



Mweru Hotel Holdings Limited v Lake Basin Development Authority & 2 others (Civil Case E018 of 2021) [2023] KEHC 26829 (KLR) (18 December 2023) (Judgment)

Neutral citation: [2023] KEHC 26829 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL CASE E018 OF 2021
RE ABURILI, J
DECEMBER 18, 2023**

BETWEEN

MWERU HOTEL HOLDINGS LIMITED PLAINTIFF

AND

LAKE BASIN DEVELOPMENT AUTHORITY 1ST DEFENDANT

CHARCON PROPERTIES LIMITED 2ND DEFENDANT

DEMIGEN AUCTIONEERS 3RD DEFENDANT

JUDGMENT

1. This is one of those cases that ought not to be pending before this court. I say so because the dispute between the parties who are tenant/landlord and the latter's property Manager is one of unpaid rent for a specific period of time, whereupon the landlord instructed the Auctioneers who are the 3rd Defendant herein to distress for rent as per the lease agreement.
2. It was upon such distress for rent arrears that the Plaintiff/Tenant approached this court seeking for a permanent injunction to restrain the Defendants from distraining for rent.
3. Interim orders of injunction were issued on 7th October 2021. Those interim orders kept being extended from time to time pursuant to the application dated 1st October 2021, which has never been heard and determined.
4. Another application was filed dated 30th November 2021 which application has never been settled to date. What the court has been doing over the period of time, is supervising the rent payment by the tenant to the landlord and its property manager, without any judgment on record, which is not right at all, as that would keep this case in this court in perpetuity.



5. The court had to ‘push’ the parties to have the case finally heard and a decision made, whichever way. Each of the parties called one witness and produced their documentary exhibits. They also filed their respective written submissions which the court has considered carefully.

The Plaintiff’s Case; Pleadings and Testimony

6. Vide Plaintiff dated 1st October 2021, the Plaintiff Mweru Hotel Holdings Limited seeks the following prayers/orders against the defendants jointly and severally.
 1. An order of a permanent injunction restraining the defendants either by themselves, agents, servants and or employees, representatives or any other person acting through or under his instructions from distraining, attaching, seizing, selling, dealing with, disposing of, damaging, wasting, entering upon, or in any way whatsoever alienating or interfering with the plaintiff’s movable items and/or interfering with the plaintiff’s tenancy, occupation and peaceful enjoyment of the Plaintiff’s Hotel premises situated on Land Reference No. 15239, subject of the lease agreement between the parties herein.
 2. Cost of this suit and interest thereon.
 3. Any other relief that his Honourable court will deem fit and just to grant.
7. The Plaintiff pleaded that it was a legal tenant occupying hotel premises and carrying out business as Best Western Hotel situate on Land Reference No. 15239 for over 2 years and that the tenancy was to run for 25 years from 1st August 2019.
8. It was averred that due to Covid-19 Pandemic and the delays in the completion of construction of the Kisumu – Mamboleo road, the Hotel experienced real challenges and economic adverse effects leading to diminished business resulting to huge losses making it difficult to meet its financial obligations.
9. That due to the presidential directives for closure of the businesses, the hotel could not operate although it did not vacate the premises and continued making some rent payments after starting the operations on 15th November 2019 after the aforesaid.
10. That on or about the month of February 2020, the 2nd Defendant who is the agent for the 1st Defendant issued the Plaintiff with Notice demanding for unpaid rent arrears of Kshs.2,859,211 and that on 6th September 2021, the 3rd Defendant Auctioneers served the Plaintiff with a proclamation Notice for the disputed sum of Kshs.23,720,551.
11. That on 30th September 2021, the 2nd and 3rd Defendants obtained an order for provision of security to attach the plaintiff’s property to recover the rent arrears hence the reason why the Plaintiff institute this suit seeking for the orders reproduced above.
12. Simultaneous with the suit, the Plaintiff also filed an application seeking for interim/temporary injunctive orders against the Defendants asserting that the hardship to be suffered if distress for rent proceeded, would not be adequately compensated by an award of damages as the hotel business was the plaintiff’s sole income generator hence it would be exposed to extreme, unfair and unjustified economic hardship and commercial embarrassment.
13. The Plaintiff also claimed that the action by the defendants was illegal, irregular and unlawful since the rent due was not to the tune demanded by the Defendants and Auctioneers and that the defendants were using the situation to extort money from the plaintiff without any reason or justification.



