



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

MISC.APPLICATION NO. 19 OF 2017

ARYAN LIMITED.....PLAINTIFF/APPLICANT

-VERSUS-

KIM INVESTMENT LTD.....DEFENDANT/RESPONDENT

RULING

1. This is the Notice of Motion dated 22nd March, 2007. It is brought under Order 51 Rule 1 of the Civil Procedure Rules, 2010. Section 1A, 3A, 6, 63(e) of the Civil Procedure Act and all other enabling provisions of the law.

2. It seeks orders;

1. Spent

2. Spent

3. That an order does issues staying and/or dismissing the proceedings of the tribunal in BPRT Cause No. 350 of 2007 pending hearing and determination of CMCC 2339 of 2016.

4. That costs of this application be provided for.

3. The grounds relied upon are on the face of the application. The main ground being the Respondent herein has filed before the Business premises rent tribunal at Mombasa Cause number 35 of 2017 during the pendency of another suit, on the same issues with the same parties over the same subject matter.

The Respondent failed to disclose to the tribunal the existence of a similar case it instituted before the Chief Magistrate's court and which is pending hearing and determination.

4. The application is supported by the affidavit sworn by Yusuf Shabbir Waljee, a Director of the applicant on the 22.3.2017 and a supplementary affidavit sworn on the 3.5.2017.

5. The application is opposed. There are grounds of opposition filed by the respondents advocate on the 24.4.2017 and dated 24.4.2017.

6. On the 26.4.2017 it was agreed between the parties that the application be disposed by way of written submissions.

Written submissions were then filed and the matter was fixed for highlighting on 28.6.2017.

7. I have considered the application, the supporting affidavit and the supplementary affidavit. I have also considered the grounds of opposition and the written submissions by counsel.

The issues for determination are, whether the tribunal Cause Number 35 of 2017 is subjudice and whether it should be stayed or dismissed.

8. It is the Applicants contention that the respondent has filed two parallel suits; CMCC Number 2339 of 2016 and BPRT Cause Number 35 of 2017.

The Applicant has annexed the Notice of Motion in CMCC No. 2339 of 2016. It is their further intention that the Respondent moved to the Business premises Rent Tribunal once it realized it was not going to get any interim orders in CMCC 233 of 2016.

9. The Respondent on the other hand states that it has since withdrawn CMCC 2339 of 2016 through a notice dated 7.4.2017. That in any case the issues in the two suits are different.

10. I have seen the pleadings in the two cases. The parties are the same. The subject matter is Plot No. 4 and plot No. MOMBASA/BLOCK/XX/265. Both suits relate to the events of 16th November 2016. It is therefore misleading for the respondent to claim the issues are different.

11. I have gone through the provisions of Order 25 rule 1, 2 of the Civil Procedure Rules and section 6 of the Civil Procedure Act. I find that the plaintiffs Notice of withdrawal of suit in CMCC 2339 of 2016 dated 7.4.2017 does not amount to a withdrawal of a suit. I have considered the authorities cited by the Applicant;

Tatu City Limited And 3 others

-versus-

Stephen Jennings And 6 Others [2016]eKLR

Eliud Kipchirchir And Another

-versus-

Canyon Properties Limited And 4 Others [2016]eKLR

I find that in view of these authorities the steps taken before a suit can be said to be withdrawn have not been followed. It is safe to say CMCC 2339 of 2016 is alive.

12. I find that as per section 6 of the Civil Procedure Act, the Respondent moved to the Business premises rent tribunal with full knowledge that they had filed another suit in the Magistrates court. I found that this amounts to an abuse of the court process. It is only fair if the suit is stayed.

I find merit in this application and do exercise this courts supervisory powers as envisaged in Article 165(6) (7) of the Constitution 2010. I also find that these proceedings are properly commenced by way of Miscellaneous Application as this court is not dealing with any issues between parties but merely giving effect to section 18(1) (b) (c) of the Civil Procedure Act.

The parties should expedite the hearing of CMCC 2339 of 2016 so that all the issues between them can be resolved quickly. I find merit in this application and do grant the orders sought name;

(a) That an order do and is hereby issued staying the proceedings of the tribunal in Business premises rent tribunal Cause number 35 of 2017 pending hearing and determination of Mombasa CMCC Number 2339 of 2016.

(b) I make no orders as to costs.

It is so ordered.

Signed, Dated and Delivered at Mombasa this 20th day of September, 2017.

L. KOMINGOI

JUDGE