



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**JUDICIAL REVIEW NO. 2 OF 2013**

**IN THE MATTER OF NAKURU MISC. CIVIL APPLICATION NO. 170 OF 2012  
(SAMUEL WARIBE MBURU & ANOTHER VS WILSON KABIRA NDUNG'U)**

**IN THE MATTER OF AN APPLICATION BY:**

REPUBLIC.....APPLICANT

**VERSUS**

THE CHIEF MAGISTRATE'S COURT AT NAKURU.....RESPONDENT

**AND**

SAMUEL WARIBE MBURU.....1<sup>ST</sup> INTERESTED PARTY

ROSANGILA AKAI LENANGIDA.....2<sup>ND</sup> INTERESTED PARTY

**EX-PARTE**

WILSON KABIRA NDUNGU.....SUBJECT

**RULING**

1. By the Notice of Motion dated 6<sup>th</sup> February 2013 and filed on 13<sup>th</sup> February 2013, the ex-parte applicant sought an order of *certiorari* to remove into this court for the purposes of being quashed and to quash the orders made by the Hon. Senior Principle Magistrate Mr. J Njoroge on 19<sup>th</sup> December 2012 in the Nakuru Chief Magistrate's Court Misc. Application No. 170 of 2012, SAMUEL WARIBE MBURU & ANOTHER VS. WISLON KABIRA NDUNGU. He also prayed that the costs of this application be borne by the interested parties.
2. This application was filed under the provisions of Order 53 of the Civil Procedure Rules, 2010, and Sections 8 and 9 of the Law Reform Act, (*Cap 26 Laws of Kenya*), and pursuant to the leave granted by this court on 1<sup>st</sup> February 2013. The application is supported by the Verifying Affidavit sworn on 1<sup>st</sup> February 2013 and the Statement of Facts also dated 1<sup>st</sup> February 2013.
3. The *ex-parte* applicant's case is premised upon the grounds that the decision complained of was made in excess of jurisdiction and without regard to due process of law and practice. He alleges that the learned magistrate erred in and acted outside his jurisdiction when he failed to adhere to the principles of natural justice in determining the issues between the parties and that he acted arbitrarily in overlooking and disregarding the binding doctrine of *stare decisis*.
4. In response to the application, the interested parties filed a Replying Affidavit sworn by Samuel Waribe Mburu on 12<sup>th</sup> March 2013. It was their contention that the present application is an abuse

of the court process because the orders sought have already been overtaken by events. The *ex-parte* Applicant has already been evicted from the premises and the same leased to a third party. Further the *ex-parte* Applicant was accused of coming to court with unclean hands, knowing well that he had been in rent arrears for four months, and was therefore properly evicted in terms of clause six of their lease agreement.

## **SUBMISSIONS**

5. By the consent of the parties, the application was determined by way of written submissions. In the submissions filed on behalf of the *ex-parte* applicant on 23<sup>rd</sup> May 2013, it was contended that the learned magistrate acted *ultra vires* his powers when he made substantive orders on 19<sup>th</sup> December 2013 without giving the applicant a chance to present his case.
6. Counsel also submitted that this decision which was made without due compliance with the law, is amenable for review. The existence of other remedies, like appeal or review, is no bar to the institution of these proceedings.
7. The Respondents' filed their written submissions on 9<sup>th</sup> July 2014. they contended that the orders sought are not attainable at this juncture because they have already been overtaken by events. The *ex-parte* applicant had since vacated the suit premises, and the same leased to a third party. Further the proceedings are an abuse of the court process, as there is pending before the lower court, an application by the *ex-parte* applicant to set aside the orders complained of.

## **DETERMINATION**

8. It was not disputed that at all material time hereto, the *ex-parte* applicant had leased from the interested parties the property known as as **NAKURU MUNICIPALITY BLOCK 5/35** on which he set up his businesses. He alleged that on 25<sup>th</sup> January 2013, his premises were invaded by Lifewood Traders Auctioneers Limited acting on the instructions of the interested parties. They proceeded to attach his goods and left behind a notification that these goods would be sold by way of public auction on an unknown date.
9. He later learnt that the interested parties had filed a suit before the Chief Magistrate's Court, Nakuru CM MISC APPL. NO. 170 of 2012. The said auctioneers were acting pursuant to an order that had been made in that suit on 19<sup>th</sup> December 2012 in favour of the interested parties, in the following terms-

***(a) That this Honourable Court be and is hereby pleased to grant leave to the Landlords/Applicants to levy distress on Wilson Kabira Ndungu for arrears of rent in the sum of Kshs. 280,000/= being unpaid rent for the period from September 2012 to December 2012.***

***(b) That this Honourable Court be and is hereby pleased to grant a breaking order for purposes of levying distress.***

***(c) That this Honourable Court be and is hereby pleased to grant an eviction order against Wilson Kabira Ndungu on the parcel of land known as NAKURU MUNICIPALITY BLOCK 5/35.***

