



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

PETITION NO 399 OF 2018 (FORMERLY E.L.C. NO.763 of 16)

DEWDROP INTERPRISES LIMITEDPETITIONER

VERSUS

WILLIAM MUTHEE MUTHAMI1ST RESPONDENT

THE CHIEF MAGISTRATE'S COURT MILIMANI

COMMERCIAL COURTS2ND RESPONDENT

JUDGMENT

1. *Dewdrop Enterprises Limited* is a limited Liability company and the petitioner herein. It filed a petition dated 15th June, 2016 against *William Muthee Muthami* and the *Chief Magistrate's Court, Milimani Commercial Courts*, Nairobi, and the 1st and 2nd respondents respectively.

2. The petitioner avers that on 23rd October, 2012, the 1st respondent entered into a tenancy agreement on LR. No. 103/394 South C Mugoya Estate and the parties agreed on the terms of rent and the mode of payment. The petitioner states that on 1st March, 2013, it appointed Auctioneers to levy distress against the 1st respondent for default in rent payment; that the action prompted the 1st respondent to pay Kshs. 55,000/- by cheque dated 4th March, 2013. However, on 11th March, 2013, the 1st respondent filed *CMCC No. 1139 of 2013* and on 13th March, 2013, the 2nd respondent granted interim injunction restraining the petitioner from interfering with the 1st respondent's tenancy.

3. It is the petitioner's case that by an order of 12th June, 2013, the 2nd respondent directed the 1st respondent to retain possession of the suit premises but pay outstanding arrears. The petitioner states that being dissatisfied with that order it lodged an appeal, *HCCA No. 574 of 2013* which is still pending. It states that by 31st October, 2013, the 1st respondent owed Kshs. 975,712/- in rent arrears.

4. The petitioner further avers that the 1st respondent violated Section 7 of the Distress for Rent Act by removing distrained goods from the premises and refused to refurbish the premises in accordance with the terms of the tenancy; that on 11th November, 2013, it filed an application seeking among others, payment of rent arrears and imprisonment of the 1st respondent for contempt of court and that on 14th July, 2014 the 1st respondent was found in contempt.

5. It is the petitioner's case that on 4th August, 2015 a preliminary decree was issued directing the 1st respondent to pay Kshs. 975,712/- being rent due as at 1st October, 2013 and that on 14th September, 2015 the 2nd respondent issued a notice for the 1st respondent to show cause why execution could not issue. According to the petitioner, when the notice to show cause came up for hearing on 24th September, 2015, the matter was set for directions on 3rd October, 2015.

6. The petitioner states that it filed an application for oral examination of the 1st respondent; that on 1st October, 2015 the 1st respondent filed an application for stay of execution and setting aside of the preliminary decree. The petitioner further states that when the matter was mentioned on 2nd October, 2015, the court did not give a hearing date for the applications that had been filed on 29th September, 2015 and 1st October, but ordered parties to file written submissions and the matter was again set for mention on 19th October, 2015.

7. It is the petitioner's case that after parties filed submissions as directed, the 2nd respondent set the matter for ruling on 26th November, 2015. The petitioner contends therefore, that the 2nd respondent's actions including setting aside the orders earlier made, violated the Bill of rights, the constitution and the law, including the petitioner's right to the rent owed to it by the 2nd respondent. The petitioner sought the following reliefs:

- i. A declaration be and is hereby issued that the orders issued on 23rd March, 2016 in Nairobi, Milimani, CMCC No. 1139 of 2013, William Muthee Muthami vs Dewdrop enterprises Limited breached the petitioner's rights and fundamental freedoms under the provisions of Articles 2(2), 10, 27, 40, 48, 50 and 159(2) of the constitution of Kenya, hence void for all intents and purposes.
- ii. Judicial Review by way of an order of certiorari to remove into the Court and quash the orders issued on 23rd March, 2016 in Nairobi, Milimani, CMCC No. 1139 of 2013, William Muthee Muthami vs. Dewdrop enterprises Limited.
- iii. A declaration be and is hereby issued that the initiation, maintenance and prosecution of the 1st respondent's application dated 1st October, 2015 in Nairobi Milimani, CMCC No. 1139 of 2013, Nairobi, William Muthee Muthami vs. Dewdrop enterprises Limited, in the manner intended, contravenes the petitioner's constitutional rights, is an abuse of the court process, malicious and oppressive;
- iv. An order be and is hereby issued prohibiting continuance of the 1st respondent's application dated 1st 2015 in Nairobi, Milimani, CMCC No. 1139 of 2013, Nairobi, William Muthee Muthami vs. Dewdrop enterprises Limited, in the matter intended;
- v. An order be and is hereby issued directing the respondents to pay the petitioner the sum of Kshs. 3,405,110/- together with interest thereon at the rate of Kshs. 2,00/- per week from 1st October, 2014 until payment in full;
- vi. Costs of this petition.

Response

8. The 1st respondent filed a notice of preliminary objection dated 16th November, 2016 contending that the petition is misplaced, an abuse of the court process, frivolous and vexatious; that the petition seeks to challenge valid orders of the court made in exercise of its constitutional jurisdiction and that the orders can only be challenged by way of an appeal.
9. The 1st respondent further contends that the orders sought if granted would have the effect of interfering with the proper administration of justice, including taking away discretionary powers of the court and that prayer (v) of the petition is incongruous as it seeks a liquidated claim in the nature of a debt that can only be dealt with by a civil court and subject to proof.
10. The 1st respondent also filed a replying affidavit reiterating the fact that the petition is misplaced. He deposed that although it is true that he entered into a tenancy agreement with the petitioner, the petitioner reneged from its terms and obligations under the tenancy leading to him filing **CMCC No. 1139 of 2013**. He deposed that warrants of arrest were issued against him but he was released on a personal bond of Kshs. 900,000/- and that the warrants were eventually set aside. According to the 1st respondent, the petitioner has been making claims of non-existent rent arrears.
11. The 1st respondent further deposed that he filed an application to set aside the preliminary decree on grounds that it had been irregularly obtained and the court set aside that decree and the orders of 14th July, 2014 by the ruling of 23rd March, 2016. He also maintained that the main suit in that court is yet to be heard and determined. It is the 1st respondent case, therefore, that if the petitioner was dissatisfied with the ruling of 23rd March, 2016, it should have lodged an appeal rather than filing a constitutional petition.

Petitioner's submissions

12. **Edward Wachira**, representing the petitioner, submitted highlighting their written submissions dated 20th December, 2017, contending that there was a violation to the petitioner's rights enshrined in Article 40 and 50(1) of the constitution on the right to property and fair hearing. He submitted that the 2nd respondent had issued a decree for **Kshs. 975,712/-** being rent due to the petitioner as at 1st November, 2013 but that decree was set aside in 2016 without according the petitioner a hearing.
13. **Edward Wachira** further argued that the decree was set aside following an application which was not heard; that parties had been directed to file written submissions. And that the court set aside the decree when they were not in court thus violated their rights.

1st respondent's submissions

14. Mr. Maina, learned counsel for the 1st respondent submitted highlighting their written submissions dated 2nd July, 2018, that parties had been directed to file and exchange written submissions in the Magistrate's court for the applications to set aside the decree and to the one for cross examination. According to learned counsel, the applications were to be determined on the basis of the written submissions. It was submitted that parties filed their submissions and the court delivered its ruling on the said applications. It is the 1st respondent contention that the petition is an abuse of the process as no rights were violated.

2nd respondent's submissions

15. Miss Wawira, learned counsel for the 2nd respondent relied on their written submissions dated 22nd May, 2018. According to the 2nd respondent, the petition is **sub-judice** in view of **CMCC No. 1139 of 2013** which is still pending and relied on Section 6 of the **Civil Procedure Act** to that effect. The 2nd respondent also relied on the authority of **Thiba Mini Hydro Co. Ltd v Josphat Karu Ndwiga** [2013] eKLR and **Republic v Chalma District Alcoholic Drinks Regulations Committee & 4 others Ex-parte Detlef Heier & another** [2013]

eKLR.

