Abdullahi t/a Jambo Matt Supermarket Ltd & 2 others v Techno Holdings Ltd & 2 others (Civil Appeal 45 of 2020) [2024] KECA 226 (KLR) (8 March 2024) (Judgment)

Neutral citation: [2024] KECA 226 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL 45 OF 2020

SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA

MARCH 8, 2024

BETWEEN

ABDIHAMID SHEIKH ABDULLAHI T/A JAMBO MATT SUPERMARKET LTD ..... 1ST APPELLANT

RAMZAN MUHAMMAD T/A INTERNATIONAL MOTORS .. 2ND APPELLANT

HUSSEIN HEMED SIMBA T/A MPANJI AFRICA COMPANY LTD ..... 3RD APPELLANT

AND

TECHNO HOLDINGS LTD ..... 1ST RESPONDENT

NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES .... 2ND RESPONDENT

DIKEMWA AUCTIONEERS ..... 3RD RESPONDENT

(An appeal from the Ruling of the High Court of Kenya at Mombasa (S. Munyao J.) dated 15th October 2019inMombasa Environment and Land Court Case No. 98 of 2018)

JUDGMENT

1. The appeal arises from a ruling delivered on 15th October 2019 by the Environment and Land Court at Mombasa (S. Munyao J.) that dismissed an application dated 25th March 2019 lodged by Abdihamid Sheikh Abdullahi T/ A Jambo Matt Supermarket, Ramzan Muhammad T/A International Motors and Hussein Hemed Simba T/A Mpanji African Company Limited, the Appellants herein. The said Appellants had sought orders in the said application that the money they had deposited in a joint account number (number withheld) at NIC Bank, Nkrumah Branch Mombasa pursuant to the orders of this Court be paid back or released back to them through their Advocates, namely Opulu & Co. Advocates.

2. The said application was opposed by the 2nd and 3rd Respondent in grounds of opposition dated 17th April 2019 on the grounds that it was bad in law, an abuse of the Court process and made in bad faith; it was in violation of the orders made by the ELC on 31st July 2018 ; the Appellants having paid the amount pursuant to a court order as rent and as a condition for their continued occupation of the premise pending the determination of the case, they had no claim or right whatsoever over the amount deposited in the joint account.

3. The trial Judge (S. Munyao J.) after hearing the parties in the application held that the Appellants had been in occupation of the suit premises as subtenants, and after a dispute arose between the head lessor and the first tenant, the Court ordered, upon an application for an injunction by the Appellants, and while the application is pending, that they continue staying in the suit premises, but that they should deposit the rent in the joint account which was similar to an order of security, or damages, for the duration that the Appellants enjoyed interim orders of injunction. Further, that it was common ground that the Appellants did enjoy the suit premises before delivery of the ruling on the application for an injunction, and therefore derived benefit from their stay in the suit premises, and in that period of time, the 2nd Respondent was barred from bringing in a new tenant. Therefore, if they are allowed to collect the money deposited, it means that they would have been in occupation of the suit premises for free, and that the respondent will not have derived any benefit from their stay, and indeed will have lost income, which it could have received by putting in another tenant. Lastly, that if the applicants are allowed to receive the deposited money, it would be an unjust enrichment, and an injustice to the respondent.

4. A brief background is necessary at this juncture to put the application and decision of the trial Court in context. The Appellants had filed a suit in the Environment and Land Court where they averred that they were lessees of various portions of the premises situated on LR No. Mombasa/ Block XX/328/319 known as Hazina Plaza, (the suit property), having leased it from Techno Holdings Ltd, the 1st Respondent herein, pursuant to a lease executed between the Techno Holdings Ltd and National Social Security Fund Board of Trustees, the 2nd Respondent, and they claimed that the 1st Respondent was therefore the head lessor. The Appellants claimed that they substantially renovated the suit at their own expense, and with the knowledge of the Respondent, and diligently paid their rent to the 1st Respondent.

