



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CIVIL APPEAL CASE NO. 29 OF 2010

JULIUS MWANGI MACHARIA.....APPELLANT

VERSUS

SAMUEL MAINA KARINA.....RESPONDENT

(Being an appeal from the ruling of I. K. Orange, Resident Magistrate, in Principal Magistrate's Civil Case NO. 249 of 2009 delivered on 5th February 2010 at Murang'a)

JUDGMENT

This judgment is the result of the appeal against the ruling of Honourable I. K. Orange, learned Resident Magistrate, delivered on 5th February 2010. The Appellant herein was the Plaintiff while the Respondent was the Defendant. By the Plaint dated 12th August 2009, the Appellant sought for the eviction of the respondent from the premises standing on parcel known as **Murang'a MUNICIPALITY/BLOCK 11/85**. The Appellant also sought for payment of Ksh.231,000/= being rent arrears. The Respondent filed a statement of defence denying the Appellant's claim. The respondent filed a formal application to have plaint struck out because it was accompanied by a false affidavit. In the verifying affidavit, the respondent has averred that there were no previous proceedings over the same dispute. It later turned out that the dispute had been filed before the Business Premises Tribunal. The trial magistrate agreed with the respondent and proceeded to strike out the suit. Being dissatisfied with the decision, the appellant preferred this appeal.

On appeal, the Appellant put forward the following grounds in his Memorandum:

1. ***That the learned Magistrate erred in law in finding that other Business Premises Rent Tribunal cases were previous proceedings in a court.***

0. ***That the learned Resident magistrate erred in law in finding that the Business Premises rent Tribunal was a court in terms of the Civil Procedure Act.***

0. ***The learned Resident Magistrate erred in applying the Civil procedure Rules to a Business Premises Tribunal matter.***

0. *The Learned resident Magistrate erred in law in failing to consider the fact that the proceedings in court were to enforce a valid notice of termination of tenancy which had not been opposed and failed to come to the correct position that there were no previous proceedings relating to the said notice which had not been subjected to a reference whereas such reference would have been the previous proceedings.*

0. *The learned Resident Magistrate wrongly struck out the plaint whereas there was no prejudice to be occasioned to the Respondent as he was a party to those proceedings that were not cited. The interests of justice would have been served by a direction that an amended plaint be filed and the respondent be compensated with costs.*

The most serious ground raised and argued on appeal is whether or not the Appellant was required to seek for leave to appeal. It is the Respondent's submission that this appeal should be struck out for want of leave under *Order XLII* of the old Civil Procedure Rules. The Appellant is of the view that leave was not necessary under *Order XLII rule 3* of the Civil Procedure Rules. With respect, I think I agree with the submissions of the Appellant that the appeal falls within the ambit of *Order XLII rule 3* of the Civil Procedure Rules.

The main question which must be determined in this appeal is whether or not the suit was properly struck out. According to the trial Magistrate, the suit was struck out because it was based on a false affidavit. It is said the Appellant had deponed that there were no previous proceedings which fact later turned out to be false. It is the respondent's submission that the trial magistrate rightly struck out the case. The Appellant is of the view that the proceedings before the tribunal cannot be regarded as civil proceedings under *Section 2* of the Civil Procedure Act. He also averred that the Business Premises Tribunal cannot be regarded as a court. The aforesaid issues were argued before the trial court. On my part, I have reconsidered the same and I think the trial court cannot be faulted. The Business Premises Tribunal is a forum like a court where particular disputes are adjudicated upon. Its decisions bind the parties. Parties who are aggrieved are entitled to appeal to the High court. Having determined the aforesaid issue, let me now turn my attention to the question as to whether the proceedings before the tribunal can be regarded as previous proceedings. I have looked at the proceedings which were before the Business Premises Tribunal, Nyeri, and it is clear that the Landlord had given notice to the tenant to terminate tenancy and to vacate premises standing on **Murang'a Municipality/Block 11/85**. In the case before the Murang'a S.P.M.'s Court, the Landlord had sought for the eviction of the tenant from the same premises. He also sought for payment of the outstanding rent of Ksh.231,000/=. The Appellant did not disclose the aforesaid proceedings in the verifying affidavit. In my view, the proceedings before the business Premises Tribunal should have been disclosed as previous proceedings. With respect, the trial magistrate cannot be faulted.

In the final analysis, the appeal lacks merit. It is dismissed with costs to the respondent.

Dated and delivered at Nyeri this 21st day of October 2011.

J. K. SERGON
JUDGE