



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**JUDICIAL REVIEW 91 OF 2011**

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION BY RADHINA SWALEH AND HUSNA HUSSEIN MOHAMMED TO SECURE PROTECTION OF THE LAW AGAINST ILLEGAL EVICTION DISGUISED AS AN ORDER TO BREAK OPEN A RESIDENTIAL PREMISES TO COMPLETE DISTRAINT FOR RENT;

**AND**

IN THE MATTER OF: DISTRESS FOR RENT UNDER THE RENT RESTRICTION ACT, CAP. 296;

**AND**

IN THE MATTER OF: THE POWER AND JURISDICTION OF THE SUBORDINATE COURT IN DISTRESS FOR RENT UNDER THE MAGISTRATE’S COURTS ACT AND THE ROLE OF THE POLICE IN ENFORCEMENT OF CIVIL ORDERS UNDER THE POLICE ACT;

**BETWEEN**

**REPUBLIC.....NORMINAL APPLICANT**

**AND**

**THE RESIDENT MAGISTRATE’S COURT, MOMBASA.....RESPONDENT**

**AND**

**ZUBEIDA SAID ABDALLA.....INTERESTED PARTY**

**EX PARTE APPLICANTS**

- 0. HUSNA HUSSEIN MOHAMMED
- 1. RADHINA SWALEH

**JUDGMENT**

The ex parte applicants were tenants of the interested party in respect of the interested parties house being Mombasa Block/XXXVI/59 in the Kibokoni area Mombasa. This judicial review matter is directed at the eviction and distress for rent carried out on 9<sup>th</sup> July and 3<sup>rd</sup> August 2011. It was carried out on the instructions of the interested party by auctioneers called Elan Traders. The interested party although was served with the documents relating to this matter did not defend this action. The depositions of the applicants therefore remain unchallenged.

The applicants are husband and wife. They were tenants of the interested party as stated before at a monthly rent of Ksh. 2,500. They contend that they paid that rent to the interested party regularly through their former advocate and lastly through the Rent Restriction Tribunal. They stated that they were not in rent arrears when the distress for rent took place on March July 2011. On that occasion, the auctioneers attached their household goods and personal property. The police were on guard when the distress for rent took place. The auctioneers returned to the flat on 3<sup>rd</sup> August 2011 and proceeded to remove doors, windows and fixtures and other household goods stating that they had been instructed to evict the applicants. On removing those items the auctioneers locked up the flat. The police who were present during that eviction threatened the applicants with arrest if they attempted to re-enter the flat. The applicant got information from the auctioneers that the interested party had obtained on 2<sup>nd</sup> August, 2011 leave of the subordinate court to break open the flat. Notably that leave was obtained after the first distress of rent of 9<sup>th</sup> July, 2011. The leave was granted in Mombasa RM Misc. Civil Case No. 135 of 2011. The order of 2<sup>nd</sup> August 2011 in that case was granted to the interested party who relied on the affidavit of Herman K. Kilonzo a licenced auctioneer practicing in the name of Elan Traders. The affidavit of the said Kilonzo was to the effect that he had been unable to levy distress of rent against the applicants because when the applicants were served with the proclamation on 25<sup>th</sup> June 2011 in respect of rent arrears the flat had remained locked up and deserted. This had prevented the levying of distress for rent. It is important to consider the order issued by the subordinate court on 2<sup>nd</sup> August 2011 following that application. It is as follows:

**“REPUBLIC OF KENYA**  
**IN THE RESIDENT MAGISTRATE’S COURT**  
**AT MOMBASA**  
**MISCELLANEOUS CIVIL APPLICATION NO. 135 OF 2011**  
**ZUBEDA SAID ABDALLAH.....APPLICANT**  
**VERSUS**  
**HUSNA HUSSEIN.....RESPONDENT**

