IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME JJ.A)

CIVIL APPEAL NO. 58 OF 2017

BETWEEN

DK REAL ESTATE LIMITED.....APPELLANT

VERSUS

DEACONS (EAST AFRICA) PLC.....1ST RESPONDENT

MODERN TECHNO FITNESS GYM LIMITED.....2ND RESPONDENT

(Being an Appeal from the Ruling of the High Court of Kenya at Mombasa (Otieno, J.) dated 23rd June, 2017

in

HC.COMM.C.No. 89 of 2016)

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JUDGMENT OF THE COURT

[1] The core issue for determination in this appeal is whether a summary judgment order was properly entered in favour of the 1st respondent in the sum of Kshs.23,528,032; and whether there were triable issue(s) which entitled the appellant and the 2nd respondent leave to defend the suit. A brief background is that by a plaint filed on 23rd August, 2016, the 1st respondent claimed that it entered into a contractual relationship with the 2nd respondent for the supply of gym and/or fitness equipment. Pursuant thereto, the 1st respondent delivered the said equipment to the 2nd respondent as agreed, at a consideration of Kshs.34,885,512 inclusive of other costs such as transportation and installation. According to the said contract, the 2nd respondent agreed that the title to all the equipment supplied would remain vested in the 1st respondent until the entire account was settled. The 2nd respondent defaulted and as at the time the suit was filed, the 2nd respondent had only paid Kshs.7,523,479 and neglected to settle balance thereof.

[2] That notwithstanding, the 1st respondent tried to be accommodative, by acceding to the 2nd respondent's proposal of offsetting the balance under various schemes of arrangement; but these too, did not materialize as the 2nd respondent continued to default. Naturally, the 1st respondent began contemplating repossession of the suit equipment and even issued the 2nd respondent with a notice to that effect. Before the repossession could be executed however, it came to the 1st respondent's attention that the 2nd respondent had closed shop and had left the suit equipment stored in a basement, under the custody and control of the appellant. At this point in time, the 2nd respondent had ceased responding to the 1st respondent's communication on the matter.

[3] Given this turn of events and the 2nd respondent's sudden detachment, the 1st respondent was left apprehensive of the likelihood that it might never recover the monies and might even lose the suit equipment as well. This spurred her to institute suit against the 2nd respondent and the appellant seeking orders that:-

> ***"a) An injunction be and is hereby granted, (sic) restraining the defendants either by themselves, their servants or agents and anyone duly authorized by them or anyone claiming under them in any manner or otherwise however, from wasting, damaging, alienating, selling, removing or disposing all the gym exercise equipment currently being held by the 2nd defendant, or any part thereof comprising the following:***

(all the suit equipment was duly listed).

b) The court be pleased to order for access, inspection, valuation and immediate and unconditional release and/ or return of all the said gym exercise equipment by the defendants to the plaintiff.

c) *In the alternative and without prejudice* ***to prayer (b) above, the 1st defendant to make an immediate payment of the principal sum of Kshs.27,472,033/- as particularized hereinabove.***

d) General Damages for breach of contract.

e) Costs of this suit.

f) Interest on (c), (d), (e) and (f) above at court rates from the date of filing suit till payment in full.

g) Any other or further relief that this court deems fit and just to grant."

[4] Contemporaneously with the Plaint, the 1st respondent also filed a notice of motion dated 19th August, 2016; which sought interim relief pending the determination of the main suit. The interlocutory orders sought were *inter alia* as follows:

"

1…

2…

3. That an injunction be and is hereby granted; restraining the respondents either by themselves, their servants or agents and anyone duly authorized by them or anyone claiming under them in any manner or otherwise however, from wasting, damaging, alienating, selling, removing or disposing all the gym exercise equipment confiscated by the 2nd respondent, or any part thereof, which equipment include;

(list of equipment was duly attached).

1. That pending the hearing and determination of this application, the court be pleased to order for access, inspection, verification and valuation of the goods, specifically gym exercise equipment currently under the custody and control of the 2nd respondent at the Nyali Complex situated on the parcel of land known as *LR NO. 15429 Section 1 Mainland North* ***within Mombasa County.***

2. That pending the hearing and determination of the application herein and subsequently the main suit and upon access, inspection, verification and valuation of the said goods, the court be pleased to order for the immediate and unconditional release of the aforesaid goods by the 2nd respondent to the applicant.

