



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CIVIL APPEAL NO. 20 OF 2013

MOHAMED SALIM t/a CHOICE BUTCHERY.....APPELLANT

VERSUS

NASSERPURIA MEMON JAMATRESPONDENT

R U L I N G

MOHAMED SALIM trading as CHOICE BUTCHERY filed this appeal against the judgment of the chair of the Business Premises Rent tribunal (BPRT) Tribunal case No. 133 of 2012.

1. BPRT by that judgment declined to allow appellant to file a late reference to the respondent's notice of termination of tenancy.

2. Appellant on filing this appeal filed a Notice of Motion dated 26th February 2013. By this court's Ruling of 4th October 2013 the court gave appellant conditional stay of execution of BPRT judgment. The condition was that the appellant was to continue to pay monthly rent and not to fall into arrears for more than 15 days. If appellant failed to abide by that condition the court ordered that the stay of execution would automatically be vacated.

3. for consideration in this Ruling is the appellant's Notice of Motion dated 20th January 2015. That application has the following prayers:

(a) That the application be certified as urgent and be heard exparte in the first instance.

(b) That this honorable court do grant temporary orders of stay of execution and orders of stay of execution of warrants dated 7th August 2014 pending interparties hearing of this application herein.

(c) That this honorable court do grant orders for stay of execution pending the hearing and determination of the application herein.

(d) Those costs of this application be in the cause.

4. Prayer (b) above refers to warrants dated 7th August 2014. Those warrants of eviction of the appellant were issued in the Mombasa Chief Magistrate's court in Misc. CMCC No. 166 of 2014. That miscellaneous matter is not the subject of this appeal.

5. The respondent has opposed appellant's Notice of Motion of 20th January 2015. One of its grounds of opposition is that the application offends the doctrine of res judicata because appellant had filed a similar

application before the Mombasa Chief Magistrate court in Misc No 116 of 2014 which application was finally determined.

6. Section 7 of the Civil Procedure Act which sets out the doctrine of res judicata is in the following terms:

7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

7. The application which was finally determined before the Mombasa Chief Magistrate's court was dated 8th August 2014. It sought the following prayers

(a) That the application be certified as urgent and be heard exparte in the 1st instance.

(b) That this honourable court do grant temporary orders for stay of execution pending inteparties hearing of this application herein.

(c) That this honourable court do grant orders for stay of execution pending the hearing and determination of the application herein.

(d) That costs of this application be provided for.

8. The order that was targeted by prayer (b) above was the warrants issued by the Mombasa Chief Magistrate's court on 7th August 2014. The chief magistrate's court after hearing that application of 8th August 2014 by its Ruling of 30th January 2015 dismissed the same. It seems it is after that dismissal that appellants filed in this matter the Notice of Motion dated 20th January 2015 but, and it is important to note this, it was filed on 30th January 2015. It is also important to note that the same affidavit that supported the application before the Chief Magistrate was also word for word the one in support of the application before this court the application dated 20th January 2015.

9. There is no doubt when one considers all the above the obvious conclusion is that the Notice of Motion dated 20th January 2015 is res judicata. Appellant is inviting this court to entertain the same application he lost before the Chief Magistrate is filed in an appeal which challenges the magistrates ruling in Misc. No 116 of 2014 see order 42 Rule 6(1) of the Civil Procedure Rules.

10. The respondents ground of opposition that the Notice of Motion of 20th January 2015 is res judicata is upheld. Although that holding is sufficient to deal with appellants Notice of Motion I will proceed to consider other grounds raised by respondent.

11. The respondent also opposed the application on the ground that appellant breached the conditional stay of execution issued by this court. That the appellant failed to pay his rent when due and accordingly the stay order was vacated.

12. The conditional stay order was issued by this court on 4th October 2013. It following from October 2013 on ward and until this appeal is heard appellant was required to pay the monthly rent no later than 15th day of each month. I have examined appellants rent receipts attached to his affidavit dated 20th January 2015. It is obvious from those receipts that appellant had rent arrears from November 2013. The receipt for that month shows that the rent paid by the appellant reflected rent balance of October and balance of November 2013. The same is seen in respect of rent receipt for October 2013, that payment was in respect of balance rent for August and September 2013. Appellant again seems to have fallen into

arrears in March April and May 2014.

13. What is noteworthy is that appellant's tenancy has been plagued by delay of rent payments. This was admitted by his and then advocate Asige Kevenge & Anyanzwa by submissions filed in court in this matter on 17th May 2013. At paragraph 3(ii) of those submission the advocate stated:

“When the land lord (the respondent) advocates served the appellant with the notice of termination, the appellant promptly paid all the then outstanding rents together with the landlords advocate fees”.

14. I find appellant breached the condition of stay of execution and on that ground the Notice of Motion dated 20th January 2015 fails.

15. Respondents third ground of opposition is based on the present appellant's advocate's failure to file and serve a notice of change of advocates as required under Order 9 Rules 5 and 6 of the Civil Procedure Rules. Those Rules require an advocate taking over the conduct of a matter from a previous advocate to firstly file a notice of change of advocate and secondly to serve all parties in the action and the previous advocate with that notice.

16. In this case an order was issued by this court on 28th January 2015 granting leave to the firm of Y.A Ali and Co. advocates to come on record for the appellant instead of the firm of Asige Kevenge and Anyanzwa advocates. Even though leave was granted as stated above the firm of Y.A Ali and Co. Advocate did not file a notice of change of advocates and required under Rule 5 of Order 9 until 12th May 2015 and there is no evidence in the file that notice of change of advocates was served on the respondents advocate or the previous advocate.

17. What is the consequence of that delayed filing the notice of change of advocates and failure to serve that a notice of change of advocates? In my view it is fatal to any application or document filed by an advocate who has not filed their notice of change of advocate. It is not enough for the firm of Y.A Ali and Co. advocates to rely on the order granting them leave to take over the conduct of appellant's case. The Rules of procedure specifically required a firm to file a notice of change of advocate and sever other parties as required under Rule 6.

18. Appellant cannot seek to shield himself from the requirement of Order 9 Rules 5 and 6 by relying on Article 159 (2) (d) of the constitution. If that was to be allowed then the end result would be we do away with Rules of procedure and each party be at liberty to adapt whatever procedure he desires. That would not be just. On this I wish to rely wholly on the court of appeals holding in the case **TELKOM KENYA LIMUTED V JONCHANDA (2014) eKLR** as follows:

The respondents are seeking umbrage under Article 159 (20) (d) of the Constitution which provides that justice shall be administered without undue regard to procedural technicalities. It does not avail them. We are content to state that the Constitutional provision is not meant to whitewash every procedural failing and it is not meant to place procedural rules at naught. In fact, what has befallen the respondents is proof, if any were needed, that there is great utility in complying with the rules of procedure. Such compliance is neither anathema nor antithetical to the attainment of substantive justice. As has been said before, the rules serve as handmaidens of the lady justice.

CONCLUSION

19. For the reasons given above I do hereby grant the following orders:

(a) The Notice of Motion dated 20th January 2015 is dismissed with costs.

(b) The stay of execution is issued previously in this matter is hereby vacated.

Dated and delivered in Mombasa this 21st day of August, 2015

MARY KASANGO

JUDGE

21.8.2015

Coram

Before Justice Mary Kasango

C/Assistant-

For Appellant:

For Respondent:

Court

Ruling delivered in their presence /absence in open court.

MARY KASANGO

JUDGE