



Five Spot (KE) Limited v Mombasa Trade Centre Limited (Environment and Land Appeal E002 of 2023) [2024] KEELC 765 (KLR) (21 February 2024) (Ruling)

Neutral citation: [2024] KEELC 765 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL E002 OF 2023
SM KIBUNJA, J
FEBRUARY 21, 2024**

BETWEEN

FIVE SPOT (KE) LIMITED APPLICANT

AND

MOMBASA TRADE CENTRE LIMITED RESPONDENT

RULING

1. The applicant's filed the notice of motion dated 6th July 2023 pursuant to sections 1A and 3A of the [Civil Procedure Act](#), section 13(7) of [ELC Act](#) and orders 40 and 42 rule 6 of the [Civil Procedure Rules](#) seeking for the following orders:
 1. Spent.
 2. Spent.
 3. That this honourable court be pleased to grant a stay of execution of the order of the court from the ruling delivered in Civil Suit No. E063 of 2021 *Fivespot (Ke) Limited v Mombasa Trade Centre Limited* pending the hearing and determination of the appeal.
 4. Spent.
 5. That a temporary injunction be issued restraining the respondent, its agents, employees, servants or any person acting under the respondent's instructions from harassing the applicant through relentless demands and further disposing off, alienating, auctioning, carting away or otherwise interfering with any of the applicant's assets in an attempt to recover the alleged rent arrears pending the hearing and determination of the appeal.
 6. That costs of this application be provided for.



The application is premised on the fourteen (14) grounds on its face and supported by the affidavit of Philip Nyamwaya, the applicant's director, sworn on the July 5, 2023, in which he inter alia deposed that on the 1st April 2018, the applicant, then known as 'Ipay Limited', entered into a lease agreement with the respondent for a term of six (6) years; that the applicant changed its name from 'Ipay Limited' to 'Fivespot Kenya Limited' on February 22, 2018 and communicated the change to the respondent, who was to reflect it in the lease before it was registered; that the respondent, who was obligated to register the lease never did so despite constant follow-ups and requests from the applicant; that the applicant continued to pay rent and on the third year on 6th April 2021 issued a notice of its intention to vacate the premises; the respondent rejected the notice and issued the applicant with a copy of the lease registered on 21st April 2021; the applicant believes that the respondent's actions of issuing them with a registered lease two weeks after being notified of their intention to terminate the lease was in bad faith and aimed at holding them, hostage; the filed Mombasa CM Civil Suit No. E063 of 2021 *Fivespot (Ke) Limited v Mombasa Trade Centre* which sought inter alia the refund of Kshs 156,240, being the security deposit and a declaration that the notice to vacate was valid; the respondent filed an application dated 3rd March 2022 seeking for the suit to be struck out on the basis that the applicant has never been the respondent's tenant due to its change of name; the magistrate's court allowed the application vide a ruling dated 30th August 2022 and dismissed the applicant's suit with costs; the applicant being dissatisfied with the ruling of Hon. Kyalo, filed this appeal vide a Memorandum of Appeal dated 29th June 2023; the deponent further contended that despite vacating the suit premises, the respondent has continued to tabulate rent and issue demands for payments, with the latest demand on 4th July 2023; the deponent urged the court to restrain the respondent from these harassments as well as issue a stay of execution pending the determination of this appeal, which he termed as arguable.

2. The respondent opposed the application through the replying affidavit of Abdulkader Mohamed Sale Mohamed, respondent's accountant, sworn on 10th August 2023, in which he deposed inter alia that in Mombasa CM Civil Suit No. E063 of 2021 *Fivespot (Ke) Limited v Mombasa Trade Centre*, the respondent filed a defence against the applicant's claim on the ground that the applicant has never been its tenant; that the respondent had entered into a lease agreement with 'Ipay Limited' and not the applicant, and at the time of the alleged change of name, the lease was running and did not provide for any change of name; that at no point did the respondent acknowledge the applicant as the tenant and has always issued invoices and receipts for rent paid under the name 'Ipay Limited'; that accepting payment from the applicant as opposed to 'Ipay Limited' did not confer the applicant with any interest in the suit premises nor did it change the content of the lease; that its application in the lower court that resulted in the applicant's suit being dismissed was a negative order incapable of forming a basis for stay orders; that the applicant filed before this court Misc App. No. 61 of 2022 seeking leave to file appeal out of time, stay as well as injunction orders against the ruling in Mombasa CM Civil Suit No. E063 of 2021 *Fivespot (Ke) Limited v Mombasa Trade Centre*; that the court delivered its ruling on 26th June 2023 dismissing the prayers for stay and injunctive orders and ordered the applicant to file an appeal within 10 days; that the respondent had not been served with the said Memorandum of appeal to ascertain that the applicant complied with the said orders; that the application herein does not confer the applicant with any contractual relationship with the respondent; that there was no valid appeal on record as this appeal has been filed under a different party and the court cannot issue an injunction in the absence of a valid appeal; that the application was an afterthought meant to frustrate the respondent's efforts to recover rent, and should be dismissed with costs.