3. Costs of the application be provided for."

[5] Both the appellant and the 2nd respondent were served with the summons and pleadings and entered their respective appearances. On its part, the appellant resisted the claim through a statement of defence and grounds of opposition both dated 19th September, 2016. For the 2nd respondent however, no defence was filed until much later. In light of the 2nd respondent's failure to mount a defence, the 1st respondent once again moved court through an application dated 7th October, 2016; seeking summary judgment against the 2nd respondent. The only opposition to this latter application came by way of a notice of preliminary objection dated 30th November, 2016 filed by the 2nd respondent.

[6] The applications were heard together. In agitating for summary judgment, the 1st respondent submitted that the 2nd respondent was truly indebted to the tune of Kshs.27,472,033 as particularized in the plaint and while the 2nd respondent entered an appearance, it did not file a defence and as such, the claim was ripe for summary judgment as against the said 2nd respondent under the provisions of **Order 36 Rule 1** of the Civil Procedure Rules. Further to this, the 2nd respondent had even admitted indebtedness to the 1st respondent albeit for only Kshs.23,528,032/- and in support of this contention, the 1st respondent produced a letter dated 5th February, 2016.

[7] Turning to the application seeking interlocutory orders, the 1st respondent contended that it was not disputed that pursuant to the contract dated 23rd December, 2015; under which gym equipment valued at Kshs.34,995,512 was supplied to the 2nd respondent, only a sum of Kshs.7,523,479 was paid as part of the purchase price. As such, the property in the equipment still vested in the 1st respondent and the same ought to have been released to the 1st respondent under **Sections 19** and **23** of the Sale of Goods Act. In other words, title in the gym equipment still vested with the 1st respondent and neither the appellant nor the 2nd respondent had valid claim thereto.

[8] On the part of the appellant, by its statement of defence, it gave a general denial of the entire claim and particularly denied having taken custody of the suit equipment. To the best of their knowledge, it claimed that the 2nd respondent was in rent arrears that was due to a landlord (a third party) and in turn, the said landlord had levied distress against the goods in question. With regard to the application for interlocutory orders, the appellant in their grounds of opposition stated that the court lacked jurisdiction to entertain the matter; that the court with the

requisite jurisdiction was the Environment and Land Court (ELC); that the suit was misconceived and that the 1st respondent's suit was bad for misjoinder of the appellant in the matter.

[9] In addition to the grounds of opposition aforesaid, the appellant also opposed the application for interlocutory orders by filing what was termed as a '*supporting affidavit'* but which, we surmise, was meant to serve as a replying affidavit; sworn on 19th September, 2016 by one Joshua Ngunze. In that affidavit, it was averred that the appellant was neither the owner of the land upon which the 2nd respondent ran its business, nor was it the landlord thereof. Nonetheless, the appellant reiterated that on account of information within the public domain, it was aware that distress for rent had been levied against the 2nd respondent by a company known as **Tropical Veterinary Services Limited** for a sum of Kshs.9,215,204.78 which was the 2nd respondent's landlord and as a consequence thereof, the suit equipment had been impounded. According to the appellant therefore, it was neither privy to the dispute between the two respondents nor that between the 2nd respondent and the Landlord/third party thus, its joinder in the suit was improper. The appellant concluded by arguing that the orders sought against them would prejudice them given that they were not in a position to comply with the same. Turning to the application for summary judgment, the appellant's contention as gleaned from the notice of preliminary objection and submissions was that the application offended the provisions of **Order 10** of the Civil Procedure Rules as it is premised on the wrong provisions of the law. Consequently, the same was misconceived, *mala fides,* unsustainable and ought to be dismissed with costs.

[10] By a decision delivered on 23rd June, 2017, the trial court (Otieno, J.) ruled in favour of the 1st respondent by granting the following orders the subject matter of the instant appeal:-

> ***a) The application dated 7/10/2016 is allowed and judgment entered for the plaintiff in the sum of Kshs.23,528,032.00 with costs and interest thereon from the date of the suit till payment in full. The balance of the claim may be pursued by the suit being heard by production of evidence.***
>
> ***b) The application dated 19/8/2016 is allowed in that :-***
>
> > ***i) Orders of permanent injunction granted to restrain the defendants jointly and severally from alienating disposing selling or in any way interfering with the suit goods pending the final determination of the suit.***
> >
> > ***ii) An order of mandatory injunction is directed at the defendants, jointly and severally, and (sic) compelling them to forthwith release to the plaintiff the suit goods pending the payment of the sum adjudged by this judgment to be due and payable to the plaintiff.***
>
> ***c) The notices of preliminary objection by the defendants based on lack of jurisdiction are dismissed with costs to the plaintiff.***

[11] Aggrieved by the aforesaid Ruling, the appellant has preferred the present appeal, which is premised on some prolix and repetitive grounds but which in a nutshell, fault the Judge for; failing to find that the appellant was wrongly sued, given that she was not privy to the contract between the respondents; failing to make a determination on whether the appellant was properly sued in the matter, but ordered the appellant to release the suit equipment; making findings that went contrary to the evidence on record; failing to appreciate the 2nd respondent's admission that it was in rent arrears against a third party, which arrears resulted in the levying of distress for rent and proclamation of the suit equipment by third parties; granting orders which unjustifiably enriched the 1st respondent; rendering a decision without giving the reasons thereof; granting orders beyond the scope of pleadings; granting summary orders in a matter that had triable issues which warranted a full trial; failure to determine the preliminary objection raised and lastly; awarding costs to the 1st respondent.

[12] This appeal was canvassed through written submissions, with oral highlights during the plenary hearing. **Mr. Gikandi**, learned counsel for the appellant, held brief for **Mrs. Wamithi-Muchene.** He submitted that the impugned ruling was bad in law as it failed to address pertinent factual issues raised by the appellant. In this regard, he pointed out that the learned Judge ignored the appellant's assertion that the goods in question were not in her custody but were with a third party. Had the trial court considered the appellant's contention aforesaid, it would have found the appellant was wrongly sued and granted the said orders. Counsel cited a decision of the Supreme Court of Nigeria in ***Goodwill & Trust Investment Ltd. and Another v. Witt & Bush Ltd - SC 266/2005;*** *in support of the contention that proper parties must be identified before an action can succeed in court; that the jurisdiction of the court may well be determined by the question of proper parties; and that where wrong parties have been sued, the court has no jurisdiction and the resulting judgment is therefore a nullity.*

[13] With regard to the contention that the Judge granted orders beyond the scope of the pleadings, counsel submitted that in a case where prayers were preferred in the alternative, the court can only grant one limb of the alternate prayers and not both. In this case therefore, counsel was of the view that the Judge erred by granting the release of the equipment as well as the payment of the principal sum; notwithstanding that the two had been pleaded in the alternative. To buttress this point counsel for appellant cited the decision in; - **Alex Wainaina t/a John Commercial Agencies v. Johnson Mwangi Wanjahia [2015] eKLR.**

[14] Pertaining the interlocutory orders, it was submitted that the 1st respondent failed to establish its case and failed to meet the prerequisites for granting of a mandatory injunction as spelt out in the case **Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 others [2015] eKLR**. The general principles that have guided courts are that a mandatory injunction cannot be granted at an interlocutory stage, unless there is a clear case that demonstrates special circumstances. The appellant contended that no special case had been demonstrated herein to warrant the mandatory injunction granted. Counsel emphasized that if the 1st respondent wanted to recover the distressed goods, it ought to have followed the procedure laid out under the Auctioneers Act and the Distress for rent Act and having failed to do so, its claim should have been disallowed. Consequently, that the trial court erred in ordering the release of the distressed goods to the 1st respondent.

[15] On the propriety of the summary Judgment, it was submitted that the Judge erred by failing to consider there were triable issues raised in the appellant's defence to wit; the appellant's misjoinder in the suit, the fact that the appellant was not privy to the contract for the supply

of the goods and lastly, the fact that it was not the custodian of the suit equipment as claimed. Thus, to the appellant, these were *bona fide* triable issues that touched on the appellant's liability and should have gone to full trial. Counsel for the appellant also faulted the trial court for failing to give reasons for its decision considering the order for release of the equipment which were not even in the appellant's custody. In view of the foregoing, the appellant contends, the court ought to have tendered its reasons for its decision.

[16] **Mr. Tollo,** learned counsel for the 1st respondent opposed this appeal, he submitted that mere denial of facts as in this case did not render them triable issues; in this case the appellant mischievously acted as an undisclosed agent of the 2nd respondent and that the appellant never denied the allegation that it did confiscate the suit equipment. With regard to the relief granted, counsel submitted that all matters were properly pleaded, there was no defence by the 2nd respondent and the orders granted arose from the pleadings. With regard to the mandatory order of injunction, counsel submitted that the court had discretion to grant the same as there was sufficient material that justified it; as matters stood, there is nothing to warrant this Court's interference with exercise of the Judge's discretion. Besides, the potential damage that was likely to be suffered by the 1st respondent was in no way trivial and in granting the injunction, the Judge acted judiciously.

[17] In conclusion, counsel for the 1st respondent submitted that the summary judgment granted did not impose a mandatory injunction upon the appellant. Similarly, the argument that summary judgment was erroneous and unmerited should not arise as it was not directed at the appellant but the 2nd respondent who was a party to the agreement; the Judge duly considered the appellant's pleadings in the matter and rightly posited that it was never disputed that the gym equipment vested in the 1st respondent until the entire purchase price was fully settled. Consequently, that the trial court's appreciation of the law and evidence in the matter was devoid of fault, since no provision of law could in this case be deemed to have overridden the 1st respondent's title over the goods.

[18] As is discernible from the above summary of what transpired before the Judge, the application for summary judgement was principally brought under **Order 36 rule 1(1) (a)** of the Civil Procedure Rules. In **Postal Corporation of Kenya vs. Inamdar & 2 Others [2004] 1 KLR 359** at p. 365 this Court stated that:-

> ***"However, we have accepted that the application that was before the learned Judge was an application for summary judgment under Order XXXV rule 1 and 2. We must now consider whether the principles of law that need to be satisfied before such a judgment is entered were indeed satisfied. The law is now well settled that if the defence filed by a Defendant raises even one bona fide triable issue, then the Defendant must be given leave to defend. There are several authorities in support of this proposition. One of them is this Court's decision in the case of Continental Butchery Limited vs. Samson Musila Ndura****, Civil Appeal No. 35 of 1997 where this Court stated:*
>
> ***"With a view to eliminate delay in the administration of justice which would keep litigants out of their just dues or enjoyment of their property, the court is empowered in an appropriate suit to enter judgment for the claim from the Plaintiff under summary procedure provided by Order 35 subject to there being no triable issues which would entitle a Defendant leave to defend.***
>
> ***If a bona fide triable issue is raised the Defendant must be given unconditional leave to defend but not so in a case in which the Court feels justified in thinking that the defences raised are a sham".***

[19] Bearing in mind the above principles, the grounds, record of appeal and the submissions of the parties, the issues that arise for determination herein are mainly threefold to wit whether;

> **a) Whether there was misjoinder of the appellant in the suit and if so, the effect thereof;**
>
> **b) Whether orders granted went beyond the scope of the pleadings;**
>
> **c) Whether the orders granted were merited;**

[20] On the first issue, the appellant strongly contended that it was wrongly sued and as a consequence, the court lacked jurisdiction to entertain the 1st respondent's claim as against it. This is because it neither was privy to the contract between the 1st and 2nd respondents nor the attendant dispute thereon, therefore, its inclusion in the suit constituted misjoinder, thereby depriving the court of jurisdiction over the matter. This exposition of the law by the appellant was based on Nigeria's ***Goodwill case*** *(supra)* However, the said case is *distinguishable from the present matter on two fronts. Firstly, as has been stated by this Court in the past, the question as to whether a party sued is a* proper party cannot be determined in isolation without the examination of the standing of all the other parties in the suit (See **Anderson Mole Munyaya & 3 others v Morris Sulubu Hare [2017] eKLR)**. Secondly, under the provisions of **Order 1 rule 9** of the Civil Procedure Rules, no suit can be defeated by reason of misjoinder or non-joinder of parties. The said rule provides as follows:

> ***'No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.'***

A misjoinder of the appellant could therefore not render the suit defective. Consequently, the contention that the appellant was misjoined in the suit is without basis and should fail.

[21] Turning to the second issue, the appellant faulted the mandatory order releasing the goods to the 1st respondent which it argued went beyond what was sought in the pleadings. Looking at orders sought in the plaint however, the 1st respondent had sought a permanent injunction as the first prayer and an order for inspection, valuation and immediate and unconditional release and/or return of all the suit equipment as its second prayer. The two prayers were conjunctive. They were not pleaded in the alternative. If anything, the only alternative prayer that was pleaded was on these terms;

> *'In the alternative and without prejudice* ***to prayer (b) above, the 1st defendant to make an immediate payment of the principal sum of Kshs.27,472,033/- as particularized hereinabove'***

The import of this was in the event the court failed to grant the permanent injunction and the release of the goods, it was at liberty to order the payment of the balance of the purchase price. Consequently, the grounds that the orders granted were never sought is without basis or merit.

[22] Closely related to the foregoing, the appellant also raised the argument that by granting both the permanent injunction and the liquidated sum, the trial court essentially gave duplicitous orders whose execution would mean unjust enrichment of the 1st respondent. It is worth remembering that the trial court was dealing with two applications; one for summary judgment against the 2nd respondent and the other for interlocutory orders. The summary judgment in question only related to the 2nd respondent; being the party against whom a liquidated claim had been made and who had failed to file a defence on time. As a result, any summary judgment that would ensue under Order 36 Rule 1, would be directed solely at the 2nd respondent and no one else. Therefore, the grant of summary judgment (as against the 2nd respondent) and return of goods (by the appellant and the 2nd respondent) was hardly a duplication of orders. In any event, the learned trial Judge clarified the issue in his order for the mandatory injunction; when he stated that as follows;

> **An order of mandatory injunction is directed at the defendants, jointly and severally, and compelling them to forthwith release to the plaintiff the suit goods <u>pending the payment of the sum adjudged by this judgment to be due and payable to the plaintiff.</u> (Emphasis added)**

[23] On the 3rd issue of whether the Judge properly exercised his discretion in granting the orders of summary judgment and the grant of interlocutory orders; the law on summary judgment on an undefended liquidated claim is laid out Under **Order 36 rule 1** of the Civil Procedure Rules which provides as follows:

> ***(1) In all suits where a plaintiff seeks judgment for –***
>
> ***(a) a liquidated demand with or without interest; or***
>
> ***(b) the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser, where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.***

[24] We also wish to examine a pertinent portion of the ruling where the Judge found that there was cogent, undisputed evidence regarding the contract and admission of debt by the 2nd respondent as follows;-

> ***"In this case, the sale is not disputed. Infact there is an admission by the 1st defendant contained in its letter of 5/2/2016 where the supply of the equipment is confirmed and a debt of Ksh.23,528,032 is admitted unequivocally and a proposal to pay offered within 210 days…***
>
> ***Nothing can be clearer than the fact that (sic) these is a debt due and admitted in the disclosed sum. This is the sum the plaintiff should not be kept away from whatever the defendant says subsequently. It would serve no purpose totally to pretend that there is a dispute when no other than the person obligated to pay has admitted and said it owes and made commitment to pay…"***

[25] The claim against the 2nd respondent was a liquidated one; also it failed to file a defence within the stipulated time. Even though a draft defence was later placed on record, the Judge fastidiously evaluated the same and found the issues therein were mere denials in the face of the uncontested issues and an unequivocal admission of indebtedness by the 2nd respondent. It bears repeating that in applications for summary judgment, the defence that matters most is that of the party against whom the summary judgment is sought. That is the party required to show cause as to why summary judgment should not be entered as prayed (See **Order 36 rule 2**). In this case, that party was the 2nd respondent, not the appellant. Therefore, the assertion that the appellant's defence raised triable issues, is of no consequence.

[26] Before we disallow this appeal as we are bound to, we wish to comment on the submission by counsel for the appellant that **Section 10** of the Distress for Rent Act and the Rules under Auctioneers Act forbid any person from interfering with any distrained goods. It should be noted that, none of the parties to the suit ever claimed to have levied the purported distress for rent. If anything, the appellant clearly distanced itself from it, claiming instead, that the same was instigated by a third party. By regular standards, the sum owed by the 2nd respondent was large, and in our view it was prudent for the 1st respondent to take possession of the equipment as title vested upon it rather than the goods degenerating whilst holding that damages would be an adequate remedy in the event the claim succeeded.

[27] From the aforesaid reasons, it goes without saying, this appeal lacks merit and we do order it dismissed with costs to the 1st respondent.

Dated and delivered at Mombasa this 14th day of June, 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR