IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPEAL NO. 14 OF 2018

BETWEEN

GANJONI PROPERTIES LIMITED..APPELLANT

AND

AL-RIAZ INTERNATIONAL LIMITED................................RESPONDENT

FUJI KING MOTORS LIMITED...................................AFFECTED PARTY

(An appeal from the ruling of the High Court of Kenya at Mombasa (Otieno, J.) dated 29th January, 2018 and amended on 1st February, 2018

in

***H.C.C.C No. 158 of 2014.*)**

****

JUDGMENT OF THE COURT

1. This is an interlocutory appeal against the decision of the High Court dated 29th January, 2018 as amended by an order dated 1st February, 2018, wherein the learned Judge (**Otieno, J.)** exercised his discretion in favour of **AL- Riaz International Limited** (the respondent) and issued several orders. As such, it is trite that whenever this Court is called upon to interfere with the exercise of judicial discretion, as in this case, it ought to be guided by the principles enunciated in ***Coffee Board of Kenya vs. Thika Coffee Mills Limited & 2 Others [2014] eKLR***. We ought not to interfere with the exercise of such discretion unless we are satisfied that the learned Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the learned Judge was clearly wrong in the exercise of discretion and occasioned injustice.

2. The gravamen of this appeal is in respect of the relationship between **Ganjoni Properties Limited** (the appellant), and the respondent which was based on a lease agreement over **Mombasa/Block XX/340** registered in favour of the appellant. The respondent was granted the ground floor (suit premises) of the aforementioned property where it operated the business of importing and selling motor vehicles. The lease was for a period of 5 years effective from 1st January, 2010.

3. On 4th October, 2014 the appellant wrote to the respondent informing it that the lease would terminate on 31st December, 2014. The appellant also indicated its willingness to renew the lease for a similar period on the condition that the monthly rent from January, 2015 would be Kshs.600,000 and thereafter, there would be an annual increment of 10%. The respondent was not happy with those conditions which it thought were unreasonable. Apprehensive that it would be evicted from the suit premises, the respondent filed a suit in the High Court seeking *inter alia*:

> ***a) A declaration that the tenancy of the plaintiff in the suit premises was a controlled tenancy as defined under the Landlord and tenant (shops, hotels and catering establishments) Act hence, the terms thereof could not be altered without the approval of the Business Premises Rent Tribunal.***
>
> ***b) An injunction restraining the defendant from evicting the plaintiff from the suit premises or interfering with its peaceful occupation.***

4. The appellant refuted the respondent's allegations and maintained that there would be no landlord/tenant relationship subsisting after the termination of the lease. Since the respondent declined the proposed conditions for renewal of the lease, the appellant had found a third party who had agreed to pay a monthly rent of Kshs.900,000. Towards that end, the appellant filed a counter-claim for orders:

> ***a) Mesne profits at the rate of Kshs.900,000 from 1st January, 2015 to the time the respondent would hand vacant possession of the suit premises.***
>
> ***b) Vacant possession of the suit premises***.

5. Meanwhile, pursuant to an interlocutory application filed at the instance of the respondent, **Kasango, J.** in a ruling dated 24th August, 2015 issued the following orders:

> ***i. The defendant/respondent, its employees, agents and/or servants are hereby restrained from evicting or in any other way interfering with the plaintiff's quiet possession and enjoyment of the suit premises pending the determination of this suit.***
>
> ***ii. OCS Central Police Station shall ensure that peace prevails in relations to tenancy of the plaintiff.***

6. What followed next was a plethora of applications and we will only refer to those that are pertinent to this appeal. According to the appellant, the respondent took advantage of the above orders not to pay the requisite rent. Therefore, the appellant filed an application dated 9th March, 2015 which was comprised by a consent order dated 14th December, 2016 in the following terms:

> ***a) THAT the plaintiff is hereby ordered to deposit all the rent arrears and mesne profits at the rate of Kshs. 360,000 in an interest earning account in the names of the advocates for the parties within 45 days.***
>
> ***b) THAT the plaintiff be and is hereby ordered to pay Kshs. 360,000and mesne profits per month as and when the same falls due on or before the 5th of each relevant month pending the determination of the suit.***
>
> ***c) THAT in default of orders number 1 and 2 above, the defendant be at liberty to effect recovery by distress.***

