



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAMIRA**

**CIVIL APPEAL NO. E001 OF 2020**

**ELLUSTONE J. M. SAGWE.....APPELLANT/APPLICANT**

**=VRS=**

**1. CO-OPERATIVE BANK OF KENYA LTD.....1<sup>ST</sup> RESPONDENT**

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

**3. WILKISTER MORAA OMENTA.....3<sup>RD</sup> RESPONDENT**

*(Being an appeal against the Ruling of Hon. M. C. Nyigei – SRM*

*Nyamira dated and delivered on the 23<sup>rd</sup> day of September 2020 in*

*the original Nyamira Chief Magistrate’s Court Civil Case No. 44 of 2020)*

**JUDGEMENT**

On 21<sup>st</sup> May 2020 the appellant filed a suit against the respondents herein in the court below seeking the following reliefs: -

- “a. 1<sup>st</sup> and 2<sup>nd</sup> defendants be compelled to return the machine.**
- b. 1<sup>st</sup> and 2<sup>nd</sup> defendants be compelled to return un Banked sums Kshs. 24,000/= with interest.**
- c. 1<sup>st</sup> defendant to be compelled to refund shares Kshs. 90,000/= with interest.**
- d. Costs, interest and any other incidental.”**

The suit is still pending hearing and determination. Simultaneously with that suit he filed an application by way of a Notice of Motion dated 18<sup>th</sup> May 2020 and sought orders as follows: -

- “1. THAT the application herein be certified as urgent service thereof be dispensed with the first instance and be heard ex-parte as such account of its agency.**
- 2. THAT there be stay of execution of the landlord/lady/3<sup>rd</sup> respondent notice of issued on 23<sup>rd</sup> March 2020 which lapses on 1<sup>st</sup> June 2020 for there is imminent destruction of properties of the applicant.**
- 3. THAT the notice herein be set aside pending the hearing and determination of the matter filed herein against the 1<sup>st</sup> and 2<sup>nd</sup> respondents who precipitated loss of business.**
- 4. THAT costs of this application to be borne by the 1<sup>st</sup> and the 2<sup>nd</sup> respondents.”**

That application was by consent heard by way of written submissions. In a ruling delivered on 23<sup>rd</sup> September 2020 the trial court declined to grant the orders sought and instead dismissed the application and ordered that costs would be in the cause. Being aggrieved by the decision of the trial court the appellant preferred this appeal citing the following as his grounds: -

**“1. THAT the trial Magistrate erred in law and fact by stating that the notice issued on rent arrears had already been implemented, while it was the main reason to seek an injunction in the trial court.**

**2. THAT the trial Magistrate erred in law and fact in her Ruling that several demand notices have been sent to the applicant without finding out when they were issued and whether the service was done.**

**3. THAT the trial Magistrate erred in law and fact in abdicating her mandate as an impartial and passive arbiter in her Ruling relying on the 1<sup>st</sup> respondents demand notices dated 27/6/2016 and 15/10/2016 which had been overtaken by event, since the sale notice was issued on an early date on 24/5/2016, therefore they served no purpose in respect to the cause of action.**

**4. THAT the trial Magistrate erred in law and fact in abdicating her mandate as an impartial and passive arbiter by failing to appreciate the applicants affidavits and documents, while it was within her powers to issue out summons for avoidance of doubt the authors of the documents to appear/produce them and be cross examined on the same at the preliminary level before the Ruling as neither the respondents had raised any doubts on the same.**

**5. THAT the trial Magistrate erred in law and fact in having a pre-determined mind in favour of the respondents by stating in her ruling that shares/monies and the repossessed machine were withheld in lieu of the outstanding balances as per the binding contract, without finding out whether was any breaches on the same by offsetting shares to other members of the group.**

**6. THAT the trial Magistrate erred in law and fact in finding out in her Ruling whether the sale notice was issued without a proclamation notice on the seized machine.**

**7. THAT the trial Magistrate erred in law and fact by including the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs as applicants in the application that they filed affidavits in support of the application to prejudice their main suit and yet they are not party to it but only witnesses.**

**8. THAT the trial Magistrate erred in law and fact in abdicating her mandate as an impartial and passive arbiter and became active participant filling the evidential gap in favour of the respondent against the applicant.”**

On 16<sup>th</sup> November 2020 this court admitted the appeal and directed the appellant to file and serve his Record of Appeal within 21 days without noticing that the Record of Appeal had been filed on 5<sup>th</sup> October 2020. This court subsequently gave directions that the appeal would proceed by way of written submissions and both sides duly obliged.

I have now had ample opportunity to peruse the material before me and more so the ruling the subject of this appeal and the Notice of Motion upon which it was premised. The application before the trial court concerned a **“Landlord’s Notice to Terminate or alter terms of a tenancy”** issued pursuant to **Section 4 (2) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act**. The appellant’s prayers in the Notice of Motion were: -

**“ .... THAT there be a stay of execution of the landlord/lady/3<sup>rd</sup> respondent notice issued on 23<sup>rd</sup> March 2020 which lapses on 1<sup>st</sup> June 2020 for there is imminent destruction of properties of the applicant.**

**3. THAT the notice herein be set aside pending the hearing and determination of the matter filed herein against the 1<sup>st</sup> and 2<sup>nd</sup> respondents who precipitated loss of business.**

**4 .....**”

The above prayers leave no doubt that this appeal concerns a decision of a trial court touching on a tenancy notice. **Section 15 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act** provides that appeals in matters falling under that Act ought to be heard in the Environment and Land Court. As such in so far as the appeal before me touches on a tenancy notice this court does not have jurisdiction to consider it and the same is struck out with costs to the respondents. For the avoidance of doubt **Section 15** of the aforesaid **Act** states: -

**“(1) Any party to a reference aggrieved by any determination or order of a Tribunal made therein may, within thirty days after the date of such determination or order, appeal to the Environment and Land Court:**

**Provided that the Environment and Land Court may, where it is satisfied that there is sufficient reason for so doing, extend the said period of thirty days upon such conditions, if any, as it may think fit.**

**(2) In hearing appeals under subsection (1) of this section the Court shall have all the powers conferred on a Tribunal by or under this Act, in addition to any other powers conferred on it by or under any written law.**

**(3) Deleted by Act No. 2 of 1970, s. 13.**

**(4) The procedure in and relating to appeals in civil matters from subordinate courts to the Environment and Land Court**

shall govern appeals under this Act:

**Provided that the decision of the Environment and Land Court on any appeal under this Act shall be final and shall not be subject to further appeal.”**

The appellant will of course be at a loss as to why this court admitted the appeal. The answer is that at the time it was not apparent to this court that the appeal touched purely on the Landlord notice issued under **Section 4 (2)** of the **Landlord and Tenant (Shops, Hotels and Catering Establishments) Act**. This is given the averments in the plaint as well as the reliefs sought. The confusion is also apparent in the appellant’s own submissions. I do however sincerely apologize to the parties for not having rejected the appeal at the earliest stage. The same is nevertheless struck out with costs to the respondents. It is so ordered.

**SIGNED, DATED AND DELIVERED ELECTRONICALLY VIA MICROSOFT TEAMS AT NYAMIRA THIS 20<sup>TH</sup> DAY OF MAY 2021.**

**E. N. MAINA**

**JUDGE**