



**Cedar Hospital v Sedco Consultants Ltd & another (Environment and Land Appeal E034 of 2022) [2023] KEELC 877 (KLR) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 877 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT AND LAND APPEAL E034 OF 2022  
EO OBAGA, J  
FEBRUARY 16, 2023**

**BETWEEN**

**CEDAR HOSPITAL ..... APPELLANT**

**AND**

**SEDCO CONSULTANTS LTD ..... 1<sup>ST</sup> RESPONDENT**

**CORNERSTONE AUCTIONEERS ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Introduction**

1. This is a ruling in respect of a notice of motion dated October 13, 2022 in which the Appellant/Applicant seeks the following orders:-
  1. Spent
  2. Spent
  3. That an injunction do issue against the Respondents restraining them whether by themselves, servants and or agents from proceeding to levy distress, carting away the proclaimed property or in any other way harassing or interfering with the Appellant/applicant's use of the premises situated at LR No 6/115 Eldoret Municipality or any further execution of the proclamation notice dated October 6, 2022 pending hearing and determination of the appeal.
  4. That costs of this application be provided for.

**Background**

2. The Applicant is a tenant of Hashaim Lalji properties Limited (in receivership) in premises situated on LR. No Eldoret Municipality/Block 6/115. The tenancy was based on an unwritten lease.



3. Sometime in 2015, the Landlord issued a notice under section 4(2) of the *Landlord and Tenants (Shops, Hotels and Catering Establishments) Act* Cap 301 to alter rent payable. This prompted the Applicant and one other tenant namely Imani Hospital to move to the Business Rent Tribunal challenging the notice.
4. After a full hearing at the Tribunal, the Landlord succeeded and rent was increased. Based on the increased rent, the 1<sup>st</sup> Respondent instructed an auctioneering firm to levy distress for rent to recover the rent arrears. This prompted the Applicant to move to the Chief Magistrates court where it filed Eldoret CMCC No E096 of 2022 against the Respondents.
5. In the suit before the chief Magistrates Court the Applicant filed an application in which it inter-alia questioned the basis of the 1<sup>st</sup> Respondents action of instructing auctioneers to levy distress based on a Tribunal decision which had not been adopted as an order of the court. The Respondents then raised a preliminary objection in which they sought to have both the application by the Applicant as well as the entire suit struck out for lack of jurisdiction.
6. In a ruling delivered on September 9, 2022, the trial magistrate upheld the preliminary objection and proceeded to strike out both the application and the suit. Based on this ruling, the 1<sup>st</sup> Respondent instructed Ms. Agunja Traders Auctioneers to levy distress for rent against the Applicant. This is what prompted the Applicant to prefer an appeal against the ruling of the trial court hence the filing of the present application.

#### **Applicant's contention**

7. The Applicant contends that the arrears of rent being claimed are disputed and the amount is colossal and if execution is allowed to go on, it will cause the Applicant to suffer irreparable loss which will render the appeal filed nugatory.
8. The applicant contends that it had been paying rent directly to the Landlord as ordered by the High Court in Nairobi Milimani Commercial Suit No 148 of 2019 *Hasham Lalji Properties Limited & 3 others v Sultan Hasham Lalji & 2 others*.
9. The Applicant further contends that if the amount being claimed is recovered, it might not recover it back as the 1<sup>st</sup> Respondent is not capable of doing so.

#### **1<sup>st</sup> Respondent's contention**

10. The 1<sup>st</sup> Respondent contends that the appeal filed as well as the application are incompetent and are a waste of judicial time. The 1<sup>st</sup> Respondent argues that the auctioneer who proclaimed the goods of the Applicant has not been made a party and is likely to be condemned without being heard.
11. On the issue of the arrears, the 1<sup>st</sup> Respondent contends that the High Court in Nairobi had appointed it an Estate Agent to manage and collect rent on behalf of the landlord. This was pursuant to the order given on February 10, 2020. Despite this clear order, the Applicant ignored it and proceeded to make rent deposit directly to the account of the landlord.
12. The 1<sup>st</sup> Respondent argues that the Applicant has not given any evidence to show that it had cleared the rent arrears due and that the receipts which it has exhibited are cumulatively of lesser amount than what is being claimed.
13. On the order of the High court being relied on by the Applicant, the 1<sup>st</sup> Respondent states that the said orders reviewed the ones given on February 10, 2020. The review was done on July 8, 2022 when the



Nairobi High Court directed the Applicant and other tenants to deposit rent directly to the landlord's account.

14. The 1<sup>st</sup> Respondent argues that the rent arrears in issue were based on what the applicant owed before the review of July 8, 2022.

### **The Parties Submission**

15. The Applicant filed its submissions on December 9, 2022. The 1<sup>st</sup> Respondent filed its submission on the same day.

### **Analysis and Determination**

16. I have carefully considered the Applicant's application as well as the opposition to the same by the 1<sup>st</sup> Respondent. I have also considered the submissions filed by the parties. The only issue for determination is whether the Applicant has met the threshold for grant of an injunction.
17. This is an injunction which is sought at the appellate stage and one of the main considerations before grant of the same is whether the Applicant who is the Appellant has an arguable appeal and an arguable appeal is not one which will necessarily succeed.
18. In the instant case, the Applicant contends that the trial magistrate erred in making a finding that she had no jurisdiction to hear the matter before her. From the memorandum of appeal, the Applicant appears to concede that the Business Premises Rent Tribunal has jurisdiction but that jurisdiction is not exclusive to it or in the Applicant's own words is not a preserve of it.
19. The Applicant had previously been before the Business Premises Rent Tribunal before going to the Chief Magistrates Court. In the premises I do not see any arguable appeal which will entitle the Applicant to an injunction.
20. The Applicant is arguing that if an injunction is not granted, execution will go on and the appeal will be rendered nugatory. What is being claimed is a liquidated sum. If the Applicant pays this amount and it finally succeeds in its appeal, the money and any costs including interest will be paid. The Applicant has not demonstrated that the 1<sup>st</sup> Respondent is incapable of repaying the amount.
21. The Applicant argues that it had been paying rent directly into the account of the landlord. It has exhibited ten bank pay in slips. A look at those slips shows that six of them were made prior to July 8, 2022 when the order of February 10, 2020 was reviewed. Prior to the review of July 8, 2022, the Applicant was expected to pay rent to the 1<sup>st</sup> Respondent. The Applicant did not do this despite the fact that the orders of February 10, 2020 were brought to its attention.

### **Disposition**

22. From the above analysis, I find that the Applicant's application is devoid of merit. The same is dismissed with costs to the 1<sup>st</sup> Respondent. The injunction orders which were granted on October 14, 2022 and subsequently extended are hereby discharged.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 16<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**E. O. OBAGA**

**JUDGE**

**In the virtual presence of;**



Mr. Githaiga for Applicant.

Mr. Cheruiyor for Respondents.

Court Assistant –Laban

**E. O. OBAGA**

**JUDGE**

**16<sup>TH</sup> FEBRUARY, 2023**

