



**Dewdrop Enterprises Limited v Isoe (Civil Appeal E488 of 2023)
[2024] KEHC 6381 (KLR) (Civ) (31 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6381 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E488 OF 2023

AN ONGERI, J

MAY 31, 2024

BETWEEN

DEWDROP ENTERPRISES LIMITED APPELLANT

AND

WILFRED MAOSA ISOE RESPONDENT

RULING

1. The application coming for consideration in this ruling is the one dated 26/10/2023 brought under order 40 rule 2, order 42 rule 6(6), order 51 rule i & order 51 rule 3 of the Civil Procedure Rules, 2010, Sections IA, 1B, 3/1 & 78 of the Civil Procedure Act, Section 4 of the Fair Administrative Action Act, 2015, Sections 60(1) & 66 of the Land Act, 2012, section 14 of the Distress for Rent Act, Articles 2, 3, 10, 20, 21, 23(1), 40, 47, 50, 159(2), 165(3) & 258 of the Constitution of Kenya, 2010 and all other enabling provisions of the law seeking the following orders;
 - i. That the Application be certified urgent and heard ex parte in the first instance;
 - ii. That this Honourable Court be and is hereby pleased to issue a temporary injunction restraining the respondent from committing and/or continuing breach of the tenancy agreement between the parties herein dated 31/1/18 pending the hearing and determination of this Application;
 - iii. That an urgent date be set for inter partes hearing of this Application;
 - iv. That this Honourable Court be and is hereby pleased to issue a temporary injunction restraining the respondent from committing and/or continuing breach of the tenancy agreement between the parties herein dated 31/1/18 pending the hearing and determination of this Appeal.



2. The application is supported by the affidavit sworn by the managing director of the appellant company.
3. The deponent stated that there is uncontroverted evidence before the lower court that as at 12/10/22 the respondent (I) owed the applicant Kshs. 3,025,970/= in rent arrears, (II) That the respondent does not possess any distrainable goods that can satisfy the said arrears, (III) that he has no employment income and other property and (IV) has unlawfully refused to comply with the Tenancy Agreement dated 31/1/18 and in particular he has failed to expeditiously hand over to the applicant vacant possession of the Suit Property to wit House No. A2 Onyonka Estate on L.R. No. 72/305 Nairobi.
4. That this matter has been fixed for mention before the Hon. Deputy Registrar on 20/2/24.
5. That in the meantime the respondent (I) continues to illegally remain in possession of the Suit Property without settling the rent arrears, (II) has failed to pay the applicant any rent in March 2023, June 2023 & September 2023 and (III) continues to contravene the applicant's right to fair administrative action and property.
6. That it is in the public interest that the respondent is restrained from further breach of the Tenancy Agreement so that the State may regularly collect the monthly rental income tax due.
7. That the applicant and its employees have urgent bills pending payment such as rent, salaries, taxes, essential supplies, loans and school fees and as such shall suffer irreparable harm if a temporary injunction is not granted in the first instance.
8. That the balance of convenience is in favour of the applicant as the respondent has had more than ample time since 30/11/18 to discharge his obligations under the Tenancy Agreement.
9. That this Application has been made without unreasonable delay.
10. The respondent filed a replying affidavit in which he stated as follows;
11. That the Appellant/Applicant herein had filed a similar application dated 24th January 2019, seeking the exact same orders in the lower court.
12. That the learned Magistrate Hon. Kivuti delivered a ruling on the Application on 16th August 2019 rendering it compromised.
13. That on 31st January 2020, the learned Magistrate further directed that the respondent pays all accruing rent failure to which the Appellant/Applicant herein was at liberty to distress for rent and that the matter should be heard to its conclusion.
14. That the instant application is in disobedience and disregard to the above order as the Appellant/Applicant never initiated any proceedings for distress for rent.
15. That furthermore, the instant application is res judicata as the issues raised and the orders sought have already been heard and determined on merit by Hon. Kivuti in MCCC No. 2 of 2019.
16. That the suit was then fixed for hearing on 1st November 2021 but on the said day the same did not proceed as the Appellant/Applicant had filed an application dated 23rd July 2021 for review of the Ruling delivered on 16th August 2019.
17. That the Application dated 23rd July 2021 was then dismissed by the Court on 11th February 2022.



