



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL APPEAL NO. 619 OF 2009
EXCO LTD APPELLANT/ ORIGINAL
RESPONDENT
VERSUS
KAMAU MUCUHA RESPONDENT/ ORIGINAL
APPLICANT

(Being an appeal from the Ruling of Hon. D Mochache Esq, Chairperson – Business Premises Rent Tribunal in Case No. 149/05 and 687/07 dated 6th November 2009 at Nairobi)

R U L I N G

CONTEMPT PROCEEDINGS

Notice of Motion dated

3rd December 2009

I. BACKGROUND/REPRESENTATION

1. The parties in this appeal are allegedly described as follows:

1.1 M/s Exco Limited ... the appellant original sub tenant

Represented by:

M/s Kelvin Mogeni who ceased acting with leave of the

Court (Khaminwa J) (22nd February 2011)

1.2 Kamau Muchua ... the respondent original head tenant

Represented by:

i) **Kimani Githogo & Co Advocates**

Later ii) **Omollo and Co Advocates** acting alongside **Kimani Githogo & Co Advocates**

(20th November 2009)

iii) **Kwame & Associates Advocates**

Notice of change of advocate in place of **Omollo & Co Advocates**

4th March 2010

Later iv) **Kimani Githogo & Co Advocates**

Notice of change of Advocates dated 27th November 2010

And filed on 6th December 2010.

Later v) for respondent (26th July 2010) notice filed.

Notice of appointment of advocates

12th April 2011 for directions

Citee Charles Munge

J Orenge appears

2. The respondent in this appeal and the original landlord herein Kamau Mucuka rented premises on premises LR 209/4984 (part) from the Rumwe Farmers Co-operative Society. He in turn sublet part of the premises to M/s Exco Limited, the appellant herein.

3. By an agreement of 15th October 2002, the two entered into a lease of

5 years 3 months. The term of the lease was that if the head tenant's rent was increased then the sub-tenant's rent would also be increased.

4. By the year 2004, it was alleged that the appellant was in arrears of rent. The respondent caused a reference to be filed in Business Premises Rent Tribunal File NO. 149/05 seeking for termination of the sub-tenancy on grounds of non-payment of the rents at Ksh. 2,007,533/-.

A further BPRT cause was filed being No. 687/07. At some point, the tribunal consolidated these two matters.

5. It is unclear why the respondent went to the tribunal's jurisdiction when the relationship between the two parties was uncontrolled. An ordinary suit would have been filed directly to the High Court.

6. Nonetheless, it appears that the sub-tenant was not satisfied with the increase of rent. The said sub-tenant appellant filed for judicial review against the tribunal orders. This is understandable because there is no right of appeal from the tribunal to the High Court for a complaint. The issue of increase of rent was ruled by the chair of the tribunal on 6th March 2009 as being correctly made by the respondent.

7. In the Judicial Review proceedings parties appeared before Nambuye J (as she then was) and entered into the following consent:

“7.1 The tenant (exparte applicant) do hand over vacant possession of premises LR 209/4985 to the landlord on 31st January 2010 in default, liberty to evict.

7.2 That parties to take account and agree on the arrears of rent (if any) or default of an agreement of rent due from the tenant, the issue to be determined by the Business Premises Rent Tribunal cases

No. 687/07 consolidated with case No. 149/05.”

(Emphasis supplied)

8. The tribunal upon hearing the parties on the issue (which may be denied by the appellant) the tribunal ordered, on the 6th November 2008, that the arrears of rent was Ksh. 4,007,533/-. That there be a levy of distress of arrears of rent by the respondent.

9. Being dissatisfied with the ruling of 6th November 2009, the appellant filed an appeal to this High Court on the 11th November 2011. The reasons on appeal being that the consent in the judicial review application was not adhered to. No account had been taken or the issue of arrears of rent.

10. A Notice of Motion filed on 11th November 2009 but undated sought orders of stay of execution to the levy of distress issued against them.

11. The respondent filed grounds of opposition and Preliminary Objection to the application (the latter was withdrawn later Okwengu J on

15th February 2010.)

II CONTEMPT PROCEEDINGS

12. By a Notice of Motion dated 3rd December 2009 filed on

4th December 2009, the respondent notified this court that the

M/s Exco Limited, the appellant herein did not exist. (That the application for leave to file contempt proceedings was applied for and granted Rawal J [as she then was] 18th November 2009.)

