



Editorial Summary

1. *Civil Appeal*
2. *Civil Practice and Procedure*
3. *Subject Tribunal Court Case*

BUSINESS PREMISES RENT TRIBUNAL

- 3.1 *Landlord/Tenant relationship*
- 3.2 *Tenant in arrears of rent*
- 3.3 *(Related HCCA 837/10 ought to determine termination of tenancy)*
- 3.4 *Judgment dated 3rd June 2011 by the Business Premises Rent Tribunal, that there be termination of tenancy to vacate the premises.*
- 3.5 *Levying of distress Section 12(1)(b) to recover outstanding arrears.*
- 3.6 *OCS Industrial Area police to ensure Compliance.*
- 3.7 *Tenant files appeal and application 9th June 2011:*
 - a) *Stay of execution pending the hearing of application, granted by duty Judge (Mwera J) (14th June 2011)*
 - b) *Interparte hearing 26th July 2011 but*
 - c) *Respondent/landlord served – absent*
 - d) *Held stay of execution granted till determination of appeal (Angawa J)*
- 3.8 *Tenant returns to High Court with a new application dated 19th September 2011 seeking orders to evict the respondent/landlord, agents and or servants from suit premises. LR 209/3704 Nairobi South B break in order alternatively goods attached and or sold to returned or payment be made to Ksh. 10,680,000/-*
- 3.9 *Advocate for landlord present (by chance) before Duty Judge when application 19th September 2011 to be heard.*
- 3.10 *Tenant admits no service made on earlier orders of 14th June 2011.*
- 3.11 *Landlord files application 2nd December 2011 seeking orders to set aside orders of 14th*

June 2011 for stay.

3.12 *The landlord has leased the business premises to a third party.*

3.13 *Application to enjoin the third party (new tenant) granted (18th January 2012)*

3.14 *Application of 2nd December 2011 amended to include 3rd party now dated 25th January 2012*

4. *Application 25th January 2012*

4.1 *To set aside orders of 14th June 2011.*

4.2 *Reasons:*

a) *There was never any service upon the landlord.*

b) *The process server had no license to practice as a process server.*

4.3 *3rd party agrees with applicant.*

Service was a nullity.

5. *In reply:*

5.1 *Appellant/respondent in application 25th January 2012 had been acting in person.*

5.2 *Unable to know if process server was licensed or not.*

5.3 *Application opposed. Orders should not be set aside. Appeal be heard in full.*

6. *Held:*

i) *Application granted.*

ii) *Orders 14th June 2011 set aside on grounds no service effected.*

iii) *Application.*

7. *Case Law:*

8. *Advocates :*

i) *G T Mugambi holding brief for M/s Mugambi & Kariuki & Co Advocates for respondent/landlord/applicant*

ii) *G Kahuthu instructed by M/s Kahuthu & Kahuthu & Co Advocates for appellant/tenant/respondent*

iii) *S N Wachira instructed by Njoroge Wachira & Co Advocates for*

interested party

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CIVIL APPEAL NO. 253 OF 2011

BERNARD NYAGA KIMOTHO APPELLANT/

ORIGINAL TENANT/RESPONDENT

VERSUS

NJUGUNA DANIEL NGANGA RESPONDENT/

ORIGINAL LANDLORD/APPLICANT

IGNATIUS MITHAMO NJERU INTERESTED

PARTY

(Being an appeal from the Judgment and decree of Hon.D Mochache Esq, Chairperson Business Premises Rent Tribunal in Case No. 966 of 2009 dated 3rd June 2011 at Nairobi)

