Wonder Feeds Limited v Ali & 3 others (Tribunal Case E082 of 2024)
[2024] KEBPRT 1447 (KLR) (Civ) (1 October 2024) (Ruling)

Neutral citation: [2024] KEBPRT 1447 (KLR)

REPUBLIC OF KENYA

IN THE BUSINESS PREMISES RENT TRIBUNAL

CIVIL

TRIBUNAL CASE E082 OF 2024

GAKUHI CHEGE, CHAIR & J OSODO, MEMBER

OCTOBER 1, 2024

BETWEEN

WONDER FEEDS LIMITED ..... TENANT

AND

TAHFA ALI ..... 1ST RESPONDENT

MUNA WAR ALI ..... 2ND RESPONDENT

MUNIR ALI ..... 3RD RESPONDENT

DIRECT "O" AUCTIONEERS ..... 4TH RESPONDENT

RULING

A. Dispute Background

1. The tenant/applicant moved this Tribunal vide a Reference dated 25th June 2024 under Section 12(4) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* Cap 301, Laws of Kenya with a complaint that the landlords/respondents had instructed the 4th respondent to evict and distress for rent against it without issuance of the prescribed notice contemplated under Section 4(2) and 5 of the said statute.

2. The tenant simultaneously filed a motion of even date seeking for injunctive orders against the respondents from illegally and arbitrarily proclaiming, attaching and selling its motor vehicles and/or tools of trade in the course of distress for rent over property known as L.R No. Nakuru Municipality Block 4/103. It is also seeking for an order for the release of the attached motor vehicles registration No. KCH 933Z Mitsubishi Fuso& KCC 699M, Mitsubishi Fusoand for an order to quash the proclamation notice dated 15th May 2024 issued by the 4th respondent.

3. The application is supported by the affidavit of Habib -Ur-rehmanParkarsworn on 25th June 2024 and the grounds on the face of the application. It is pleaded that the Applicant's acquisition of the suit property through a public auction was nullified by the Superior Court in Nakuru HCCC No. 82 of 2006. As a result, the relationship between the Applicant and the Respondents was converted into a landlord/tenant relationship with the Applicant being ordered to be paying rent at the rate of Kshs 50,000/= per month with effect from 1st December 2005 until payment in full.

4. The Applicant contends that the 1st to 3rd respondents instructed the 4th respondent to levy distress for rent without issuing the prescribed notice under Section 4(2), (4) & (5) of Cap. 30 following which two of its lorries were attached and advertised for sale. It is therefore sought to quash the proclamation notice and order for the release of the two lorries.

5. An interim order of injunction was given ex-parte which inter-alia restrained sale of the attached motor vehicles and/or tools of trade pending hearing inter-partes on 4th July 2024.

6. The application is opposed through a replying affidavit sworn on 12th July 2024 by the 3rd respondent in which it is deposed in material part that the Applicant was a tenant of the respondents paying a monthly rent of Kshs 50,000/= prior to the fraudulent sale of the suit property which was nullified by the Superior Court in the aforesaid case. The judgement and decree are attached to the replying affidavit as annexure MAO I.

7. The Applicant was granted a conditional stay of the judgement by the Superior Court vide a ruling marked as annexure MOA II (a) delivered on 14th March 2024 in which it was directed to deposit Kshs 35 million in a joint interest earning account within 45 days. The Applicant failed to meet the condition despite being issued with a notice dated 2nd May 2024 to pay the outstanding rent.

8. Subsequently, the 4th respondent was instructed to levy distress and sell the Applicant's properties which was successfully executed in terms of the annexures marked MAO V-VIII.

9. It is therefore denied that the respondents have any intention to evict the Applicant despite being in arrears of Kshs 5,406,724/= as at July 2024. However, they admit having given fresh instructions to the 4th respondent to levy further distress for the outstanding rent arrears since the Applicant is still in occupation of the suit premises.

10. According to the respondents, this Tribunal has no jurisdiction to entertain this case as it is not only res judicata but also sub-judice since the Applicant has a pending application before the Court of Appeal vide COA Civil Appeal No. E054 OF 2024 as can be discerned from annexure marked MAO XI. As such, this Tribunal is being called upon to sit on appeal over the decisions of the High Court and the Court of Appeal.

