



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL APPEAL NO 181 OF 2010**

**KIMEU KIETI & 184 OTHERS.....APPELLANT**

**VERSUS**

**KENYA MEAT COMMISSION.....RESPONDENT**

**(An Appeal arising out of the Ruling of S.M Mungai SPM delivered on 10<sup>th</sup> December 2010 in Machakos Chief Magistrate's Court Civil Case No. 834 of 1995)**

**JUDGMENT**

The Appellants through a Memorandum of Appeal filed in Court dated 2<sup>nd</sup> August 2011 have appealed against the ruling of the Honourable Senior Principal Magistrate S. M. Mwangi, delivered on 10<sup>th</sup> December 2010 in Machakos Chief Magistrate's Court Civil Case No. 834 of 1995. The grounds of appeal are as follows:

1. That the learned trial magistrate erred in law and in fact by concluding that there existed a tenancy agreement between the Appellants and Respondent in which the Appellants were required to pay rent.
2. That the learned trial magistrate erred in law and in fact by deciding that the Appellants ought to pay rent.
3. That the learned trial magistrate erred in law and in fact by granting orders varying the injunction orders despite there being no new facts.
4. That the learned trial magistrate erred in law and in fact in failing to consider that the Appellants and the Respondent had entered into a consent that the Appellants would continue staying at the suit premises until all their dues and benefits were paid.
5. That the learned trial magistrate erred in law and in fact by finding that the Respondent were incurring losses from unpaid rent despite there being no agreement to pay rent but a housing provision scheme agreement.
6. That the learned trial magistrate erred in law and in fact in basing his ruling on matters not pleaded and extraneous strange information.
7. That the learned trial magistrate erred in law and in fact by failing to appreciate that the Appellants were given houses under the housing scheme but not as tenants of the Respondent.
8. That the trial magistrate failed to appreciate the fact that the Respondent owe the Appellants dues in terms of benefit which is subject to Civil Suit No. 834 of 1995.
9. That the learned trial magistrate erred in law and in fact in finding that the Appellants had obtained the injunction order by not stating material facts.
10. That the learned trial magistrate erred in law and in fact by failing to find that rent had been agreed on by parties and no amount was ever availed.
11. That the learned trial magistrate erred in law and in fact by finding that it was the applicants who

- were in contempt by not paying rent.
12. That the learned trial magistrate erred in law and in fact by directing the Appellants to validate their stay at the Respondent despite there being consent on record and the Appellants being housed under the Respondent's housing scheme.
  13. That the learned trial magistrate erred in law and in fact by giving final order on an interim application.
  14. That the learned trial magistrate erred in law and in fact in not relying on any authority and/or basis whilst giving his ruling.

The Appellants pray for orders that this appeal be allowed with costs and that

the ruling of the lower court be set aside and/or be varied. Further, that this Court be pleased to make such further and other orders as it may deem just in the circumstances of the case.

### **The Facts**

The brief facts of this Appeal are that the Appellants who were the original Plaintiffs in the trial court were employees of, and were housed by the Respondent, which was the original Defendant. The Respondent was closed down for purposes of rehabilitation in December 1993. The Appellants claimed that from that date onward they had not been paid their dues, and that it was mutually agreed that once paid, the Appellants would vacate the staff quarters. The Appellants filed a suit by way of a Plaint in the lower court dated 29<sup>th</sup> August 1995 which was variously amended, seeking *inter alia* an injunction against the Respondent to restrain it from evicting them from the staff houses, and from allocating the said houses occupied by the Appellants to any other person.

The Appellants filed an application simultaneously with their suit by way of Chamber Summons dated 29<sup>th</sup> August 1995, seeking the same injunction orders. This application was heard inter-parties on 15<sup>th</sup> November 1995 and the trial court granted the Appellants the injunction orders they sought. The Respondent then subsequently filed a Notice of Motion Application dated 21<sup>st</sup> May 2009 seeking orders that the injunction orders issued on 15<sup>th</sup> November 1995 be set aside or varied. The said Notice of Motion was heard and determined by the trial magistrate in a ruling delivered on 20<sup>th</sup> December 2010, in which he held that each Appellant pays the outstanding rent arrears and continue to pay the rent as and when it is due, to justify the continued operation of the injunction. Further, that if they failed to duly comply within 40 days from the date of the ruling, the injunction dated 15<sup>th</sup> November 1995 would stand automatically vacated.

