



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL APPEAL NO. 92 OF 2011

MATHEW KIPTOO.....1ST APPELLANT/APPLICANT

JOHN OTIENO OKELLO.....2ND APPELLANT/APPLICANT

VERSUS

RONALD CHELANGAT

TRADING AS YATRIN INVESTMENTS.....RESPONDENT

*(Being an appeal from the Ruling and decision of the Chairman at the Business Premises Tribunal
(Hon. Mochache D.) delivered on 19.05.2011 in Nakuru business Premises Tribunal Case No. 11
and 14B of 2011)*

RULING

1. Before the court are three applications two filed by the Appellants, hereinafter referred to as the “**Tenants**” and one by the Respondent hereinafter referred to as the “**Landlord**” for determination.

The first application is dated 27th February 2015 filed by the Appellants/Tenants under Order 45 rule 6 of the Civil Procedure Rules. It seeks the following orders:

(1) - Spent

(2) That pending the hearing and determination of the application interparties, the court be pleased to stay the execution of its orders dated 18th July 2014 to the extent that the applicants are not to be evicted from their normal place of business situated at Show Park Garage.

(3) That the Honourable Court be pleased to reinstate this appeal.

(4) That upon granting prayer 3 above the court be pleased to reinstate its stay of execution order issued on the 25th November 2011.

(5) That the Honourable Court be pleased to extend time for the applicant's within which to file their Record of Appeal.

It is based on the grounds that the Landlord/Respondent has began demolishing structures on the subject suit property, that the Landlord never at all issued any notice to the Applicants/Tenants about the

demolition of the business structures and that the Respondent/Landlord has always been receiving rent from the Applicants. It is supported by an affidavit sworn by Mathew Kiptoo the 1st Appellant.

2. The second application is dated the 27th March 2015 and is filed by the Landlord/Respondent. It seeks the following orders:

1. Spent

2. That pending the hearing and determination of this application the Appellants/Tenants, their agents, employees and whomsoever acting under their instruction be and are hereby retained from encroaching, trespassing, remaining on and or in any other way interfering with the Respondents suit property described as **Nakuru Municipality block 451/96**.

It is based on grounds that the orders of the court issued on 27th February 2015 were based on material non disclosure and that the Application dated 27th February 2015, and all consequential orders have been overtaken by events. It is supported by the Landlord/Applicants affidavit sworn on even date.

3. The third Application dated 20th April 2015 was filed by the Appellants/Tenants and is brought under Order 40 Rule (3) of the Civil Procedure Code.

The Applicants/Tenants seek leave to institute contempt proceedings against the Respondent/Landlord and its agents, to punish the persons named for disobedience of court orders issued on the 27th February 2015 and extended on the 13th March 2015. These persons are:

(1) Ronald Chelagat,

(2) Benson Wekesa Milimo Advocate

(3) Jeremiah Nandikove Advocate

It is based on the grounds that the Respondent in collusion with its Advocates blatantly disobeyed the court orders above.

4. A brief background of the subject matters leading to the above applications is necessary.

The Appellant is the Landlord of premises known as **Nakuru Municipality Block 451/96** and the Respondents are the Tenants therein pursuant to a Lease Agreement. Sometimes on 22nd March 2010, the Landlord issued a Notice to terminate the tenancy with effect from 1st August 2010. The Tenants challenged the notice in the Business Premises Tribunal by a Reference filed on the 13th August 2010. On the 19th May 2011, the Tribunal upheld the termination notice and ordered the Tenants to vacate and give vacant possession to the Landlord by the 1st June 2011 and leave was granted to the landlord to levy distress for the rent arrears. The tenants were aggrieved by the Business Premises Rent Tribunal (BPRT) ruling and appealed to this court vide this Appeal. They also sought an order of stay of execution pending hearing of the appeal which was granted the 16th May 2014. The court directed the tenants to file precise and proper statements of accounts stating payments made in rents and outstanding arrears. The tenants were also directed to file their Record of Appeal within 30 days of the date of the ruling and take directions within another 30 days failing which the appeal would stand dismissed. That was the status of the matter as at 16th May 2014.