5. However, that on 29th April 2018, the 2nd Respondent issued instructions to the 3rd Respondent to levy distress against the 1st Respondent, and the 3rd Respondent instead proclaimed the Appellants goods requiring them to pay the amount sought despite the Appellants not being obligated to pay rent to the 2nd Respondent. According to the Appellants, the 2nd Respondent as the head landlord was obligated under section 23 of the Act to issue a notice to them as under tenants instructing them to pay rent, and since the 1st Respondent had no right of property or beneficial interest in the proclaimed goods, the 2nd Respondent had no legal basis to levy distress against the said goods.

6. The Appellants therefore prayed for orders of a permanent injunction to restrain the 1st, 2nd and 3rd Respondents from interfering with their quiet and peaceful possession of the suit property; and for payment of Kshs. 100,000,000/- being the total costs of renovation and of Kshs. 500,000,000/- for furnishing the said building with expensive furniture. The Appellants, contemporaneously with the suit, filed an application dated 23rd April 2018, which was later amended on 8th May 2018, and which sought a temporary injunction restraining the 1st, 2nd and 3rd Respondents from attaching their goods as contained in the proclamation notice issued by the 3rd Respondent pending the hearing of the suit.

7. The 2nd and 3rd Respondents thereupon filed a Notice of Preliminary Objection dated 2nd May 2018 on the grounds that the Appellants' suit was an affront to the provisions of section 6 of the *Civil Procedure Act* in view of the fact that there exists a similar suit over the same subject matter between the same or substantially the same parties in Mombasa ELC No. 377 of 2017 and in the Court of Appeal in Civil Application No. 50 of 2018 over the same issue herein, and further, that the application dated 23rd April 2018 was res judicata and an affront to the provisions of section 7 of the *Civil Procedure Act* in view of the ruling delivered by Komingoi J. in Mombasa ELC No. 377 of 2017 on 10th April 2018 over the issues raised herein between the same parties.

8. In a ruling delivered on 22nd February 2019, A. Omollo J. found that the application dated 23rd April 2018 was res judicata and the entire suit was sub judice Mombasa ELC No. 377 of 2017, and struck out the application and the entire suit with costs to the 2nd Respondent. Consequent to this ruling, the Appellants filed the application dated 25th March 2019, whose dismissal is the subject of this appeal.

9. The Appellants have raised eight (8) grounds of Appeal in their Memorandum of Appeal dated 16th July 2020 lodged in this Court on even date, namely:

    1. That the Learned Judge erred in law and fact in dismissing with costs the Appellants' Application dated 25th March 2019 and consequently ordering that the money deposited in the joint accounts be released to the Respondent, the National Social Security Funds Board of Trustees and the accounts closed.

    2. That the Learned Judge erred in law and fact when he made a finding that 'to me that was a similar to an order for security or damages, for the duration that the Applicants enjoyed interim Orders of Injunction' without considering the fact that the Respondents were in contempt of the very Orders of the Court and could not legally derive a benefit from their own mischief.

    3. That the Learned Judge erred by failing to consider the weight of evidence on record and totally failed to appreciate the fact that there was no privity of contract between the Appellants and the Respondents.

    4. That the Learned Judge failed to properly appreciate the doctrine of unjust enrichment in application to the facts of the case.

    5. Had the Judge fully and properly considered the entire case without a predetermined bias against the Appellants he would have come to a conclusion that the Appellants' application was merited

    6. That the Learned Judge erred in law and in fact by failing to determine the main issues which was the conflict between the 1st and 2nd Defendants causing a miscarriage of justice

    7. The entire Ruling is simplistic dismissive and plainly wrong that it has occasioned a failure of justice

    8. The Learned Judge entirely failed to evaluate the fact of tenancy status of the Petitioner in the suit premises Vis a Vis the position of the 1st Defendant Techno Holdings Limited. By this the Honourable Judge failed to draw a distinction of the legal position between the 1st and 2nd Defendant leading to an erroneous Ruling dated 15th October 2019.

10. The Appellants therefore seek orders from this Court that the ruling issued by S. Munyao J. dated 15th October 2019 be set aside and their application dated 25th March 2020 be allowed with costs. We heard the appeal on this Court's virtual platform on 14th June 2023, when learned counsel, Mr.

