



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**Civil Appeal 341 of 2003**

**UKULIMA CO-OP. SOCIETY LTD. & ANOTHER ..... PLAINTIFFS**

**VERSUS**

**DAVID M. MEREKA..... RESPONDENT**

**J U D G M E N T**

The Appellants challenge the order of the Senior Resident Magistrate, granted on 15.5.03 in Nairobi P.M.C.C. No. 3179/03 which order restrained the 1st Respondent, Ukulima Co-op. society Limited, their agent and/or assigns, from levying distress for rent against the Respondent until the hearing and determination of the suit. The Ruling was pursuant to a Chamber Summons, dated 2/4/03.

In their Memorandum of appeal, the appellants list 20 grounds of appeal. But a close look at the issues raised therein, discloses that the grounds can be reduced to seven because many of the grounds are duplicated and a determination on some of the grounds cover three or so other grounds. For instance ground of appeal No. 10 is the same as grounds Nos. 16 and 17. In brief, most of the grounds of appeal can be, and are, subsumed in others.

I begin with ground of appeal No. 11, on whether the learned magistrate erred in failing to appreciate that BPRT No. 113 of 2000 sought to terminate tenancy, and not to determine the amount of rent and space occupied.

On 28/1/2000, the Landlords/appellants gave Notice to Terminate or alter Terms of Tenancy to the Tenants/ Respondents with effect from 1/4/2000. The grounds given for such Notice are that: the Respondents were in rent arrears, and that the Respondent/tenants had failed to co-operate with the appellant/Landlord to ascertain the area occupied as it, the area, was in dispute.

On 17/5/2000 the Respondent/Tenant filed Reference to the BPRT, case No. 113 of 2000 in which he opposed the Appellants Notice of Termination/alteration of the tenancy, and requested the Tribunal, to investigate the matter and determine the issues involved.

A close perusal of the above material, and logic, dictates that whereas the appellant/landlord submits that the issue was on termination, not rent, that is not borne out by the record. The grounds for the purported termination are clearly due to rent arrears. The Notice to terminate also admits that the exact measurements of the space occupied by the Respondent was in dispute.

It is trite learning that the amount of rent, how much is owing or payable, is tightly hinged on the size of the area occupied by the Respondent/Tenant. And that is what the Respondent requested the Tribunal to determine in BPRT case No. 113 of 2000, and the order appealed against was the order to restrain the appellants, from levying distress for rent, against the Respondent/Tenant till the determination of the suit.

In her Ruling, the Learned Magistrate, found, as common grounds, that: there was dispute between the parties as to the size of the premises occupied by the Respondents and whether the appellant should increase the rent.

Both the rent and the size of the premises occupied by the Respondents are matters within the jurisdiction of the Tribunal, and since the matter was already before such Tribunal, an eviction [termination of tenancy] while the matter was pending before the Tribunal, is neither fair, nor logical.

All in all therefore, I find and hold, that the lower court did not err, as alleged by the appellant in ground of appeal No. 11, and that the case sought to determine the amount of rent payable and the space occupied by the Respondent herein.

Accordingly, this ground of appeal, and the related ground, No. 12, are dismissed as unfounded and lacking in both merit and logical connectivity.

I have no doubt, in my mind, that failure to grant the injunction to the applicant/Respondent would have rendered hollow the proceedings before the Tribunal and made nonsense of the judicial process and the justice that underpins it.

The foregoing findings and conclusions dispose of two other grounds of appeal. These are grounds Nos. 2 and 4 of the Memorandum of Appeal whose gist is whether or not there is a dispute between the parties in the business Premises Restriction Tribunal [and the answer is yes, and therefore the Learned Magistrate is right] and that the issues touching on rent, and what is owe,d can duly be conclusively be dealt with by the Rent Tribunal.

I have already held that grounds of appeal Nos. 10, 16 and 17 are similar and disposal of No. 10 covers the other two. I now turn to ground of appeal No. 9, whether the Learned Magistrate erred in finding that HCCC No. 55 of 2001 dealt with completely different issue and hence the issue of RES JUDICATA was not invocable against the Respondent in the application before the lower court.

I have looked at the Ruling in HCC No. 55 of 2001, by A. Visram, commissioner of Assize,[as he then was] dated 28/2/01, and I am in total agreement with the Learned Magistrate, that that ruling dealt with a completely different issue and premises. For one, the above case dealt with 6th Floor of the Building while here, BPRT Case No. 113 of 2000, is concerned with 7th Floor, but in the same Building. Further, the parties in HCC 55 of 2001 are different from the parties herein in that whereas the Landlord is the same in both cases, the tenants are totally different.

The issue of res judicata is clearly misplaced under the circumstances and I dismiss that ground of appeal as not only baseless but also as mischievous and misleading on the part of the appellant.

All in all, and on the basis of the foregoing reasons and conclusions, I dismiss, with costs to the Respondent, and against the appellants, the appeal herein.

**DATED and delivered in Nairobi this 24th Day of November, 2005.**

**O.K. MUTUNGI**

**JUDGE**