RULING

Application to set aside orders of

Stay of execution issued on

14th June 2011

I. INTRODUCTION

1. This is a most unusual matter.
2. The appellant/tenant filed an appeal in this High Court of Kenya on the 10th June 2011, upon being dissatisfied with the decision of the business Premises Rent Tribunal delivered on 3rd June 2011.
3. The tribunal, deals with controlled tenancy disputes. The Chairperson had given orders, that the tenant be evicted from the premises. Together with the appeal, the tenant filed on application dated 9th June 2011 under a certificate of urgency seeking orders that there be ***“a stay of execution of the judgment and decree of the Business Premises Rent Tribunal made on 3rd June 2011 in Tribunal Case No. 966/09”***
4. Exparte orders were granted by the duty judge (Mwera J) on the 14th June 2011, giving the tenant protection not to be evicted out of the premises, nor levying of distress should not take place. The tenant was instructed to serve the application and come back to court for an interparte hearing.
5. The tenant returned to this court on the 26th July 2011 and informed the court (Ang’awa J) that he had effected service upon the landlord. An affidavit of services was duly filed.
6. The case was called out of court but the landlord was absent. Under Order 12 and Order 42 r 20 Civil Procedure Rules, the application proceeded in the absence of the landlord.
7. By a ruling of this court, the orders issued on 14th June 2011 was confirmed on 27th July 2011.
8. The tenant then returned to court a third time, this time with a second new application dated 19th

September 2011 seeking orders that:

8.1 Whereas there is an order of stay of execution in force, the respondent [landlord] had refused to comply with the court order.

8.2 “a _____

b) That this court be pleased to issue an eviction and execution order against the respondent, his agent and or servants in respect of this suit premises known as LR 209/3704 situated within Nairobi South B

c) That this Honourable court be pleased to issue a Break – in open order.”

9. This ex parte application prayed that the landlord be restrained from selling the tenant’s goods or alternatively the tenant be paid the sum of Ksh. 10,680,000/- being value of goods taken away from the suit premises.

10. The application came ex parte before the duty judge on 20th September 2011. The advocate for the landlord becoming aware of the matter, by chance, was in attendance and was able to notify the duty judge that the landlord was never served with the earlier order of 14th June 2011.

11. Directions were issued that the application be fixed for hearing within 28 days. The landlord’s advocate and the tenant’s advocate appeared on 19th October 2011 before this court and withdrew the application of Notice of Motion 19th September 2011. The tenant had all along acted in person in the High Court. He engaged his current advocate in this matter. [He had been represented in the tribunal case.]

12. The landlord then filed an application dated 14th November 2011 under certificate of urgency in which he prayed for the striking out of the appeal. This was withdrawn on 7th December 2011.

13. An application dated 2nd December 2011 was pending, seeking the setting aside of the orders of 14th June 2011. This application was amended on 25th January 2012, to include the tenant who is now in occupation of the premises.

14. It is this amended application of 25th January 2012 that is a subject of this ruling.

II APPLICATION 25TH JANUARY 2012

15. The landlord/applicant prayed that the orders of the court issued on 14th June 2011 be set aside. The reasons being that the landlord had never been served.

16. The landlord produced a list of process servers, who had been licensed by the Chief Justice. The process server, who filed the said affidavit of service, was never licensed.

17. Further, the tenant had been represented in the subordinate tribunal. He filed an application to act in person.

18. The new tenant and third party herein supported the submissions by the applicant/landlord. That the service, if any was a nullity.

19. In reply, the tenant stated that the papers filed to court was so done in person. He was not able to know if the process server had been licensed or not.

20. The appeal should be heard in full. The application to set aside the orders of this court should be

dismissed.

III OPINION

21. The tenant was issued orders of stay of execution on grounds that the landlord having been served and failed to come to court was not objecting to the application. There was the issue of irreparable loss to the business.

22. This court issued the orders but it now transpired that the tenant had voluntarily moved out of the premises under supervision.

23. The process server had no license to act, as such any service upon the landlord (which was denied) was a nullity.

24. Upon obtaining the orders of 14th June 2011, a considerable time lapsed before the orders are extracted and served.

25. I would find that this application has merits. The orders of 14th June 2011 be and are hereby set aside.

26. There will be costs to the applicant/landlord, to the new tenant/interested party, to be paid by the appellant/tenant/respondent in the application.

27. The appeal is pending for hearing before Two Judges upon the usual compliance on directions. The application of 9th June 2012 is pending interparte hearing.

DATED THIS 28TH DAY OF FEBRUARY 2012 AT NAIROBI

M.A. ANG'AWA

JUDGE

Advocates :

i) *G T Mugambi holding brief for M/s Mugambi & Kariuki & Co Advocates for respondent/landlord/applicant*

ii) *G Kahuthu instructed by M/s Kahuthu & Kahuthu & Co Advocates for appellant/tenant/respondent*

iii) *S N Wachira instructed by Njoroge Wachira & Co Advocates for interested party*