7. Still convinced that the tenancy in issue was a controlled tenancy, the respondent lodged a notice at the Business Premises Rent Tribunal (BPRT) seeking the reassessment of the monthly rent of Kshs.360,000 to Kshs.100,000. As far as the respondent was concerned, since the appellant did not respond to the said notice the monthly rent was automatically reassessed to Kshs.100,000. It is on that basis that it approached the High Court seeking review of the consent orders. On 28th February, 2017 the learned Judge (**Otieno, J**.) granted the following orders *exparte*:

> ***"(1)…***
>
> ***(2) THAT am interim stay of execution of the order dated 14th December, 2016 is hereby granted on condition that:***
>
> ***(a) The applicant pays rent of day*** *(sic)* ***due being Kshs.100,000 per month since January, 2015 to date to the landlord within 14 days."***

8. As per the appellant, the time within which the aforementioned payment was to be made expired on 14th March, 2017. Accordingly, it declined to accept the respondent's attempt to make payment on 15th March, 2017. The appellant also deemed that the non-compliance on the part of the respondent discharged the orders dated 28th February, 2017. The appellant then proclaimed some of the respondent's cars on account of the outstanding rent which was calculated on the basis of the monthly rent of Kshs.360,000.

9. Once again, the respondent sought the High Court's intervention and the learned Judge (**Otieno, J**.) on 13th October, 2017 directed the appellant to release the two vehicles that had been attached to the respondent. That was not the end of that issue, the respondent yet again filed an application dated 10th November, 2017 seeking committal of the appellant's director for non-compliance with the orders issued on 13th October, 2017. It seems the parties tried to settle the matter as evidenced by the subsequent order issued by the learned Judge on 14th December, 2017 in the following terms:

> ***"(i) THAT this matter be stood over to 25th January, 2018 to enable parties to try and negotiate its dispute and record a possible consent.***
>
> ***(ii) THAT the tenant is not clothed with any order to stop paying rent just like the Landlord has no injunction to refrain from receiving the rent.***
>
> ***(iii) THAT the prevailing orders be maintained till the hearing date."***

10. Apparently, on 21st December, 2017 the appellant proclaimed the respondents assets on account of rent arrears of Kshs.14,971,000. Later on, 5th January, 2008 through its auctioneers, M/s Makuri Enterprises Limited, the appellant carried away the respondent's furniture and cars which were parked at the internal yard. As per the respondent, they also took cash in the sum of Kshs.10,000,000. Further, on 7th January, 2018 the said auctioneers returned and took away the cars which were in the show room. In the respondent's view, the foregoing actions

were contrary to the orders which were in place and the law. That was not all, it was alleged that the appellant barred the respondent's access to the suit premises by changing the locks therein. As a result, the respondent filed an application dated 15th January, 2018 this time around seeking *inter alia*:

> ***1) THAT the court be pleased to declare that the seizure of all the plaintiff's motor vehicles parked on the suit premises, office furniture, tools of trade and personal items/documents and subsequent eviction from the suit premises is unprocedural, irregular, null and void.***
>
> ***2) THAT the court be pleased to compel the defendant to reinstate the plaintiff back to the suit premises.***
>
> ***3) THAT the court be pleased to grant an injunction restraining the defendant, its agents, servants and/or employees from selling, advertising for sale or in any manner interfering with the plaintiff's motor vehicles, office furniture, tools of trade and personal items/documents listed and unlisted in the notification for sale of moveable goods dated 5th January, 2018 pending the hearing and determination of the application.***
>
> ***4) THAT the court be pleased to order all the motor vehicles seized by the defendant and the auctioneer together with all office furniture, tools of trade, personal items/documents, cash amounting to Kshs.10 million taken from the plaintiff's office be released to the plaintiff.***

11. The said application which was filed under a certificate of urgency was first placed before **Njoki Mwangi, J.** on 22nd January, 2018 and she issued the following orders:

> ***"(i)THAT the status quo appertaining as at 14th December, 2017 is well known to the parties in this suit and succinctly captured in Judge Otieno's orders of 14th December, 2017.***
>
> ***(ii) THAT the said orders remain in force until the application dated 15th January, 2018 is heard and determined."***

12. Thereafter, when the application landed on the Otieno, J.'s docket on 29th January, 2018 the learned Judge in his own words expressed:

> ***"I proceed from the learning that a party in breach of a court order deserved*** *(sic)* ***no audience from court. I entertain no doubt, just as Judge Njoki didn't on 22/1/2018 that the orders of 14/12/2017 are clear on their terms.***
>
> ***The parties were to preserve the status quo being the occupation of the suit premises by the plaintiff even as parties negotiated. Any distress or interference with that position is clearly in breach of the court orders and should not be entertained but must be discouraged."***

