



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL APPEAL 134 OF 2011**

**J. B. MAINA & COMPANY LTD. ....APPELLANT**  
**VERSUS**  
**FARID AL-MAARY .....RESPONDENT**

**Coram:**

**Mwera, J.**

**Alwenya for Appellant**

**Omwenga for Respondent**

**Court clerk Furaha**

**RULING**

On 16<sup>th</sup> April, 2012 the appellant brought a notice of motion under O42r. 6 (1) (2) (6) for orders:

- i) that there be a stay of execution of the judgments and orders of the Business Premises Rent Tribunal (BPRT) of 16<sup>th</sup>, 23<sup>rd</sup> June 2011; and
- ii) that there be an injunction restraining the respondent from levying distress for rent arrears pursuant to the same orders in (i) above.

The grounds set out in the body of the motion alluded to dissatisfaction with the judgment delivered on 23<sup>rd</sup> June, 2011. That another judgment had been delivered on 16<sup>th</sup> June, 2011 meaning there were 2 judgments in the same cause. The respondent made to execute the judgment of 23<sup>rd</sup> June, 2011 by levying distress for sh. 890,833/= in rent arrears against the applicant's goods due for removal on 17th April, 2011. That in the meantime the applicant continued to pay the old rent of sh. 31,000/= per month which the respondent accepted. It had done so up to 4<sup>th</sup> April, 2012. Then the respondent declined to accept rents for the months of April, May, June 2012.

There was an expansion on the grounds above in the supporting affidavit of Ramesh Patel, a director of the appellant company. It was averred that in the judgment of 23<sup>rd</sup> June, 2011 the BPRT assessed payable rents at sh. 57,320/= per month with effect from the date of the landlord/respondent's notice. That on 30th

August, 2007 the BPRT had assessed rents payable for the premises MBA/Block xx/83/84 on Meru Road, at sh. 31,000/= per month, payable quarterly. When the respondent moved to raise the rent to sh. 80,000/= per month by a notice of 29<sup>th</sup> September, 2009 the appellant filed a reference in the subject case BPRT case 190/09. The applicant filed a valuer's report for the hearing after which, 27<sup>th</sup> January, 2011 was set for delivery of judgment. The judgment was not delivered on that day but without notice to the applicant, one was delivered on 16<sup>th</sup> June, 2011, setting rents at sh. 80,000/= as per the respondents valuers report. The respondent moved to enforce that judgment on 17<sup>th</sup> June, 2012. Immediately the applicant instructed counsel to apply on 22<sup>nd</sup> June, 2011 for a review of that judgment on the grounds, **inter alia**, that its own valuer's report had not been considered. Following that, the tribunal wrote and delivered another judgment now dated 23<sup>rd</sup> June, 2011 setting the rent of sh. 57,320/= but without reviewing the judgment of 16<sup>th</sup> June, 2011 first, as sought by the 22<sup>nd</sup> June, 2011 application – hence this appeal. The applicant then continued to pay the old rent of sh. 31,000/= until the respondent declined to receive the same and proceeded to proclaim to recover rent arrears of up to sh. 890,833/=. All the relevant receipts, valuation reports and the two judgments – dated 14<sup>th</sup> June, 2011 (not 16<sup>th</sup> June, 2011) and that of 23<sup>rd</sup> June, 2011 were exhibited.

The respondent filed a replying affidavit in which it was averred that the present motion was brought after inordinate and unexplained delay; it was an abuse of the court process and it lacked merit. It was added that for the application of 22<sup>nd</sup> June, 2011 to review the judgments of 14<sup>th</sup> June, 2011, orders sought were granted by consent and thereafter the judgment of 23<sup>rd</sup> June, 2011 was delivered. That the applicant was thus not being truthful. The assessed rents of sh. 57,320 had not been paid – hence the levy to distress for rent. And that there was no evidence that any rents had been paid since July 2011. This claim may not be entirely correct in the light of the applicant's evidence of remitted rents to M/s Dat00 Kithii Kii lxd (ann RP5-31 to 40).

In the further affidavit, the applicant deponed that delay in bringing this application was caused by having two judgments on the record. That it was not clear if one reviewed, varied or set aside the other. But it had continued to pay old rents as a sign of good faith. If the respondent is not restrained from recovering the rent arrears, it will mean taking rents twice over, to the detriment of the applicant. And that the applicant's advocate Mr. Alwenya at no time informed it that a consent was recorded in respect of their review application dated 22<sup>nd</sup> June, 2011. May it be noted at this point that the only part of the BPRT record exhibited before this court was by the applicant: the proceedings off 15<sup>th</sup> December, 2010 and the 2 judgments. Both sides submitted – the applicant insisting that if the stay order is not granted, it will suffer substantial loss while the respondent stated otherwise.

What the court gleans from that material placed before it is that in the judgment of 14<sup>th</sup> June, 2011 the learned chairman of BPRT delivered herself in part thus;

**“The landlord filed and served his valuation report prepared by Maina Chege & Company dated 26<sup>th</sup> June, 2009 and dated 24<sup>th</sup> May, 2010.**

**The tenant did not file any valuation report. In the absence of the tenant's report I would adopt the landlords report in its entirety. The landlord proposed to increase rent from ksh. 31,000/= to ksh. 80.000/= which I hereby grant”.**

When the appellant/applicant got to know of this, it filed an application to review that judgment:

**“3. That the court be pleased to review the said undated judgment delivered herein on 14<sup>th</sup> June, 2011 with a view to taking into consideration the applicant/tenant's valuation report dated 17<sup>th</sup> January, 2011 and filed in court on 24<sup>th</sup> January, 2011 before judgment here was delivered”.**

Such judgment had been delivered on 14<sup>th</sup> June, 2011 (above). Now although the respondent deponed that on the same 22<sup>nd</sup> June, 2011 that prayer was granted by consent giving way to the judgment

of 23<sup>rd</sup> June 2011, that part of proceedings was not extracted and exhibited here.

In the judgment of 23<sup>rd</sup> June, 2011 it was recorded:

**“ The landlord filed his valuation report prepared by Maina Chege & Co. dated 26<sup>th</sup> June, 2009 and received in the Tribunal on 24<sup>th</sup> may, 2010.**

**The tenants’ report on the other hand is prepared by Wyco Valuers & Co. .... I will therefore rely on the valuation reports to assess new rent.”**

After review of the 2 reports the learned chairman concluded:

**“The new rent is therefore assessed at Ksh. 57,320/=”.**

And the decision was delivered:

**“In the presence of Mr. Omwenga for landlord and Mr. Alwenya for the tenant.”**

The tenant is the present appellant/applicant and his lawyer is Mr. Alwenya. From all the foregoing even as the learned chairman did not specifically refer to the review application by the appellant dated 22 June 2011, the substance of that application, namely to consider its valuation by M/s Wyco valuers & Co. was in-corporated in the judgment of 23<sup>rd</sup> June 2011 in the presence of its lawyer, Mr. Alwenya. Accordingly it does not sound true to claim that the judgment of 23<sup>rd</sup> June, 2011 was secretly delivered or it did not refer to the review application. On assessing the new rent, the applicant was bound to pay it or appeal, if the rent was found excessive or wrongly assessed, but not that there were 2 judgments. The chairman may not have stated that the judgment of 23<sup>rd</sup> June, 2011 reviewed that of 14<sup>th</sup> June, 2011. But the former was the judgment of the Tribunal. That was the substance and effect of the proceeding on/following 22<sup>nd</sup> June, 2011. This application is dismissed with costs. But if the appellant still wishes to have its day in court it shall deposit the rent arrears standing at sh. 890,833/= in court in the next twenty-one (21) days and continue to do so, paying the new rents for subsequent months until the appeal is finally determined or further court orders issue. Of course that sum may be reduced with any rents paid at the old rates.

The parties then should pursue and process the appeal for hearing. Mention in the next 30 days.

Dated on 22<sup>nd</sup> June, 2012.

**J. W. MWERA  
JUDGE**