**(BEFORE THE HON. OLE TANCHU (SRM) IN COURT ON THE 2<sup>ND</sup> AUGUST 2011)**

**ORDER**

***UPON HEARING*** the Notice of Motion Application dated the 25<sup>th</sup> day of July 2011 brought to this Honourable Court on 25<sup>th</sup> day of July 2011 under section 3A of the civil procedure Act Cap 21 Laws of Kenya and Section 11 of the Distress for Rent Act Cap 293 Laws of Kenya and Rule 9 of the Auctioneers Rules 1997 **AND UPON PERUSING** the affidavit in support sworn by **HERMAN K. KILONZO** on the 25<sup>th</sup> day of July 2011 **AND UPON HEARING** counsel for the applicant in the absence of the Respondent.

**IT IS HEREBY ORDERED**

1. **THAT** this application be and is hereby certified as urgent and service of the same be dispensed with.
2. **THAT** leave be and is hereby granted to **M/S ELAN TRADERS** to break open and enter the Tenant/Respondent’s premises situated at

*Kibokoni area occupied by Husna Hussein for purposes of removing the distrained goods as per the proclamation dated 25<sup>th</sup> June 2011.*

3. **THAT** the OCS Central Police Station to ensure that law and order is maintained.

4. **THAT** costs of this application be borne by the Respondent.

**GIVEN** under my hand and seal of this Honourable court at Mombasa on this 2<sup>nd</sup> day of August, 2011.

**Hon. T. Ole Tanchu**  
**Senior Resident Magistrate**  
**MOMBASA**

**ISSUED** at Mombasa this 2<sup>nd</sup> day of August, 2011

**PENAL NOTICE**

*Any party who fails to abide and/or obey this order shall be in contempt of court and shall be liable for imprisonment for a term not exceeding six (6) months.*

The applicants contend that they were never at any time in rent arrears and further that they were not served with any pleadings relating to the subordinate court case. By a notice of motion dated 21<sup>st</sup> September 2011 in this matter, the applicants seek for order of certiorari to call up to the High Court the proceedings and order of the Resident Magistrate's Court of 2<sup>nd</sup> August 2011 for quashing because the orders were made without jurisdiction. They also seek for an order of prohibition to issue to stop the resident magistrate's court from continuing to entertain the application seeking to break open the flat and a prohibition order seeking to stop the interested party using the police in breaking open the flat. They finally prayed that the court will order for the restoration of their goods that were attached in the distress for rent. Although those were the very specific prayers in the substantive notice of motion, in this judicial review matter, the ex parte applicant both in their statement of facts and in their written submissions sought the court to make a determination of the Constitutionality of section 11 of the Distress For Rent Act Cap 293 and of Rule 9 of the Auctioneers Rules 1997. It was contended in those written submissions that the right given under section 11 of Cap 293 and under Rule 9 to break open a house/premises where seized goods are fraudulently suspected to be hidden, was contrary to Articles 31 and 50(1) of the Constitution of Kenya 2010. Looking at the prayers in the notice of motion, it is clear that there was no prayer for the Constitutionality or otherwise of the distress of Cap 293 or the Auctioneers Rules 1997.

It is in my view that the statements of facts filed by an applicant in support of the application for leave for Judicial Review Orders to ought to be in tandem with the prayers in the substantive notice of motion. It would be very unfair and unjust to entertain the prayer for Constitutionality of that law when that is not sought in the prayers before court. It is even more of a concern that the court would entertain prayers that are not sought which prayers are not the ones that were brought to the attention of the interested party when she was served with the application. As stated before the interested party did not respond to the application and did not participate in the hearing. That is why it would be unfair to change 'the goal post'. I am also in agreement with the Respondent when it was submitted on its behalf that the court should only consider Constitutionality of that law when it is considering a Constitutional petition. Those prayers will therefore not be considered in this judgment. The court will consider the prayers as set out in the notice of motion alluded to above.

