



REPUBLIC OF KENYA

High Court at Mombasa

Civil Appeal 159 of 2012

MOHAMED ADAN ALI.....APPELLANT

VERSUS

MOHAMED AHMED SALIM.....RESPONDENT

Coram:

Mwera J.

Bosire for Appellant

Magiya for Respondent

Furaha Court Clerk

RULING

By the notice of motion dated 17th September, 2012 the appellant sought orders under Order 42 rule 6 of Civil Procedure Rules in that:

(i) there be a stay of execution of the orders issued by the Business Premises Rent Tribunal (BPRT) on 21st August, 2012 until the disposal of this appeal.

The grounds given were that the respondent, the appellant/applicant's landlord, once gave a notice to terminate on bases including owing rent arrears. The applicant objected to the notice and filed a reference in Business Premises Rent Tribunal case 80/11. It was settled by consent including the issue of rent arrears. Subsequently, the respondent distressed for rent. The appellant filed a complaint No. 151/12 but the same was dismissed with costs. That the appellant was not accorded opportunity to tender *viva voce* evidence to support his claim. That had he been accorded that fundamental procedure, the Business Premises Rent Tribunal could have come to a different conclusion. The court does not go into the detail that the supporting affidavit may contain because a preliminary point dated 15th October, 2012 was filed by the respondent and the same had to be determined first. But suffice it to state that on 18th September, 2012 this court directed that the claimed rent arrears totaling Shs. 416,000/= be deposited in court in thirty (30) days and the application be served for hearing, with a temporary stay in place.

Partial deposit was made and the applicant was ordered to pay the balance before/on the date of the ruling on the said preliminary objection. It need not be repeated here but as per the Civil Procedure Rules a respondent may oppose an application of the type before court by raising a preliminary objection or filing grounds of opposition or a replying affidavit. Here we have a preliminary objection on points of law couched as follows:

“TAKE NOTICE that the Respondent shall raise an objection at the hearing that the appeal and application herein is bad in law, misconceived and an abuse of the court process on the grounds

that it contravenes section 15 and 2 of Cap 296, Rent Restriction Act.”

Given to submit the respondent, asserted that this appeal and application did not lie because no appeal lies on a complaint/application made under section 12 of Landlord & Tenant (Shops, Hotels & Catering Establishment Act (Cap 301), the Act. That section 15 (1) of that Act does not allow appeal from any decision of the tribunal except where there is a reference before the tribunal and it has made a determination on the same. Further, that section 2 of the Act (Cap 301) defines reference as reference to a tribunal under section 6 of Cap 301. And that that section of the Act provides that a party who has been served with a tenancy notice under section 4(5) shall file a reference, if he wishes to oppose that notice. Then before expanding further in the submission, the court was urged to find that the appeal is non-existent and it is bad in law since none lies from section 12 (4) of Cap 301. And as at this point and before the court goes further, it is baffled by the mixture of the statutes. While the notice of preliminary objection states that this appeal is, *inter alia*, bad in law:

“.....on the grounds that it contravenes section 15 and 2 of Cap 296, Rent Restriction Act,”

the same court is being told in submission that:

“.....we humbly submit that the appeal is non-existent and it is bad in law as no appeal lies from section 12(4) Cap 301.”

Perhaps it may be prudent to look at what the appellant says in this apparent confusion of statutes on the part of the respondent before venturing further.

In his submission the appellant proceeded:

“...the respondent has invoked the wrong provision of the law as section 15 and 2 of Cap 296 Rent Restriction Act is not applicable in the present instance and or appeal.”

The appellant went on to refer to another notice of preliminary objection dated 15th October, 2012 allegedly “*sneaked*” in and filed on 22nd October, 2012 – all without leave of the court. He urged the court to strike out this other notice and admonish the respondent for such a conduct, while at the same time allowing the proceedings taken out by that party to proceed since they are well within the provisions of Cap 301.

May it be stated here that the record does not seem to have that “*other*” notice of preliminary objection also dated 15th October, 2012 and filed in court on 22nd October, 2012 without leave/or first withdrawing the “*original*” one. Accordingly, this court cannot strike out what is not before it. In any event the respondent does not at any point admit that the “*first*” notice referred to Cap 296 in error but only proceeds to submit on the provisions of Cap 301. So the court has remained with the notice citing Cap 296, which is inapplicable in the circumstances of this case and which in all particulars and respects refers to pleadings and proceedings before the Business Premises Rent Tribunal under Cap 301.

In sum, the notice of preliminary objection dated and filed in court on 15th October, 2012 is misconceived and misplaced since it refers to Cap 296 Rent Restriction Act, while the subject matter is under Cap 301. With such confusion and indeed inattention on the part of the respondent, there is nothing here to entertain as a notice of preliminary objection. What he purported to bring before court is untenable. It is dismissed with costs assessed at Shs. 7,000/= to be paid before the *inter partes* hearing of the notice of motion dated 17th September, 2012.

Orders accordingly.

Delivered on 14th November, 2012.

J. W. MWERA

JUDGE