16. It was also contended that the petitioner had not exhausted all the available remedies, namely; applying to set aside or appeal against the orders. The 2nd respondent further argued that this court has no jurisdiction to entertain the matter since it is a constitutional petition instituted in an environment and Land Court yet the issue is on recovery of rent.

Determination

17. I have carefully considered this petition; the responses, submissions and the authorities relied on. The issue that arises for determination is whether the petitioner's rights were violated.

18. The facts of this petition are not in dispute. The petitioner and 1st respondent entered into a landlord - tenant relationship over a property in South C Nairobi. The 1st respondent was to pay rent but there seems to have been a disagreement over rent payment leading to filing of **CMCC No 1139 of 2013** for recovery of rent arrears. Subsequently the petitioner obtained a preliminary decree followed with a notice to show cause why execution should not issue.

19. This led to a number of applications on either side, one; to set aside the preliminary decree and the other for cross examination. The court gave directions that the applications be determined by way of written submissions and indeed both the petitioner and 1st respondent complied by filing their submissions. The court then went ahead to determine the two applications and delivered its ruling setting aside that decree. That decision triggered this petition both filed by the petitioner. In the present petition, the petitioner contends that its constitutional rights in the Bill of rights were violated.

20. The petitioner's argument is that its right to property guaranteed under Article 40 and the right to fair hearing under Article 50(1) were violated. With regards to Article 40, the petitioner's argument seems to be that it was entitled to the decree which was set aside in that it cannot recover the rent owed to it. As regards Article 50(1), the petitioner's contention is that it was not heard; that it did not highlight submissions and that the ruling was delivered in their absence.

21. The respondents have on their part argued that this petition is an abuse of the court process and that no rights were violated. They contend, therefore, that if the petitioner was aggrieved by the court's decision, it should have applied to have it set aside or appeal but not to file a constitutional petition.

22. This petition arises from a decision of the court made in a civil matter. The court set aside its own orders in exercise of its judicial discretion. The court in doing so was exercising power conferred on it by law. This was after it had been moved by parties in a matter that fell under its jurisdiction. It is admitted by both parties that they were directed to file written submissions which they did and that the court thereafter issued its ruling after considering those submissions. The petitioner was aggrieved to the extent of filing this petition.

23. The petitioner presented to this court a constitutional petition contending that there had been violation of its rights and fundamental freedoms under Articles 40 that is; the right to property and 50(1), the right to fair hearing. The respondents have on their part argued that there is no such violation and that this petition is misconceived and an abuse of the court process.

24. It is now settled law that when a party institutes a constitutional petition pleading violation of constitutional rights and fundamental freedom, the right must be clear and unequivocal; the violation must be discernable and the respondent must be identified to have been the violator.

25. It was in that regard that The Constitutional Court of Seychelles observed in the case of **Elizabeth v President Court of Appeal** (2010) SLR 38, that for a petition to disclose a cause of action, the petitioner must show that he enjoyed a constitutional right; that the right had been violated and that the defendant is liable for that violation.

26. In the present petition, although the petitioner contends that its constitutional rights were violated, it has not shown how the 1st respondent violated its rights. The 1st respondent is a party in that civil suit. He obtained orders setting aside the preliminary decree and it is not him who set aside those orders. Apart from enjoining him in the petition, the petitioner has not attempted to demonstrate how he is liable for the alleged violation in line with the above persuasive authority.

27. The petition further fails to meet the position laid down in Sail v National Commissioner of South African Police Service & others [2014] ZACC19, that it is a fundamental principle in constitutional litigation that there be accuracy in the identification of the provisions of the constitution said to have been infringed on the grounds that the breach is inconsistent with the constitution or fundamental rights and freedoms; and that the constitutional challenge must be explicit, with due notice to all those affected in order to ensure that the interested parties have an opportunity to suitably respond to the allegations and to enable them lead relevant evidence where necessary. (See also Phillips & others v National Director of Public Prosecutions [2005] ZACC 15; 2006(1).

28. The petitioner is unpersuasive that there was violation of its rights and fundamental freedoms in so far as the 1st respondent is concerned. It has not identified the right and the Articles violated or even shown how the 1st respondent violated those rights and or Articles of the constitution.

29. I must also state here that this court is not exercising its appellate jurisdiction but jurisdiction under Article 165(3) (b) of the constitution, to determine whether a right or fundamental freedom has been violated, infringed or threatened. This is so because what the petitioner complains about is a decision rendered by a court of competent jurisdiction exercising its judicial and legal mandate.

30. The respondents have argued, and correctly so, in my view, that the petitioner could have sought to have the impugned orders set aside and or reviewed or even lodged an appeal to the High Court for determination in exercise of appellate jurisdiction rather than file a constitutional petition as the petitioner has done.

31. It is true that the Civil Procedure Act provides for appeals from judgments, decrees or orders from subordinate courts to the High Court on a question of law or fact. Order 42 further provides the procedure for filing such appeals. There is therefore an alternative remedy provided for by the law for seeking redress in the event the petitioner was aggrieved by the 2nd respondent's decision. In that regard, the petitioner did not have to institute a constitutional petition where an alternative remedy exists. In ***Speaker of the National Assembly v James Njenga Karume*** [1992] eKLR, the Court of Appeal stated that “***where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.***”

32. In the South African case of ***S v Mhlungu***, [1995] (3) SA 867 (CC), ***Kentridge AJ***, stated in the dissenting opinion (at paragraph 59), that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed. Further, in the case of ***Authorized Officer, State Bank of Travancore and another v Mathew K.C.*** (Civil Appeal No. 1281 of 2018), the Supreme Court of India stated, as the normal rule, that a writ petition under the Constitution ought not to be entertained if alternate statutory remedies are available, except in cases falling within the well- defined exceptions.

33. The court had earlier stated in ***Commissioner of Income Tax and Others vs. Chhabil Dass Agarwal***, [2014] 1 SCC 603 that;

“... while it can be said that this Court has recognised some exceptions to the rule of alternative remedy i.e. where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the proposition laid down in Thansingh Nathmal case, Titaghur Paper Mills case and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.”

34. Flowing from the above authorities, the law is now plain that it is only after exhausting alternative statutory mechanism provided for redress, or where the remedy provided for is ineffective, that a party should approach this court by way of a constitutional petition under Articles 22 and 23 as read with Article 165 (3) (b) of the Constitution.

35. In the present petition, the petitioner had first to exhaust the process of appeal provided for under the Civil Procedure Act and Rules or demonstrate that the alternative remedy provided for was not sufficient. Only then could it file the present petition. The above position is also in line with the provisions of section 9 (2) of the Fair Administrative Action Act, 2015 that a review of an administrative action will not be entertained unless the alternative remedy has been exhausted.

36. It is therefore clear that this court cannot intervene in the circumstance of this case. I say so because the petitioner has not demonstrated that the Magistrate's court acted outside its constitutional or legal mandate; that it was unconstitutionally constituted or that the impugned decision was ***ultra vires***. Only then would this court exercise its jurisdiction of judicial review and deal with the impugned decision. The petitioner still has a remedy in the form of appeal which it can pursue.

37. In conclusion, having considered this petition, submissions and the law, I am not persuaded on its merit. And as I have already adverted to herein above, the petitioner has not established that the 1st respondent violated its rights. The 2nd respondent on the other hand, was exercising its constitutional and legal mandate and made a decision in that regard. If there was an error of fact or law, that was an issue to be pursued on appeal. It could not justify the filing of a constitutional petition.

38. Consequently, and for the above reasons, this petition is declined and is hereby dismissed with costs to the 1st respondent.

Dated, Signed and Delivered at Nairobi this 28th Day of March 2019

E C MWITA

JUDGE