5. The Appellants/Tenants on the 27th February 2015 filed the **First** Application under consideration.

The Tenants did not file their Record of Appeal and reason given by their counsel Mr. Simiyu is that the ruling was given in their absence and the Landlord moved to evict them. They also did not file the statements on rent paid and arrears.

On the 27th February 2015, the court granted temporary orders and stayed eviction of tenants upto the 13th March 2015 when the application was scheduled for interpartes hearing. The orders were extended to the 19th May 2015 to allow the Landlord to file its response (supplementary affidavit).

6. On the 27th March 2015, the second application of even date was filed by the Landlord, seeking orders to restrain the Tenants from encroaching on the Landlord's property. It was stated for the Landlord that the tenants were evicted from the suit property in September 2014 and the tenants were in the process of constructing the property. It was contended that the earlier orders issued on the 27th February 2015 were issued when the tenants had already been evicted, that the court was not furnished all material facts as obtaining on that day. He sought an order to restrain the tenants from further construction pending hearing of the application on the 19th May 2015 with the first application dated 27th February 2015.

7. Mr. Simiyu Advocate for the Tenants submitted that while the two interim orders of injunction were in place, the Landlord on a Sunday, on the 12th April 2015 evicted the tenants and proceeded to lease out the premises to a 3rd party, who has fenced off the premises. It is his submission that the action of eviction of the tenants by the Landlord was a blatant disobedience of court orders and a classic contempt of court orders.

He cited the landlord and its advocates for contempt. In citing the Advocates Mr. Simiyu stated that on the 13th March 2015 in the presence of the Landlords Advocates the orders of injunction were extended, and that the landlords advocates, pursuant to Section 1A and 1B of the Civil Procedure Act, are mandated to assist the court to further the overriding objective of the Act and, to comply with directions and orders of the court. It was his submission that the Advocates Mr Milimo and Mr. Walusale were in court contempt by advising or none advice to the Landlord to obey the court orders.

He submitted that since the Landlords Advocates were present in court when the orders were issued, there was no need to effect personal service upon the landlord. He relied on several authorities, **African Management Communication International Ltd -vs- Joseph Mathenge Mugo (2013) e KLR. And Ibrahim Haji Isaac -vs- Kenya Meat Commission and Another(2-13) e KLR.**

He urged the court to find that the landlord through its proprietor Jeremiah Kore and the mentioned advocates were in contempt of the court orders.

8. For the Landlord through its Advocate Mr. Walusale urged the court to dismiss the two applications. It was his contention that the orders issued by the court where so issued upon none disclosure of material facts pertaining to the landlord-tenant relationship, and that the Tenants misled the court on the status of the suit property at that date, that they had already been evicted.

It was his submission that the Tenants were on the 16th May 2014 granted an order of stay of eviction from the suit premises upon complying with certain conditions as stated earlier, that they should file their Record of Appeal within 30 days of the order and take directions within another 30 days. A further condition was that they file a comprehensive statement of the rent payments and arrears. He submitted that on 5th February 2015 they, Landlords moved to the lower court in **Misc. Civil Application No. 13 of 2015** where an order of eviction against the Tenants was issued and they (the tenants) pursuant to the said order were **evicted on the 8th February 2015**, so that by the 27th February 2015 when they obtained stay orders in this court, eviction had already taken place and the tenants were no longer in the landlords premises, a fact that they withheld from the court. He further submitted that, that being the case, the said orders were overtaken by events and therefore an academic exercise.

Further, the landlord submitted that the (tenants)-Appellants appeal stood dismissed when they failed to file their Record of Appeal 30 days after the orders issued on 16th July 2014 as directed by the court, and as such, there was no competent Appeal on record as at the 16th August 2014 the same having been dismissed. He therefore urged that issued on the 27th March 2015 were discharged after the suit premises

were leased out to a 3rd party who has since fenced it off.

9. The court has considered the background leading to this Appeal by the Tenants/Appellants. The tenants obtained orders for stay of execution of the eviction issued by the Business Premises Rent Tribunal but upon conditions. The tenants failed to comply with the conditions. They did not file their statements of account on rent paid and outstanding arrears. They did not file their Record of Appeal within the time the court allowed them. The court has not been told whether the Appeal has been filed as none is in the court file. The explanation by the Appellants counsel that the orders issued on 15th July 2014 were issued in their absence, and therefore they did not know the terms of the order. The 30 days they were granted lapsed on the 16th August 2014. They were represented by counsel. No explanation was given why they took over seven months to approach the court for stay and other appropriate orders.

10. I must state that a case belongs to the party, not to the advocates. It was incumbent upon the Appellants to follow up their case. It is their averments that the ruling they sought to stay was due for delivery by the court on the 4th April 2014 and that it was not delivered. No explanation was given for the seven months delay. There was no follow up by the applicants. If they did, they would have known when the ruling was delivered. They can therefore not blame anybody for their indolence. Further, even after they discovered that the ruling was delivered on the 16th July 2014, they continued on sleeping on their rights. Nothing was done to mitigate their delay in complying with the court orders. They did not file the Record of Appeal nor the statements of accounts before approaching the court, seven months later.

11. It was stated that the Appellant - tenants were evicted from the suit premises on the 8th February 2015, and the premises leased and fenced off. On the 27th February 2015 when the order of stay of execution was granted, they failed to disclose that very material fact to the court. They misled the court that they were still on the suit premises, when they knew that they had been evicted. It is trite that he who seeks an equitable remedy must come to court with clean hands. It is my finding that this court was misled by the Appellants/Tenants who withheld material facts and knew such order was unenforceable. They also failed to disclose to the court that there was no appeal on record as it had stood dismissed on the 16th August 2014.

12. The court finds that the application dated 27th March 2015 has been overtaken by events as the suit premises has already been leased out to a 3rd party and fenced off before the said date. The Appellants have no access thereto. To issue the orders sought would be an academic exercise.

13. The Appellants/tenants advocates have urged this court to find that the Respondent/Landlord and its two advocates in contempt of the court orders – issued on the 27th February 2015.

The Respondent submitted that the tenants were evicted on the 8th February 2015 before the stay orders were issued. In their submission that by the time the orders of 27th February 2015 were issued, the eviction had already taken place. I have noted that in the Landlord's application dated 27th March 2015, the landlord was seeking orders to restrain the tenants from gaining the re-entry into the premises. It demonstrates that the tenants were already out of the premises. Having found that the Appellants were evicted from the suit premises and the landlord-tenant relationship terminated, it would be futile to grant the orders sought. The court will not grant orders in vain. They will serve no purpose. In any event, the court has already pronounced that no good reasons were advanced to persuade the court as to the delay and indolence by the Appellants in their failure to comply with court orders issued on 16th July 2014 to file the Record of Appeal.

14. This court is alive to the fact that disobedience of a court order, whether right or wrong goes against the fundamentals and principles to the fair administration of justice and rule of law. The court rendered itself, in the case **Africa Management Communication International Limited** (supra) that:

“ the reason why courts will punish for contempt of court is to safeguard the rule of law which is

fundamental in the administration of justice....”

A court order once issued, whether right or wrong in the eyes of a party, binds all and sundry and ought to be obeyed, until it is set aside.

In this matter before me, I find that the Appellants/tenants misled the court to issue orders which they knew could not be enforced or obeyed by the Respondents as and eviction had already taken place. This was dishonest and mischief on their part.

The court finds follows that there were no orders that the landlord could be said to have disobeyed the act the order sought to restrain having taken place earlier. There is no basis upon which the cited contempnors could be found to have disobeyed the court orders.

15. Having stated as above his court finds the applications dated 27th February 2015 and 20th April 2015 by the Appellants without merit, are baseless and an abuse of the court process. They are dismissed with costs to the Respondent.

16. The court had been urged to reinstate the Appeal and enlarge time for filing the Record of Appeal. Having found that the Landlord-Tenant relationship was terminated, it would be futile to grant the orders. The court will not grant orders in vain as they will serve no purpose.

17. The application dated 27th March 2015 and filed by the Respondent has been overtaken by events and therefore of no consequence.

It is so ordered.

Dated, signed and delivered in open court this 23rd day of July 2015

JANET MULWA

JUDGE

In the presence of:

Mr. Walusalo - for Respondent

No appearance - for the Applicant

Court clerk - Linah.