



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

PETITION NO. 4 OF 2017

IN THE MATTER OF THE ARTICLES 2, 3, 10, 22, 60, 159 AND 258 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMNETAL FREEDOMS UNDER ARTICLES 27, 28, 35, 36, 40, 46, 48 AND 50 OF THE CONSTITUTION OF KENYA

BETWEEN

DEWDROP ENTERPRISES LIMITED.....PETITIONER

AND

JAMES IRUNGU WAKABA.....1ST RESPONDENT

THE CHIEF MAGISTRATES COURT,

MILIMANI COMMERCIAL COURTS.....2ND RESPONDENT

JUDGEMENT

1. This Petition was filed on 6/3/2017 seeking the following orders:

- a) A declaration that the orders of 6/12/2013 issued by the 2nd Respondent in **Milimani CMCCC No. 5083 of 2013- James Irungu Wakaba v Dewdrop Enterprises Limited and Another** breached the Petitioner's rights and fundamental freedoms under Articles 27, 28, 36, 40 and 50 of the Constitution of Kenya hence are void.
- b) Judicial review by way of an order of certiorari to remove into the court and quash the orders issued on 6/12/2013 in **Milimani CMCCC No. 5083 of 2013 James Irungu Wakaba v Dewdrop Enterprises Limited and Another**;
- c) A declaration that the initiation, maintenance and prosecution of **Milimani CMCCC No. 5083 of 2013 James Irungu Wakaba v Dewdrop Enterprises Limited and Another** in the manner intended contravenes the Petitioner's constitutional rights, is an abuse of the court process, malicious and oppressive;
- d) Judicial review by way of an order of prohibition barring the continuance of **Milimani CMCCC No. 5083 of 2013 James Irungu Wakaba v Dewdrop Enterprises Limited and Another** in the manner intended;
- e) Judicial review by way of an order of mandamus compelling the 2nd Respondent to provide to the petitioner a certified copy of the order issued on 6/12/2013 in **Milimani CMCCC No. 5083 of 2013 James Irungu Wakaba v Dewdrop Enterprises Limited and Another**;
- f) An order directing the Respondents to pay the Petitioner the sum of Kshs. 6,000,002.00 together with interest at the rate of Kshs. 2000.00 per week from 1/6/2014 until payment in full; and
- g) The Respondents do bear the costs of this petition.

2. The petition is supported by the affidavit of Edward Thiong'o Wachira, the Managing Director of the Petitioner. He depones that the Petitioner entered into a tenancy agreement with the 1st Respondent on or about March 2013 over the premises known as House No. 26A on

3. He claims the 1st Respondent breached the terms of the tenancy agreement by failing to pay rent as a result of which the Petitioner notified the 1st Respondent of the default and proceeded to instruct auctioneers to levy distress for rent. The 1st Respondent filed **Milimani CMCCC No. 5083 of 2013 James Irungu Wakaba v Dewdrop Enterprises Limited and Another** in which the 2nd Respondent granted orders on 23/8/2013 barring the Petitioner from evicting the 1st Respondent.

4. The Petitioner filed an application dated 4/9/2013 seeking to strike out the plaint. The 2nd Respondent delivered a ruling on 6/12/2013 granting an injunction barring the Petitioner from levying distress against the 1st Respondent. The Petitioner claims the issuance of these orders by the lower court was arbitrary, illegal and violated its constitutional rights.

5. Being dissatisfied with the 2nd Respondent's decision, the Petitioner lodged Milimani **HCCA No. 631/2013 Dewdrop Enterprises Limited v James Irungu Wakaba and Another**. The Petitioner states that the 1st Respondent moved out of the premises on 3/4/2014.

6. The 1st Respondent swore the Replying affidavit filed on 21/4/2017 admitting most of the facts stated by the Petitioner. However, he denied owing the Petitioner any rent in respect of the suit premises and maintains that the Petitioner is holding his deposit of Kshs. 126,000/=. He claims that he was not served with the documents relating to the appeal filed by the Petitioner and challenged the Petitioner to produce copies of the proceedings.

7. The 1st Respondent avers that the Petitioner is litigious and annexed copies of the Petitioner's application dated 21/5/2014 filed by the Petitioner alleging that the 1st Respondent had breached the terms of the court order issued on 6/12/2013.

8. The 2nd Respondent filed Grounds of Opposition on 10/4/2017. The 2nd Respondent claims the petition is an abuse of court process and is *sub judice* since **Milimani CMCCC No. 5083 of 2013 James Irungu Wakaba v Dewdrop Enterprises Limited and Another** is still pending in court. The 2nd Defendant maintains that the petition discloses no cause of action against the 2nd Respondent.

9. Parties filed submissions. Both Respondents maintain that this court lacks jurisdiction to hear this matter. The issue for determination is whether the court ought to grant the declarations the Petitioner seeks and orders of certiorari, mandamus and prohibition.

10. The court agrees with the 2nd Respondent's submission that the petition discloses no cause of action against the 2nd Respondent. Section 6 of the Judicature Act protects a Judge or Magistrate from being sued in a civil suit for an act done or ordered by him in the discharge of his judicial duty where at the time he acts in good faith believing he has jurisdiction. A party aggrieved by a court order may seek to have the order set aside or reviewed or appeal against the order. It is improper to make the judicial officer a party to proceedings involving the dispute in question.

11. The petition amounts to an abuse of the court process. The Petitioner lodged **HCCA No. 631/2013 Dewdrop Enterprises Limited v James Irungu Wakaba and Another** against the orders issued on 6/12/2013 by the 2nd Respondent in **Milimani CMCCC No. 5083 of 2013 James Irungu Wakaba v Dewdrop Enterprises Limited and Another**. The Petitioner should have served the 1st Respondent with the appeal. The Petitioner can pursue that appeal and may file a counterclaim in **Milimani CMCCC No. 5083 of 2013** for any sums it alleges the 1st Respondent owes it.

12. The petition lacks merit and is dismissed with costs to the Respondents.

Dated and delivered at Nairobi this 26th day of June 2018.

K. BOR

JUDGE

In the presence of: -

Ms. Kitololo holding brief for Ms. Mutuku for the Respondent

Mr. Terell for the 2nd Respondent

Mr. V. Owuor- Court Assistant

No appearance for the Petitioner