It is this ruling that the Appellants have now appealed against.

### **The Submissions**

This appeal was canvassed by way of written submissions. The Appellant's counsel Wangalwa Oundo & Co Advocates in submissions dated 21<sup>st</sup> November 2014 argued that no evidence was placed before the learned magistrate to show that the Appellants and the Respondent herein had entered into a tenancy agreement. In addition that if such evidence existed it was not exhibited. The Appellants contended that the only pleading on this issue of tenancy agreement was an averment by the Respondent that the Appellants had been paying rent in pursuance of a tenancy agreement between them, and a sample agreement by one of the Appellants that was attached to their supporting affidavit.

However, that one copy of the exhibited tenancy agreement was not a basis to hold all the 184 Appellants liable to pay rent, since a tenancy agreement being a contract creates contractual obligations between the parties who sign it. Further, that the learned magistrate in his ruling made the finding that the Appellants used to pay rent for its houses prior to securing the injunction based on the said tenancy agreement.

It was the submission by the Appellants that this finding is not only unlawful but totally unacceptable, as to bind persons to perform an obligation which has a monetary liability without their consent, which is

oppressive and in violation of those persons fundamental rights.

The Appellants further submitted that the position taken by the learned magistrate when he varied the injunctive orders was in complete derogation with the well-known and settled principles of variation of injunctions. The Appellants relied on the following principles upon which a court can use as a basis of varying injunctions.

1. The applicant must show *inter alia* that the conditions prevailing at the time of making the order have changed or are different from those prevailing now.
2. There is justification and necessity to set aside an interlocutory injunction.
3. The applicant shows that prejudice has been caused to the applicant.
4. The interlocutory injunction is obtained by misrepresentation or concealment of material facts.

Further, that order 39 Rule 4 & 9 (now Order 40 Rule 7) of the Civil Procedure Rules is very clear that any order for an injunction may be discharged, or varied or set aside by the court on application made thereto by any party dissatisfied with such order. The Appellant cited the decisions in **Lifico Trust Registered vs Patel, [1985] KLR 538** and in **Ragui vs Barclays Bank Ltd [Ltd]( 2002) 1KLR 647** in support of his arguments.

It was the Appellant's argument that these principles were not presented before the trial court, and that in any event the final orders made by the trial Magistrate were neither pleaded in the Appellants' plaint dated 29<sup>th</sup> August 1995 or the Respondent's statement of defence. Further, that none of the parties pleaded or led evidence in respect of the issue of rent owed or the alleged tenancy agreement, and that the issue of rent would not have amounted to a new fact since the annexed tenancy agreement was dated 1<sup>st</sup> July 1994. It was argued that if the Respondent knew it had this tenancy agreement subsisting at the time of canvassing the injunction application, it ought to have brought it up when the matter was being heard on 15<sup>th</sup> November 1995.

The Appellants also submitted that the learned magistrate erred when he purported to anchor his ruling on statements attributed to by Lenaola J in his ruling delivered on 26<sup>th</sup> November 2009 that it is the Appellants who were in contempt by not paying rent for the premises occupied solely on account of the injunction order. It was their contention that that particular statement was made '*obiter dicta*' by the Honourable Judge when he was hearing contempt proceedings, and that there were no questions regarding the landlord-tenancy relationship brought before him for determination.

It was further submitted by the Appellants that since there is evidence that the parties had entered into a consent which consent had not been set aside or varied, the learned magistrate could not *suo-moto* purport to set aside the terms of that consent, and proceed to direct the Appellants to regularize their tenancy by paying an un-determined sum of rent which the sum was not even quantified.

In addition, that the ruling did not conform with the requirements of Order 45 Rule 1 and 2 of the Civil Procedure Rules as the learned magistrate's findings were not based on any principles of review. Lastly, the Appellants submitted that the Meat Control Act, which is the parent Act which formally constituted the Respondent, does not empower it to engage in the business of renting and offering for rents its premises.

The Respondent's Advocate's, Mulwa & Mulwa Advocates filed submissions dated 30<sup>th</sup> July 2015, in which they argued that it was clearly shown that the houses in question were meant to house the employees of the respondent based on a tenancy agreement. Further, that a sample tenancy agreement was availed and that unless the Appellants are saying they are occupying the houses on different arrangements, nothing would have been easier than adducing evidence on those terms. Therefore, that the trial court was correct to find that they were bound under the tenancy agreement.

