



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO 400 OF 2017

IDEAL LOCATIONS LIMITED..... PLAINTIFF

-VS-

NAKUMATT HOLDINGS LIMITED.....1ST DEFENDANT

ATUL SHAH.....2ND DEFENDANT

RULING

1. By a Plaint dated 3rd November 2017 which was amended on 16th November, 2017, the Plaintiff brought this suit against the Defendants seeking the following reliefs:

a. A declaration that the 1st Defendant is in breach of the sub-lease Agreement dated 9th June, 2014 between the 1st Defendant and the Plaintiff.

b. A declaration that the 2nd Defendant is liable to meet and satisfy the 1st Defendant's debts and liabilities under the sub-lease Agreement dated 9th June, 2014.

c. This Honourable Court be pleased to grant its approval to the Plaintiff to exercise its right of forfeiture and peaceable re-entry into the premises occupied by the 1st Defendant and situate on building known as "city mall" erected on LAND REFERENCE NUMBER 14407 AND 16088, SECTION 1, MAINLAND NORTH MOMBASA MUNICIPALITY (CR 42055) AND (CR 46440).

d. An order directed at the 1st Defendant to immediately vacate the premises situate in the building known as "City Mall" erected on LAND REFERENCE NUMBER 14407 AND 16988, SECTION 1, MAINLAND NORTH MOMBASA MUNICIPALITY (CR 42055) AND (CR.46440) and in any event not later than 7 days of this order.

e. Kshs.27,812,108.52 being outstanding rent, service charge and promotion fund as at 1st November, 2017.

f. An order directed at the Defendants jointly and severally to pay to the Plaintiff all outstanding rents, service charge, promotion fund and all payments accrued to the Plaintiff at the date of vacating the premises.

g. Costs of this suit.

h. Any other and further relief this Court may deem just to grant.

2. On 23rd November, 2017 the Plaintiff filed a Notice of Motion dated 23rd November, 2017 seeking approval of the Court to allow the Plaintiff to continue the Suit against the Defendants, Summary Judgment to be entered for the Plaintiff against the Defendants as prayed in the amended Plaint and an order directed at the 1st Defendant to immediately vacate the Suit Premises in default of which the Plaintiff to be at liberty to evict the 1st Defendant forcefully. The Motion is brought under Section 1A, Order 36 Rule 1 (1)(b) of the Civil Procedure Rules, Section 561(4)(e) and (f) of the Insolvency Act, 2015 and is supported by the Affidavit of Anish Doshi sworn on 23rd November 2017.

3. The Defendants filed Grounds of Opposition dated 7th December 2017 and Notice of Preliminary Objection dated 16th January 2018 which are both similar word for word and are on the following grounds:

a. THAT this Honourable Court is not vested with jurisdiction to hear and determine the Application.

b. The prayers sought in the Application and the Suit contravene the provisions of Section 430 of the Insolvency Act, 2017.

c. THAT the Application and the Suit are premature in view of ongoing proceedings seeking to wind up the Respondent in Insolvency Petition No.10 of 2017, in the Matter of Nakumatt Holdings.

d. THAT the subject matter of the Application and the Suit herein are under judicial consideration before another Court of competent jurisdiction in High Court Insolvency Petition No.10 of 2017, in the matter of Nakumatt Holdings Limited.

e. THAT as a consequence the orders sought in the Application and the Suit cannot issue.

4. I gave directions that the Preliminary Objection and the Plaintiff's Application be heard simultaneously on 22nd January, 2018, and they are the subject of this ruling.

