



REPUBLIC OF KENYA



**Mwangi v Ndegwa (Environment and Land Appeal 6 of 2017)
[2022] KEELC 15305 (KLR) (9 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15305 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL 6 OF 2017
JO OLOLA, J
DECEMBER 9, 2022**

BETWEEN

EDWARD NJOROGE MWANGI APPELLANT

AND

WILLIAM KIMUNYA NDEGWA RESPONDENT

RULING

1. By the notice of motion dated April 12, 2019 Edward Njoroge Mwangi (the appellant) prays for orders:-
 1. That the honourable court be pleased to review its judgement delivered on February 7, 2019 and in doing so, vacate its orders directing the parties to the dispute to file a joint valuation report in respect of the suit premises within 45 days from the date of delivery of the judgement;
 2. That this honourable court be pleased to order for the release of Kshs 131,437/- deposited by the appellant/applicant into this court; and
 3. That the respondent do pay the costs of the appeal and this application.
2. The application is supported by an affidavit sworn by the appellant and is premised on the grounds:
 - (a) That the dispute between the parties arose following a notice issued by the respondent seeking to increase rent payable by the appellant;
 - (b) That the impugned notice which was dated November 25, 2015 was challenged before the Business Premises Rent Tribunal by way of reference;
 - (c) That the tribunal purported to set the rent payable without giving reasons thereof and the decision was challenged on appeal before this court;



- (d) That in allowing the appeal, this court observed that the mode of determining the rent payable was unprocedural and set the same aside;
- (e) That this court further directed the parties herein to file a joint valuation report in respect of the suit premises to enable it to make a determination on the issue of rent payable in exercise of the powers donated to it by section 15 of cap 301;
- (f) That it is the appellant's contention that he is no longer in occupation of the suit premises having been evicted therefrom during the pendency of the appeal and there no longer exists a landlord – tenant relationship between the parties.
- (g) That the obtaining circumstances therefore oust the jurisdiction of cap 301 in respect to the parties herein;
- (h) That it is therefore necessary for this court to review its judgement and vacate the order which was issued on the mistaken belief that there still exists a landlord-tenant relationship between the parties; and
 - (i) That it also serves the interest of justice that the sum of Kshs 131,437/- deposited in this court be released to the appellant.

3. William Kimunyu Ndegwa (the respondent) is opposed to the application. In his replying affidavit sworn and filed herein on May 10, 2022, the respondent avers that following orders of the court, he had through his advocates prompted the appellant on the issue of the valuation report but the appellant declined. The respondent avers that he then proceeded to file the said report in court on March 28, 2019.
4. The respondent further avers that the court subsequently gave directions that it would give further orders in line with the report on June 3, 2019 and it would be prejudicial if the sum deposited in court was released to the appellant as there was the pending issue of 13 months unpaid rent.
5. The respondent further avers that the appellant had willingly declined to obey the directive issued by the court and had now instead brought this application in a bid to circumvent justice.
6. I have carefully perused both the application and the response thereto. I have similarly perused the submissions placed before me by the learned advocates for the parties.
7. By his application before the court, the appellant has urged the court to review the judgement delivered herein on February 7, 2019 and to vacate the orders requiring the parties herein to file a joint valuation report in respect of the suit premises. The appellant further urges the court to order the release of the sum of Kshs 131,437/- deposited by himself in court.
8. On matters concerning review of decrees and orders, order 45 rule 1 of the [Civil Procedure Rules 2010](#) provides as follows:

1 (1) Any person considering himself aggrieved –

- a. by a decree or an order from which an appeal is allowed, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is hereby allowed.

And who from discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on



the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order may apply for a review of judgement to the court which passed the decree or made the order without unreasonable delay.”