The Respondent also submitted that the issue of paying rent was addressed by Lenaola J. in Machakos High Court Misc. Application No. 143 of 2009 between the Appellants herein and the Respondent.

Further, that the Appellants in the said proceedings were seeking to commit officers of the Respondent to civil jail for contempt of court after they issued notices to Appellants to pay rent or vacate the premises. Further, that the court was of the view that the notices were proper and the Appellants were in contempt by not paying rent for premises occupied solely on account of Court Order.

The Respondent urged that the Appellants did not appeal against the foregoing ruling. Further, that the same was brought to the attention of the trial court, and that the trial magistrate did the right thing; to agree with a decision of a superior court which was binding on him when he held the Appellants were supposed to pay rent.

The Respondent also submitted that the Appellants allude to a consent between the parties, which consent was however not availed to court. Further, that the Appellants had an obligation to place all the facts before the court, and that they failed to lead evidence on what terms they were then occupying the houses. It was contended that in the application before the subordinate court dated 29<sup>th</sup> August 1995, the Appellants did not seek to stop the Respondent from demanding rent from them. It was the Respondent's view that the trial court acted on the correct principles when it varied the orders as it was clearly shown the orders were being abused.

### **The Issues and Determination**

I have read and carefully considered the pleadings, evidence and submissions by the parties to this application. The issue for determination is whether the injunction orders granted on 15<sup>th</sup> November 1995 by the trial court should be varied, set aside or discharged. A court has discretion, on an application by any party dissatisfied by that order, to discharge or vary an injunction order pursuant to Order 40 Rule 7 of the Civil Procedure Rules. The essence of the provisions for discharging an injunction order was stated in the case of **Mobile Kitale Service Station – Vs – Mobil Oil Kenya Limited & Another (2004) 1 KLR Pg. 1** wherein the Court held as follows:-

“1. An interlocutory injunction is given on the Court's understanding that the defendant is trampling in the rights of the Plaintiff.

2. An interlocutory injunction, being an equitable remedy, would be taken away (discharged) where it is shown that the person's conduct with respect to matters pertinent to the suit does not meet the approval of the Court which granted the orders which is the subject matter.

3. The orders of injunction cannot be used to intimidate and oppress another party. It is a weapon only meant for a specific purpose – to shield the party against violation of his rights or threatened violation of the legal rights of the person seeking it....

...7. The law permits that before the court can exercise its discretion, it has to differentiate what is shadow and what is substance in order to exercise the discretion judicially. However, a Court can only revert to the discretion when there are valid reasons, excuses, mistakes and errors...but when there is no proper explanation, then the court's power are limited....”

It is also settled law that an interlocutory injunction will be set aside or discharged if it has been obtained by means of misrepresentation or concealment of the material facts. See in this regard **Ragui v Barclays Bank of Kenya Ltd [2002] 1KLR 647** and **Star Publication Limited & Another vs Ahmednasir Abdullahi & 5 Others [2015] ECLR** .

Following these principles, the question in this appeal therefore is whether there are any changed circumstances, misrepresentation by the Appellants and/or any injustice occasioned to the Respondent from the injunction orders issued by the trial court on 15<sup>th</sup> November 1995. In his ruling the learned magistrate found as follows in this regard:

**From the foregoing it is not in dispute that the Plaintiffs stopped paying the rent due to the Defendant after securing the injunction on 15/11/1995. The Defendant relies on the copy of the**

**tenancy agreement (Annex 2) as proof that indeed the Plaintiffs used to pay rent for its houses prior to securing the injunction.**

**The Plaintiffs in their replying affidavit did not categorically disown or deny being party to the tenancy agreements. They Only deponed that he copy annexed was unclear(sic) vague and does not make sense. That does not amount to a claim of being a stranger to the same. The inference one gets from their affidavit is that they should not be called upon to pay their dues.**

**Turning to the order of injunction the same categorically and unambiguously only barred the defendant from evicting the Plaintiffs from the residential premises which they were occupying and further from allocating the premises to other persons.**

**The issue of rent was not canvassed to justify non-payment of the rent relying on the order aforesaid. They aver that the defendants have not presented this application with clean hands for failing to pay them their dues. So far no order has been made directing the defendant to pay any dues. The Plaintiffs are yet to prosecute the suit.**

**The scenario in this suit was aptly captured by the superior court in its ruling dated 26/11/2009 while the Plaintiffs attempted to have the defendants official committed for contempt.**

**The Honourable Judge commented that it is the Plaintiffs who are in contempt by not paying rent for premises occupied solely on account of the said court order. I must concur with the superior court...”**

I have perused the court record of the lower court. It is not in dispute that the Respondent alleged in its application in the trial court that it wanted to set aside and discharge the injunction orders because the Appellants had stopped paying rent since the injunction orders were issued, and it brought evidence of one tenancy agreement entered into with one of the Appellants dated 1<sup>st</sup> July 2014 to show that the Appellants were previously paying rent.