5. Mr. Oluga argued the Plaintiff's case and submitted that the Defendants have not disputed that the rent of Kshs.27,812,108.52 is owing and continues to accrue and that the lease entered into between the parties entitled the Landlord to exercise its right of forfeiture and take possession in the event of default in payment of rent by the tenant and when a winding up petition has been instituted against the tenant. He further submitted that the 1st Defendant who is the lead tenant in the Suit Premises is not doing any meaningful business thereon and this has affected the value of the premises with other tenants threatening to vacate. Mr. Oluga submitted that the Suit Premises are charged to the bank and the rent from the 1st Defendant is assigned to offset the loan and because the 1st Defendant is not paying rent, the loan remains unpaid and the bank is likely to foreclose in exercise of its right to sale the property. He submitted that the prayers sought in the Application do not contravene the provisions of Section 430 of the Insolvency Act as the Plaintiff is not carrying out attachment or other forms of execution against the assets of the 1st Defendant. He stated that the Plaintiff has not taken any action against the assets of the 1st Defendant, whether attachment, sequestration, distress or execution thereof. Counsel submitted that the evidence available shows that the proceedings in **Nairobi Insolvency Cause No.10 of 2017** were determined and dismissed and there is no evidence of any pending Insolvency cause. Mr. Oluga submitted that in the Suit and Application, the Plaintiff is seeking leave of the Court pursuant to Section 561 (4) of the Insolvency Act and that any Application filed for the appointment of an administrator does not bar this Court from proceeding with the matter. Relying on the case of **Job Kilach -v- Nation Media Group Ltd & 2 Others (2105)eKLR**, Mr. Oluga submitted that the Defendants have not filed any defence or affidavit

and urged the Court to allow the Application.

6. Mr. Nganga, Counsel for the Defendants submitted that the Court lacks the jurisdiction to hear and determine the Suit which touches on the insolvency of the 1st Defendant. He submitted that **Insolvency Cause No.10 of 2017** is still pending and that what was dismissed was an Application. He pointed out that an order for administration had been made and an administrator appointed with regard to the affairs of the 1st Defendant. Mr. Nganga further submitted that as the Plaintiff's Application is brought under Section 561(4)(e) and (f) of the Insolvency Act, this Court has no jurisdiction to handle the matter as the relevant Court is defined under Section 2 of the Insolvency Act. He relied on the case of **Fredrick Okoth Owino –v- T.S.S. Grain Millers (2017)eKLR**; the case of **Daniel Chitwa Chegenye –v- Vihiga Clerk County Assembly and Another (2016)eKLR**, as well as **Maganlal Motichand Chandaria & 6 Others –v- Paresh Kumar Dodhia (2017)eKLR**, and **Aden Noor Ali –v- IEBC & 2 Others, Nairobi HC Misc. Appl.No.533 of 2017**, and urged the Court to have the Plaintiff's application as well as the amended plaint struck out.

7. In his brief response, Mr. Oluga agreed that jurisdiction flows from the constitution and the statute, and specifically referred the Court to the provisions of Article 162 (2) (b) of the Constitution and Section 13 of the Environment and Land Court Act. He submitted that among the reliefs sought by the Plaintiff is eviction of the 1st Defendant from the Suit Premises which falls squarely within the meaning of use and occupation of land. He added that under the Constitution, there is no discrimination of the use, either as commercial or otherwise. Mr. Oluga further submitted that Section 561 of the Insolvency Act does not state that one has to move to the Court dealing with a Petition. He adduced that though Section 2 of the Insolvency Act defines 'Court' to mean High Court, the definition must be interpreted and understood within the meaning of Article 162 (2)(b) of the Constitution and Section 13 of the Environment and Land Court Act to the extent that where the dispute revolves around use and occupation of land, then the right Court to seek redress is the Environment and Land Court. He pointed out that Article 165 (5)(b) of the Constitution expressly prohibits the High Court from hearing matters falling under Articles 162(2)(b). He stated that it was not relevant whether there was a pending Insolvency Cause or whether an administrator has been appointed, as long as the dispute touches on use and occupation of land, this Court has jurisdiction. He added that whereas Article 165(3)(b) of the Constitution expressly provided that it is the High Court that has jurisdiction to hear and determine the question of whether a right or fundamental freedom under the Bill of Rights has been denied, infringed or violated, it has been held that if the breach of fundamental right falls within or relates to the matters reserved for determination of specialized superior courts under Article 162(2) of the Constitution, then those specialized courts have jurisdiction to hear such disputes. He referred the Court to the case of **Daniel Chitwa Chegenye (supra)**.

