



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO.45 OF 2013

PATRICK MUHULO T/A PAMA GARMENTS.....APPELLANT

VERSUS

D.A. HOLDING.....RESPONDENT

RULING

1. This is a ruling on a preliminary objection whose notice is dated 11/7/2013 and was filed on the same date. It was filed by the respondent's counsel and asserts that the application dated 29/6/2013 and the court order obtained on 2/7/2013 violate Order 45 Rule 6(2) Order 51(Rule 13(3) of Civil Procedure rules and Section 15(2)(4) of the Landlord and Tenant (shops, Hotels and catering establishments) Act, Cap 301, Laws of Kenya. The applicant is **PATRICK MAHULO T/A PAMA GARMENTS**. The respondent is **D.A HOLDINGS LTD**.
2. On 2/12/2013 both sides agreed that the objection be disposed of by way of written submissions. In that regard, counsel for respondent filed submissions on 14/3/2014.

In the submissions it is alleged that the respondent was served 3 days to the hearing date instead of 7 days prescribed by Order 51 Rule 13(3) of Civil Procedure Rules. Counsel for the applicant was faulted for not offering explanation as to why this occurred.

3. It was also alleged that the order of stay was granted without asking the applicant to deposit security. This is said to be in violation of Order 42 Rule 6 (2) of Civil Procedure Rules. According to counsel, the application should not be prosecuted as long as there is no security offered.
4. Section 15(2) of the Land Lord and Tenant (shops, hotels and catering establishments) Act (Cap 301) simply enjoins that the High Court assumes the powers of the tribunal set up under the Act while handling appeals. It is not clear how this was violated. Counsel simply asks that the application be struck out.
5. The decided case of **FREDRICK KIBATHI KIONGO VS DOMINIC NDIRANGU MUKUBWA & Another: NAIROBI C.A. CIVIL APPEAL NO.63 OF 1988** was availed to buttress the argument that a successful litigant should not unnecessarily be denied the fruits of his judgment. According to the respondent, notice of termination of tenancy in this matter was given way back on 24/9/2010 and it was not until 29/5/2015 when it was determined in his favour. The stay order suspends the enjoyment of that determination. The order of stay is said to oppress the respondent.
6. The applicant's submissions were filed on 2/4/2014. According to the applicant, the respondent complaint about service is an issue of fact, not law, and is also a technicality. It does not therefore qualify as a point of preliminary objection as such points should on points of law only. As a

- technicality, it is also caught up by provisions of Article 159(2)(d) of the Constitution of Kenya, 2010, which enjoins that justice shall be heard without undue regard to procedural technicalities.
7. On the issue of depositing security as enjoined by Order 42 Rule 6(2) of Civil Procedure rules, the applicant submitted the applicant had expressed willingness to deposit security but was not ordered to do so. No taxation of costs has been done also and the quantum of costs remains unknown to the applicant.
 8. I have considered what each side availed. The preliminary objection raised is largely technical. It faults non-compliance with some legal provisions. The bone of contention revolves around service and deposit of security. Technicalities are often the bane substantive justice and if I agree to take the action urged by the respondent's counsel, the Applicant's application will never see the light of day.
 9. In my view, counsel for respondent selectively picked the provisions of law said to be violated and decided to use them to knock out the application herein. These same provisions are invoked on the face of the application but there is more; counsel for the applicant also sought to rely on Section 1A, 1B and 3B of Civil Procedure Act (Cap 21). The import of relying on these provisions is that the court must look at the broader picture; it cannot decide to be unduly technical. The broader picture requires that it is merits, rather than technicalities, that should guide the court in handling a matter. Article 159(2)(d) of the Constitution of Kenya cited by the Applicant's counsel has the same import.
 10. I am not therefore persuaded that I should strike out the application. Though service may have been faulted by respondent's counsel, I needed to be told whether respondent suffered any prejudice or hardship as a result of being served late. If they respondent felt it didn't have enough time to respond to the application, it is a simple thing to ask the court for more time.
 11. The applicant had intimated willingness to offer security. This is clear at paragraph 11 of the supporting affidavit accompanying the application. It is the court itself that decided not to order deposit of security at the ex parte stage. And the reason was simple: There was no material upon which the court could act to assess or estimate the amount required. The anticipation was that more material would become available from both sides at a later stage. Then this objection came; and here we are.
 12. The upshot is that there is nothing to warrant striking out the application herein. The objection is found unmeritorious and is hereby dismissed with costs.

A.K. KANIARU – JUDGE

19/3/2015

19/3/2015

Before A.K. Kaniaru – Judge

Diang'a G. - Court Clerk

Defendant – Present

Plaintiff – Absent

Indumuli for Odeny for respondent

Lore for Njoga for Applicant

Court: Ruling on Preliminary objection dated 11/7/2013 read and delivered in open **COURT**.

Right of Appeal – 30 days.

A.K. KANIARU – JUDGE

19/3/2015