/328/329 (hereinafter referred to as the suit premises) being tenants of Techno Holdings Limited, named in the suit as 1st defendant. Techno Holdings Limited were in turn lessees of the suit premises from the registered owners, the Board of Trustees of the National Social Security Fund, named as the 2nd defendant (respondent to this application). The applicants stated that they used their own money to renovate the premises and had been diligent in their rental payments. They averred that on 20 April 2018, the respondent instructed auctioneers to levy distress against Techno Holdings Limited, but instead, the auctioneer proceeded to proclaim the goods of the applicants, which they contended was unlawful. In the suit they wished to have orders declaring the attachment unlawful and damages of Kshs. 100,000,000/= being the total costs of renovation.

3. Together with the plaint, the applicants filed an application for injunction to stop any attachment of their goods pending hearing of the suit. That application was argued on 31 July 2018 before my predecessor, A. Omollo J, who reserved ruling to 5 December 2018. She ordered that in the interim, the applicants do deposit rent in a joint interest earning account to be opened in the name of counsel for the applicants and counsel for the respondent. The court did deliver its ruling on 22 February 2019, where the application for injunction was dismissed. In addition, the court was not persuaded on the merits of this case and dismissed it, principally because there was another related suit, being Mombasa ELC No.377 of 2017, over the same subject matter.

4. It will be noted that in this application, what the applicants want is release, to them, of the money deposited in the joint interest earning account following the directions of the court. In the affidavit in support of the motion, it is deposed that after the ruling of 22 February 2019, the respondent evicted them from the suit premises. It is further deposed that the lease between the 1st defendant and the respondent was surrendered. It is urged that there is no tenancy relationship between the parties and no nexus that would entitle the respondent to the deposited funds.

5. The respondent has opposed the motion through Grounds of Opposition and a replying affidavit sworn by Augustus Khisa Wafula who is also counsel on record for the respondent. Principally, it is argued that the applicants deposited the money as a condition for their continued occupation of the suit premises, pending determination of the ruling of the court. It is averred that the applicants continued to stay in the suit premises and thus the applicants cannot have any claim on the money.

6. In his submissions, Mr. Opolu, learned counsel for the applicants, submitted that the sub-tenancy was not recognized by the respondent, and having denied that, they cannot now claim the benefit of the money. It was further submitted that it is not just the applicants who deposited money in the account, but many other tenants, and thus, if the court orders the respondent to keep the funds, this will be money from persons not before the court.

7. Mr. Wafula, on his part, submitted inter alia that having been in occupation of the suit premises, and having utilized the same, the applicants lost their right over the money since they were trading over that period.

8. I have considered the issue and taken note of the rival submissions.

9. To me, this is a fairly simple matter and I will therefore be brief in my determination. It is apparent that the applicants had been in occupation of the suit premises as subtenants. There were issues between the head lessor and the first tenant and the applicants seem to have been caught in the crossfire and that is why they presented this suit for protection. They filed the application for injunction and the court did order that while the application is pending, they can continue staying in the suit premises, but that they should deposit the rent in the joint account which is the subject of this application. To me, that was similar to an order of security, or damages, for the duration that the applicants enjoyed interim orders of injunction. Now, it is not submitted that the respondent evicted the applicants during this pending period, and it indeed appears to be common ground that the applicants did enjoy the suit premises before delivery of the ruling. It follows that the applicants derived benefit from their stay in the suit premises, and in that period of time, the respondent was barred from bringing in a new tenant. I really do not see what argument the applicants are raising, for if they are allowed to collect the money deposited, it means that they would have been in occupation of the suit premises for free. It further means that the respondent will not have derived any benefit from their stay, and indeed will have lost income, which it could have received by putting in another tenant. If the applicants are allowed to receive the deposited money, it would be an unjust enrichment, and an injustice to the respondent.

10. There was the other argument that this money does not only belong to the applicants but to other tenants as well. I see no issue in this argument. Whether it is money deposited by the applicants or money deposited by other subtenants, it is still money that was deposited by persons who enjoyed the premises and need to pay for their stay. In any event, the applicants can only speak for themselves. If there are other persons who feel that the money should not be released, they are free to file a suit or an application, and the same will be considered on merits.

11. For the above reasons, I do not see any merit in this application and it is hereby dismissed with costs. Instead, I do order that all the money that was deposited in the joint account be released to the respondent, that is The National Social Security Fund Board of Trustees, and upon release of the said funds the joint account be closed.

12. The applicants will shoulder the costs of this application.

13. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 15th day of October 2019.

MUNYAO S.

JUDGE.

IN THE PRESENCE OF:

Mr. Opolu for the applicants.

Mr Wafula for the respondent

Court assistant; Koitamet