



**Shikara Limited v Vej & 2 others (Civil Case E020 of 2023)
[2024] KEELC 8 (KLR) (17 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 8 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CIVIL CASE E020 OF 2023
SM KIBUNJA, J
JANUARY 17, 2024**

BETWEEN

SHIKARA LIMITED PLAINTIFF

AND

SAMIER MOHAMED RAZA MURA VEJ 1ST DEFENDANT

MURA VVEJ HOLDINGS LIMITED 2ND DEFENDANT

LINKS PLAZA MANAGEMENT COMPANY 3RD DEFENDANT

RULING

1. The plaintiff vide an application dated September 25, 2023 sought the following prayers;
 - a. Spent.
 - b. Spent.
 - c. The court be pleased to issue an order of injunction restraining the Defendants whether by themselves, their agents or any other person acting on their behalf from enforcing Notice for Distress for rent dated 18/9/2023 and the proclamation dated 18/9/2023 by Tip Top Auctioneers or further demanding service charge or trespassing or otherwise interfering with the Plaintiff's quiet possession or enjoyment of the property Unit No. 3B, on the 3rd Floor of the apartment building known as Links Plaza together with one car parking space marked as 3B situate on property subdivision No. 14014 Section I Mainland North pending the resolution of a dispute between the Plaintiff and the 1st Defendants by arbitration in accordance with clause 11 of the agreement for sale dated 28/11/2011.
 - d. Costs.



2. The application is premised on the fourteen (14) grounds on its face and supported by the affidavit of Alice Wahome Githere, director with the plaintiff, sworn on the 26th September 2023, inter alia deposing that the plaintiff became the registered owner of the suit property on the 10th December 2016 and paid service charge up to the 31st August 2023; that the 1st and 2nd defendants are coercing the plaintiff to pay illegal and backdated service charge through the demand notice dated the 18th July 2023 issued by J. P. Ngoya and Austine Advocates and another of the same date by Tip Top auctioneers demanding Kshs. 544,737.64 and 601,951.88 respectively; that the 1st and 3rd defendants have breached and or refused to perform the fundamental terms of the agreement of sale dated the 28th November 2011 and sublease dated the 10th December 2016 and the plaintiff should be protected; that the 1st defendant has declined to provide details on the 3rd defendant sought in the plaintiff's counsel letter dated 1st August 2023.
3. The application is opposed by the 1st and 2nd defendants, through the replying affidavit of Samier Mohamed Raza Muravvej, the 1st defendant, sworn on the 13th October 2023, inter alia deposing that the applicant has always known the 2nd defendant was the agent of the 3rd defendant in management of the commercial office block and for purposes of collection of service charge from 2012; that the 3rd defendant increased service charge effective 1st January 2017 from Kshs.20 per square foot to Kshs.24.93 and instructed the 2nd defendant to effect the increment; the plaintiff refused to pay the service charge in terms of the increased rates and continued to pay the old rates; that this court has no jurisdiction as payment of service charge is purely a commercial issue that only the High Court can deal with; that there is no arbitration agreement with respect to service charge and that the plaintiff has not taken any steps in commencing arbitration.
4. On record is another replying affidavit by Edward Timothy Okuyosi, an auctioneer, sworn on the 13th October 2023 among others deposing that he acted on instructions from counsel for the 1st & 2nd defendants as well as the 3rd defendant and served notice of distress dated the 18th September 2023 upon the plaintiff in respect to unit 3 for Kshs.601,951.88; that when he went to remove the distressed goods on 2nd October 2023, he was served with a restraining order; that he does not know the 3rd defendant and it could be a non-existent entity.
5. The court issued directions on filing and exchanging submissions on the 14th November 2023. The learned counsel for the plaintiff and 1st & 2nd defendants filed their submissions dated the 15th November 2023 and 17th November 2023 respectively.
6. The learned counsel for the plaintiff submitted this court has jurisdiction and cited the Court of Appeal case of *Nakumatt Holdings Limited & Another vs Ideal Locations Limited* (2019) eKLR where it was held that the Environment and Land Court has jurisdiction to hear and determine issues of service charge emanating from lease agreement or any other instrument. Counsel also argued that the court ought to be persuaded by the decision of the *China Zhongxing Construction Company Ltd. Vs Eden Development Limited (K)* 2020 eKLR where the High Court held that where the court finds that there is an arbitration agreement between the parties, the court is obliged to grant interim orders of preservation.
7. The learned counsel for the 1st and 2nd defendants cited several cases inter alia the case of *Co-operative Bank of Kenya Limited vs Patrick Kangethe Njuguna & 5 Others* (2017) eKLR where the Court of Appeal held that the Environment and Land Court cannot deal with questions on accounting or tabulations of sums owing. Counsel also referred the court to the sub lease agreement dated 10th December 2016 at paragraph 2.4 where issues relating to amounts of service charge should be referred



to a person appointed by the Chairman of the Institute of Surveyors of Kenya to act as an expert and not as arbitrator.