It is uncontested fact that the rental for the flat was Ksh. 2,500/=. By virtue of section 2 of Rent Restriction Act Cap 296, the relationship of the interested party and the applicants was one that was controlled by that Act. Section 16 of that Act forbids the levying of rent arrears except with the leave of the Tribunal under that Act. Similarly repossession of such premises can only be authorized by the

Tribunal if the conditions set out in Section 14 of that Act are fulfilled. The interested party was therefore wrong to have levied for rent and to have taken possession of the flat from the applicants. Did the magistrate err in granting the orders that were sought before him by the interested party? The breaking in of the flat by the auctioneers is permitted both by section 11 of Cap 293 and Rule 9 of the Auctioneers Rules 1997. Indeed those two provisions do not require a Court Order and for the interested party to have sought that order, it was superfluous, but in my view was not illegal since it was permitted by the law. The law permits breaking into premises under special circumstances without notice to the tenant. That is so where the tenant is said to have locked up the premises where distress of rent is due to take place. The fact therefore that the applicants were not served with that subordinate court action does not make the order illegal because the law permits such breaking in without notice to the tenant. It should be noted that the interested party in approaching the subordinate court overstated the rental income of the flat. It is for that reason that the magistrate not realizing the overstatement of the rent and believing he therefore had jurisdiction granted the orders. In effect the overstating of the rent showed that the tenancy was not controlled under Cap 296.

In my view, the mistake of the subordinate court entertaining the matter as it did was caused by the overstatement of the rent. That would mean that if action ought to be taken in respect of those orders and distress for rent, that action should be restricted to be against the interested party alone. Such action ought to have been in the normal civil action. Similarly, the fact that the action before the resident magistrate was initiated by way of chamber summons contrary to Section 2 of the Civil Procedure Act Cap 21, did not necessarily take away the jurisdiction of that court. Section 2 of Cap 21 defines what a pleading is. It is defined as follows:

***“Includes a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendants thereto, and of the reply of the plaintiff to any defence or counter claim of a defendant.”***

It follows that the miscellaneous application filed by the interested party before the magistrate’s court does not fit the definition of what a pleading is as seen above. It certainly was not a plaint. The fact that it was not a proper pleading is an error that should be subjected either to an appeal or to a review. It however is not suitable to be challenged in a judicial review matter. The prayer of prohibition is unavailable to the applicants because even according to their own depositions, that matter was completed and their eviction took place in August 2011. There would be, therefore, nothing to stay or prohibit. Again, if the eviction of the applicants was unlawful, the applicants should have sued the interested party in a normal civil action. There is no basis for this court entertaining the claim for compensation because it ought to have been brought in a civil action. There is even no evidence before court what the loss to the applicant was. The applicants also prayed that there should be prohibition stopping the police from being involved in their eviction. The fact is the applicants were evicted and are no longer at the interested party’s flat. More than that, it should be noted that the police are mandated under the Police Act Cap 84 to keep law and order. The functions of the police are set out in section 14 of that Act as follows:

***“14. (1) The Force shall be employed in Kenya for the maintenance of law and order, the preservation of peace, the protection of life and property, the prevention and detection of crime, the apprehension of offenders, and the enforcement of all laws and regulations with which it is charged.”***

Before concluding this judgment, I must state that it was wholly unsatisfactory for parties to file voluminous authorities attached to their submissions and yet failed to state what part of those authorities they were relying on. This makes it difficult when the court is considering judgment or ruling to be able to summarize the case of such a party properly. This is what the ex parte applicants did in this matter. They filed voluminous authorities and apart from one or two quotations from those authorities in their submissions, for the rest I was left unaware of their reliance on them. In the end I find there is no merit in the ex parte applicants notice of motion dated 21<sup>st</sup> September 2011 and the same is dismissed with costs to the Respondent.

**DATED and DELIVERED at MOMBASA this 25<sup>th</sup> day of April, 2012.**

*Mary Kasango*

*JUDGE*