



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT AT MOMBASA**

**ELC APPEAL NO 415 OF 2017**

**NGOROGI WAMUNYUA & MOSES GITONGA**

**T/A LIKIA GUEST HOUSE.....APPELLANTS**

**VERSUS**

**GEORGE GATHEKA KINYANJUI.....RESPONDENT**

**RULING**

1. The Application for determination is the Notice of Motion dated 15<sup>th</sup> September 2019 by the Appellants seeking orders that the original title deeds for parcels of land Title Number; KILIFI/MTWAPA 4436, KILIFI/MTWAPA 4437, KILIFI/MTWAPA/2248 which are currently deposited in court be released to the appellants herein and an order that the encumbrances in the form of inhibitions which are currently registered against the said titles pursuant to this court's orders be discharged forthwith. The Respondent through his Replying Affidavit dated 12<sup>th</sup> October 2020 has opposed the release of the title documents until the rent arrears are paid in full. The Application was canvassed by way of written submissions.

**The Appellants' submissions**

2. The Appellants filed their submissions on 2<sup>nd</sup> November 2020 in support of the Application. The Appellants submitted that the subject appeal was to challenge the decision of the Business Premises Rent Tribunal (BPRT) to terminate the Appellants' tenancy with the Respondent. That this Court on 9<sup>th</sup> October 2015 granted a stay of execution of the BPRT decision on condition that the Appellants deposit a Kshs 3,450,000/= in an interest earning account to serve as security. That the Court on 30<sup>th</sup> November 2015 allowed the appellant to deposit three title deeds in court and inhibitions be placed against the titles pending hearing and determination of the appeal.

3. That since the tribunal terminated the tenancy before the rent was assessed, the rent payable on the subject premises was the old rent of Kshs 40,000. That should have the rent been increased by the tribunal as per the notice by the respondent, then the respondent would have been entitled to the security. Since no assessment of rent was undertaken the rent payable remains the same as the appellant were paying, and the security does not serve any purpose anymore.

4. That the Appellant has since lost this Appeal on 5<sup>th</sup> October 2018 where court upheld the decision of the BPRT order of terminating the tenancy between the appellants and respondent. That having the Appeal heard and determined, the title deeds no longer serve as security and pray that court orders their release to them as well as the discharge of the registered inhibitions.

**The respondent's submissions**

5. The respondent filed his submissions in opposing the application on 16<sup>th</sup> November 2020. That the application was faulty it was filed by an advocate who is not on record for the Appellant. That Order 9 Rule 5 of the Civil Procedure Rules 2010 states that unless there is a change of advocates filed and served, the former advocates shall be considered the advocate of the party.

6. The respondent further submitted that the Court has no jurisdiction to determine the amount of rent payable in the tenancy which was terminated by the BPRT on 20<sup>th</sup> February 2015. That the decision by the tribunal to terminate the tenancy was triggered by a notice of rental increment dated 28<sup>th</sup> June 2013 that the respondent had issued to the appellants under Section 4 (2) of the Landlord & Tenant (Shops, Hotels and Catering Establishment) Act Cap 301. That as from 1<sup>st</sup> September 2013, the appellants would pay Kshs 150,000 as opposed to Kshs 40,000.

7. The respondent also submitted that by the time the tribunal was terminating the tenancy the rent in arrears was over Kshs 3,000,000. That this appeal challenging that decision has since been dismissed by this court. That this court upheld the BPRT decision to terminate the tenancy agreement and by the time the appellants were vacating the premises the arrears were Kshs 6,710,000.

8. The respondent concluded by asking court to dismiss the application and release the title documents to the respondent.

**Analysis and determination**

9. Having taken into consideration the application, the replying affidavit and the written submissions filed by both parties, I have the following issues to make a determination on:

**a) Whether the title deeds deposited in court as security should be released to the appellant.**

**b) Whether the inhibitions registered against the title deeds be discharged with.**

10. The title deeds were deposited in court by the appellants to serve as security pending the hearing and determination of the appeal. The Appeal was heard and determined by this court and it has been dismissed. The decision of the tribunal to terminate the tenancy agreement has been upheld. The titles were deposited in court only as security not to settle the decree that the respondent may have obtained for rent arrears.

11. The order to deposit the titles was made by court as a condition pending the outcome of the appeal which has since been decided. The condition having been met and dispensed with, this court has no other further reason to hold the titles. The appellants have a right to have their titles back and the inhibition registered against them discharged.

12. The determination of the Appeal concluded the matter at this Court making it functus officio as far as this matter goes. The parties have now gone back to the position that they were in at the tribunal. The respondent is at liberty to apply for execution of decree including by way of sale of immoveable property. This application can only be done at the tribunal which terminated the tenancy agreement.

13. Having said that, I allow the application dated 15<sup>th</sup> September 2019 and order as follows:

**a) That the Deputy Registrar, of this Court do release the original title deeds for the following parcels of land;**

**i. KILIFI/MTWAPA 4436,**

**ii. KILIFI/MTWAPA 4437,**

**iii. KILIFI/MTWAPA/2248.**

**To the appellants forthwith.**

**b) That the Land Registrar Mombasa Land registry do discharge the encumbrance in the form of inhibitions which are currently registered against the following titles deeds:**

**i. KILIFI/MTWAPA 4436,**

**ii. KILIFI/MTWAPA 4437,4**

**iii. KILIFI/MTWAPA/2248.**

**Within 14 days of this judgment.**

**c) That the costs are in the cause.**

**DATED, SIGNED and DELIVERED at MOMBASA this 18<sup>th</sup> day of February, 2021**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Yumna Court Assistant

**C.K. YANO**

**JUDGE**