



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 153 OF 2014

SHAMSHAD AHMED MOHAMMED YAKUB

FARHAN MOHAMED YUSUF.....PLAINTIFF/RESPONDENTS

VERSUS

RASHID KALUMA OKEDI

JOSEPH K. NDUNGU.....DEFENDANT/APPLICANTS

R U L I N G

1. The defendant/applicants filed Notice of Motion dated 16/2/2016 in which they sought the following reliefs:-

(a) Spent

(b) Spent

(c) That this Honourable court be pleased to set aside the exparte judgment plus all consequential orders.

(d) That the applicants be restored in possession of the suit premises pending the hearing and determination of the application and the suit.

(e) That the draft statement of defence be deemed duly filed and served upon payment of the requisite court fees.

(f) Costs of this application be provided for.

2. The applicants were tenants of the respondents in a property which stood on **LR. No. Kitale Municipality Block 6/39** (suit premises). The respondents issued notices to terminate the applicants' tenancy but the applicants never filed a reference to the Business Premises Rent Tribunal as required under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Cap 301. When the notices took effect, the respondents moved to court and filed the present suit whereby they sought for orders of eviction.

3. The applicants who had been served neither entered appearance nor filed defence. The respondents proceeded with the hearing by way of formal proof. They obtained a judgment in their favour on 15/4/2015 after which a decree for eviction was issued. Execution was carried out and the applicants were evicted from the suit premises.

4. The applicants moved to court and filed the present application. They contend that they were not served with notice to terminate their tenancy and that they were not served with summons to enter appearance and file defence in this suit. They both contend that the process server who was an employee of the advocates for the respondents filed false affidavits of service and that they were actually not served with either the notices to terminate tenancy or summons to enter appearance.

5. The first applicant Rashid Kaluma Okedi depones that the first time he knew about the present case was when some hired goons in the company of the police went to the suit premises to evict him. That he had previously been summoned to the offices of the respondents' lawyer where he was informed that the respondents intended to sell the suit premises and that he expressed his intention to purchase it and pleaded to be given first priority.

6. The second applicant Joseph K. Ndung'u on his part stated that he had left the running of his business to his daughter and son and that he was not on the suit premises when the process server alleges to have served him. He contends that the affidavits of service by the process server are all false and were only meant to assist the respondents evict him from the suit premises.

7. The applicants' application is opposed by the respondents through a replying affidavit sworn by the first respondent Shamsad Ahmed Mohamed Yakub and the respondents counsel's affidavit sworn on 2/3/2016. The respondents contend that the applicants were duly served with notices to terminate their tenancy as well as the summons to enter appearance and file defence but they ignored all those resulting in their eviction. The respondents further contend that the prayers being sought by the applicants cannot be granted as eviction has already been carried out and the suit premises has been demolished for major renovations or re-construction.

8. I have gone through the applicants' application as well as the opposition to the same by the respondents. There are two issues to be determined in this application. The first issue is whether the applicants were served with notice to terminate their tenancy and summons to enter appearance and file defence. The other issue is whether the proposed defence raises any triable issues.

9. On the first issue, there is evidence that the notice to terminate tenancy of the applicants were issued on 1/7/2014. Both applicants were served at the suit premises on the same day. The process server who served the notices prepared two separate affidavits of service which were duly filed in court as required. Though the applicants are denying that they were served, their denial is without basis. The second applicant in his further affidavit has annexed copies of the notices to terminate his tenancy as well as that of the first applicant. If the applicants want the court to believe that they were not served, the question which then arises is where did they get the notices from? They did not get the notices from the court file because the court file copies had been stamped. The copies which the second applicant has annexed bear the court stamp when they were received in court on 18/4/2016. It is therefore clear that the applicants were actually served only that they never bothered to do what the Act required of them.

10. On whether the applicants were served with summons to enter appearance and file defence, I have no difficulty in finding that the two were served. The process server has sworn two separate affidavits of service stating how he served the two on 22/10/2014 at the suit premises. He easily identified the two because he had previously served them with notice to terminate tenancy. The applicants cannot therefore claim that they were not served with summons to enter appearance. The mere fact that the process server was an employee of the respondents counsel does not mean that he filed false affidavit. He had no personal interest in the matter and he could therefore not file a false affidavit. He was authorized to serve court processes and he discharged his duties as required.

11. On the second issue, the applicants in their draft defence contend that the suit was prematurely filed as there was no proper notice to terminate tenancy given and that as a result this court does not have jurisdiction to handle the case. I have already found that there was service of notice to terminate tenancy. The notices were dated 1/7/2014 and were served on the same day. As per **Cap 301** the termination took effect two months after the date of service. It therefore follows that after 1/9/2014, the applicants became trespassers in the suit premises and were liable to be evicted. They did not file any reference as required.

The applicants cannot therefore claim that this court has no jurisdiction. In **Nairobi Court of Appeal Civil Appeal No. 3 of 2002 between Reuben Muli Musyoki T/A Konza Merchants -vs- Wayua Mutisya Kinothya & Another**, a notice to terminate tenancy was served upon the appellant who acknowledged receipt of the same but indicated that he had no intention of acting on the same. The respondents moved to the High Court for eviction. The eviction orders were issued. The appellant appealed against the judgment of the High Court on the grounds that the notice for termination was not properly served and that therefore a reference to the Tribunal was unnecessary. In dismissing the appeal by the appellant, the judges of the Appeal Court held that the appellant had ignored the notice served upon him and since he did not act as per the requirements of the Act; the termination notice took effect after expiry of two months and the appellant's occupation of the suit premises amounted to a tortious act of trespass.

12. The applicants in this case having ignored to take the necessary steps before 1/9/2014 their occupation of the suit premises after the said date amounted to trespass and the respondents were at liberty to bring a suit for their eviction. The applicants therefore do not have any triable issue in their defence. The upshot of this is that their application fails and the same is hereby dismissed with costs to the respondents.

Dated, signed and delivered at Kitale on this 20th day of **July, 2016**.

E. OBAGA

JUDGE

In the presence of Mr. Murgor for Mr. Samba for applicants.

Court Assistant - Isabellah.

E. OBAGA

JUDGE

20/7/2016