



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL PETITION NO. 320 OF 2016

**IN THE MATTER OF: ARTICLES 22, 23 AND 25(c) OF THE CONSTITUTION OF THE
REPUBLIC OF KENYA**

AND

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF RIGHTS UNDER ARTICLE 27(1),
40, 47 AND 50(1) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: THREATENED VIOLATION OF RIGHTS UNDER ARTICLES 27(1),
40, 47 AND 50(A) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: THE LANDLORD AND TENANT (SHOPS, HOTELS AND CATERING
ESTABLISHMENTS ACT, CAP 301, LAWS OF KENYA**

BETWEEN

DESMOND BOI AND WILLIS OLOO t/a INSTITUTE OF

APPLIED STUDIES & RESEARCH.....PETITIONER

VERSUS

HON MBICHI MBOROKI CHAIRMAN BUSINESS

PREMISES AND RENT TRIBUNAL.....1ST RESPONDENT

SOROYA INVESTMENTS LIMITED.....2ND RESPONDENT

RULING

Introduction

1. Before the court are three related applications - Notice of Motion dated 26th July 2016, Notice of Motion dated 5th August 2016 and Notice of Motion dated 8th August 2016. The three applications relate

to the petitioner's tenancy dispute on the suit premises belonging to the 2nd Respondent. The matter has previously been the subject of proceedings before the Business Premises Rent Tribunal (BPRT) and the petitioners' proceedings before this court are expressed to be pursuant the High Court's supervisory jurisdiction under Article 165(6) and (7) of the Constitution.

The Applications

2. The three applications seek orders against the parties to the suit, respectively, as follows:

1. Notice of Motion of 26th July 2016 by the Petitioners

a) This application be certified urgent

b) The honourable court in exercise of its supervisory powers be pleased to call for the records/proceedings in the Nairobi Business Premises and Rent Tribunal, Tribunal Case No 150 of 2013: Desmond Boi and Willis Oloo t/a Institute of Applied Studies and Research – versus- Soroya Investments Limited for purposes of this application/Petition.

c) Pending the hearing and determination of this application/petition, the Honourable Court be pleased to issue a temporary injunction restraining the respondent and its Auctioneers, employees, servants, agents or howsoever otherwise from advertising putting on sale or selling the Petitioners' goods and equipment attached on 29th June 2016 in the purported distress for rent.

d) Pending the hearing and determination of this application/petition, the Honourable court be pleased to issue an injunction restraining the respondent acting either by itself or through employees, servants, agents. Or howsoever otherwise from entering, repossessing or dealing in the premises known as CORNER HOUSE, 12th FLOOR RIGHT WING (subject premises) in any manner that is prejudicial to the petitioners' peaceful occupation thereof or evicting the petitioners therefrom.

e) Pending the hearing and determination of this application/petition, the Honourable Court be pleased to grant a mandatory injunction compelling the respondent and its Auctioneers, employees, servants agents, to return all the goods/properties of the petitioners carted away from CORNER HOUSE, 12TH FLOOR, RIGHT WING (subject premises on 29th June 2016 in the purported distress for rent, in their right conditions.

f) Such orders and/or directives that the Honourable court may deem just and appropriate in the circumstances of this case in order to forestall the risks of violation of the petitioners/applicants' rights over their properties and all appurtenant interests, and the petitioners/applicants' right to fair administrative action, pending hearing and determination of the petition herein.

g) Costs.

2. Notice of Motion of 5th August 2016 by the 1st and 2nd Respondents

1. That pending the hearing and determination of this Application, this application be certified as urgent, service thereof be dispensed with in the first instance and the same be directed to proceed to hearing immediately in view of its urgency.

2. That pending the hearing and determination of this application, this Honourable Court be pleased to stay the Orders issued on 29th July 2016 on the basis that the said orders are res judicata.

3. That pending the hearing and determination of this application, this Honourable Court be pleased to vacate the Orders issued on 29th July 2016 in totality due to the fact that they have been overtaken by events since the petitioner was not in occupation of the suit premises as at

the date of the said orders.

4. That pending the hearing and determination of this application, this Honourable Court be pleased to issue a temporary injunction restraining the petitioner either by themselves, their servants, employees agents or anybody else, from trespassing through themselves or howsoever; or entering or dealing with the suit property and in extension the 2nd respondent's property in any manner whatsoever;

5. That upon the hearing and determination of this application, this honourable court be pleased to issue a temporary injunction restraining the petitioner either by themselves, their servants, employees agents or anybody else, from interfering with or in any way harassing the existing tenants in the suit property herein.

6. That in addition to the above, this court be pleased to grant such other or further orders as it shall deem fit and just for the preservation of justice regarding the nature and circumstances of this case.