8. The issues for the determination by the court are as follows:
 - a. Whether the court is with jurisdiction in this matter.
 - b. Whether the plaintiff has met the threshold for the orders sought to issue at this interlocutory stage.
 - c. Who pays the costs?
9. The court has carefully considered the grounds on the application, the affidavit evidence by the parties, submissions by the learned counsel, superior courts decisions cited thereon and come to the following determinations:
 - a. The suit property is an apartment on a building along Links Road and the cause of action revolves around service charge whereby the 1st and 2nd defendants issued demand notices for Kshs. 601,951.88 through auctioneers known as Tip Top Auctioneers. They alleged that the plaintiff had failed to pay the full amount of the service charge and a notice for distress to be issued and served. The plaintiff then approached the court seeking for injunctive orders to prevent the 1st and 2nd defendants from gaining entry into the suit property..
 - b. It is important for the court to start by addressing the issue of whether or not the court is with jurisdiction to hear and determine this suit. Section 13 (2) of the *Environment and Land Act* No. 19 of 2011 provides as follows:

“In exercise of its jurisdiction under article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes—

- a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals 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.”

In the case of *Debra Limited v Board of Trustees National Social Securities Fund & another* [2017] eKLR where L. Gacheru held as follows:

“There is no doubt that the 1st Defendant/Respondent instructed Regent Auctioneers to levy distress upon the Plaintiff/Applicant and on or about 15th June 2015, the 2nd defendant proclaimed goods belonging to the plaintiff/applicant. Section 3(1) of the *Distress for Rent Act* provides that:-

“..... any person having any rent or rent service in arrear and due upon a grant, lease, demise or contract shall have the same remedy by distress for the recovery of that rent or rent services as is given by the common Law of England in a similar case.”



It is therefore evident from the above provisions of law that distress for rent or right to distress accrues once the tenant is in arrears of rent and rent services.

There is no doubt that the 1st Defendant levied distress upon the Plaintiff/Applicant because of the arrears for service charge. Service charge is not rent as service charge is a debt which can be demanded from and recovered as a civil debt. In the instant case, trying to recover arrears of service charge through distress for rent is therefore a wrong move. The Court of Appeal in the case of *C.Y.O Owayo..Vs..George Zephania & Adudata T/A Aduda Auctioneers* (2007) eKLR held that:-

“Thus in looking into what constitutes illegality of distress for rent, we must not only consider our laws, but must also consider what in England would be considered an illegality in the levy of distress. In *Halsbury Laws of England*, 4th Edition volume 12, Page 368, it is stated:-

An illegal distress is one which is wrought at every outset that is to say either where there was no right to distrain or where a wrongful act was committed at the beginning of the levy invalidating all subsequent proceedings. The following are instances of illegal distress, a distress by a Landlord after he has parted with reversion, a distress by a person in whom the reversion is not vested, a distress whom no rent is in arrears or for a claim or debt which is not rent....”

In the above case, the learned judge granted an injunction. I do not see any reason to depart from the reasoning in the foregoing decision.

- c. The plaintiff has mentioned a number of disputes apart from the amount of service charge which can only be resolved through an arbitration as provided for in the afore mentioned sublease agreement. I find that the plaintiff has a prima facie case and in accordance with the decision in the case of *Giella Versus Cassman Brown & Company Limited* (1973) EA 358, the plaintiff has made a case for the suit property to be conserved in terms of prayer 3, pending the outcome of the arbitration and or the determination of the suit herein.
 - d. In respect of costs, and as under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, costs follow events unless for good cause otherwise directed, I am of the view costs should be in the cause.
10. That in the upshot to the foregoing, the court finds and orders as follows:
- a. That the plaintiff’s application dated the September 25, 2023 has merit and is allowed in terms of prayer (c).
 - b. That costs be in the cause.

It is so ordered.

DATED AND VIRTUALLY DELIVERED ON THIS 17TH DAY OF JANUARY 2024.

S. M. KIBUNJA, J.

In the presence of:

Plaintiff: Mr Karina

Defendants: M/s Ongeso holding brief for Karega.

WILSON – COURT ASSISTANT.

