



Mombasa Trade Centre Ltd v Micro City Computers Limited & 2 others (Environment and Land Appeal 31 of 2021) [2023] KEELC 15688 (KLR) (21 February 2023) (Judgment)

Neutral citation: [2023] KEELC 15688 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL 31 OF 2021
NA MATHEKA, J
FEBRUARY 21, 2023**

BETWEEN

MOMBASA TRADE CENTRE LTD APPELLANT

AND

MICRO CITY COMPUTERS LIMITED 1ST RESPONDENT

FREDRICK MUTUA KINOVI 2ND RESPONDENT

PAUL OKOLU ANANG'A 3RD RESPONDENT

JUDGMENT

1. This is an Appeal from the Ruling and Order of Hon. C. Ndegwa, SPM made on 12th May 2021 in Mombasa Resident Magistrate Civil Case No .E33 of 2020 Mombasa Trade Centre Ltd v Micro-City Computers Limited, Fredrick Mutua Kinovi & Paul Okolo Anang'a). The Appellant (who was the Plaintiff in the lower court) being dissatisfied and aggrieved with the lower court Ruling Appeals to this Court against the whole of the said Ruling on Grounds;
 1. That the Learned Trial Magistrate erred in law and fact in finding that the suit before Court was an abuse of the Court process when the evidence before Court was clear that the suit was regularly and properly filed.
 2. That the Learned Trial Magistrate erred in law and fact by misapprehending the doctrines of res-judicata or sub-judice as applied by the Courts under Section 6 of the *Civil Procedure Act* thereby arriving at a wrong decision and more particularly the failure to appreciate the material fact that the doctrine of sub-judice is applied when parties are sued or are suing in similar capacities as in previous suits and not otherwise howsoever.
 3. That the Learned Trial Magistrate erred in law and fact by failing to find that the cause of action in the case before Court arose long after the filing of the previous suits between the Parties and



could not possibly and/or properly form the basis for filing of a Counter - Claim in any of the earlier suits.

4. That the Learned Trial Magistrate erred in law and fact in failing to find that the suit-before Court involved different parties in different capacities thereby making it impracticable to include them as parties to a counter-claim in any of the previous suits.
 5. That the Learned Trial Magistrate erred in law and fact in finding that the subject matter in the suit before Court was the same as the subject matter in other suits when the evidence before Court was clear that the breach of each or any term or condition of the commercial leases between the Parties gave rise to separate and distinct causes of action with an attendant right to sue on the part of the wronged or injured party.
 6. That the Learned Trial Magistrate erred in law and fact when he failed to appreciate and/or find that the Plaintiff in ELC Case No. 33 of 2020 Micro-City Computers v Mombasa Trade Centre Ltd had pleaded that there were Two (2) separate and distinct tenancies and the claim was strictly for an injunction against the levy of distress in respect of unit G07 while the suit before Court was for vacant possession and recovery of Rent Arrears for Units G07 and GO 1B thereby disclosing a different cause of action.
 7. That the Learned Trial Magistrate erred in law and fact in failing to find that HCCC No.21 OF 2019, Microcity Computers Ltd v Mombasa Trade Centre was limited to a claim for taking of accounts in respect of rents paid for Unit GOIB and G07 which was a separate and distinct cause of action from the claim before Court.
 8. That the Learned Trial Magistrate erred in law and fact in failing to properly evaluate and appreciate the terms and conditions of the Leases signed by the Parties in respect of the demised premises which provided for the remedies available to the Appellant in the event of default on the part of the Tenant thereby arriving at a wrong decision.
 9. That the Learned Trial Magistrate erred in the law and fact by arriving at a decision whose effect amounts to an attempt to re-write contracts on behalf of the Parties contrary to the law.
 10. That the Learned Trial Magistrate erred in law and fact in arriving at a decision which was against the overriding principle as enshrined in *the Constitution* of Kenya 2010 thereby denying the Appellant the right to be heard on merit.
2. The Appellant submits the Learned Magistrate erred in its Ruling by stating that the Appellant ought to have approached the Court by way of Counter-claim when it can be clearly discerned that the Orders sought by the Respondent were different from the Orders sought by the Appellant as can be seen at pages 3 - 8 of the Record of Appeal.
 3. The Appellant submits that the Respondents' filed the above suits to prevent the levy of distress upon themselves and thereafter, proceeded to vacate the demised suit premises sometime in August, 2020 leaving the premise in derelict conditions contrary to the terms of the Lease as such necessitating the suit against them.
 4. Further, it is a clear term in Clause 3.3.1 of the Lease Agreement executed by the parties herein provided as follows;-

