Woburn Estate Ltd v Mariga (In Her Capacity as Administrator Ad Litem of the Estate of Raymond Mark Warner - Deceased) (Environment & Land Case 104 of 2011) [2024] KEELC 3733 (KLR) (13 May 2024) (Ruling)

Neutral citation: [2024] KEELC 3733 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT & LAND CASE 104 OF 2011

FM NJOROGE, J

MAY 13, 2024

BETWEEN

WOBURN ESTATE LTD ..... PLAINTIFF

AND

LILLIAN MARIGA (IN HER CAPACITY AS ADMINISTRATOR AD LITEM OF THE ESTATE OF RAYMOND MARK WARNER - DECEASED) .... DEFENDANT

RULING

1. There is a notice of withdrawal of the main suit dated and filed on 17/10/2013 in this matter which has been brought to this court's notice by Mr Otara for the plaintiff and which Ms Oruta for the defendant denies ever having been served with. Whether the main suit was effectively withdrawn or not does not however affect the preliminary objection and the application that are the subject of this ruling. It is however necessary to commence with a determination of the Preliminary objection but I will first state what is claimed in both the objection and the application before delving into their respective merits. This is therefore a ruling on Preliminary Objection dated 4th October 2023 and Notice of Motion dated 23rd December, 2022.

2. The preliminary objection states as follows:

    a. Thatthis Honourable Court lacks jurisdiction to entertain the Defendant's counterclaim by virtue of the decision in the Mombasa Court of Appeal Civil Appeal Number 20 of 2018.

    b. Thatthis Honourable Court lacks jurisdiction to entertain the Defendant's counterclaim by virtue of the decision in the Malindi Court of Appeal Civil Appeal Number 33 of 2020.

    c. Thatlease agreement has got internal mechanism which is final and binding through which service charge disputes are to be solved.

3. The Notice of Motion dated 23rd December, 2022 filed by the defendant in the main suit and brought pursuant to Sections 1A and B, 3A and 63 (e) of the *Civil Procedure Act*, Cap 21; Orders 40 Rules 2 (1) and (51) Rule 1 of the *Civil Procedure Rules*, 2010 seeks the following orders:

    a. An ex parte mandatory injunction, directing the Plaintiff to restore electricity and water supply to Apartment No. 6A in Block 6 comprised in the Development known as "Woburn Residence Club" on Portion Number 10714 within Malindi Municipality, be granted pending the hearing and determination of this Application.

    b. An Ex parte prohibitory injunction, restraining the Plaintiff from disconnecting electricity and water supply to Apartment No. 6 A in Block 6 comprised in the Development known as "Woburn Residence Club" on Portion Number 10714 within Malindi Municipality and/or in any way interfere with the peaceful and quiet enjoyment of the apartment, be granted pending the hearing and determination of this application.

    c. After inter partes hearing of the Application, an interlocutory prohibitory injunction, restraining the Plaintiff from disconnecting electricity and water supply to Apartment No. 6A in Block 6 comprised in the Development known as "Woburn Residence Club" on Portion Number 10714 within Malindi Municipality and/or in any way interfere with the peaceful and quiet enjoyment of the apartment, be granted pending the hearing and determination of the suit; and

    d. Costs of this Application be granted to the Applicant.

4. To better understand the preliminary objection, it is necessary to look at what was claimed in both the suit and the counterclaim. In the main suit the plaintiff claimed that a lease was executed between the parties which provided for service charge. The plaintiff increased the service charge but the defendant insisted on paying the old service charge despite what the plaintiff called the rise in the cost of living in Kenya. The plaintiff claimed that due to the defendant's action it had become difficult for it to provide services as provided for in the lease agreement, hence the lodging of the suit that claimed arrears of service charge, then said to be standing at Kshs 594,693.70/= and payments for the subsequent post-filing period up to the date of judgment with the alternative prayer for termination of lease and re-entry by the plaintiff into the defendant's premises, costs of the suit and interest.

5. The defendant's claim in the defence and counterclaim is that the plaint discloses no cause of action, that no notice issued to him; that the defendant was entitled to quiet and peaceful possession of the leased premises for 125 years from 1998 subject to the payment of the agreed premium; that the plaintiff in November 2002 in breach of the lease agreement issued a notice of increase of the service charge notwithstanding the plaintiff's failure to comply with certain terms of the lease agreement relating to certified accounts and a fully audited financial statement; that the defendant was justified in declining to pay the increased service charge until the plaintiff complies with the lease conditions; that the lease provides for an expert to file a report on the service charge dispute; that an expert had been appointed in accordance with the lease and made a report but the plaintiff had ignored the same and commenced the present suit without disclosing to court of the report's existence, and that the plaintiff having come to court with unclean hands does not deserve any relief in terms of the increased service charges or termination and re-entry.