Opulu, appeared for the Appellants while learned counsel, Mr. Wafula, appeared for the 2nd and 3rd Respondents. There was no appearance for the 1st Respondent despite their advocates having been duly served with the hearing notice, nor did they file any response to the appeal. Mr. Opulu and Mr. Wafula relied on their respective written submissions dated 25th May 2023 and 18th October 2022. This being a first appeal, the duty of this Court is reiterated as was set out in the decision of Selle & Another v Associated Motor boats Co. Ltd & Others [1968] EA 123 which is to reconsider the evidence, evaluate it and draw our own conclusion of facts and law, and only depart from the findings by the Trial Court if they were not based on evidence on record; where the said Court is shown to have acted on wrong principles of law as held in Jabane v Olenja [1968] KLR 661 or where its discretion was exercised injudiciously as was held in Mbogo & Another v Shah [1968] EA.

11. The main issue in this appeal is whether the learned trial Judge erred in his findings as to entitlement to the funds deposited by the Appellants in the subject joint account. Mr. Opulu's position on the issue was that the Court ordered them to deposit the money in a joint account between the parties' Advocates while, during the subsistence of the Court order they were illegally evicted in clear contempt of Court orders. Therefore, the 1st Respondent breached the conditional orders of the Court and brutally evicted the Appellants, which was pure contempt and clear disregard of the Courts. Additionally, the 2nd Respondent should not be allowed to benefit from the very order they deliberately breached with impunity by the illegal eviction under the guise of distress for rent.

12. Mr. Opulu also urged that the 2nd Respondent had no nexus or entitlement to the funds as there was no legal relationship that subsisted between the Appellants and the 2nd Respondent and thus the Learned Judge erred in law and in fact when he made a finding that the applicants derived benefit from their stay in the suit premises, and in that period of time, the 2nd Respondent was barred from bringing in a new tenant. Further, that the Learned Judge was overzealous and deliberately refused and or ignored to check the record and the application dated 25th March 2019 before him. The Appellants asserted that the learned Judge should have noticed that; the orders were issued after the ruling of A. Omollo J. that were given pending appeal on 22nd February 2019; the 2nd Respondent did not file any Defence or Counter Claim; and in its Replying Affidavit, did not deny the fact of the eviction of the Appellants during the pendency of the Court order pending appeal.

13. The counsel asserted that the 2nd Respondent did not apply for any order of security in the matter and did not seek damages, had claimed that it had no lease with the Appellants and thus no privity of contract, and therefore that it was a fundamental error of law for the trial Judge to make a finding of entitlement to the funds by the 2nd Respondent. Further, that the Judge failed to draw a distinction between the main tenancy between the 1st and 2nd Respondents and the Appellants' sub tenancy status. Therefore, the Appellants having been deemed as trespassers, the trial Judge fell into contradiction in holding that they ought to pay rent for the suit property. It was counsel's assertion that recourse for the 2nd Respondent lay against the 1st Respondent with whom there was privity of contract by virtue of a lease, and that the doctrine of unjust enrichment was not properly taken into account.

14. Mr. Wafula on his part submitted that it was not in contest that the 2nd Respondent was at all material times to the proceedings, the owners of the suit property leased out to the 1st Respondent subject to terms and conditions negotiated and agreed upon. Further, that one of the fundamental terms and conditions of the tenancy agreement between the tenant and the landlord was payment of rent, and the 1st Respondent was prohibited from subletting the premise without written consent of the 2nd Respondent. However, that the 1st Respondent without the written consent of the 2nd Respondent sublet the premise to the Appellants, and when the application to injunct the distress for rent was lodged, the Court, in order to safeguard the interest of the 2nd Respondent who was not receiving rent

for the premises, directed that the rent be deposited in a joint interest earning account in the name of the Appellants' and the 2nd Respondent's advocates pending the hearing and determination of the application inter partes.

15. Further, that it was not in dispute that the Appellant continued occupying the premise while paying the monthly rent into the joint account until the matter was determined by the Court, where it struck out the suit for being an abuse of the Court process. Mr. Wafula's position therefore was that the deposits in the joint account was the Appellants' consideration for their continued occupation of the 2nd Respondent's premises while the suit was pending in Court, and that the Appellants lost property in the money in the joint account the moment they enjoyed the stay.