“in the event that the Lessee shall fail to effect payment of rent or other moneys payable on their respective due dates then without prejudice to the Lessor's rights and remedies or otherwise, the Lessor shall at its sole option be entitled to charge interest and administration



charges at the Lessor's then ruling and applicable rates and in accordance with the Lessor's Rules and Regulations for the time being enforce (which it shall be the responsibility of the Lessee to ascertain) from the date upon which such rent or other moneys should have been paid until actual payment thereof and the interest and administration charges shall forthwith be applied and come in force and become payable without any prior notice to the Lessee.”

5. The above term is encapsulated in the Lease Agreement voluntarily entered into between the Parties and the term therefore binds the parties without exception as was held in the case of a Paragon Electronics Limited v Fatma Muses [2022] eKLR where upon relying on the case of National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR, the court was of the view that:-

“A party must be prepared to live within the terms of her bargain, unless any of the established exceptions, which were discussed in the National Bank case are proven and/or established.”

6. The 2nd and 3rd Respondents acknowledged the terms of the lease and the Deeds of Guarantee and as such agreed to be bound by the said terms unreservedly as such the Appellant herein deemed it fit to enjoin them as parties to the suit.
7. The Appellant submits that the Learned Trial Magistrate erred in law and fact in finding that the suit before Court was an abuse of the Court process when the evidence before Court was clear that the suit was regularly and properly filed.
8. The Appellant submits that she had a very clear and strong case on the basis that there exists a right to levy distress which had been infringed by the Respondents by their attempt to file the three suits. The Appellant contends that there were two separate and distinct tenancies and/or leases and upon breach of the terms in the Lease by the Respondent, the Appellant instituted a suit to recover the rental arrears.
9. The Appellant submits that it has sufficiently demonstrated that the Trial Court erred in striking out the suit on alleged grounds of duplicity as it is clear that the reliefs and Orders sought by the Plaintiff were different from the reliefs sought by the Respondent in the other suits and the cause of action for the suit before the Learned Trial Magistrate arose at a totally different time and did not form any claim or link with the alleged causes of action contained in the suits filed by the Respondent in seeking to bar the Appellant from exercising their rights under the different lease as Landlord. That the Appellant's case discloses a reasonable cause of action with immense chances of success, therefore, it is in the interest of justice that this Honourable Court considers this Appeal on merit and sets aside the Ruling delivered on the 12th May, 2021.
10. The Respondents submitted that before the commencement of RMCC E33 of 2020 by the Appellant, the 1st Respondent had instituted three other suits relating to the same tenancy agreements i.e. HCCC 21 of 2019, CMCC ELC 27 of 2020 and CM ELC 33 of 2020. In HCCC No. 21 of 2019 Micro-city Computers Limited vs Mombasa Trade Centre Limited, the 1st Respondent (the Plaintiff therein) sought to restrain the Appellant (the Defendant therein) from distressing for rent on the ground that it owed no rent arrears and sought an order for taking of accounts and a permanent injunction restraining the Defendant from interfering with its quiet possession hence they agree with the trial magistrate's ruling.
11. This court has considered the Appeal and submissions therein. This is an appeal from the ruling delivered on 12th May 2021 Senior Principal Magistrate Hon. C. Ndegwa in Mombasa Resident Magistrate Civil Case No. E33 of 2020 Mombasa Trade Centre Ltd vs Micro-city Computers Limited, Fredrick Mutua Kinovi & Paul Okolo Anang'a in the Notice of Motion dated 10th November 2020.