14. The Defendants entered appearance on 7th October 2021 and filed their joint defence on 19th October 2022 admitting the descriptive paragraphs of the plaint and denying most of the claims by the plaintiff but admitting to distressing for arrears of rent amounting to Kshs.23,720,551 which was due and owing. It also denied that the hotel business was the sole income generating business/activity for the plaintiff or that it will suffer irreparable loss or damage or at all.
15. They also denied that they levied illegal/irregular or unlawful distress for rent.
16. The defendants denied jurisdiction of the court at paragraph 16 stating in contention that the dispute is tenant/landlord hence this court lacks jurisdiction to hear and determine the suit.
17. The suit was heard by way of viva voce evidence with each party calling one witness. They also filed written submissions which I have considered. I will however deal with the issue of jurisdiction first because when I took over the conduct of this matter from my predecessor Judge, I posed the question of whether this court had jurisdiction to hear and determine the suit and both counsel for the parties as they appeared on 20th September 2022 said yes the court had jurisdiction since the tenancy was not controlled.
18. I agree that the tenancy which was for 25 years was not a controlled tenancy and therefore it does not fall within the jurisdiction of the Land Lord Tenant Act *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, Cap 301 of Laws of Kenya nor does such a dispute fall within the jurisdiction of the Environment and Land Court in view of the fact that the dispute is over non-payment of rent for a tenant who is not protected.
19. In the submissions, however, the Defendants’ counsel raised the issue of jurisdiction in view of the clause (6) (0) of the Lease Agreement which provides that:

“All disputes or differences between the parties touching on or concerning the lease agreement shall first be resolved by amicable negotiation between the parties’ authorised representatives failing which the same shall be referred to a single arbitrator to be agreed upon by the parties or in default, of agreement, to be nominated by the chairman for the time being of the Chartered Institute of Arbitrators, (Kenya Chapter) in accordance with the *Arbitration Act*, 1995 or any Statutory modification or re-named or if for the time being in force.”
20. The Defendants relied on Section 10 of the *Arbitration Act* No. 4 of 1995 which provides:

“Except as provided in this Act, no court shall intervene in matters governed by this Act.”
21. It has been stated not once but severally that jurisdiction is at the heart of any proceeding before a court of law. Jurisdiction cannot be arrogated by the court itself or be conferred by the parties’ consent. It is clothed by the *Constitution* and the law. The question of jurisdiction may be raised by the parties or the court on its own motion. See the *Owners of Motor Vessel ‘Lilian S’ v Caltex Oil (K) Limited* (1889) eKLR and *R v Karisa Chengo & 2 others* (2017) eKLR (SC).
22. From the lease agreement, the Arbitration clause is clear that all disputes and disagreements arising therefrom in execution or interpretation or construction of the said Agreement shall be referred to Arbitration.
23. It follows that before this suit was filed, the parties ought to first have gone through negotiations and if such negotiations collapsed then they would go the Arbitration way.