6. In the counterclaim, the Defendant in the main suit, now the sole plaintiff in the counterclaim, prays that the main suit be dismissed with costs and asks for the following specific orders:

    a. Kshs 16,000.00/- in respect of special damages;

b. Damages for loss of peaceful and quiet enjoyment of apartment 6A from 1st January 2003 to the date of the judgment herein;

c. Costs;

d. Interest on (a), (b) and (c) above at Court rates.

7. The counterclaim being a distinct suit in its own right, still does exist, whether or not the notice to withdraw the main claim took effect, hence the preliminary objection to it.

8. In this court's view only the first two limbs of the preliminary objection deserve its attention for reasons that will be evident later in this ruling. They relate to the claim of res judicata based on the decisions made in two cases to wit *Mombasa Court of Appeal Civil Appeal Number 20 of 2018* and Malindi Court of Appeal Civil Appeal Number 33 of 2020, which the plaintiff in its submissions avers are among other cases that were lodged by lessees against the plaintiff in respect of the service charges subject matter of the present suit.

9. It is averred that in one of the cases, Malindi ELC No 51 Of 2014 a preliminary objection on the jurisdiction of the ELC to deal with the service charge issue was raised and dismissed but on appeal to the Court of Appeal in Mombasa Civil Appeal Number 20 of 2018 the Court of Appeal made a finding that this court has no jurisdiction on the issue, and that decision was adopted in Malindi Court of Appeal Civil Appeal Number 33 of 2020. It was that appellate decision that informed the plaintiff's filing of notice of withdrawal of the main suit herein.

10. Further in support of the preliminary objection the plaintiff cites Clause 2.5 of Part B of the 4th Schedule of the lease agreement as having provided the parties with a means of resolving the service charge dispute. However, whereas the defence and counterclaim states that a Mr Chege was appointed in accordance with the terms of the lease to issue a report to resolve the dispute the plaintiff avers that a Mr Wambua was so appointed and did present a report. The plaintiff, citing *Filipo Ferdini V Ibrahim Mohamed Omar* 2018 eKLR and *National Bank of Kenya Ltd Vs Pipeplastic Samkolit (K) Ltd & Another* 2001 eKLR, avers that where there is a mechanism for an out of court resolution of a dispute provided the same ought to be exhausted prior to invocation of the jurisdiction of the court and the court ought to be the last resort; that the effect of the Court Of Appeal decisions cited herein above on Clause 2.5 of Part B of the 4th Schedule of the lease agreement is still binding on the parties.

11. So is the counterclaim *res judicata* the two decisions mentioned herein above? The obvious method of going about this inquiry is to examine the counterclaim's contents vis-à-vis the decisions cited by the plaintiff.

12. In doing so, the knowledge that the counterclaim was a suit the defendant was compelled to file as a reaction to the plaintiff's suit must inform the stance the court takes. The plaintiff's suit filed in breach of the express terms of the lease is obviously incompetent and a non-starter as has been declared by the Court of Appeal, but would the same fate automatically befall the defendant's counterclaim? That issue has not been resolved at the appellate stage and the plaintiff has not cited any decision in support of his argument that the defendant's claim is res judicata.

13. On this court's part, a suit brought in the form of a counterclaim and as a response to a main suit brought in breach of the express provisions of both an agreement between parties and the exhaustion doctrine need not be automatically considered as a violation of the exhaustion doctrine.

14. In this case the defendant had the option, wrongful as it is, to outstrip the plaintiff and file a suit just as the plaintiff did but he did not. When sued he had the option to eschew filing a defence in favour

of filing a preliminary objection or a stay of proceedings application claiming that the parties' dispute resolution method regarding service charge was provided for under the lease but he did not. What he did was to file a defence and counterclaim.

15. As the person to be appointed under the lease for resolution of service charge disputes was not to be deemed as an arbitrator under the lease terms, the *Arbitration Act* is thus inapplicable. Nevertheless, drawing an analogy from Section 6 of the *Arbitration Act* which is the closest statute suitable for the purpose this court can resolve the issue as to whether it has jurisdiction or not. Section 6 of the *Act* provides as follows:

    6.Stay of legal proceedings

    1. A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds—

        (a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or

        (b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

    (2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.

    (3) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings."

16. Ordinarily in a matter where a party claims an arbitration clause in a contract governs the dispute between him and another party, the appropriate thing to do under Section 6(1) of the *Act* is to seek an order that the proceedings be stayed and that the parties' dispute be referred to arbitration.