- The Memorandum of Appeal dated 31st May 2021 outlined the grounds upon which this appeal stands on, however the said Memorandum did not outline the orders sought by the Appellant.
12. In the ruling dated 12th May 2021, was pursuant to the Respondents/Defendants Notice of Motion dated 10th November 2020 which was brought under Section 1A, 3A, & 6 of the [Civil Procedure Act](#) and Order 2 Rule 15 (1), (b) (c) (d) of the Civil Procedure Rules. The orders that were sought:
 - a. That this honorable court do strike out with costs the plaint herein as being vexatious and filed in abuse of the court process.
 - b. That the costs of this application be provided for.
 13. The trial court found that there were three other pending cases arising from the tenancy between the Plaintiff and the Defendant, which were litigating on the same subject matter. The learned magistrate addressed the issue on whether the Plaintiff had abused the court process by filing the present suit with the full knowledge of the existence of the other suits. The court found that the suit was an abuse of the court process and struck it out with costs to the Respondents/Defendants.
 14. In his memorandum of appeal, the Appellant has averred that the learned Magistrate erred in law and in fact by misapprehending the doctrine of res judicata or sub judice by failing to find that the cause of action herein rose before the filing of the previous suits and could not be the basis of a counterclaim. The Appellant argued that each of the three cases; CM ELC 27 of 2020, CM ELC 33 of 2020 and HCCC 21 of 2021 were distinct with different cause of actions that could not be litigated on the same suit and the ruling was an attempt to rewrite contracts on behalf of parties.
 15. The Court of Appeal in *Nguruman Limited v Jan Bonde Neilsen & 2 others* [2014] eKLR, held that

“Before advertent to the origin of the dispute, it is appropriate to reiterate before this court can interfere with the exercise of a discretion of a judge, it must be shown that the judge either erred in the principle of his approach or has left out of account factors he ought to have considered or has taken into account some factors that he should not have considered or that his decision was wholly wrong or that the decision was so aberrant that no reasonable judge, aware of his duty to act judicially could have reached it.”
 16. In *Mbogo and another v Shah* [1968] EA 93 the Court of Appeal held that,

“I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matter on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is for the company to satisfy this court that the judge was wrong and this, in my view it has failed to do.”
 17. In *RMCC E33 of 2020 Mombasa Trade Centre Limited vs Micro-city Computers Limited, Fredrick Mutua Kinovi & Paul Okolo Anang’a*, was commenced by Appellant/Plaintiff. it’s a cause of action arose from two tenancies agreements entered between itself and the 1st Defendant, a six-year lease dated 20th November 2015 for Unit G07 and another six-year lease dated 20th January 2017 for Unit G01B. The 2nd and 3rd Defendants were said to have executed a deed of guarantee, where they guaranteed the 1st Defendant payment of rent for the period of the lease. The Plaintiff claimed Kshs 8,905,104.97 jointly and severally against the Defendants and prayed for an order of eviction of the 1st Defendant from the two units.



