



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**CIVIL CASE NO. 388 OF 2014**

**GEORGE NJOGU WAKIBI.....1<sup>ST</sup> PLAINTIFF**

**SOLOMON MUNGAI WAKIBI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**TOUGH HIDE LIMITED.....1<sup>ST</sup> DEFENDANT**

**LITTLE VINEYARD AUCTIONEERS..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The subject matter of this ruling is the motion dated 14<sup>th</sup> April 2015 in which the Defendants are seeking to have this court's ruling delivered on 25<sup>th</sup> February 2015 to be reviewed and set aside. The motion is supported by the affidavit of Karim Javer sworn on 14<sup>th</sup> April 2015. The plaintiffs opposed the motion by filing the replying affidavit of George Njogu Wakibi together with the grounds of opposition.

2. When the motion came up for hearing inter parties, learned counsels made oral submissions. The applicants argued one main ground which is to the effect that this court committed an error on the face of record by failing to take into account the replying affidavit of the Defendants/applicants. It is the submissions of the Defendants/applicants that had this court considered the aforesaid replying affidavit it would have arrived at a different conclusion. For this reason this court was beseeched to set aside its decision of 25.2.2015. The respondents on the other hand are of the view that there are no grounds shown to enable this court review its decision. It is argued that once the applicants filed an appeal then they lost the option of filing an application for review. In my view, the Respondents later ground appears to be more of preliminary a point of law.

3. Before considering the merits or otherwise of the motion let me first set out the background of the motion. This court heard the respondent's notice of motion dated 13.11.2014 and on 25<sup>th</sup> February 2015, the court issued an order of temporary injunction to restrain the Defendants, their servants and or servants from distressing or interfering with the applicants quiet occupation of Simla House, LR no. 209/664, Tom Mboya Street pending the hearing and determination of the suit. This court further directed that the issuance of the injunctive orders was on condition that the plaintiffs will to continue paying rents. Upon delivery of the aforesaid ruling, the Defendants filed a notice of appeal to challenge the decision in the Court of Appeal. Having given a brief background of the motion for review, let me now revert back to consider the substance of the motion. It is also convenient to first deal with the preliminary issue raised by the plaintiffs. It is the plaintiffs argument that once the Defendants' elected to file an appeal, they lost the opportunity to urge for review. For this reason this court was asked to strike out the application. I have carefully considered the rival submissions and I have come to the conclusion that whatever the

Defendants have done is not fatal. There are sufficient authorities from the Court of Appeal that support this view. In *African airlines International Ltd vs Eastern & southern African Trade and Development Bank (P.T.A Bank) (2003) K.L.R 140* the Court of Appeal held inter alia: see holding

***“Where an application for review is presented before an appeal is preferred the court has jurisdiction to hear it although the appeal is pending.***

***The court’s jurisdiction to hear a review is not taken away if after the review petition, an appeal is filed by any party.***

***An appeal may be filed after an application for review, But once the appeal is heard the review cannot be proceeded with”***

4. I am therefore convinced that the preliminary point of law raised by the Plaintiffs/Respondents cannot stand. The same is rejected.

5. Having disposed of the preliminary objection, let me now consider the merits or otherwise of the motion. The applicants have pointed out that there is an error apparent on the face of record, in that this court inadvertently failed to consider the Defendants replying affidavit which was filed to resist the motion dated 13.11.2014. I have carefully perused this court’s ruling delivered on 25.02.2015.

6. At page 2 of the ruling, this court stated in paragraph 3 inter alia as follows.

***“The Defendants did not file a reply but rather filed a Notice of Motion dated 20<sup>th</sup> November, 2014 seeking that there be stay of execution of the ex-parte orders of injunction given by this court on 14<sup>th</sup> November, 2014 and that the ex-parte orders of injunction given on 14<sup>th</sup> November, 2014 be set aside and/or vacated. The application is premised on the grounds stated on the body of the application and the supporting affidavit of Karim Javer sworn on 20<sup>th</sup> November, 2014. He contended that the Plaintiffs did not disclose that the rent arrears for which distress was levied had been the subject of litigation between the Plaintiffs who were trading under the firm name and style of New Thimbigua Provision Stores and the 1<sup>st</sup> Defendant in case no. 141 of 2013 at Business Premises Tribunal. That the said tribunal entered judgment on 3<sup>rd</sup> October 2011 ordering the Plaintiffs to pay rent of Khs.146,000/= per month with effect from 1<sup>st</sup> March, 2013. That the Plaintiffs sought to set aside the said order but they were denied. That this court has no jurisdiction to hear this application since the issues in this application have been canvassed in a similar application before the tribunal. That the Defendant did not require leave to levy distress for rent truly owed.”***

The Defendants do not deny the Plaintiffs’ assertion that this court did not consider the plaintiffs’ replying affidavit.

7. In *National Bank of Kenya Ltd vs Ndungu Njau (1997) eK.L.R* the Court of Appeal held inter alia

***“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”***

8. It is obvious from the above analysis that the ruling of 25.2.2015 should be reviewed to enable this court take into account the facts deponed in the replying affidavit of Karim Javer sworn on 3<sup>rd</sup> December 2014. The question to be answered is whether or not the facts deponed in the replying affidavit would have tilted this court’s decision on the motion dated 13.11.2014.

9. I have carefully considered the facts deponed in the replying affidavit vis-à-vis the arguments made in support of the motion.

It is the averment of the Plaintiffs that the sum of kshs.2,000,000/= demanded by the Defendants as arrears of rent was a figure unknown to the Plaintiffs. They also argued that since the Defendants did not obtain a court order, the purported distress was illegal hence a restraining order should issue. The Defendant comprehensively responded to those allegations through the averments contained in the replying affidavit of Karim Javer. It is stated that the distress for rent was levied by the Defendant against the Business known as New Thimbigua Provision Stores. Attached to the replying affidavit is an electricity bill in the name of New Thimbigua Provision Stores.

10. The 1<sup>st</sup> Defendant further states that it initially issued a notice increase rent to the aforesaid outfit who instead filed a reference at the Business Premises Rent Tribunal and was at the end ordered to pay costs in the sum of kshs.134,390/= vide B.P.R.T case no. 141 of 2013. The 1<sup>st</sup> Defendant pointed out that Solomon Mungai Wakibi, the 2<sup>nd</sup> Plaintiff herein had actually signed documents and references on behalf of New Thimbigua Provision Stores, hence the allegation that they are not aware of the rent arrears was false.

11. After a careful perusal of the documents attached to the replying affidavit, I am convinced that the Plaintiffs were aware of the existence of BPRT case no. 141 of 2013 in which the Business Premises Tribunal assessed rent payable by the tenant at ksh.146,000/= per month. I am also convinced that because the tenant did not pay, the assessed rent which took effect from 1<sup>st</sup> March 2013, the 1<sup>st</sup> Defendant was entitled to levy distress for rent arrears and the landlord in the circumstances did not require a court order. There is also doubt whether this court should entertain the suit since the dispute herein is directly and substantially in issue in B.P.R.T case no. 141 of 2013 which was heard and concluded on 3<sup>rd</sup> October 2014.

12. In the end I find the motion dated 14<sup>th</sup> April 2015 to be well founded. Consequently the ruling delivered on 25.2.2015 is set aside and is substituted with an order dismissing the Plaintiffs motion dated 13.11.2014 with costs to the Defendants.

13. In view of the above orders, it means that the Defendants' notice of motion dated 20.11.2014 is with merit. It is allowed with costs.

Dated, signed and delivered in open court this 19<sup>th</sup> Day of June 2015.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

.....for the Defendant