13. He went on to issue the following orders:

> ***"(i) THAT in the interim, the plaintiff be reinstated to the premises forthwith and before midday on 30/1/2018.***
>
> ***(ii) THAT the OCS Central Police Station to provide security and to ensure no public disturbance ensues.***
>
> ***(iii) THAT pending the hearing and determination of the application dated 15/1/2018 there be registered a restriction against the transfer of any vehicles taken away and allegedly sold.***
>
> ***(iv) THAT this matter shall be heard on 20/2/2018."***

14. Despite the foregoing orders, the respondent felt that there was need for more specific orders to ensure compliance hence, it approached the High Court in that regard. The learned Judge (Otieno, J.) agreed as much and on 1st February, 2018 he added the following order on top of the orders issued on 29th January, 2018:

> ***THAT leave be and is hereby granted to the plaintiff to break open and enter the premises should the same be locked and/or barricaded and whilst thereat hand over to the landlord/owner and/or carefully remove any goods therein that do not belong to the plaintiff.***

15. It is these decisions dated 29th January, 2018 and 1st February,2018 that the appellant has challenged in this appeal on the grounds that the learned Judge erred in law and fact by, refusing to determine the issue of jurisdiction; finding that there was breach of the orders dated 14th December, 2017; ordering the reinstatement of the respondent to the suit premises which had been let to the affected party; issuing the impugned orders in favour of the respondent who had not paid rent; and issuing orders contradicting the consent orders dated 14th December, 2016.

16. The appeal was disposed of by way of written submissions as well as oral highlights. By the time the appeal was filed **Fuji King Motors Limited** (the affected party) had joined the proceedings on the ground of having interest on the suit premises. Learned counsel, Mr. Kinyua appeared for the appellant while learned counsel, Mr. Ngonze appeared for the respondent. The affected party was represented by learned counsel, Mr. Oluga.

17. Rising on his feet, Mr. Kinyua reiterated the sequence in which several orders were issued at the High Court. In his view, the learned Judge erred in granting the impugned orders. Firstly, there were no subsisting orders restraining the levying of distress or eviction of the respondent as at 29th Janaury, 2018 when the matter was placed before the learned Judge. The initial interim orders restraining the respondent's eviction issued by Kasango, J. on 24th August, 2015 had lapsed on 24th August, 2016 by virtue of ***Order 40 Rule 6*** of the ***Civil Procedure Rules*** which prescribes the lifespan of interim orders as one year. Those orders were neither extended nor revived.

18. Secondly, the consent orders dated 14th December, 2016 were clear that the appellant was at liberty to levy distress in the event the respondent defaulted in paying rent. The foregoing consent orders were not set aside by the orders dated 14th December, 2017 which also emphasized that the respondent was not exempted from paying rent when it falls due. In point of fact, the respondent had not paid rent for about 4 years and the arrears stood at Kshs.12,960,000.

19. Thirdly, at no time did the learned Judge inquire as to whether the respondent had paid rent when he issued several orders in its favour. According to Mr. Kinyua, this portrayed bias on the learned Judge's part against the appellant.

20. Fourthly, the appellant had challenged the High Court's jurisdiction to entertain the suit which it believed fell under the Environment and Land Court (ELC's) jurisdiction. In that respect, the appellant had filed an application dated 28th July, 2017 seeking transfer of the suit to the ELC; the High Court failed to determine the said application which in turn instigated the appellant to file another suit in the ELC being ELC No. 458 of 2017. Thereafter, the appellant filed another application dated 18th December, 2017 before the High Court seeking stay of the proceedings therein pending the determination of the ELC matter which is still pending. Moreover, the appellant's counsel had raised the issue once again when the matter was before the learned Judge on 29th January, 2018 but the learned Judge chose not to determine the same. Mr. Kinyua argued that the learned Judge was obliged to first deal with the issue of jurisdiction before issuing any further orders.

21. Counsel went on to add that the appellant had since entered into a fresh lease agreement with the affected party on 15th January, 2018. Following the turn of events at the High Court, the affected party filed a suit against the appellant and the respondent being ELC No. 20 of 2018 and even obtained injunctive orders in its favour on 1st February, 2018. As it stood, there were two conflicting orders from two courts of equal status over the suit premises. This state of affairs has eroded the dignity of the courts.