18. Before the commencement of RMCC E33 of 2020 by the Appellant, the 1st Respondent had instituted three other suits relating to the same tenancy agreements i.e. HCCC 21 of 2019, CMCC ELC 27 of 2020 and CM ELC 33 of 2020. In HCCC No. 21 of 2019 *Micro-city Computers Limited v Mombasa Trade Centre Limited*, the 1st Respondent (the Plaintiff therein) sought to restrain the Appellant (the Defendant therein) from distressing for rent on the ground that it owed no rent arrears and sought an order for taking of accounts and a permanent injunction restraining the Defendant from interfering with its quiet possession. In CM ELC 27 of 2020 *Micro-city Computers Limited v Mombasa Trade Centre Limited*, which was instituted vide a plaint dated 4th March 2020. The 1st Respondent (the Plaintiff therein) again sought an injunction to restrain the Appellant (the Defendant therein) from distressing for rent under the tenancy over G01 and G07. However, the suit was struck out with costs following the Appellant (Defendant therein) application dated 3rd June 2020 seeking to strike out the suit for being frivolous and an abuse of the court process (reference is made to page 267-274 of the record of appeal).
19. The third suit CM ELC 33 of 2020 *Micro-city Computers Limited v Mombasa Trade Centre Limited*, the 1st Respondent (the Plaintiff therein) sought an injunction to restrain the Appellant (the Defendant therein) from distressing for rent under the tenancy over G01 and G07. After the Appellant filed RMCC E33 of 2020, the Respondents filed an application dated 10th November 2020 seeking to have the same struck out for being an abuse of the court process. The Court ruled on 12th May 2021 that the suit was an abuse of the court process and the Appellant (the Plaintiff therein) ought to have raised a counterclaim in the existing suits as opposed to filing a fresh suit (page 350-352).
20. Section 6 of the *Civil Procedure Act* provides as follows:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”
21. It is not disputed that in all the pending suits relate to the same subject matter, the two commercial leases between the Appellant and the 1st Respondent respectively, save for RM E33 of 2020 the 2nd and 3rd Respondents have been included in their capacity as the 1st Respondent’s guarantors. I have perused the agreement of lease executed on 20th November 2015 over Unit G07 (page 323), I note that the 2nd and 3rd Respondents herein executed the said agreement and the subsequent Guarantee in their capacity as the directors of the 1st Respondent. The second agreement of lease is dated 20th January 2017 executed by the same parties, the Appellant and the 1st Respondent.
22. In my view RMCC E33 of 2020 is directly and substantially similar to the remaining suits pending before court. In RMCC E33 of 2020, the Appellant has sued the 2nd and 3rd Respondents in their capacity as the guarantors of the 1st Respondent to ensure payment of rent. In my view, they cannot be held responsible for the payment of rent without making reference to the leases between the Appellant and 1st Respondent. From an actual reading of the Guarantee dated 20th November 2015, it is clear that it forms part of the lease agreement dated 20th November 2015 as the seventh schedule (page 324).
23. The court has looked closely at the conduct of the Respondents and noted that it is the 1st Respondent who commenced HCCC 21 of 2019, CM ELC 33 of 2020 and CM ELC 27 of 2020 (which was struck out vide a ruling dated 21st October 2020) all against the Appellant over the same issue of distress of rent. I do find both parties at fault here, the Appellant ought to have sought an amendment of its



pleadings and leave of court to join the 2nd and 3rd Respondents as Defendants in one of the pending suits. On the other hand, the 1st Respondent is also at fault for instigating similar suits before different courts while litigating on the same issue. The 1st Respondent too ought to have sought leave of court to amend its pleadings where if indeed it felt there were emerging causes of action emanating from the said leases.

24. The Court of Appeal in *Kivanga Estate Limited v National Bank of Kenya Limited* (2017) eKLR, the court held;

“There is no greater duty for the court than to ensure that it maintains the integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by, amongst other measures, stopping litigations brought for ulterior and extraneous considerations. The courts, litigants and counsel are enjoined by both *the Constitution* and the law to assist the court to further the overriding objective for the just determination of the proceedings; the efficient disposal of the business of the court; the efficient use of the available judicial and administrative resources; the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the parties.”

25. I do agree with the learned magistrate that the actions of the Appellant of commencing RMCC E33 of 2020 while being aware of the other pending suits was by itself an act of abusing the court process. The learned magistrate had sufficient reason under Order 2 Rule 15 (1)(b) and (d) to strike out the suit. In conclusion, I find no fault in the manner the learned magistrate exercised his discretion and I find the appeal herein unmerited and the same is dismissed with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 21ST DAY OF FEBRUARY 2023.

N.A. MATHEKA

JUDGE

