REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
MISC CIV APPLI 166 OF 2004

JOSEPHAT SHEDRACK MUREITHI T/A MUREITHI VALUERS COMPANY…….APPLICANT

Versus

LEONARD WACHIRA……………………….........................……………1ST RESPONDENT

REUBEN KAMONJI……………………….........................……………2ND RESPONDENT

JOB NDIRANGU……………………….........................………………..3RD RESPONDENT

TIMOTHY NJOGU……………………….........................…………………4TH RESPONDENT

SAMUEL MBUTHIA……………………….........................……………..……5TH RESPONDENT

<u>MISCELLANEOUS CIVIL APPLICATION NO. 167 OF 2004</u>

PETER N. GICHOHO NGUGI………………........................………………………..APPLICANT

Versus

LEONARD WACHIRA……………………….....................………………...1ST RESPONDENT

REUBEN KAMONJI……………………….....................……………2ND RESPONDENT

JOB NDIRANGU……………………….....................…………………3RD RESPONDENT

TIMOTHY NJOGU……………………….....................………………..4TH RESPONDENT

SAMUEL MBUTHIA……………………....................……………………..5TH RESPONDENT

<u>RULING</u>

In each of these two Miscellaneous Civil Applications, the Respondents are the same and own the same building in respect to which rent is in dispute between them on the one hand and the Applicants on the other. The Applicants are two and each as a tenant of Respondents has filed a separate Miscellaneous Civil Application against the Respondents jointly because each Applicant is aggrieved with the increased rent the Respondents are proposing to charge.

In their intention to raise the rent the Respondents gave to each Applicant a tenancy notice as required under *Section 4 (2)* of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Chapter 301 Laws of Kenya (the Act). The tenancy notice was to take at least two months before taking effect and the tenant was expected, within one month of the tenancy notice, to notify the Respondents in writing whether or not the tenant agreed to comply with the tenancy notice.

If the tenant notified the Respondents that he did not agree to comply with the tenancy notice, the tenant was expected to refer the matter to a Tribunal within the two months the tenancy notice was scheduled to take effect.

It is not disputed that after each of the tenant in these matters had been served with a tenancy notice to increase rent from Ksh.4500/= per month to Ksh.10,500/= per month, neither of the tenants notified the Respondents in writing that he did not wish to comply with the tenancy notice and neither of the tenants filed a reference, under *Section 6 (1)* of the Act, to the Tribunal.

The two months period expired and when the Respondents moved to enforce the tenancy notices against the tenants, the said tenants moved to this court to file their respective Miscellaneous Applications, by way of Notices of Motion dated 29th October 2004, through the law firm of M/S Waweru Macharia & Karweru Advocates, first, seeking enlargement of time within which to file a reference to the Business Premises Rent Tribunal and secondly, seeking orders restraining the Respondents and their agents and employees from levying distress for rent against the Applicant or in any other way interfering with the Applicant's tenancy or his property in the demised premises pending the hearing and final determination of the Applicant's application herein or further order of this court.

Similar issues from similar facts against same Respondents concerning same business premises being handled by same advocates, the law firm of M/S Muteithia, Kibera & Co. Advocates appearing for Respondents. The two Miscellaneous Civil Applications were therefore consolidated for the purpose of hearing the Notices of Motion dated 29th October 2004. The Applications are brought under Sections 3A and 63 of the Civil Procedure Act and Order XXXIX Rules 2A and 3 and Order XLIX Rule 5 and Order L Rule I of the Civil Procedure rules. Grounds in support of each application are stated in the body of each application which is further supported with the affidavit of the Applicant. Against each application the Respondents filed a replying affidavit. All those have been canvassed during the hearing of the applications.

It is my intention to be brief and I therefore go straight to the problems. Firstly, the Applicants were supposed to comply with provisions of *Section 4* and *Section 6* of the Act as already stated earlier in this ruling, they did not comply and they have given the reason that it was because there were attempts to discuss the matter between each Applicant and the Respondents with a view to reaching an agreement without having to go to the Tribunal. No evidence of any such discussion has been brought by any of the Applicants. But even if there were such discussions Applicants were knowledgeable people who knew the legal effect of a tenancy notice. Since such a notice had already been served upon them, Applicants could not have done nothing with respect to *Section 4 (5)* and *Section 6 (1)* of the Act even if negotiations were taking place. They should have acted under those provisions to protect themselves in case negotiations failed. The fact that the Applicants sat back and did nothing under *Sections 4 (5)* and *6 (1)* for two months suggests that the Applicants intended to comply with the tenancy notice and are now just coming up in this court as an afterthought perhaps with the mere intention of delaying the enforcement of the tenancy notices.

Secondly, is it proper for the Applicants to come to this court at this stage? None of the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act says that parties who are supposed to go to the Tribunal can, instead of going to the Tribunal, go to the High Court. None of the provisions of the law the Applicants are relying upon is therefore from Landlord and Tenant (Shops, Hotels and Catering Establishments)Act and that suggests that the Applicants are not properly before this court at this stage.

Applicants are supposed to go to the Tribunal in terms of *Section 6 (1)* of the Act even for the purpose of enlargement of time within which to file a reference. I note that Mr. Waweru Macharia and Mr. Kibera do not agree as to the correct procedure to follow where enlargement of time is involved. But that is for the Tribunal, and not this court, to decide.

To-date the Chairman of the Tribunal has normally been one person. The Legislature must have been aware that that single Chairman could sometimes be unavailable through various reasons like sickness or death or dismissal or suspension. But still that Legislature made no provisions for proceedings supposed to be filed in the Tribunal to be filed elsewhere. The unavailability of the Chairman should not therefore be a reason for parties supposed to file references in the Tribunal to come and file cases in the High Court. The Legislature has given that specific jurisdiction to the Tribunal and ordinary courts should not be seen usurping that jurisdiction even under the guise of *Section 3 A* and *Section 63* of the Civil Procedure Act. Those provisions are to be used only when the High Court or Subordinate court is properly seized of a civil suit under the Civil Procedure Act and a suit under that Act is one commenced by a plaint or as prescribed. Even when the Chairman is not available, the Tribunal remains in existence with its registry open for references to be filed and applications made and a mere filing of a reference renders the tenancy notice ineffective until, and subject to, the determination of the reference by the Tribunal. Had the Applicants filed their respective references therefore, they would have lost nothing even if they were also to engage in negotiations with Respondents for an amicable solution because in the event of their negotiations succeeding, that would simply have been the end of their dispute.

Thirdly, an injunction under *Order XXXIX Rules 3* is an ex-parte injunction. The Applicants were refused such when their respective applications were certified urgent for inter partes hearing. As a result there has been this inter partes hearing. Furthermore, there can be injunction under Rule 2 A and/or Rule 3 *per se*. Any injunction under any of those rules or both of them must first be founded either under rule 1 (a) or Rule 1 (b) or Rule 2. In so far as the Applicants cited Rule 2 A and Rule 3 without also citing Rule 1 (a) or Rule 1 (b) or Rule 2, their respective applications disclosed no reasonable cause of action and were therefore bad in law and unmaintainable.

Further still an application for an injunction under *Order XXXIX* of the Civil Procedure Rules must be an application filed in a pending suit and the application for injunction be by way of Chamber Summons. That is not the position in these proceedings where there is no pending suit and the applications brought by Notice of Motion, Notices of Motion, which commenced the proceedings. Counsel for the Applicants was at pains trying to convince the court that there was a suit in each case because a suit can be commenced by a Notice of Motion. Counsel for Respondents did not agree and I am far from being convinced by Counsel for the Applicants. Indeed if the Notice of Motion in each of these two cases constitutes a suit, then where is the application for injunction? A suit itself cannot turn round to be an application for a temporary injunction under *Order XXXIX* of the Civil Procedure Rules.

Fourthly, the application of each Applicant lacks merits. Some of what I have said have touched on the issue of merits. The Applicants have shown no reasonable cause to have failed to file a reference. No evidence of negotiations. Such negotiations could not have prevented them from filing references. They had too much time to file references and knew the legal necessity for filing such references. The Tribunal may have had no chairman said to have been removed following the recent nasty purge in the Judiciary. But the Tribunal has remained existing to-date with its registry open. Even if they paid the increased rent, it can be refunded to them if they eventually successfully disputed it. It is not correct to say that Regulations 15 and 16 of The Landlord And Tenant (Shops, Hotels and Catering Establishments) (Tribunals) (Forms And Procedure) Regulations say that the Tribunal is a court. What Regulation is saying is simply that when effecting service of a hearing notice from the Tribunal, such service will be

effected in the manner regulating the issue and service of summons under rules made under the Civil Procedure Act. Regulation 16 is simply saying that the Tribunal when handling matters mentioned under paragraphs (a), (b), (c) and (d) shall have the same powers as are vested in a court when the court is trying a suit under the Civil Procedure Act in respect of same matters.

I think I have said enough to dispose off these two Notices of Motion dated 29th October 2004. Accordingly, each Notice of Motion is hereby dismissed with costs to the Respondents.

Dated this 25th day of November 2004.

J. M. KHAMONI

JUDGE