17. Having regard to the foregoing provisions of the law, it is possible to see that the all the parties respective actions of filing of suit, filing of defence and counterclaim, and the failure to seek a stay prior to filing of defence had the cumulative effect of consensually removing the dispute from the realm of both the lease terms and the exhaustion doctrine and conveying it right into the jurisdiction of the court and hence none of the parties may at this juncture be heard to premise their argument on the doctrine of exhaustion challenge the other's suit on the basis of want of jurisdiction.

18. Secondly, it is out of the defence and counterclaim that the revelation emerges that the plaintiff in the main suit concealed from court the fact that there is a dispute resolution mechanism regarding service charge provided for in the lease. It is further averred in the counterclaim that an expert had been appointed under the lease terms to prepare and avail a report for the purpose of the resolution of the dispute but the plaintiff in the main suit breached the lease agreement by ignoring the report made under the dispute resolution mechanism provided for under the lease. The consequence of the filing of these averments coupled with the release of the appellate judgment now relied on by the plaintiff as authority, was the plaintiff's withdrawal of the suit, leaving the counterclaim intact.

19. The cases cited by the plaintiff are of no avail in that the Court of Appeal therein only found that the parties to a contract are free to determine terms that govern their relationship and the court's role is limited to enforcement of those terms and that according to the lease terms the parties were bound to

the procedure provided for therein for the resolution of service charge disputes prior to invoking the jurisdiction of the court.

20. The plaintiff has in its submissions on the Preliminary objection focused solely on whether a dispute resolution mechanism has been provided for under the lease. In this court's considered opinion also, the counterclaim herein is not merely about the computation of the amount of service charge payable, but involves other triable landlord and tenant issues which this court has jurisdiction to hear and determine as the counterclaimant claims that she has suffered loss and damage by reason of some actions of the plaintiff.

21. The counterclaim protests the breach by the plaintiff in the main suit, which breach is not confined to the service charge, but which extends to whether the plaintiff has in violation of the terms of the lease occasioned the counterclaimant loss of peaceful and quiet enjoyment of the suit premises and whether the plaintiff should be injuncted from terminating the lease agreement.

22. The counterclaim is not a suit brought for the purpose of circumventing the dispute resolution mechanism provided for under the lease agreement but rather one that insists on it and seeks to remedy the breach which is not confined to the determination of the service charge dispute. There were no such issues raised in the cases cited by the plaintiff, the merits of which are however not for determination at this interlocutory juncture but only at judgment. I am thus unable to agree with the preliminary objection and I find that it lacks merit and it is hereby dismissed with costs to the counterclaimant.

23. Regarding the application dated 23rd December 2022, the sole issue is whether an injunction ought to issue against the plaintiff in the main suit restraining it from disconnecting utilities to the suit premises pending the determination of the counterclaim. It is stated that the respondent had disconnected these on the ground of nonpayment of the service charge.

24. The application is opposed by way of the sworn affidavit of Franco Eposito. In it is deponed that the application is meant to delay the conclusion of the present suit which is approaching judgment stage; that a similar application was heard by this court and determined earlier; that yet another similar application whose fate has not been given was also filed; that the matter is pending the filing of final submissions; that the applicant's service charge arrears which the applicant has concealed from the court are huge at present; that the suit property has one common water and electricity meter with private separating meters; that the applicant would otherwise enjoy the common facilities maintained by the respondent for free and that the respondent has been footing the bill for the utilities connected to the premises from its own resources.

25. The applicant never filed any submission to the application. However, I have noted that it is the correct position that the counterclaim has been heard and the parties are expected to have filed submissions save for the intervening application and Preliminary Objection that followed the respondent's actions of disconnection of utilities to the premises. When a matter has reached such a stage, the issue of whether an injunction should issue is not as weighty as when the suit has not been heard for the reason that the only delay possible is that which would result as the court prepared its judgment and which is a normal occurrence and hence little prejudice would be occasioned to the parties.

26. Consequently, I find that it is necessary and in the interests of justice to issue a temporary injunction as prayed. The application dated 23/12/22 therefore has merit and I allow the same and I issue the following orders:

    a. The preliminary objection dated 4/10/2023 is hereby dismissed;

    b. An order of injunction is hereby issued restraining the Plaintiff from disconnecting electricity and water supply to Apartment No. 6A in Block 6 comprised in the Development known

as “Woburn Residence Club” on Portion Number 10714 within Malindi Municipality and/or in any way interfering with the applicant’s peaceful and quiet enjoyment of the apartment pending the determination of the suit;

c. The respondent shall bear the costs of the application and of the preliminary objection;

d. This matter shall be mentioned on 26th June 2024 to confirm filing of submissions.

Ruling Dated, signed and delivered at Malindi on this 13th day of May 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI