



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO.326 OF 1998

JOHN KAMAU..... APPELLANT

VERSUS

DANSON MUNENE KIBETU..... RESPONDENT

JUDGMENT

Facts giving rise to the case subject to this appeal appear to be simple.

The appellant was previously a tenant of the respondent carrying out business in the latter's plot number Kerugoya – Kutus Municipality plot No.173/230.

In Business Premises Rent Tribunal case No.45 of 1997, the appellant was ordered to pay certain sums of money to the respondent as rent during the month of August 1997.

By 5th October 1997 the applicant had made no payment and that such rent had accumulated to Ksh.75,000/=.

The respondent filed a suit for recovery of this money in the court of the Senior Resident Magistrate at Kerugoya on 13th October 1997.

With the filing of the suit, the respondent also filed a suit for summary judgment for the recovery of this money which application was supported by an affidavit.

From the record, the application for summary judgment was heard and granted on 14th October 1997 and the appellant ordered to pay Ksh.75,000/= to the respondent and that the latter be assisted by the court bailiff and the officer in charge of Kerugoya Police Station to take vacant possession of the suit premises.

The appellant filed an application on 16th October 1997 in the court to set aside the orders of 14th October 1997 but this application was rejected in a ruling dated 17th October 1997.

It would appear after that order, execution was carried out in respect to the payment of the rent wherein the appellant was arrested and placed in civil jail.

Then he filed another application on 21st July 1998 seeking review of the orders made by the lower court on 17th October 1997 and for his temporary release from civil jail.

This application was supported by the grounds set out thereon and by the supporting affidavit.

The application was rejected on 24/8/98 mainly due to an inordinate delay and that the application was similar to the one dismissed by the same court on 17th October 1997.

Arising out of that order this appeal has been lodged with ten (10) grounds of appeal which dealt with the illegality and mistake on the face of the record of the orders sought to be reviewed.

The appeal was heard on 3rd December 2002 wherein Counsel for the parties appeared and either presented or opposed the appeal. Counsel for the appellant complained that the court process was grossly abused in respect to the decision subject to this appeal and that this was a proper case where the appellate court can interfere and set aside the lower court's decision.

Counsel for the respondent stated that the application for review was properly dismissed as it sought the same orders as the one dismissed on 17th October 1997.

I have heard and considered these submissions and also perused the record of proceedings and rulings of 17th October 1997 and 24th August 1998.

This is the situation. A suit is filed in court on 13th October 1997 together with an application for summary judgment. On the same day the plaint and application are saved upon a person said to be the secretary of the appellant who accepts service but declines to sign them on behalf of the respondent. Then on 14th October 1997 the application is heard and granted, taxation is done and by 17th October 1997 when the application for setting aside is called for hearing, execution has already been carried out.

These matters particularly the plaint were not in court under certificate of urgency and even if they were some 3 days would have been allowed for the appellant to file his papers before the matter was determined.

Otherwise in general, after the plaint is filed, the opposite party is allowed 14 days within which to file appearance and/or defence and that before that period lapses and the said opposite party has not taken any such action, the plaintiff cannot do anything.

Moreover, even where the plaint has been filed and the plaintiff wishes to file proceedings for summary procedure, he cannot do so until the opposite party appears.

None of these had happened when summary judgment was entered against the appellant on 14th October 1997.

And the speed With which the respondent moved in this matter and the manner the learned magistrate flouted the legal proceedings as provided under Orders IX and XXXV of the Civil Procedure Rules should have been considered as proper grounds under orders XLIV of the Civil Procedure Rules for reviewing the learned magistrate order of 17th October 1997.

After all an order under the above quoted rule is discretionary and that the application was filed in court after 9 months would not be sufficient reason for the court to over look important legal provisions flouted by the lower court in this process.

That execution had already been carried out and the appellant evicted from the premises was not good reason for the learned magistrate to refuse to grant the orders for review when even in the magistrate's own ruling of 17/10/1997 she indicated that there was actually something wrong with the appellant's whole exercise in this matter and that there was in fact the issue of payment of rent arrears which the appellant was contesting.

I allow this appeal and refer the case back to the Resident Magistrate at Kerugoya for hearing de novo.

Costs of this appeal to be paid by the respondent to the appellant either agreed or taxed.

Delivered this 11th day of February 2003.

D.K.S. AGANYANYA

JUDGE