9. As it were, the judgement sought to be reviewed was delivered by the Honourable Lady Justice L Waithaka on February 7, 2019. By the said judgement, the learned judge allowed the appellant’s appeal and set aside the findings of the Business Premises Rent Tribunal delivered on February 17, 2017 which had assessed the rent payable for the premises that were then occupied by the appellant at Kshs 26,852/- with effect from February 1, 2016.
10. At the penultimate paragraphs 23, 24, and 25 of the judgement, the learned judge concluded as follows:
 - “ 23. I think I have said enough to demonstrate that the appellant has made up a case for setting aside the judgement of the tribunal, which I hereby do;
 24. Because the proceedings instituted before the tribunal were for determination of the fair rent payable in respect of the suit premises, which determination is for the common good of the parties, I order that the parties shall bear their own costs of the appeal and the proceedings before the tribunal; and
 25. Cognizant that the determination herein has not resolved the dispute the parties referred before the tribunal, in exercise of the powers conferred on this court under section 15 of cap 301, I direct the parties to this dispute, within 45 days from the date of delivery of this judgement, to file a joint valuation report in respect of the suit premises to enable this court to make a determination of the issue of the rent payable in respect of the suit premises.
11. As it turned out, the order that the parties file a joint valuation report within 45 days was not complied with. From a perusal of the replying affidavit filed herein by the respondent/landlord, they did by a letter dated March 14, 2019 attempt to prompt the appellant to comply with the said order. In response, Messrs Gori, Ombongi and Company Advocates for the appellant wrote to the respondent’s counsel on March 28, 2019 stating as follows at paragraph 2 of the letter:

“ Our client vacated the suit premises way back in 2018 and therefore it will be an exercise in futility to conduct valuation. We are of the considered opinion that the matter be marked as settled upon the release of the rent which was deposited in court by our client.”
12. Some two weeks after the said response, the appellant instituted this application asserting that he was no longer in occupation of the suit premises and that the relationship of landlord –tenant no longer existed between him and the respondent. According to the appellant, the judgement delivered on February 7, 2019 had been issued on the mistaken belief that the landlord – tenant relationship still existed and hence required to be reviewed as a matter of course.
13. Unfortunately for the appellant, that view was as mistaken as it was erroneous. From the material placed before me, the respondent had sought to raise rent for the determined premises from Kshs 15,000/- to Kshs 60,000/- effective February 1, 2016. That is what led to the appellant filing a reference before the Business Premises Rent Tribunal.
14. It was also clear that by the time the appellant filed this appeal, auctioneers acting on the assessment of rent by the tribunal had issued him with a proclamation dated March 14, 2017 demanding from him rent arrears in the sum of Kshs 262,874/-. Following an urgent application he made to the court dated March 20, 2017, the Honourable Lady Justice A Mshila then seized of the matter granted a temporary



stay of execution on the same day on the condition that the appellant would deposit half the decretal amount in court within seven (7) days.

15. That then is how the appellant ended up depositing the sum of Kshs 131,437/- which he now asks this court to release to himself on the purport that it would be in the interest of justice to do so as the matter has been determined.
16. As it were, this court is yet to determine the rent that ought to have been paid by the appellant to the respondent between February 1, 2016 and July 6, 2017 when he asserts that he was evicted by the respondent from the suit premises. That determination was not made because the appellant failed to comply with the orders of this court requiring him to file a joint valuation report for the suit premises within 45 days from February 7, 2019.
17. While the appellant contends that he is no longer a tenant of the respondent, it was clear that the application of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, cap 301 upon the two parties shall only cease if and when the proper rent is assessed and paid.
18. In the premises, the motion dated April 12, 2019 is misconceived, without any basis and an abuse of the court process. I dismiss the same with costs to the respondent.

**RULING DATED, SIGNED AND DELIVERED IN OPEN court AND VIRTUALLY AT NYERI
THIS 9TH DAY OF DECEMBER, 2022.**

In the presence of:

Mr Makura for the appellant

No appearance for the respondent

court assistant - Kendi

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J O Olola

JUDGE