3. The court gave directions on filing and serving submissions on the 4th October 2023. The learned counsel for the appellant and respondent filed their submissions dated the 6th November 2023 and 12th January 2024 respectively, which the court has considered.
4. The issues for the determinations by the court are as follows:
 - a. Whether the appellant has met the threshold for orders of stay and temporary injunction to be issued at this interlocutory stage.
 - b. What orders to issue in this matter.
 - c. Who pays the costs?
5. The court has after considering the grounds on the application, affidavit evidence, submissions by the learned counsel for the parties, superior courts decisions cited thereon, the record, come to the following determinations:
 - a. That it is apparent the appellant herein had previously filed ELC Misc. Application No. 61 of 2022 *Five Spot (KE) Limited v Mombasa Trade Centre Limited*, in which it applied vide the application dated 10th October 2022 for:
 - i. Stay of execution of the order of the trial court in the ruling delivered in Civil Suit No. E063 of 2021 pending the hearing and determination of the appeal.
 - ii. Leave to file the appeal out of time.
 - iii. Memorandum of appeal dated the 10th October 2022 and filed on 11th October 2022 be deemed as duly filed and properly on record.
 - iv. Temporary injunction be issued restraining the respondent in person or agents from demanding payment of the alleged rent arrears being Kshs.359,531.90, or any sum whatsoever, and further disposing or otherwise interfering with any of the applicant's assets in an attempt to settle the alleged arrears pending the hearing and determination of the appeal.
 - v. Costs.
 - b. That above application was heard by this court and determined through the ruling delivered on the 26th of June 2023, in which the court inter alia directed as follows:
 - i. That the applicant is hereby granted leave to file an appeal out of time.
 - ii. That the memorandum of appeal be filed and served within ten (10) days from today, and in default the leave granted above to automatically lapse.
 - iii. The prayers for stay of execution of the trial court ruling in Civil Suit No. E063 of 2021, and temporary injunction are found to be without merit and rejected.
 - iv. The applicant to pay the respondent's costs in the application notwithstanding the outcome of the appeal to be filed.
 - v. This file be closed.
 - c. That as can be deduced from above details, the previous suit, ELC Misc Application No. 61 of 2022 *Five Spot (KE) Limited v Mombasa Trade Centre Limited* was between the same parties as is in this present suit, i.e the applicant in the former suit, is the appellant herein, while



the respondent in the former suit is still the respondent herein. In ELC Misc. Application No. 61 of 2022, the former suit, the prayers were inter alia for the stay of execution of the ruling delivered in CMCC No. E063 of 2021, pending determination of the appeal and a temporary injunction restraining the respondent from demanding rent arrears of Kshs 359,531.90 pending determination of the appeal. In the present application, the prayers are the stay of execution of the orders issued in CMCC No. E063 of 2021 pending determination of this appeal and a temporary injunction restraining the respondent from demanding rent arrears pending determination of the appeal. In the former suit, the court delivered its ruling on the application after considering all issues, especially on whether the applicant (appellant herein) had met the threshold for orders of stay of execution of the ruling delivered in CMCC No. E063 of 2021 and temporary injunction pending the hearing and determination of the appeal. The court proceeded to reject the prayer for stay of execution as well as that of temporary injunction.

- d. The application dated 10th October 2022 and determined on the 26th June 2023 in ELC Misc Application No. 61 of 2022 *Five spot (KE) Limited v Mombasa Trade Centre Limited*, and the instant application dated 6th July 2023 therefore, raises similar issues and are between the same parties litigating under the same capacities. This inevitably means the issues raised in the instant application, having been determined by a court of competent jurisdiction through the ruling of 26th June 2023, is therefore *res judicata* and had been filed in contravention of section 7 of the [Civil Procedure Act](#) chapter 21 of Laws of Kenya, which states;

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

- e. From the analysis above, it is clear to the court that the appellant herein is bringing forward his case in bits. He was denied orders in the previous Miscellaneous Application No. 61 of 2022 and now seeks the same prayers in their appeal. The appellant will not be allowed to open the same subject of litigation, in respect of an issue that has already been raised before, litigated upon and determined by a court of competent jurisdiction.
- f. The doctrine of *res judicata* was well discussed in [E.T. v Attorney General & another](#) [2012] eKLR where the court held;

“The courts must always be vigilant to guard litigants evading the doctrine of *res judicata* by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of *Omondi s NBK & others* (2001) EA 177 the court held that “parties cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action in a subsequent suit”. In that case the court quoted Kuloba J, (as he then was) in the case of *Njanju v Wambugu and another* Nairobi HCC No. 2340 of 1991 (unreported) where he stated: If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his



case some cosmetic face lift in every occasion he comes to court, then I do not see the use of doctrine of *res judicata*.....”.

The appellant/applicant herein has not presented anything new to what it presented before the court in the former suit. The issues raised herein were litigated and adjudicated before a court of competent jurisdiction after all parties presented their facts and evidence. I find that this application is *res judicata* to the ELC Misc App No. 61 of 2022 and this court is barred by Section 7 of the [Civil Procedure Act](#) from pronouncing itself on the same issues, a second time.

- g. The Court granted leave to the appellant in ELC Misc. App No. 61 of 2022 to file its appeal out of time, within ten (10) days. The memorandum of appeal herein was filed on the 6th July 2023. However, to file the instant application seeking for prayers similar to those sought for and rejected in the previous suit is an abuse of the court process, a waste of judicial time and violates the overriding objective as stipulated in Section 1A of the [Civil Procedure Act](#). The application herein is for striking out.
 - h. That as a consequent of section 27 of the [Civil Procedure Act](#) Chapter 21 of Laws of Kenya, the Appellant will pay the Respondent’s costs.
6. Flowing from the foregoing findings, the court orders as follows:
- a. That the issues raised in the appellant’s notice of motion dated July 6, 2023, have already been decided in the previously filed application No. 61 of 2022 and is therefore *res judicata*.
 - b. The application dated the July 6, 2023 is hereby struck out with costs.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED ON THIS 21ST DAY OF FEBRUARY 2024.

S. M. Kibunja, J.

.....

ELC MOMBASA.

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In The Presence of:

Appellant M/s Nyachia for Ngugi

Respondent : M/s Shisia for Mutubia

Wilson – Court Assistant.