8. In the case of **Owners of Motor Vessel "S"-v- Caltex Oil (K) Ltd (1989) KLR 1**, Nyarangi J.A. held that:

“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where the Court has no jurisdiction, there would be no basis for a continuation of proceedings pending evidence. A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

In the case of **Samuel Kamau Macharia & Another –v- Kenya Commercial Bank Ltd & 2 Others (2012) eKLR**, the Supreme Court held that:

“ A Court's jurisdiction flows from either the Constitution or legislation or both. Thus a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by the law....It cannot expand its jurisdiction”

9. In this case, the issue of jurisdiction having been raised, it is paramount that the same ought to be determined in the first place before I take any further steps. If I find that the Court has no jurisdiction, I will have no basis of considering the Application.

10. In the Plaintiff and amended Plaintiff herein, the Plaintiff avers that vide a Lease Agreement date 9th June 2014, it leased out to the 1st Defendant a portion of the premises comprising about 87.518 square feet situate on the building known as “City Mall” erected on **Land Reference Number 14407 and 16088 Section 1, Mainland North, Mombasa Municipality CR 422055 and CR.46440** for a period of 11 years. It the Plaintiff’s contention that the 1st Defendant has breached the terms of the lease agreement by defaulting in payment of rent, service charge and promotion fund when the same have fallen due besides committing other breaches of the lease agreement. The second Defendant guaranteed to the Plaintiff the payment of all monies and liabilities due and owing by the 1st Defendant pursuant to the said lease. From the pleadings on record the relationship between the Plaintiff and the Defendants is that of landlord and tenant. The same is not disputed by the Defendants.

11. Having therefore settled the issue of landlord/tenant relationship, the issue of jurisdiction then comes to play. Article 162(2) of the Constitution states as follows:

“(2) Parliament shall establish Courts with the status of the High Court to hear and determine disputes relating to –

b) the environment and the use and occupation of, and title to, land.”

Article 162(3) provides that Parliament shall determine the jurisdiction and functions of the Courts contemplated in clause (2). In order to give effect to Article 162(2)(b), Parliament enacted the Environment and Land Court Act, 2011 which, under Section 4 thereof established the Environment and Land Court which is a superior Court of record with the status of the High Court. The jurisdiction of the Court is provided under Section 13 which states:

“13 (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2)(b) of the Constitution and with the provisions of this Act or any other written law relating to the environment and land.

(2) In exercise of its jurisdiction under Article 162 (2)(b) of the Constitution, the Court shall have power to hear and determine disputes relating to environment and land, including disputes.

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a) relating to environmental planning and protection, trade, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, mineral and other natural resources.

b) relating to compulsory acquisition of land;

c) relating to land administration and management;

d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

e) any other dispute relating to environment and land.

12. The jurisdiction of the High Court has been taken away by the Environment and Land Court specifically in matters of Environment and Land. Article 165(5) provides as follows:

“(5) the High Court shall not have jurisdiction in respect of matters –

a. Reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

b. Falling within the jurisdiction of the Courts contemplated in Article 162(2).”

13. I am aware that Section 2 of the Insolvency Act defines 'Court' to mean High Court. In my view, that definition must be interpreted and understood within the meaning of Article 162 (2)(b) of the Constitution and Section 13 of the Environment and Land Court Act to the extent that where the dispute revolves around use and occupation of land, then the right Court to seek redress is the Environment and Land Court. The Constitution has not prohibited this Court from hearing the dispute over use and occupation of land where there is a pending insolvency cause involving one of the parties.