19. That the Applicant also filed another application dated 10th November 2022 seeking to strike out several paragraphs of my Statement of Defence and the same was struck out by Hon. P. K. Rotich on 12th June 2023 and on the same day the Court set the suit down for hearing on 1st November 2023.
20. That on the hearing date the matter could not proceed as the Appellant/ Applicant had filed yet another application dated 12th September 2023 seeking the Hon. P. K Rotich to recuse himself from the matter and that the hearing be adjourned pending the hearing and determination of the instant appeal.
21. That the Appellant/Applicant has not demonstrated any reasons as to why he does not want to prosecute the suit MCCC NO. 8 of 2019 but has only bombarded the court with baseless applications meant to further delay and waste precious judicial time.
22. That the Appellant/Applicant has also not prosecuted the Appeal in question and only seeks to employ the same delay tactics as in the lower court by once again filing the instant application.
23. That the Appellant/ Applicant is a vexatious litigant who is only forum shopping and who is not ready to have MCCC No. 2 of 2019 concluded.
24. That the court lacks the jurisdiction to entertain the instant application as the proper forum for the appellant/applicant to air his case if any would have been the distress for Rent Tribunal.
25. That the application dated 26th October 2023 is not only misguided but also bad in law and the court ought to dismiss the same with costs.
26. The parties filed written submissions as follows; the applicant submitted that it has established its case at a prima facie level. The applicant has duly filed and served a Record of Appeal dated 23/10/23. The only documents missing from the Record of Appeal are certified copies of the typed proceedings and the impugned Ruling dated 12/6/23. These have not yet been prepared by the lower court. The applicant intends to incorporate these in a Supplementary Record of Appeal. This Appeal is therefore not ready for hearing.
27. The applicant contends that if indeed the instant Appeal was fatally defective as claimed by the respondent, then he would have applied to have the same struck out. The Replying Affidavit does not reveal how the respondent would be inconvenienced if the present Application was granted. In the circumstances, the applicant suggests that the balance of convenience is in its favour.
28. The applicant submits that this Court has jurisdiction to grant the present Application pursuant to order 42 rule 6(6) of the *Civil Procedure Rules*, 2010 and section 3A of the *Civil Procedure Act*. The Application cannot be res judicata as the lower court lacks jurisdiction to try the present Appeal.
29. The applicant further points out that this Application has been made in public interest pursuant to article 258 of *the Constitution* of Kenya, 2010. The applicant posits that it is in the public interest that the Application is granted so that the State may regularly collect the Monthly Rental Income Tax due.
30. The respondent on the other hand submitted that the applicant has not demonstrated a prima facie case in the instant application but has only demonstrated himself a vexatious litigant. The applicant had filed a similar application before the lower court in MCCC No.2 of 2019 which was rendered compromised. The applicant was then ordered to distress for rent which he never did but instead bombarded the court with more frivolous applications including the one herein.
31. The respondent further argued that Applicant has also not proven an infringement of any rights accruing to him and ought to have prosecuted suit MCCC No. 2 of 2019 to its completion. He



however failed to do so despite the matter having been fixed for hearing severally. Consequently, it is the Respondent's submission that no adjudicative body applying itself to the facts and history of this matter can hold that a prima facie case exists.

32. On the issue of irreparability of injury the respondent indicated that the applicant has not demonstrated that if the injunction is not granted and that there is no other remedy available to him. Right from the lower court the Applicant has had the remedy of distress for rent at his disposal and which he has deliberately refused to exercise. Having established there exists no prima facie case and that the Applicant stands to suffer no irreparable harm, the balance of convenience lies with the Respondent and hence there are no grounds for grant of the injunction sought.
33. The sole issue for determination is whether the appellants are entitled to an injunction to restrain the respondent from continuing to breach tenancy agreement.
34. The conditions for grant of an injunction are as stated in *Giella v Cassman Brown & Co Ltd* [1973] EA 358 at pg 360, it was stated as follows:-

“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (EA Industries v Trufoods, [1972] EA 420.)”
35. I find that it is not in dispute that the respondent owes the applicant Kshs. 3,025,970/= in rent arrears and that he does not possess any distrainable goods that can satisfy the said arrears and that he has no employment income and other property and has unlawfully refused to comply with the Tenancy.
36. The applicant is seeking a temporary injunction restraining the respondent from committing and/or continuing breach the tenancy agreement between the parties herein dated 31/1/18 pending the hearing and determination of this Appeal.
37. It is trite law that courts do not act in vain and that orders issued by the court must be capable of enforcement.
38. It is not clear how the applicant can enforce that order since the respondent is already staying in the premises unlawfully having refused to pay rent. The appellant has a right to distress for rent arrears and also to seek eviction order to remove the respondent from the premises forcefully.
39. There are other remedies available to the applicant which are appropriate such as distress for rent arrears and eviction and to issue a temporary injunction restraining the respondent from committing and/or continuing breach of the tenancy agreement between the parties herein dated 31/1/18 pending the hearing and determination of this Appeal is not appropriate in the circumstances.
40. In that respect, the appellant requires legal advice since the respondent appears to be taking advantage of him.
41. I dismiss the application dated 26/10/2023 with no order as to costs and I direct that the appeal herein be expedited.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 31ST DAY OF MAY, 2024.

.....

A. N. ONGERI



JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent

