



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Appeal 710 of 2009

JACK & JILL SUPERMARKET LTD..... APPLICANT/APPELLANT

VERSUS

VIKTAR MAINA NGUNJIRI..... RESPONDENT

R U L I N G

The application before us is a Notice of Motion dated 9th March, 2012 brought by the Appellant against the Respondent. The Appellant was the Tenant of the Respondent in premises known as L.R. NO. 20/869 Temple Road, Nairobi.

The facts behind this application as we understand them, are that the respondent purchased the above mentioned premises sometime in the year 2006. In a bid to remove or evict the Applicant from the premises, he put some unnecessary pressure upon the Applicant with a view to make the latter and others move out of the premises to enable him renovate or reconstruct the same. It was alleged that the Respondent actually removed doors and portions of the roofing materials to force the applicant to move out.

Whatever the case was actually, the Applicants decided to and moved to the Business Premises Rent Tribunal for protection. The Tribunal on 24th March, 2009 gave injunction orders to the Landlord/Respondent stopping the Landlord from evicting, harassing or doing anything illegal to the tenants among whom were the Applicants.

On 3rd April 2009 the Tribunal visited the relevant premises and as a result ordered that the Applicant/Tenants who were still in the premises should stop paying their monthly rents until their reference to the Tribunal arising from the Landlord's served Notice for Termination of the Tenancy, was determined.

On 15th December, 2009, nine months down the line, the Tribunal lifted its earlier orders upon to withhold payment of monthly rent given on 3rd April 2009. It is not clear whether the tenant/Applicant, thereafter paid the withheld rents for occupying and using the premises. It is however, apparent and undenied that the Applicant had for the period between 15th December 2009 and 24th November, 2011 when the Judgment in this Appeal was delivered, paid as rents a total sum of Ksh.4,388,860/-.

In the court's Judgment in this Appeal, this court ruled that the Tribunal's order to lift its earlier order of 3rd April, 2009 to withhold rents, was irregularly done. For that reason, if we properly understand it, the Applicant/tenant herein, felt justified that the rents paid between 15th December, 2009 and 24th November, 2011, were refundable.

The application accordingly seeks, effectively, the refund of Ksh.4,388,860/- being the rents paid by the Applicant herein for the period between 15th December, 2009 until this court delivered its judgment on 24th November, 2011. The rationale for seeking such refund is that the order of the Tribunal which lifted the earlier order not to pay rents, was irregular as indeed this court found. For that reason, the applicant argued that any rents paid as a result of an irregular order of the Tribunal were irregular, invalid and unjustified and therefore not sustainable. The applicant, therefore, seeks for what it terms “**restitution**”, because the rents paid during the relevant period were to the Respondent/Landlord, a benefit accruing from an irregular order.

The Applicant also argued that it is the duty of this court which ruled that the said orders of the Tribunal were irregular, to enforce its judgment by ordering the refund of the sum of ksh.4,388,860/- aforestated.

The Respondent/Landlord however, saw the issue differently. First, he argued that once this court delivered its appeal judgment on 24th November, 2011, it became functus officio in the case. It cannot, therefore, again be called to sit on the same case to perform any function touching on the issues already decided on.

The Respondent, secondly, argued, that the issue of payment or non-payment of rent, is a jurisdiction of the Tribunal from which the appeal arose generally under the provisions of the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act, Cap 301, and not the High Court whose jurisdiction is only appellate and specifically on grounds and issues raised in the Memorandum of Appeal. To that end the Respondent argued, he has an application presently lying before the Tribunal to resolve the issue of payment or non-payment of rent raised herein.

The Respondent also argued, that the issue of whether or not the Landlord was entitled to receive or continue receiving monthly rents during any period the Applicant occupied the relevant premises, was not an issue now before this court nor was it dealt with by this court during the determination of the appeal. This court, therefore, has no jurisdiction to deal with an issue which was not before it at any relevant time, the Respondent opined.

The Respondent/Landlord further argued, that payment of rent was a contractual issue between the Respondent and Applicant as Landlord and Tenant and this court has no jurisdiction to interfere with it unless it was an issue, directly, or otherwise in the appeal which this court decided.

The Respondent finally also argued that no court, not even the Tribunal which has direct jurisdiction on matters of the Landlords and Tenants, has jurisdiction to order that a tenant can occupy the Landlords premises without paying agreed or commensurate rents for such occupation since the issue of rent, is a contractual matter between them while the Tribunal can only interpret the contract.

We have carefully considered the arguments above after perusing all the materials given in support. The first issue is whether or not this court is functus officio on matters concerning the appeal the court heard and determined. We agree generally, that once we finally dealt with all the issues raised in the appeal, we indeed became functus officio except in situations under the law where we are allowed to revisit the appeal. For example, we can revisit our judgment and orders under a formal application for review under the relevant orders of the Civil Procedure Rules. This application is not a review application and therefore it cannot become the vehicle through which we can revisit an appeal which we conclusively determined.

We next consider whether or not we have jurisdiction to deal with matters of payment or non-payment or even refund of rents. We observe that the issue was not one of those we dealt with in determining the appeal. It was neither a ground of appeal in the form it is now raised in this application. It is also clear from the provisions of Section 9 (2) and (3) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301, that the rents issue is a jurisdiction of the Tribunal established under the Act and that the Tribunal alone, determines or varies the rents payable in respect of the controlled tenancies.

In this application the Applicant is asking us to determine whether it was regular or irregular of the Tribunal to order a resumption of payment of rents and whether the rents paid during some period of the tenancy should or should not be refunded. It is our view and finding that this court has no jurisdiction to hear and determine such an issue since we hold that such jurisdiction belongs to the relevant Tribunal.

The third issue to consider is whether the issue of rent payment or variation is a contractual issue between the Landlord and Tenant. We have considered the issue too. Our view and finding is that the rent issue is a contractual issue between the Landlord and Tenant. Rarely is there a case where a tenant becomes such tenant without some kind of agreement or understanding as to how much rent he should pay on accepting delivery of the relevant premises. Thereafter, payment and/or variation of such rent where not agreed upon, becomes a jurisdiction of the Tribunal. The Tribunal has power to reassess the level of rent payable. The Tribunal for good and lawful reasons, as happened in this case, except for irregularity of the order, can also suspend and then, order resumption, of payment of rents under the relevant provisions of the Act. In the rare cases where there is no contractual tenancy, the Tribunal which has original jurisdiction, assess and determines reasonable rents payable.

This court in this appeal found that the Tribunal ordered that monthly rents payment which had earlier been suspended, should be resumed. Unfortunately, the relevant file in respect of which this appeal arose, was not before the Tribunal on the day when the discharge of the relevant order was made. That made the order irregular in view of the fact that notice to attend court had not been given to all the parties affected by the order. Hence this court in this appeal ruled the order to discharge orders for suspension of rents, were irregularly made.

In our view and finding, the appeal ruling above, did not make a finding that the Applicant/Tenant is excused from paying monthly rents for the premises it still occupied and used to carry out its trade. This court did not have such jurisdiction. This court's ruling without expressly saying so, left effectively the issue of rent payment, suspension thereof or otherwise, to the Tribunal to reconsider the order in the presence of both parties with their inputs and thereafter come to a final determination on the issue. The decision the Tribunal reaches, can be the same or different depending on the relevant facts be placed before it.

Finally, whether or not the Tribunal or this court has power to order suspension of rent payment between a Landlord and Tenant, or can vary contractual obligations between the parties, is an issue which was not before this court during the appeal hearing. We are reluctant to be drawn into it.

The result, therefore, is that this court has no jurisdiction to Order a refund of Ksh.4,388,860/- being rents received by the Respondent during the period of 15th December, 2009 and 20th November, 2011. On that basis this application is found without merit and is hereby dismissed with costs to the Respondent/Landlord. Orders accordingly.

Dated and delivered at Nairobi this 18th day of October, 2012.

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M A ANG'AWA

JUDGE

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D A ONYANCHA

JUDGE