11. The respondents also filed a preliminary objection dated 3rd July 2024 in which they have raised the following issues;

    i. That the reference herein is a nullity as the same amounts to an abuse of the due process of law.

    ii. That this honourable court lacks jurisdiction to entertain this matter for it cannot sit as an appellate court.

    iii. That the High Court made a finding on the matter in a ruling delivered in the High Court Civil Suit No. 82 of 2006 in terms of the Judgment, decree, ruling and Order attached to the notice of preliminary objection.

iv. That the entire suit is void ab initio, non-starter, bad in law an abuse of the due process and should be struck out.

v. That the honourable court cannot entertain a matter that is pending in the court of appeal vide Court of Appeal Mis App No. 054 of 2024 in which directions have already been given (Directions attached).

vi. That the reference violates the express provisions of Section 12, Cap 301.

12. The preliminary objection was directed to be disposed of by way of written submissions and both parties complied. We shall consider the submissions together with the issues for determination.

B. Issues for determination

13. The following issues arise for determination; -

a. Whether this Tribunal has jurisdiction to hear and determine this suit under the doctrines of Res Judicata and Res sub-judice.

b. Who is liable to pay costs.

Issue a) Whether this Tribunal has jurisdiction to hear and determine this suit under the doctrines of Res Judicata and Res sub-judice.

14. In the case of John Florence Maritime Services Limited & another Vs Cabinet secretary, Transport and Infrastructure & 3 others (2021) eKLR, the Supreme Court of Kenya ably discussed the doctrine of Res Judicata at paragraph 58 as follows;

> "(58) This Court in the case of Kenya Commercial Bank Limited v. Muiri Coffee Estate Limited & another Motion No. 42 of 2014 [2016] eKLR (Muiri Coffee case) held as follows regarding the doctrine of res judicata:
>
> "(52) Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights. Such a perception has a basis in comparative jurisprudence; in the Ugandan case of Hon. Norbert Mao v. Attorney-General, Constitutional Petition No. 9 of 2002; [2003] UGCC3, the petitioner brought an action on behalf of 21 persons from his constituency, for declarations under Article 137 of the Uganda Constitution, and for redress under Article 50 of that Constitution. The matter arose from an incident in which officers of the Uganda Peoples Defence Forces attacked a prison, and abducted 20 prisoners, killing one of them. Unknown to the petitioner,another action had already been filed under Article 50, seeking similar relief; and Judgment had been given in Hon. Ronald Reagan Okumu v. Attorney-General, Misc. Application No.0063 of 2002, High Court HCT 02 CV MA 063 of 2002. The Constitutional Court dismissed the petition, on a plea of res judicata, declining the petitioner's pleas that certain important constitutional declarations now sought, had not been accommodated in the earlier Judgment.

(53) In Silas Make Otuke v Attorney-General & 3 Others, [2014] eKLR, the High Court of Kenya agreed with the Privy Council decision in Thomas v The AG of Trinidad and Tobago [1991] LRC (Const.) 1001, in which the Board was "satisfied that the existence of a constitutional remedy as that upon which the appellant relies does not affect the application of the principle of res judicata".

(54) The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.

(55) It emerges that, contrary to the respondent's argument that this principle is not to stand as a technicality limiting the scope for substantial justice, the relevance of res judicata is not affected by the substantial-justice principle of Article 159 of *the Constitution*, intended to override technicalities of procedure. Res judicata entails more than procedural technicality, and lies on the plane of a substantive legal concept.

(56) The learned authors of Mulla, Code of Civil Procedure, 18th Ed. 2012 have observed that the principle of res judicata, as a judicial device on the finality of Court decisions, is subject only to the special scenarios of fraud, mistake or lack of jurisdiction (p.293):

"The principle of finality or res judicata is a matter of public policy and is one of the pillars on which a judicial system is founded. Once a Judgment becomes conclusive, the matters in issue covered thereby cannot be reopened unless fraud or mistake or lack of jurisdiction is cited to challenge it directly at a later stage. The principle is rooted to the rationale that issues decided may not be reopened and has little to do with the merit of the decision."

(57) The essence of the res judicata doctrine is further explicated by Wigram, V-C in Henderson v. Henderson [1843] 67 E.R.313, as follows:

".....Where a given matter becomes the subject of litigation in, and adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a Judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time" [emphasis supplied].

(58) Hence, whenever the question of res judicata is raised, a Court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The Court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a Court of competent jurisdiction. This test is summarized in Bernard Mugo Ndegwa . James Nderitu Githae & 2 Others, [2010] eKLR, under five distinct heads:

(i) the matter in issue is identical in both suits;

(ii) the parties in the suit are the same;

(iii) sameness of the title/claim;

(iv) concurrence of jurisdiction; and

(v) finality of the previous decision

(59) That Courts have to be vigilant against the drafting of pleadings in such manner as to obviate the res judicata principle was judicially remarked in E.T v. Attorney-General & Another, [2012] eKLR, thus:

"The Courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the Court. The test is whether the plaintiff in the second suit is trying to bring before the Court in another way and in a form of a new cause of action which has been resolved by a Court of competent jurisdiction. In the case of Omondi v. National Bank of Kenya Limited and Others, [2001] EA 177 the Court held that, 'parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.' In that case the Court quoted Kuloba J., in the case of Njangu v. Wambugu and Another Nairobi HCCC No.2340 of 1991 (unreported) where he stated, 'If parties were allowed to go on litigating forever over the same issue with the same opponent before Courts of competent jurisdiction merely because he gives his case some cosmetic face-lift on every occasion he comes to Court, then I do not see the use of the doctrine of res judicata...."

15. The tenant/applicant moved this Tribunal vide a Reference dated 25th June 2024 under Section 12(4) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* Cap 301, Laws of Kenya with a complaint that the landlords/respondents had instructed the 4th respondent to evict and distress for rent without issuance of the prescribed notice contemplated under Section 4(2) and 5 of the said statute.

16. The tenant simultaneously filed a motion of even date seeking for injunctive orders against the landlords from illegally and arbitrarily proclaiming, attaching and selling its motor vehicles and/or tools of trade in the course of distress for rent over property known as L.R No. Nakuru Municipality Block4/103. It is also seeking for an order for release of the attached motor vehicles registration No. KCH 933Z Mitsubishi Fuso& KCC 699M Mitsubishi Fuso and for an order to quash the proclamation notice dated 15th May 2024 issued by the 4th respondent.

17. The application is supported by the affidavit of Habib -Ur-rehmanParkarsworn on 25th June 2024 and the grounds on the face of the application wherein it is pleaded that the Applicant's acquisition of the suit property through a public auction was nullified by the Superior Court in Nakuru HCCC No. 82 of 2006. As a result, the relationship between the Applicant and the Respondents was converted into a landlord/tenant relationship with the Applicant being ordered to be paying rent at the rate of Kshs 50,000/=per month with effect from 1st December 2005 until payment in full.

18. The Applicant contends that the 1st to 3rd respondents instructed the 4th respondent to levy distress for rent without issuing the prescribed notice under Section 4(2), (4) & (5) of Cap. 301 following which two of its lorries were attached and advertised for sale. It is therefore sought to quash the proclamation notice and order for release of the two lorries.

19. An interim order of injunction was given ex-parte inter-alia restraining sale of the attached motor vehicles and/or tools of trade pending hearing inter-partes on 4th July 2024.

20. The application is opposed through a replying affidavit sworn on 12th July 2024 by the 3rd respondent in which it is deposed in material part that the Applicant was a tenant of the respondents paying a monthly rent of Kshs 50,000/= prior to the fraudulent sale of the suit property which was nullified by the Superior Court in the aforesaid case. The judgement and decree are attached to the replying affidavit as annexure MAO I.

21. The Applicant was granted a conditional stay of the judgement by the Superior Court vide a ruling marked as annexure MOA II (a) delivered on 14th March 2024 in which it was directed to deposit Kshs 35 million in a joint interest earning account within 45 days. The Applicant failed to meet the condition despite being issued with a notice dated 2nd May 2024 to pay the outstanding rent.

22. Subsequently, the 4th respondent was instructed to levy distress and sell the Applicant's properties which was successfully executed in terms of annexures marked MAO V-VIII.

23. It is therefore denied that the respondents have any intention to evict the Applicant despite being in arrears of Kshs 5,406,724/= as at July 2024. However, they admit having given fresh instructions to the 4th respondent to levy further distress for the outstanding rent arrears since the Applicant is still in occupation of the suit premises.