16. The grounds upon which we can interfere with the exercise of the learned Trial Judge's discretion were set out in United India Insurance Co. Ltd, Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co. Ltd v East African Underwriters (Kenya) Ltd [1985] eKLR as follows:

> " The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case.
>
> The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

17. A perusal of the record shows that the deposits in the joint account that is the subject of this appeal arose from orders granted on 31st July 2018 by A. Omollo J., who, after hearing the parties on the application dated 23rd April 2018, ordered as follows after reserving the ruling on the application for 5th December 2018: "The interim orders extended till then. The applicants to deposit rents between now and 5/12/18 in a joint interest account to be opened by Cottow & Associates and Opulu and Co. Advocates." It is clear that the description and nature of the deposits were the rent payable by the Appellants, and we are satisfied at this early stage that on that ground the Appellants are not entitled to the deposits as they do not contest that they were in possession of the suit property pending the delivery of the said ruling.

18. The Appellants allege that they were thereafter evicted from the premises by the 2nd Respondent in contempt of court, however no such ruling or finding is on record. On the contrary, the record shows that on 22nd February 2019 after delivering the ruling on the application dated 23rd April 2018, A. Omollo J. ordered as follows:

> " The Applicants are granted leave to appeal. They will be supplied with certified copies of proceedings at their costs. In the interests of justice and for the applicants to formally move the court if at all, I do allow an order of status quo to be maintained for a period of 21 days from today."

19. It is therefore clear that the status quo orders were time-bound, and the Appellants did not bring any evidence or findings of the date of their eviction, or that the eviction if any, was contrary to the orders of 31st July 2018 or 22nd February 2019 or of any other orders. We therefore do not find any reason to fault the learned Judge in finding that the Appellants did enjoy the possession of the suit premises for the period they deposited the rent.

20. The question that remains to be answered is which party, as between the 1st and 2nd Respondent is the one entitled to the rent that was deposited in the joint account? It is not disputed that the Appellants entered into a lease with respect to the suit property with the 1st Respondent. It is also not in dispute that the 1st Respondent's interest in the suit property arose from a lease it had in turn entered with the 2nd Respondent, who is the owner of the suit property. The 1st Respondent however did not respond to the application dated 25th March 2018 filed in the ELC nor to this appeal, and did not lay any claim to the funds deposited in the subject joint account. In addition, in dismissing the Appellant's application dated 23rd April 2018 for being res judicata, A.Omollo J. held in the ruling delivered on 22nd February 2019 that the Appellants were in the group of persons who may litigate through the plaintiffs in ELC Case No. 377 of 2017 under section 7 of the *Civil Procedure Act* which was then still pending.

21. The learned Judge noted the following holdings that were made in ELC No. 377 of 2017:

> "9. Together with the suit was filed an application seeking temporary relief of injunction restraining the said defendant from levying distress against the 1st-4th plaintiffs. This application after being heard, the trial Judge Komingoi rendered her ruling on 10th April 2018. In her decision, the Judge found that the defendant had a right to levy distress for the recovery of rent. She proceeded to dismiss that application with costs. The applicants not being satisfied with this finding moved to the Court of Appeal. Mr. Wafula submitted that the Court of Appeal rendered itself on 12th July 2018 and still granted the defendant liberty to proceed with distress."

22. A. Omollo J. also specifically observed and made a finding that "from the pleadings in ELC Case No. 377 of 2017, 4 of the plaintiffs were described as subtenants challenging the levying of the distress by the current 2nd defendant. The plaintiffs in this suit are equally sub-tenants and had the former application succeeded, they would have used that order to bar the 2nd defendant from carrying out the levying of distress on their goods which form the basis of the subject matter in this suit." It is also notable in this regard that the plaintiffs in ELC Case No. 377 of 2017 were the 1st Respondent herein and another set of its sub-tenants, while the defendant therein was the 2nd Respondent herein.

23. We therefore find that arising from the previous rulings made in the suit in the trial Court, it was evident that the 2nd Respondent was the one entitled to the rent paid by the sub-tenants to the suit premises including the Appellants, and the learned trial Judge did not err in finding so, and making a consequential order to that effect in the circumstances of the case.

24. We accordingly find no merit in this appeal and it is hereby dismissed in its entirety with costs to the 2nd Respondent.

25. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 8TH DAY OF MARCH, 2024.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR