



REPUBLIC OF KENYA

High Court at Mombasa

Civil Appeal 1 of 2012

NDOHO MARKET STALLS LTD.....APPELLANT

VERSUS

MAUREEN MARIGA.....RESPONDENT

**Coram:
Mwera, J.**

Mrs. Juma for Appellant/Respondent

Tarus for Respondent/Applicant

Court Clerk Furaha

RULING

In the motion of 26th June, 2012 the respondent/applicant sought orders under Order 40 rules 1, 2, 3, 9 of Civil Procedure Rules and the court's inherent jurisdiction:

(i) that the appellant/respondent be restrained from removing her movable properties from the rented premises in dispute.

It was stated in the grounds that the applicant had been the appellant's tenant in the suit business premises since 2004 observing all the covenants. Then in 2011 the appellant/landlord arbitrarily raised service charge bills and the two fell in a disagreement. Such was characterized by mixed-up power bills tendered by the landlord who did not install a separate meter for the tenant/applicant. This provoked the tenant to file BPRT Case No. 49/11, a reference, which was decided in her favour on 7TH December, 2011. The landlord filed the present appeal but continued to harass/intimidate the tenant on the same issue of service, charge/power bills, including having an auctioneer proclaim her goods – a thing that shall cause her immense and irreparable loss. She had all along been paying rents.

On 29th June, 2012 the applicant got orders restraining the appellant from removing her properties from the rented premises and putting the intended distress on hold. She was also ordered to pay Shs. 11,651/= to the landlord.

In the replying affidavit by the landlord's property manager (Solomon Mutungi), it was averred that on 1st September, 2005 the applicant was by agreement made a licensee of stall No. 504, to trade in the appellants premises. On 1st September, 2005 and 1st February, 2007 the applicant got the use of stalls number 1 and 3 plus a store. The respective agreements were exhibited. And as regards service charges, the licensee was also to pay all charges for the supply and consumption of electricity. The

appellant/respondent installed a separate sub-meter to be used by the applicant and that even before the BPRT cause the appellant had been issuing all the tenants with bills, bearing the break-down of consumption. And that the BPRT decision did not bar the appellant from pursuing the arrears of power bills. The applicant's arrears totalled Shs. 42,851/50 as per statements exhibited (SM 8). Then she paid some money in July 2012 leaving a balance of Shs. 31,200/50 as per the statements.

It was averred that the applicant who still occupies four stalls in the premises only owed and the appellant demanded arrears of service charges. She was not harassed at all. Thus she had come to court with unclean hands. Either side submitted.

On perusal of the above, plus the decision of the BPRT what comes up clearly is that there the dispute was not over rents in arrears or other. If a part of that ruling can be set out, it reads:

“I have carefully analyzed the evidence on record, indeed the electricity bill shot up from KshsP. 2,000/= to Shs. 6,000/= the landlord has not annexed any document to show that they explained to the tenant that electricity rates had shot up. The tenant was indeed very right to become worried. On this ground alone I do find that the tenant's concern was merited.”

And then:

“I do find that indeed the tenant's complaint was not baseless since the issues complained about have been addressed and the tenant has no more problems. I would order that this file be closed.”

Each party was ordered to bear its own costs. BPRT did not order that service charge arrears were not to be paid. In the light of the BPRT ruling and with the issues there having been addressed fully and the file closed, the applicant should pay the service charge bills without fail.

There was total arrears due as per the landlord's position. But after payment on 9th July, 2012 there was Shs. 31,200/= balance. If that did not take into account Shs. 11,651/= ordered by the court to be paid in twenty one (21) days on 29th June, 2012, and it was said that payment was made, that sum to be deducted from whatever balance is due from the tenant. If that sum was taken into account, adjustment in accounts to be effected. What this court is saying is that the tenant should pay regularly the service charge levied against her. Emanating from this dispute if any balance/arrears is due from her, the parties should sit down and consider payment by instalments, minimum of five. The BPRT did not bar the landlord from recovering arrears at all. And with that the distress on the appellant's goods is held in abeyance for good.

In the event of default in clearing the arrears or regularly paying due bills, then the court and the tribunal are open to adjudicate.

As once directed by the BPRT, this court is inclined to order that each side will bear its own costs.

Delivered on 30th October, 2012.

J. W. MWERA
JUDGE