24. The Defendant did not apply for stay of these proceedings pending the Alternative Dispute Resolution (ADR) mechanisms provided for in the agreement. However, that in itself does not cloth this court with blindness and jurisdiction which is expressly ousted by the statute and supported by Article 159 (2) of the *Constitution*. Off course, this court has jurisdiction to grant injunctive orders to maintain status quo but not to determine the merits of the case which the arbitrator could have done as it is within the jurisdiction of the Arbitrator to do so.
25. In addition, parties are bound by the terms of the contract and this court cannot rewrite that contract. The lease agreement having provided for the alternative dispute resolution mechanism, that ADR mechanism ought to have resorted to first as guided by the provisions of the *Arbitration Act* and the provisions of Article 19(2)(c) of *the Constitution*.
26. The decisions in the *National Assembly v. Karume* Civil Application No. Nai. 92 of 1992; *Republic v Ministry of Interior and Coordination of National Government and Another ex parte ZTE* Judicial Review Case No. 441 of 2013; *Republic v Benjamin Jomo Washiali, Majority Chief Whip, National Assembly & 4 others Ex-parte Alfred Kiptoo Keter & 3 others* [2018] eKLR, are clear that where there is an alternative remedy provided by an Act of Parliament which is as effective, the court ought to ensure that the dispute is resolved in accordance with the relevant statute.
27. Mativo J (as he then) was in *Euromec International Limited v Shandong Taikai Power Engineering Company Limited* (Civil Case E527 of 2020) [2021] KEHC 93 (KLR) (Commercial and Tax) (21 September 2021) (Ruling) stated as follows:
- “...There is nothing before me to show that the arbitration clause is inoperative, null or void. Commercial arbitration is a private form of binding dispute resolution, conducted before an impartial tribunal, which emanates from the agreement of the parties. The law requires the parties to honour their contractual obligation to arbitrate. The law also provides for limited judicial intervention in arbitral proceedings, and supports the enforcement of arbitral awards in a manner similar to that for national court judgments. National laws generally recognize and support arbitration as a mutually exclusive alternative to litigation as a means of finally resolving disputes.
68. Flowing from the jurisprudence discussed herein above and the conclusions arrived at, it is my finding that the dispute disclosed in this case falls within the ambit of article 8 of the agreement...”
28. In the *County Government of Kirinyaga v Africa Banking Corporation Limited* (2020) eKLR it was held that:
- “The clear the intention of the parties was that if any dispute arises they oust the jurisdiction of the court and have preference to have the dispute settled through arbitration. This is in line with judicial authority, under Article 159(2)(c) of the *Constitution* which states: “in exercising judicial authority, court and tribunals shall be guided by the following principles – “alternative forms of dispute resolution including reconciliation, mediation, arbitration....shall be promoted.”
29. See also *Kenneth Kindi Muriuki & 5 others v Dirana Developers Limited & another* (2020) eKLR.
30. In the instant case, albeit this court had jurisdiction to grant a temporary injunction in the filed application, that should have been only for purposes of preserving the status quo as the parties proceeded for arbitration assuming negotiations had collapsed.



31. None of the parties sought for stay of the suit pending Arbitration. It is now too late to stay a suit which has been pending for over 2 years with parties continuing with their contractual relationship.
32. Despite the merit hearing which the parties acceded to, I find that this court has no jurisdiction to make a merit determination on the substantive prayer sought.
33. I am however alive to the fact that both parties kept having the matter adjourned from time to time on account that they were negotiating for a settlement through a payment plan and that the plaintiff has been making payments of the accrued rent though not fully settled.
34. For all the above reasons, I find and hold that this court is devoid of the necessary jurisdiction to make any merit determination of this suit which is hereby struck out.
35. Even assuming that I was wrong in my above decision which I highly doubt, the plaintiff's witness clearly admitted that they were in default of the rent claimed by the defendants as per the statements filed in court and therefore an injunction would not issue to restrain a landlord or its agent from recovering rent lawfully due to them. I find that the conditions for grant of a permanent injunction were not met at all and the suit would thus not be allowed at all.
36. As both parties have been having out of court negotiations and this court having found that it has no jurisdiction, I order that each party bear their own costs of the suit as struck out.
37. This file herein is closed.
38. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 18TH DAY OF DECEMBER, 2023

R. E. ABURILI

JUDGE