13. The contempt proceedings of 3rd December 2009 prayed that:-

13.1 ____

13.2 *That this honourable Court be pleased to cite Exco Limited and its directors Mr and Mrs Charles Munge and one Peter Odeny (general manager Exco Ltd) for criminal contempt with regard to obstruction of the due administration of justice and conspiracy to defeat justice pursuant to the orders issued by the Chairperson, business Premises Rent Tribunal dated 6th November 2009 confirmed on 12th November 2009 in BPRT No. 687/07*

13.3 *that the said directors Mr & Mrs Munge together with the said Peter Odeny be committed to civil jail for a period not exceeding six months and a payment of a fine.*

13.4 *That the respondent herein Exco Ltd be subjected to a and or fine of such obstruction of the due administration of justice and conspiracy to defeat justice as per the findings of the BPRT dated 12th November 2009 in BPRT 687/07.*

13.5 *That the respondents be ordered to deposit Ksh.4,007,533/- with the Registrar of this Hon. Court forthwith before they may be heard to preserve the orders of the ... as per the findings of the BPRT dated 12th November 2009 in BPRT No. 687/07.*

13.6 *Break in orders to issue against the suit premises in favour of the appellant (respondent)*

13.7 ____

13.8 ____

14. It is the said above application which is the subject of this ruling. It was as a result of the appellant allegedly vacating the premises and removing all the items within the business premises thereby making it impossible for the landlord/head tenant respondent herein to levy distress of rent as ordered by the tribunal.

15. Before the application was heard the general manager, one Peter Odeny was called to court and cross examined on his affidavit. The proceedings was conducted before Sitati J who was soon transferred from Nairobi. This was on 12th May 2010.

16. The said Peter Onono Odeny stated that he would receive rent from one Anne Mutisya, a director, and pay cash. It was therefore that he identified his employer as Kamau Muchua and Anne Mutisya.

17. The issue therefore arose as to whether the said directions should be called to court. By an application dated 27th November 2007, leave to order the personal appearance of Charles Munge was granted.

18. His cross examination was conducted before this court on

17th November 2011.

19. The advocate for the respondent demanded that the director

Anne Mutisya be summoned to appear to court also. The reasons being that Charles Gaithuma Munge alleged that he was a businessman. He became director of the appellant's company to assist Anne Mutisya. He was not an active director. He ceased being a director in the year 2004. (two years after the lease had been entered into for the premises.)

20. The whereabouts of Anne Mutisya was unknown. The cross examination was closed.

21. The parties gave submissions to this court.

22. The respondent/applicant prayed that whereas the said Exco Ltd did not exist, it was apparent that the director Charles Munge should be held liable for the contemptor's behaviour of the limited liability company.

23. The advocate for Charles Munge, the citee objected to this and stated that Charge Munge was never party to this suit. He should not be held responsible for the matters before court on contempt.

24. In his replying affidavit Charles Munge stated that he was very good friends with the respondent, but due to the differences that arose, the respondent attempted to even harm his life.

25. I have been asked to evoke Section 3A of the Civil Procedure Act and punish for contempt.

26. In the text book *Palmer's Company Law* 22nd Edition by Clive M Schmitt Hoff in collaboration with Maurice Kay & Geoffrey K Morse Vol. 1976 Chapter 27 – contracts, where the advocate for the respondent applicant relied on this text stating that:

“in common law, before a company is “incorporated” it has no capacity to contract”.

An act cannot be done by a principal or an agent.

27. The capacity to enter into an obligation does not exist.

28. Charles Munge at all times interacted with the respondent applicant as to the premises.

29. From the cross examination of Charles Munge, it has been established that the appellant does not exist in law. There is no locus standi for the appellant to appeal to this court, to sue and be sued.

30. The actions done in the purported capacity are done fraudulently and without a force of legality. The said directors so alleged are personally liable.

31. Charles Munge stated he ceased to be a director in 2004. It is upon the respondent to pursue the directors in a civil suit where they are to be made parties to the civil cases.

32. The court herein declares that the applicant/sub-tenant has no basis both in this appeal and in the tribunal court case to be before the court.

33. That whereas the contempt has been committed by a non-existent company to enforce the same, requires that a civil suit be filed to give the alleged directors Charles Munge, Anne Mutisya and Peter Onono Odeny appear to the civil courts to answer to the alleged damages caused and disobedience to court's orders.

34. I hereby would strike out this appeal with costs to the respondent herein.

DATED THIS 12TH DAY OF MARCH 2012 AT NAIROBI

M.A. ANG'AWA

JUDGE

Advocates :

i) *J Orenge instructed by M/s Malonza & Co Advocates for*

applicant/citee

ii) *L M Ombete holding brief for L M Ombete instructed by L M Wambua &*

Co Advocates for respondent