14. The dispute herein is about landlord/tenant relationship. It relates to non-payment of rent for the premises that 1st Defendant leased from the Plaintiff. The same clearly relates to use and occupation of land. Therefore under Article 162(2)(b) of the Constitution and Section 13 (2)(a) of the Environment and Land Court Act, this Court has jurisdiction to hear the Suit and the application and issue the orders sought by the Plaintiff. In my view, the Plaintiff's action does not in any way contravene Section 430 of the Insolvency Act as the Plaintiff in this case is not undertaking or seeking to undertake any of the actions listed in Section 430. The Plaintiff has not taken any action against the assets of the 1st Defendant, whether attachment, sequestration, distress or execution. The Plaintiff is only seeking to exercise its rights to peaceable re-entry which in my view, is not prohibited by Section 430 of the Insolvency Act. Accordingly, I hold that the Preliminary Objection by the Respondent is not merited and the same is hereby dismissed with costs to the Plaintiff.

15. I now turn to the application by the Plaintiff. in the Notice of Motion dated 23rd November 2017, the Plaintiff seeks orders for summary Judgment in its favour as pleaded in the amended plaint. Order 36 Rule 1 of the Civil Procedure Rules provides as follows:

(1) In all suits where a Plaintiff seeks judgment for-

a. A liquidated demand with or without interest; or

b. The recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expires or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser, Where the Defendant has appeared but not filed a defence the Plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.

2. The application shall be supported by an affidavit either of the Plaintiff or of some other person who can swear positively to the facts verifying the cause of action and any amount claimed.

3. Sufficient notice of the application shall be given to the Defendant which notice shall in no case be less than seven days.

4. The Defendant may show either by affidavit, or by oral evidence, or otherwise that he should have leave to defend the suit"

16. The Plaintiff's application is based on the grounds set out in the face of the motion and the supporting affidavit of Anish Doshi sworn on 23rd November 2017. The Plaintiff has deponed that the 1st Defendant is a tenant in the Plaintiff's premises pursuant to a Sub-Lease Agreement dated 9th June 2014. The Plaintiff avers that it was term of the Lease Agreement that if the 1st Defendant fails to pay rent or any part thereof within 21 days from the due date of payment of the rent or if a petition is presented for the winding up of the 1st Defendant and if any material part of the property, assets or revenues of the 1st Defendant is threatened to be sold or disposed of, or if the 1st Defendant materially changes the nature or mode of conduct of its trading in any material respect, that amounts to breach of the lease agreement by the 1st Defendant and automatically gives the Plaintiff the right to forfeit the lease and to repossess the subject premises. The Plaintiff avers that the 1st Defendant has breached the terms of the lease agreement by defaulting in payment of rent and the amount unpaid now stands at Kshs.27,812,108.52 and continues

to accrue. The Plaintiff further avers that the 1st Defendant has also committed other breaches of the lease agreement including but not limited to an **Insolvency Cause No.10 Of 2017** having been lodged against the 1st Defendant in the High Court at Nairobi, among other winding up causes, several creditors have threatened to sell or dispose of the assets of property or revenue of the 1st Defendant in order to recover monies owed to them and that the 1st Defendant has materially changed the nature or mode of conduct of its trading by entering into and/or pursuing a merger or a trading partnership with Tusker Mattresses Limited (Tuskys Supermarket).

17. It is also the Plaintiff's contention that by a Guarantee and Indemnity dated 9th June 2014, the 2nd Defendant guaranteed to the Plaintiff the payment and discharge forthwith, on demand being made in writing, of all monies and liabilities due, owing and/or incurred by the 1st Defendant pursuant to the lease. The Plaintiff avers that a demand in writing has been made to the 2nd Defendant to make good the outstanding payments due to the Plaintiff from the 1st Defendant and to discharge all liabilities accruing from the lease as against the 1st Defendant but the 2nd Defendant has declined to do so. In addition, the Plaintiff states that the rent collected from the suit property is assigned to service a credit facility of Kshs.545,000,000.00 advanced to the Plaintiff by Prime Bank Limited with Suit Premises as security and the failure to pay rent by the 1st Defendant has made it extremely difficult for the Plaintiff to service the loan and the lender is likely to exercise its right to foreclosure if the default persists and the Plaintiff may lose the entire premises. It is the Plaintiff's contention that the 1st Defendant's continued occupation of the premises is causing grave injustice to the Plaintiff and the same does not and will not serve any useful purpose since the 1st Defendant no longer does any meaningful business therein.