7. That the costs of this application be provided for.

3. Notice of Motion of 8th August 2016 by the Petitioners

a) This application be certified urgent and admitted to hearing during the Honourable Court's vacation.

b) Notice to Show Cause to issue to BRIAN JULIAN D'SOUZA, PHILIP MWAU, DIANA NTHIWA ADVOCATE and STEPHEN KIMANI KARUU t/a KIRIIYU MERCHANTS AUCTIONEERS, to state why they should not be committed to civil jail for disobedience of the orders of the Honourable Court (Hon. Justice E. Muriithi) issued on 27th July 2016.

c) BRIAN JULIAN D'SOUZA, PHILIP MWAU, DIANA NTHIWA ADVOCATE and STEPHEN KIMANI KARUU t/a KIRIIYU MERCHANTS AUCTIONEERS be committed to prison for 6 months or such period as this Honourable Court shall determine for contempt of the decision/orders of the Honourable Court (Hon Justice E. Muriithi) issued on 27th July 2016.

d) Such further or other consequential orders as may seem just to this Honourable court.

e) Costs of and occasioned by these proceedings to be borne by the respondents.

Submissions

3. The three applications were heard together on 17th August 2016 and the Counsel present for the parties - Mr. Midenga for the Petitioners and Mr Odera with Miss Nthiwa for the 2nd respondent - made oral submissions on their respective contentions and ruling was reserved.

Respective cases for the parties

4. Briefly, the respective cases of the parties were based on the tenancy dispute proceedings before the BPRT with the petitioner alleging that the Tribunal had in violation of its right to be heard made an order for breaking into the premises for purposes of levying distress for rent and eviction of the petitioner tenant, and the 2nd respondent asserting its right to property and contending that its actions had been in accordance with the law and lawful orders of the tribunal, and that the matters raised in the petition were res judicata.

5. The petitioner's petition seeks, principally, an order for the hearing of an application for review by the Chairman of the BPRT against its decision of 3rd June 2016 allowing the 2nd respondent landlord to levy distress on the petitioner's goods. The petitioner challenges a subsequent order of the tribunal made on

27th June 2016 which allowed the 2nd respondent to break into the premises for purposes of the distress and to take possession of the suit premises. The petitioner seeks interlocutory relief by way of mandatory injunction for the return of attached goods and for restraining the 2nd respondent from interfering with its possession of the suit premises pending determination of the petition. The petitioner alleged disobedience of interim orders for that purpose by the respondents and its servants through sale of the attached goods and eviction on 3rd August 2016 and thereafter restriction from entry into the suit premises. The petitioner therefore seeks by Notice of Motion of 8th August 2016, orders of the committal to civil jail of the 2nd respondents' property manager, its advocate, its security officer agent and the auctioneer.

6. The 2nd Respondent's case is that the issues raised in the petition have been determined by the BPRT which has granted orders levying of distress on the petitioner's goods, and subsequently an order for breaking in and taking of possession of the suit premises, and that pursuant to the said orders, the petitioner's goods had been attached and sold in accordance with the law and the premises let out to a third party tenant. It was contended that this Court's orders were overtaken by events because they were obtained after the petitioner's goods had been sold and the suit premises leased to a new tenant who had already taken possession.

7. The 2nd respondent also complained that upon obtaining the interim order of 27th July, 2016 the petitioner had on the night of 2nd August, 2016 had broken the locks into the suit premises and vandalized the new tenant's signages and property, a matter which had been reported to the police for investigations. The 2nd respondent urged that the petitioners were guilty of unclean hands and delay in their pursuit of the equitable remedies of injunction. The Petitioners' application for contempt is opposed on the grounds that 'the events sought to be prevented by the Court order of 27th July 2016 had already taken place by the time the order was served, as the goods had been sold by public auction on the 9th July 2016 and there was already a new tenant on the suit premises with a lease commencing 15th July 2016.

The issues before the court

8. The issue before the Court has the following components:

- a. Whether the court will grant an order of mandatory injunction at the interlocutory stage.
- b. Whether the court will discharge the interim injunction granted pending hearing of the petition.
- c. Whether the 2nd respondent is guilty of contempt of court for disobedience of the interim injunction order.

9. A collateral issue is raised by the evidence of the 2nd respondent that it had already leased the suit premises out to a third party:- that is, whether the said new tenant should be joined as a party to these proceedings.

Determination

10. The resolution of the dispute between the parties herein requires a determination of the **status quo** at the suit premises as existing on the 26th July 2016 when the petitioner approached this court and obtained the interim order the subject of the subsequent applications herein – the first by the respondent seeking the setting aside of the order and the second by the petitioner seeking committal of the respondents for contempt of court in disobedience of the interim order.

