



**Koroga v Sufra Garden Restaurant Limited (Environment and Land Appeal E104 of 2022) [2023] KEELC 16077 (KLR) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 16077 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E104 OF 2022  
AA OMOLLO, J  
FEBRUARY 16, 2023**

**BETWEEN**

**LETS KOROGA ..... APPELLANT**

**AND**

**SUFRA GARDEN RESTAURANT LIMITED ..... RESPONDENT**

*(Business Premises Rent Tribunal by Hon.Gakubi Chege in Tribunal case No E437 of 2022)*

**RULING**

1. The Applicant filed a notice of motion dated November 2, 2022 seeking for the following orders;
  1. Spent
  2. That pending the hearing and determination of the Appeal herein the Respondent Sufra Garden Resaturant Limited, its agents, workers, auctioneers or anyone acting on its behalf be restrained from evicting, repossessing, occupying or doing the following acts; -
    - i. Stopping the Applicant/Tenant from refurbishing and making temporary improvements for a temporary kitchen Removable at the termination of the lease.
    - ii. Failing or neglecting to allow the Applicant/Tenant an abatement of rent if the business premises is destroyed by storm, tempest or fire or interfering with the Applicant/Tenant quiet and peaceful tenancy on land Reference Number 1870/VI/Nairobi.
    - iii. That this Honourable Court be pleased to temporarily restrain the Respondent / Landlord, its servants and or agents or auctioneers from evicting, repossessing, occupying or Interfering with the said Applicants/Tenants peaceful enjoyment of its tenancy on Land Reference Number 1870/VI/Nairobi pending inter parte hearing of this Application.



3. That costs of this Application be provided for.
2. The motion was supported by grounds outlined in the supporting affidavit and further affidavit both sworn by Kamal Singh Bhullar on November 2, 2022 and December 15, 2022 respectively stating that the applicant was dissatisfied by a ruling and order issued at Business Premises Rent Tribunal by Hon.Gakuhi Chege in Tribunal case No E437 of 2022 against it and has filed an appeal with high chances of success in this court.
3. The Applicant stated that it is a subtenant to the Respondent on part of LR No 1870/VI/Nairobi for the term of 1 year effective from 1<sup>st</sup> January,2022 to December 31, 2022 and on October 28, 2022, the tribunal dismissed its reference filed on May 24, 2022 with costs exposing them to loss of business, customers and damages.
4. The Applicant highlighted the grounds which make their Appeal have high chances of success detailing that the Respondent was in breach of the terms and conditions of their Lease Agreement dated December 24, 2021 and that the tribunal erred in fact and law in failing to find that the Respondent was in the said breach; failing to provide that the Applicant had proved the losses incurred due to the breach; and had established a prima facie case with high chances of success.
5. The Applicant also stated that the interim orders granted in their favour by the tribunal on June 3, 2022 restraining the respondents from evicting, repossessing, occupying or interfering with the tenancy was vacated and the Applicant seeks to preserve the suit property.
6. The Respondent vehemently opposed the application vide grounds of opposition dated December 1, 2022 and replying affidavit sworn by Abdulwahid Qassim Abdo on December 1, 2022 stating that this court lacks jurisdiction to hear and determine this appeal together with the applicant's application as stipulated under Order 30 rule 9 of the [Civil Procedure Rules,2010](#) on the ground that the Appellant has no capacity in law to sue or be sued and that the interim order granted on November 16, 2022 be vacated as the same was granted on the basis of non-disclosure of material facts.
7. The Applicant filed a reply to the grounds of objection by the Respondent stating that this court has jurisdiction to determine the appeal from a decision of the Business Premises Rent Tribunal and that Lets Koroga is a business name registered under the [Registration of Business Names Act](#) and has capacity to sue or be sued alongside its proprietor.
8. The Application was heard on December 19, 2022 where the Respondent contended that the interim orders were obtained for non-disclosure of material facts because they were not served and that the parties have a lease agreement for one year at the rate of Kshs 200,000 and service charge of Kshs 50,000 monthly and the Applicants have only paid rent for 6 months. The Respondent further stated that they had never interfered with the Applicant's occupation and that profits were to be shared if the Applicant sold products from the Respondent which did not happen and therefore their application should be dismissed and the lease which ended in December 2022 should not be extended.
9. First, the Respondent has brought about the question of jurisdiction on the ground that "Lets Koroga" is not a juristic person that could sue and be sued as it was a registered business name and it is fit to dispense with it at instant as it would ideally go into the root of this matter. Indeed, without jurisdiction, the court would not be able to hear the appeal herein.
10. The law is that a sole proprietor of a business cannot sue in the name of that business if that name is not his own and he should sue in his own name simpliciter and then in the body of the pleadings he can say he carries on business in the name of whatever business happens to be and is the sole proprietor of that business.



11. However, it is evidenced that the “Kamal Singh Bhullar” is the business owner and failure to sue in his own name does not render the Appeal defective for dismissal. This was the approach applied in the decision in *U Design & 2 others v Alex Bazara Tabulo* [2015] eKLR where the court held that;

“In its Amended Plaint dated April 9, 2014 and filed on April 10, 2014, the Plaintiffs attached a Disclosure of Partners’ names pursuant to Order 30 Rule 2 (1) of the *Civil Procedure Rules* showing the partners’ names as Paul Mutahi Wariithi, Anthony Thomas Gachunge Thimangu and Stephen Khisa Simiyu. This was not a fact that was rebutted by the Defendant.

36. In the absence of any evidence to the contrary, the court found and held that the suit was filed by the 1st Plaintiff was quite in order and could not be struck out as had been contended by the Defendant.”

12. Second, in considering whether or not to grant the orders sought in the application, the court is guided by the provisions by the provisions of order 40 of the *Civil Procedure Rules* which states thus,

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(1). Where in any suit it is proved by affidavit or otherwise—

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or y g wrongfully sold in execution of a decree; or

(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders

13. The Applicant has stated that its appeal has high chances of succeeding because the Rent Tribunal did not consider the fact that the Respondent was in breach of their lease agreement. The restraining orders are being sought on the premises of the existence of the lease agreement. The question is whether the Applicant has established the principles of granting an injunction. The Respondent pleaded that the Lease was for a period of one year and it came to an end on December 31, 2022. Consequently, the Applicant can argue its appeal for the damages incurred from the breach but without restraining orders being issued post the expiry of the Lease.

14. In the case of *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR the Court of Appeal held that;

“A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved”

15. The Lease agreement entered into by the Applicant and the Respondent having expired before the determination of the current application, it is obvious that the same has been overtaken by events due to effluxion of time. This is so because granting the orders of injuction without a valid lease is equivalent



to using the orders to extend the contract between the parties which is making the court to renew the lease.

16. The application is dismissed with costs to the respondent.

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

**A. OMOLLO**

**JUDGE**

**Ruling delivered virtually in the presence of:**

Wachakana for Applicant

No appearance for Respondent

Muchiri for 2<sup>nd</sup> Interested Party

Court Assistant – Catherine/Valentine