18. The Defendants were served with summons to enter appearance but only filed a notice of appointment of advocates. They were also served with the Plaintiff's application and they filed Grounds of Opposition dated 7th December 2017 and the Notice of Preliminary Objection dated 16th January 2018 in which they mainly contend that the Court is not vested with the jurisdiction to hear and determine the Application and that the prayers sought in the application and the suit contravene the provisions of Section 430 of the Insolvency Act 2017.

It is also the Defendants' contention that the Application and the Suit are premature in view of ongoing proceedings seeking to wind up the 1st Respondent in **Insolvency Petition No.10 of 2017**, in the matter of Nakumatt Holdings Limited and that the subject matter of the Application and the Suit herein are under judicial consideration before another Court of competent jurisdiction in **High Court Insolvency Petition No.10 of 2017**.

19. I have considered the Application. The principles which guide the courts in determining an Application for Summary Judgment are well settled. In the case of **Gupta –v- Continental Builders Ltd (1978)KLR 83**, the Court of Appeal stated:

“If no prima facie triable issue is put forward to the claim of the Plaintiff, it is the duty of the Court forthwith to enter Summary Judgment for it is as much against natural justice to shut out without proper cause a litigant from defending himself as it is to keep a Plaintiff out of his dues in a proper case. Prima facie triable issues ought to be allowed to go to trial just as sham or bogus defence ought to be rejected peremptorily.”

In the case of **Job Kilach –v- Nation Media Group Ltd & 2 Others (2015)eKLR**, the Court of Appeal stated that:

“A triable issue is said to exist if there is a dispute in the facts which dispute can only be resolved after ventilation in full hearing.”

Also in the case of **Giciem Construction Company –v- Amalgamated Trade & Services LLR No.103 (CAK)**, the Court of Appeal stated:

“As a general principle, where a Defendant shows that he has a fair case for defence or reasonable grounds for setting up a defence or even a fair probability that he has bona fide defence, he ought to have leave to defend. Leave to defend must be given unless it is clear that there is no real substantial question to be tried; that there is no dispute as to the facts or law which raises a reasonable doubt that the Plaintiff is entitled to judgment.”

20. The Plaintiff has stated that the 1st Defendant has defaulted in the payment of rent and committed other breaches of the Lease Agreement between the parties. The Defendants have not denied or challenged the Plaintiff’s claim. The Defendants have only challenged the jurisdiction of this Court to handle the matter which I have already dealt with. In the case of **Mugunga General Store –v- Pepco Distributors Ltd (1986) LLR 5111 (CAK)** the Court of Appeal stated thus:

“first of all, a mere denial is not sufficient defence in this type of case. There must be some reason why the Defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason.”

In the case of **Continental Butchery Ltd –v- Nthiwa (1989)KLR 573**, Madan, JA stated:

“with a view to eliminate delays in the administration of justice which would help litigants out of their just dues or enjoyment of their property, the Court is empowered in an appropriate suit to enter judgment for the claim of the Plaintiff under the summary procedure provided under Order 35 subject to there being no bona fide triable issues which would entitle a Defendant leave to defend. If a bona fide triable issue is raised, the Defendant must be given unconditional leave to defend but not so in a case in which the court feels justified in thinking that the defences raised are a sham.”

21. As already stated, the Defendants have not challenged the Plaintiff’s claim. The evidence by the Plaintiff remains uncontested and there is no affidavit filed in response to the factual matters stated by the Plaintiff and therefore the material facts as stated by the Plaintiff are uncontroverted. I am therefore unable to see any defence the Defendants would have against the Plaintiff’s claim.

22. Having considered the Plaintiff’s pleadings and the evidence on record, I do find that the Notice of Motion dated 23rd November 2017 is merited and the same is hereby allowed as prayed.

Delivered, signed and dated at Mombasa this 5th March, 2018.

C. YANO

JUDGE