22. On his part, Mr. Oluga associated himself with the submissions made on behalf of the appellant. He submitted that the respondent ceased being a tenant in the suit premises on or about 7th January, 2018 thus, the premises was vacant when the affected party took possession on 15th January, 2018. He took issue with the learned Judge for making the orders in question being well aware that the same affected his client who was not a party to those proceedings. He pointed out that the proceedings of the 29th January, 2018 clearly indicate that the appellant's counsel informed the learned Judge that the suit premises was under the affected party's occupation.

23. In the end, the learned Judge condemned the affected party without giving it an opportunity to be heard contrary to the principles of natural justice. Counsel also faulted the learned Judge for making the impugned orders as he termed it *suo moto* without hearing the application dated 15th January, 2018.

24. In opposing the appeal, Mr. Ngonze contended that it was clear from the appellant's submissions that the sole issue revolved around the High Court's jurisdiction to determine the matter. He went on to state that the record as filed by the appellant omitted essential documents which he proceeded to list. It was equally clear that directions were given in the High Court that the issue of jurisdiction be disposed of by written submissions and oral highlights. The parties had filed their respective submissions and the High Court is yet to make a determination. Accordingly, the appeal before us was premature and misguided.

25. As far as he was concerned, the affected party had not filed a cross appeal against the impugned orders and as such, could not make any submissions on the same.

26. We have considered the record, submissions by counsel and the law. The case at hand is an example of how matters can become convoluted as a result of applications being filed upon applications without any issue being conclusively determined. Be that as it may, jurisdiction is what clothes a court with the authority to determine a dispute before it. Without it a court is required to put down its tools otherwise any orders issued will be in futility. Owing to the significance of jurisdiction in any matter, once a challenge over the same is raised it should be addressed immediately. **Nyarangi, JA.** best put it in the celebrated case of ***<u>Motor Vessel M.V. Lillian S vs. Caltex Oil (Kenya) Limited</u> [1989] KLR1***:

> ***"Jurisdiction must be acquired before judgment. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on evidence before the court."***

27. Mr. Ngonze mentioned that the parties had already put in written submissions with respect of the jurisdiction issue which is pending for determination. Without pre-empting the High Court's decision on the same all we can direct is that the issue be considered and determined on priority basis as soon as reasonably practicable.

28. As for the impugned orders, we do not think the learned Judge exercised his discretion properly in issuing them. We say so because the right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. See this Court's decision in ***<u>James Kanyiita Nderitu & Another vs. Marios Philotas Ghikas & Another</u> [2016] eKLR***. Similarly, the Supreme Court of India underscored the importance of the right to be heard in ***Sangram Singh vs. Election Tribunal, Koteh, AIR 1955 SC 664,*** at 711 as follows:

> ***"[T]here must be ever present to the mind the fact that our laws of procedure <u>are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from</u>***

***participating in them*.”** *[Emphasis added]*

29. It is common ground and the record bears witness that before issuing the impugned orders the learned Judge was brought to speed concerning the affected party’s possession of the suit premises. To us, that should have prompted the learned Judge at the very least to give the affected party an opportunity to address him since any orders issued with respect to those premises would affect it. By failing to do so, the learned Judge breached the rules of natural justice.

30. Furthermore, the orders issued being in the nature of a mandatory injunction should as a general rule have been granted in clear circumstances. See this Court’s decision in ***Magnate Ventures Limited vs. Eng Kenya Limited* [2009] eKLR**. We doubt that the circumstances that were pertaining at the time the learned Judge issued the said orders were clear. It is common ground that he based his orders on the earlier order he had issued on 14th December, 2017 and in particular limb 3 thereof which read:

> ***“THAT prevailing orders be maintained till the hearing date.”***

31. What were these prevailing orders? This question can only be answered when the parties respective positions are heard more so, in light of the numerous orders that had been so far issued prior to the impugned orders. That is as much as we are willing to say on that issue lest we make findings touching on the application dated 15th Janaury, 2018 which is still pending before the High Court.

32. We think we have said enough to demonstrate that we should interfere with the learned Judge’s exercise of discretion. Consequently, we find that the appeal has merit for the reasons stated herein above and we hereby set aside the orders dated 29th January, 2018 and 1st February, 2018 in their entirety. Due to the circumstances under which the impugned orders were issued we do not think it will be just to make orders on costs.

Dated and delivered at Mombasa this 12th day of July, 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