***(d) That this Honourable Court be pleased and is hereby pleased to order the OCS Nakuru Central Police Station to provide security to the Landlord in their exercise of eviction and/or levying distress against the said Wilson Kabira Ndungu on the said parcel of land known as NAKURU MUNICIPALITY BLOCK 5/35.***

10. The *ex-parte* applicant has asked this court to quash this decision on the basis that it was made *ultra vires* and in disregard to the rules of natural justice. The remedy sought by the Applicant is an order of "*certiorari*" to call up and quash the decision of the court.
11. It is said that Judicial Review is not concerned with the merits of the decision, and the court may

not inquire into the reasons but only examine the decision-making process. This court cannot substitute its own decision merely on the basis that it would have arrived at a different finding on the same facts. The suit or order of certiorari lies for illegality or excess of jurisdiction by the lower court or inferior tribunal.

12. The question here is whether the lower court acted illegally, that is to say contrary to some law or without or in excess of jurisdiction. The decision giving rise to this application was made in Nakuru Chief Magistrate's Court Misc. Application No. 170 of 2012 and sought leave of court to levy distress and eviction of the ex parte Applicant for arrears of rent in excess of Ksh 280,000/= being unpaid rent for a period of four months from September 2012 to December 2012, (*inclusive*).
13. According to the pleadings accompanying the Application for leave to commence judicial review proceedings (*the Statement of Facts, and the Affidavit Verifying the Facts both dated and sworn on 1st February 2013*), the dispute arose out of the default by the ex parte Applicant in payment of rent as stipulated in an agreement described as a Lease Agreement said to have been registered on 27th July 2011 with a commencement date of 1st February 2011, but otherwise undated.
14. Under Clause 6(a) of the said Agreement the ex parte Applicant covenanted as follows -

***“6(a). If the rent hereby reserved or any part thereof shall at any time be unpaid for FOURTEEN 14 DAYS after becoming payable (whether lawfully demanded or not), or if any of the covenants on the part of the Lessee herein contained shall not be performed or observed on the part of the Lessee herein contained then and in any of the said cases it shall be lawful for the lessor to re-enter upon the premises or any part thereof in the name of the whole and thereupon this lease shall determine absolutely but without prejudice to the right of action of the Lessor in respect of any antecedent breach of any of the covenants on the part of the Lessee....”***

15. There is no denial that the ex parte applicant as Lessee was in breach of a cardinal term of the Lease Agreement. He defaulted in payment of the rent, not for fourteen (14) days, but for four months, accumulating a colossal sum of Ksh 200,000/= in arrears.
16. Under Section 3 of the Distress for Rent Act, (*Cap. 293, Laws of Kenya*), the Interested Party (*the Lessor*), would merely have instructed a Licenced Auctioneer in writing to levy distress for rent against the Lessee, lock and cart away some or all of the Lessee's chattels to recover the arrears of rent. Citing, F.A. Fraser, **History of the Law of Distress (1931 Edn) Blacks Law Dictionary 8th Edn. Defines “Distress” as -**

***“the taking either with legal process, or extra-judicially subject to the performance of some necessary condition precedent, by a private individual or by an officer of the court of a personal chattel, out of the possession of a wrongdoer or defaulter and into the custody of the law to be impounded as a pledge in order to bring pressure to bear upon the owner of the chattel to redress an injury, or perform a duty, or to satisfy a lawful demand, subject however, to the right of the owner to have the chattel returned to him, (up) on the injury being redressed or the duty performed, or the demand satisfied or on the security being given so to do.”***

17. In this case, notwithstanding the fact that he was in arrears, the Applicant made promises to pay which he did not keep. According to the Replying Affidavit of the Interested Party (*the Lessor*), the Applicant even issued a cheque of shs 80,000/= on 14th December 2013 in part payment which cheque was returned unpaid with an endorsement **“Insufficient Funds – Refer to Drawer”**. Besides as at 13th February 2014, the Applicant was in arrears in the sum of Ksh 450,000/=.
18. Clearly therefore, under the Lease Agreement, the Interested Party was at liberty to instruct in writing a licensed auctioneer to levy distress against the Applicant's chattels. The Interested Party had also the right to re-enter the premises. That however would not have been due process. The Interested Party chose due process by seeking the court's intervention by way of a Miscellaneous Application to get an order of eviction, with the aid of Police to ensure security of the persons levying distress against the Applicant. That process was within the legal parameters

of the Distress for Rent Act aforesaid, and also within the jurisdiction of the court. There is no legal basis for saying otherwise.

19. For those reasons, I find that the Applicant's Notice of Motion dated 6th January 2013 and filed on February 2013 has no merit at all. It is dismissed with costs to the Interested Party.

**Dated, signed and delivered at Nakuru this 31<sup>st</sup> day of October, 2014**

**M. J. ANYARA EMUKULE**

**JUDGE**