24. According to the respondents, this Tribunal has no jurisdiction to entertain this case as it is not only res judicata but also sub-judice since the Applicant has a pending application before the Court of Appeal vide COA Civil Appeal No. E054 of2024 as can be discerned from annexure marked MAO XI. As such, this Tribunal is being called upon to sit on appeal over the decisions of the High Court and the Court of Appeal.

25. The respondents also filed a preliminary objection dated 3rd July 2024 in which they have raised the following issues;

    i. That the reference herein is a nullity as the same amounts to an abuse of the due process of law.

    ii. That this honourable court lacks jurisdiction to entertain this matter for it cannot sit as an appellate court.

    iii. That the High Court made a finding on the matter in a ruling delivered in the High Court Civil Suit No. 82 of 2006 in terms of the Judgment, decree, ruling and Order attached to the notice of preliminary objection.

iv. That the entire suit is void ab initio, non-starter, bad in law an abuse of the due process and should be struck out.

v. That the honourable court cannot entertain a matter that is pending in the Court of Appeal vide Court of Appeal Mis App No. 054 of 2024 in which directions have already been given (the directions are attached to the notice).

vi. That the reference violates the express provisions of Section 12, Cap 301.

26. The respondents in their submissions contend that the entire reference is a nullity, void ab initio, non-starter, bad in law and an abuse of court process. They have cited the decisions in Dalcom Kenya Ltd v Francis C Maritim & Another [2021] eKLR and Samuel Wanyoike Igecha & Another v James Gitau John & 2 others [2021] eKLR in support of the same.

27. It is further submitted that the order issued herein is an attempt to vacate, stay and/or vary the High Court decision and therefore a usurpation of the findings of the High Court's jurisdiction. We entirely agree with the foregoing submission as this Tribunal has no jurisdiction to sit on appeal against the Superior Court's decision. We reject the said invitation.

28. We have seen the decisions cited by the Applicant in the cases of Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd [1969] E.A 696, China Road & Bridge Corporation v Kelvin Nyuki Muchimbo [2018] eKLR and Oraro v Mbaja [2005] eKLR wherein Superior Courts have discussed with finality what constitutes a preliminary objection and we entirely agree with the holdings therein but find that the facts in the said cases are clearly distinguishable from those in the present case.

29. In so holding, we rely on the locus classicus case of Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited [1989] eKLR wherein the Court of Appeal ably discussed the issue of jurisdiction at pages 8-9 as follows;

> "I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

30. The Superior Court made its decision on the amount of rent payable by the Applicant and even set conditions for stay of execution of the said judgement in its subsequent ruling. We have not been shown any evidence of the alleged intended eviction of the Applicant and we shall be overstepping our mandate if we were to start a fresh litigation over matters already determined in the previous litigation.

31. We further hold that any issue relating to execution of the decree or orders of the Superior Court in the previous litigation ought to be litigated in the said case in line with section 34(1) of the *Civil Procedure Act*, Cap. 21, which provides as follows; -

> "(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.'

32. In the premises, we find and hold that the instant suit is Res Judicata as well as Res Sub-Judice. The interim orders of injunction given herein were made without jurisdiction and the same are candidates for discharge.

Issue (b) Who shall bear the costs of the case?

33. As regards costs, the same are in the Tribunal's discretion under Section 12(1)(k) of Cap. 301, but always follow the event unless for good reasons otherwise ordered. We shall award costs of the reference and application to the landlords/respondents.

C. ORDERS

34. In view of the above analysis, the final orders which commend to us are;

    a. The tenant's reference and application dated 25th June 2024 are hereby dismissed with costs for being Res Judicata and Res Sub-judice.

    b. The interim orders given on 13th May 2024 are hereby discharged and/or set aside.

    c. The landlords'/respondents' costs are assessed at Kshs 50,000/= against the tenant.

    It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 1ST OCTOBER 2024

HON. GAKUHI CHEGE

(PANEL CHAIRPERSON)

BUSINESS PREMISES RENT TRIBUNAL

Hon. Joyce Akinyi Osodo

(Member)

In the presence of:

Wambeyi for the landlord

Gekonge for the Interested Party

N/A for the Tenant