I agree with the Appellants that this annexure of a sample agreement was not sufficient to demonstrate a contractual agreement between all the Appellants and Respondent. More so, even if it could be argued that the sample agreement was evidence of payment of rent before the issue of the injunction orders on 15<sup>th</sup> November 1995, it cannot be said to be evidence of the allegation that the Appellants had stopped paying the said rent after the injunction orders were granted. To this extent the trial magistrate did err in finding that the said one sample tenancy agreement met the threshold of *prima facie* evidence of the Appellants paying any rent or stopping to pay rent.

This finding notwithstanding, I agree with the learned magistrate's finding that the orders granted on 15<sup>th</sup> November 1995 did not injunct the Respondent from demanding rent. This position was confirmed in the ruling by Lenaola J delivered in Machakos High Court Misc. Application No. 143 of 2009 on 26<sup>th</sup> November 2009 that demand for rent by the Respondent's agent was not being in contempt of the said orders. The said demand is not disputed and the Appellants did attach copies of the demand letters to their replying affidavit to the Respondent's Notice of Motion of 21<sup>st</sup> May 2009. In addition the Appellants did not provide any evidence in the lower court of the alleged consent allowing them to stay in the Respondent's houses. The fact that there was a demand made for rent by the Respondent was in my view a material change of circumstance that merited the trial Court to review the injunction orders it had granted.

In addition, it is not in dispute that the Appellants are no longer employees of the Respondent. At the time of the issue of the injunction orders on 15<sup>th</sup> November 1995 it was alleged that there was some terminal benefits due to them from the Respondent. However, 14 years down the line in May 2009, their dues had not been determined and they were still in possession of the Respondent's houses. It must always be remembered that an injunction is an equitable remedy, and he who comes to equity must also do equity.

In addition, delay defeats equity. The delay in prosecuting the suit in the trial court by the Appellants while still enjoying the benefits of the injunction orders for 14 years is in my view inequitable. It is thus my finding for this reason that *the sustenance of the injunction orders issued on 15<sup>th</sup> November 1995 on their original terms will cause an injustice in terms of the loss that the Respondent is likely to incur, and as the said orders are now serving a different purpose altogether from the original intention of granting equitable relief.*

I am persuaded in this regard by the decision in **Reef Building Systems Ltd vs NCC HCCC 1357/01 (2001) LLR.** wherein Ringera J.(as he then was) held as follows:-

**“An order of injunction is an equitable relief issued to prevent the ends of justice from being defeated, it may be discharged or varied or set aside if it is shown that it is contrary to the ends of justice to retain it in force. Such would be the case, I venture to think, if it is to show, for example, that the order was irregularly obtained, or there is subsequent change in circumstances that it was unjust to maintain it in force, or it was otherwise unjust and inequitable to let the order remain”.**

I am however constrained to vary the orders issued by the trial magistrate on 20<sup>th</sup> December 2010, in light of insufficient evidence as to the existence of tenancy agreements between the Appellants and the Respondent, and what rent if any, was payable by the Appellants. In the circumstances, the Appellants Appeal only partially succeeds. I accordingly vary the orders granted by the trial Court on 20<sup>th</sup> December 2010 to the following extent:

1. The injunction orders issued on 15<sup>th</sup> November 1995 by the trial court shall subsist only on condition that the Appellants shall, within six (6) months of the date of this judgment, set their suit in the trial court for expeditious hearing and determination of the issues it raises
2. That upon default and/or non-compliance by the Appellants with the condition in order (1) hereinabove, the injunction orders issued on 15<sup>th</sup> November 1995 shall stand automatically vacated after the expiry of six (6) months from the date of this judgment
3. Each Party shall meet their respective costs of the Appeal.

It is so ordered.

**DATED AT MACHAKOS THIS 27<sup>TH</sup> DAY OF OCTOBER 2015.**

**P. NYAMWEYA**

**JUDGE**