11. By the hearing inter parties of the application of 26th July 2016, the petitioner seeks the confirmation of the interim Order of 29th July 2016 and the further orders set out in the Notice of Motion. The Order of 29th July 2016 may be discharged, as prayed by the 2nd Respondent, if the Court is satisfied that it was

misled by the petitioner on the **status quo** as at the date of the Order into granting the interim injunction to restrain what had already happened. As regards, the application for contempt of court, if the **status quo** regarding the petitioner's tenancy had already changed before the order seeking to maintain it, then the respondent cannot be held to be in contempt of court. Accordingly, any orders on the application for committal must follow a determination as to exact state of things as at the 29th July 2016 when the order of the court made on 27th July 2016 was extracted and served.

12. While the court has power to make mandatory injunction orders at the interlocutory stage, this jurisdiction is to be exercised cautiously and exceptionally where there is demonstrated a clear case in favour of the applicant which gives the Court, in the words of Megarry J. in **SHEPHARD HOMES LTD. VS. SANDHAM** (1970) 2 ALL ER 402 at 412, "**assurance that at the trial it will appear that the injunction was rightly granted.**" See **Kamau Muchuha v. The Ripples Ltd** Civil Application No. NAI. 186 OF 1992 (unreported) and this Court's decision in **KENYA INTERNATIONAL FISHERIES DEVELOPMENT AND FISH SUPPLIES AGENCY LTD. V. AGRICULTURAL DEVELOPMENT CORPORATION and 2 Ors.**, Nairobi Pet. No. 355 of 2016.

13. In the present case, the court must finally and positively determine the following issues before the mandatory orders for return of attached goods and the prohibitory order to restrain interference with its possession as sought by the petitioner could be granted:

1. That the Business Premises Rent Tribunal (BPRT) erred in granting the order on the 27th June 2016 for breaking into and for possession of the suit premises.
2. That the petitioner was in occupation of the suit premises at the time of the order of the court made on 27th July 2016 and issued on 29/7/2016.
3. That the letting out of the premises to another tenant was unlawful in the circumstances of the case.

For the same reason, the court must determine that the acts of the respondent were in contempt of court and, therefore, null and void.

14. While there appears to be merit in the petitioner's complaint that it was not heard on the 2nd respondent's application dated 27th June 2016 for breaking into the premises and for possession of the suit premises and that, therefore, the BPRT order made thereon on the same date the 27th June 2016 ought to be discharged *ex debito justitiae*, intervening factors between the date when the Tribunal made the order and the proceedings before this Court work against an order, at the interlocutory stage of the Petition, for reinstatement *status quo ante* before the Tribunal's order of 27th June 2016.

15. An order made without hearing the other side of a dispute is in the category of orders which Lord Diplock in **Lord Diplock in Isaacs v. Robertson**, [1984] 3 All E.R. 140 at 143 held to be liable to be set aside *ex debito justitiae* without need to applying in accordance with the Rules of court for setting aside:

"there is a category of orders of such a court which a person affected by the order is entitled to apply to have set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the court without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity and give to the judge a discretion as to the order he will make. The judges in the cases that have drawn the distinction between the two types of orders have cautiously refrained from seeking to lay down a comprehensive definition of defects that bring an order into the category that attracts *ex debito justitiae* the right to have it set aside, save that specifically it includes orders that have been obtained in breach of rules of natural justice."

16. However, the presence of the new tenant by a Lease whose commencement date was shown to be the 15th July 2016 complicates the matter. For instance, is the court entitled to set aside the BPRT order of 27th June 2016 and direct the eviction of the new tenant, without hearing the said new tenant? Would not

that start a spiral of orders made without hearing the parties affected thereby, and therefore all liable to be set aside *ex debito justitiae*? What is the impact of the alleged conduct of the petitioners in breaking into the suit premises and destroying the new tenant's signages and property, which is now subject of criminal investigations? And what is the total effect of the respondent's allegations, if proved, that the petitioner is an untruthful applicant?

17. It is trite law that an untruthful *ex parte* applicant is not entitled to exercise of discretion of the court in his favour and that where it is discovered that he had gained an advantage by misrepresentation or non-disclosure of material facts, the same may be set aside at once without a determination of the merits of the case. See *The King v. The General Commissioners for the Purposes of Income Tax Acts for the District of Kensington: Ex parte Princess Edmond De Polignac* [1917] All E. R. 486, where Warrington L. J. at page 509, said:

"It is perfectly well settled that a person who makes an *ex parte* application to the Court - that is to say, in the absence of the person who will be affected by that which the Court is asked to do - is under an obligation to the Court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by him. That is perfectly plain and requires no authority to justify it."

See also *Uhuru Highway Development Limited v Central Bank of Kenya & 2 others* [1995] eKLR.

18. In the present case, without deciding at this stage, it would appear that the petitioner was aware but did not disclose during its *ex parte* application that the goods had already been sold on the 9th July 2016. The Court has noted the counsel for the petitioner's letter of 21st June 2016 protesting the proclamation of the goods and the Notification of Sale dated 29th June 2016 and witnessed by Inspector Alex Khaemba of Central Police Station in terms of the Tribunal order that Police do supervise the execution of the orders of 3rd June 2016 and the newspaper notice on the sale scheduled for the 9th July 2016. It is also noted that 29th June 2016 was a working day of the week and if the petitioner was in occupation of the premises as alleged, its directors, associates or staff would have known of the attachment and notification of sale issued on that date. No explanation was given by the petitioner as to how the goods could have been attached without its knowledge. Indeed the petitioner's prayer for return of the goods accepts that they had been attached. The Notification of Sale dated 29th June 2016 gave notice of the sale of the attached goods seven (7) days from the date of the Notice.

19. It is not clear from the affidavits, despite the lease showing commencement date as 15th July 2016, that there was a new tenant in the premises or that the petitioners knew of the leasing of the premises and occupation thereof by a new tenant before they came to court on the 26th July 2016. That must remain a matter of proof at the trial of the petition.

20. However, the alleged breaking into the suit premises by the petitioner on the 2nd August 2016, if established, would amount to the offence of forcible entry under section 90 of the Penal Code, because the offence is committed notwithstanding any right to the property by the offender. Section 90 of the Penal Code is in the following terms:

"90. Any person who, in order to take possession thereof, enters on any lands or tenements in a violent manner, whether the violence consists in actual force applied to any other person or threats in breaking open any house or in collecting an unusual number of people, and whether he is entitled to enter upon the land or not (emphasis added) is guilty of the misdemeanor termed forcible entry:

Provided that a person who enters upon lands or tenements of his own, but which are in the custody of his servant or bailiff, does not commit the offence of forcible entry."

21. The Court is not able to determine from the affidavits filed in the matter by both sides as to the **status quo** of the premises at the time of filing the Petition and the Notice of Motion therein dated 26th July 2016. The court's considered view is that the matters in dispute herein are not suitable for determination by affidavit evidence, or at any rate at the interlocutory stage, but rather upon full investigation of the merits of the Petition including, as necessary, the calling of viva voce evidence with cross-examination as permitted under Rule 20 of THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013. The determinations sought in this case depend on the establishment of the facts of the case, which from the very conflicting evidence presented by the various affidavits filed herein, it is not possible to decide the matter on the basis of affidavit evidence on the disputed facts.

Joinder of Necessary/Interested Party

22. Order 10 rule (2) of the Civil Procedure Rules provides for the joinder of a necessary party as follows:

“(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

23. Similarly, Rule 6 of THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013 provide as follows:

“(2) A court may on its own motion join any interested party to the proceedings before it.”

24. This Court considers that the alleged tenant named in the Lease attached to the Replying Affidavit of Mr. Brian De Souza of 5th August 2016 as Erick Kavita t/a M/S Erina Systems of P.O. B Ox 22008-00100 Nairobi is a necessary as well as an interested party to these proceedings as the determination herein will affect him as the current tenant in possession of the suit premises. He shall accordingly be joined to these proceedings and served with the Petition to which he shall a response with 14 days of service.

Orders

25. Accordingly, for the reasons set out above, the court makes the following orders on the applications before the court:

1. Notice of Motion dated 26th July 2016 is declined, the matters raised therein to abide the determination of the Petition.
2. To maintain the **Status quo**, the Notice of Motion dated 5th August 2016, is granted in terms of prayer No. (5) that a temporary injunction restraining the petitioner either by themselves, their servants, employees agents or anybody else, from interfering with or in any way harassing the existing tenants in the suit property pending hearing and determination of the Petition.
3. Notice of Motion dated 8th August 2016 is held in abeyance pending hearing of the Petition.
4. The alleged new tenant, Mr. Erick Kavita t/a M/S Erina Systems of P.O. B Ox 22008- 00100 Nairobi is joined as a necessary/interested party in this suit.
5. For avoidance of doubt, pending the hearing and determination of the Petition, the **status quo** of the suit premises in terms of **occupation, alienation and registration of any interests** shall be

maintained as at today the 19th September 2016.

6. Costs on all the applications shall be Costs in the Cause, to await the outcome of the Petition.

26. The Petition will be fixed for hearing on priority basis on a date to be set in consultation with the Counsel for the parties.

DATED AND DELIVERED THIS 19TH DAY OF SEPTEMBER 2016.

EDWARD M. MURIITHI

JUDGE

In the Presence of:-

Mr Midenga for the Petitioner

No appearance for the 1st Respondent

Miss Nthiwa for 2nd Respondent

Kazungu - Court Assistant.