



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

CIVIL APPEAL NO. 11 OF 2017

PANFIELD INVESTMENT LTD.....APPELLANT

(NEW ELDORET TOTAL SERVICE STATION LTD)

VERSUS

SISIBO LUXURY SHUTTLE LTD.....RESPONDENT

RULING

This is the ruling in respect of a preliminary objection dated 21st November 2017 by the respondent herein. The appellant had filed an application under certificate of urgency seeking for stay of execution of order dated 3/10/17 in Eldoret CMCMA No. 56 of 2017 pending the hearing of this application inter partes.

The court granted temporary orders pending the hearing of the application inter partes. The respondent filed a preliminary objection to the whole application. Mr. Kigamwa stated that there is no dispute that the appellant and the respondent filed a consent in the Magistrates' court which was annexed to the replying affidavit. He submitted that a consent order can never be a subject of an appeal under section 67(2) of the Civil Procedure Act. The only recourse for a party is to file a review to the court that recorded it.

Counsel referred the court to the case of Flora N. Wasike Vs. Destimo Wamboko CA No. 8 of 1984

Counsel further stated that the appellant is already in contempt of court and cannot be heard without purging the contempt. Counsel distinguished the case of Rose Ndetho whereby the party in contempt had not been heard. The Judges allowed the party to explain the validity of the order. Counsel submitted that in the current case the appellant was heard by the Magistrate and was found to be in contempt of court. The appellant was given an opportunity to show cause and in the process, recorded a consent. He prayed that the preliminary objection be allowed and the application be dismissed with costs.

Mr. Siganga opposed the preliminary objection and filed submissions to respond to the PO and the application. He submitted that they have an order dated 10/10/17 and that the respondent has not shown in their reply that the appellant frustrated any of those orders. He further submitted that the respondent has not shown that it indeed made an effort to occupy the premises in dispute or effort to have a meeting with the parties.

Counsel gave a background to the case whereby he stated that the Respondent filed a reference (Tribunal Case No. 19 of 2016) at the Business Premises Rent Tribunal (herein referred to as "the Tribunal") seeking inter alia, injunctive orders against the Applicant and challenging the eviction of the Respondent from the suit premises. The Tribunal allowed the application. The Respondent proceeded to file an application at the Chief Magistrate's Court at Eldoret (Miscellaneous Application No. 57 of 2017) for adoption of the orders of the Tribunal.

Counsel further stated that the Respondent served the applicant's station Manager with the application and an order seeking his committal to civil jail for disobeying orders of the court. This was the first time that the Applicant was served with suit papers in the case.

It was Counsel's submission that on 10th October, 2017, parties appeared before the Learned Trial Magistrate and recorded a consent. It was a proposal that the Respondent meet with Total who are the landlords/ licensor to formalize the occupation of the space at the station. Counsel submitted that instead, the Respondent drove 14 matatus to the station on that Thursday on the false premise that the court had ordered the Applicant to allow the Respondent to use the premise. He stated that the role of the Applicant was to link the Respondent to the landlord for purposes of formalizing the agreement but this meeting never materialized due to laxity and/or non-commitment on the part of the Respondent.

Counsel listed issues for determination which largely dealt with the application and not the preliminary objection.

In response to the preliminary objection Counsel submitted that the Respondent has challenged the appeal and this application and cited that a consent order cannot be challenged through an appeal. It has further contended that both the appeal and the application have not been instituted at the right forum

Counsel submitted that this appeal and the application are at the proper forum as they both raise issues of law and fact. He also submitted that these are issues which do not fall under the purview of review or institution of a fresh suit. These questions of law and fact are ripe for examination by this court and can only be sufficiently adjudicated on appeal.

Mr. Siganga cited the provisions of Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010 which this application is predicated upon that gives a party the right to file an application of the nature at either the Trial Court or the court before which the appeal has been instituted. He stated that the Applicant herein has chosen the latter option as the rules allow.

On the issue as to whether the appeal is time barred Counsel submitted that the Tribunal became *functus officio* the very moment the Subordinate Court adopted the decision of the Tribunal. It follows that the decision of the Subordinate Court can only be challenged in this Court.

In response to the issue of Joinder and misjoinder of parties, Counsel submitted there was no such issue as the Appellant occupies property EM/ block 6/35 and that the proceedings and the orders related to a different property. Counsel further submitted that the Appellant was only made a party to the proceedings at the Chief Magistrate's Court and that the Respondent ought to have enjoined the owner of the latter property to the suit. These issues could have been addressed at the Tribunal had the appellant been served with pleadings.

Lastly on the issue as to whether there was a consent between the parties, Counsel submitted that there was never any consent between the parties, that what existed was an

opportunity granted to the respondent to regularize its position with the actual proprietor of the suit premises. He stated that the applicant is a licensee on the suit premises and the license agreement does not accord him authority to enter into a tenancy agreement with a third party.

Counsel submitted that the appellant having been aggrieved by the decision of the Subordinate Court, preferred an appeal to this Honourable court and filed an application seeking for stay of execution pending hearing and determination of the appeal. He enumerated the conditions to be satisfied under Order 42 Rule 6(2) of the Civil Procedure Rules 2010. He urged the court to dismiss the preliminary objection.

Analysis and determination

The issue for determination is whether the preliminary objection as put has merit. The court will be guided by the Mukisa Biscuit case on preliminary objections. Preliminary objections can be raised at any time before judgement and it must deal with points of law.

The court is also cognizant of the fact that jurisdiction is everything and once a court notices that it does not have jurisdiction to handle a matter then it must down its tools. Apart from the issues above I have noticed that the supporting affidavit filed on 23/10/17 by Dave L. Siganga is not dated and it does not indicate where it was sworn. Likewise, the supporting affidavit of Fredrick Odhiambo filed on the same date is not dated as required by rules of swearing affidavits. This leaves the application naked so to speak.

I have considered the submissions of both Counsel and agree with the respondent's Counsel that a consent order cannot be a subject of appeal. It is clear from the pleadings that the parties recorded a consent and such consent has not been varied or set aside. Section 67 (2) of the Civil Procedure Act clear on this issue. The parties who entered into the consent must agree to set it aside or enter into another one varying the terms of the consent.

This is a matter that should have been dealt with at the subordinate court where it originated from. There is an issue of a consent and contempt proceedings which have not been purged. The appellant has largely dwelt with the application for stay and not the

preliminary objection. I will not therefore rule on the application for stay of execution at this stage as the application is in the wrong forum. The appellant is at liberty to canvass the issues at the Magistrate's court, set aside or vary the consent if they so wish and purge the contempt before moving on appeal.

I am guided by Article 159 of the Constitution and also recognize the need to do substantive justice without undue technicalities. This applies to both parties and justice has to be done for all parties.

The upshot is that the preliminary objection is upheld and the application is dismissed with costs to the respondent. The interim orders earlier granted are hereby vacated.

Dated and delivered at Eldoret this 30th day of January, 2018

M. ODENY

JUDGE

Ruling read in open court in the presence of:

Mr. Mogambi for Respondent

Mr. Chemoyai holding brief for Mr. Siganga for Appellant

Mr. Koech – Court Assistant