



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 4 OF 200

MOHSEIN MOHAMMED ALBEITY APPELLANT

VERSUS

PETER MUCHERU NJUGUNA RESPONDENT

JUDGMENT

The Respondent (Tenant) filed suit against the Appellant (Landlord) on 24th November 2000 for an order of accounts to determine the rent payable and payment of the said rent through the court. At the same time he filed an application by summons under the provisions of Section 3A and 63 of the Civil Procedure Act and Order 19 rule (2) of the Civil Procedure Rules and the substantive orders sought were:

1. That the distress for rent commenced against the Plaintiff by the defendant be stayed pending the inter-partes hearing of this application.
2. That accounts be taken to determine how much rent arreas is payable to the defendant by the plaintiff.

The application was heard ex-parte in the first instance and the two prayers granted and the application set for hearing inter-party on the 8th December 2000. However on being served with the application and the order the Landlord filed the present appeal challenging the said orders. The appeal raises 7 grounds which I reproduce for ease of reference.

1. The learned magistrate erred in law in failing to appreciate the fact that in law the Respondent herein had no right to apply for an order of accounts.
2. The learned magistrate erred in law in failing to appreciate that the application by the Respondents herein was premature as an application for account under Order 19 can only be made after appearance has been entered or after time for entering appearance has expired and in this case no summons had even been served on the Appellant requiring him to enter appearance.
3. The learned magistrate erred in granting orders for stay of distress whereas there were no proceedings before any court that could be stayed.
4. The learned magistrate erred in law in failing to note that the Respondent herein had gone to the lower court with unclean hands as he was already in arreas of rent and did not deserve the protection of the court.
5. The learned magistrate erred in law in failing to appreciate that what the Respondent herein

really sought was an order for a temporary injunction and had failed to meet the legal requirements set out in *Giella –vs- Cassman Brown* (1973) E.A. 358.

6. The learned magistrate erred in holding that the Kshs.18,910/= paid to court by the Respondent as the arrears he admitted be held in court.

7. The learned magistrate erred in holding that future rent be Paid to court yet this was not part of the dispute between the Parties.

In his submissions, Mr. Nyongesa for the Landlord argued that under the provisions of Order 19 rule 2 the court had no business granting an order for taking of accounts as no summons had been served at that stage. It provides:

“... shall be made by summons in chambers and be supported by an affidavit when necessary filed on behalf of the Plaintiff stating concisely the grounds of his claim to an account; and such application may be made at any time after the time for entering an appearance has expired.”

Mr. Obura for the Tenant submitted that the applicable word used in the said provision was MAY and therefore it was not mandatory to file the application after entering appearance or the time for so doing having expired. With respect I think the word may is used in giving the applicant an option to make the said application. It is therefore not mandatory for the application to be made but if one chooses to do so, then it is to be at any time after the time for entering appearance has expired. Rule 1 of the same order is clear as to what appearance is in regard to such an application. The first part provides

“where a plaint prays for an account, or where the relief sought or the plaint involves the taking of an account,”

In this case, the plaint clearly does pray for an account. It then goes on to say

“... if the Defendant either fails to appear or does not after appearance by affidavit or otherwise satisfy the court that there is some preliminary questions to be tried, an order for the proper accounts with all necessary inquiries and directions usual in similar cases shall forthwith be made.”

Underlining mine

A party can only enter appearance after service of summons. In this case the application was filed on the same date with the plaint and heard ex parte on the same date before summons were issued. In fact a perusal of the court record reveals that even upto this stage no summons have been issued. However the party is also given an option of making an appearance through affidavit. Again from the record it is clear the application was heard ex-parte and therefore the Landlord was not accorded the opportunity to enter appearance by way of an affidavit. He was also not given the opportunity to satisfy the court that there were some preliminary questions for trial as the orders were granted at the ex-parte state. As to whether the court had the power to order the stay of distress, Mr. Nyongesa submitted that the same amounted to granting an injunction. The application was grounded upon the provisions of Section 63 of the Civil Procedure Act and the relevant part is (e).

“63. In order to prevent the ends of justice from being defeated, the court may, it is so prescribed –

(e) Make such other interlocutory orders as may appear to the court to be just and convenient.”

The court has a discretion in granting such an order and from the annexures in support of the application there is no doubt there is dispute as to actual amount owing as well as the Landlord refusing to

accept rent. The magistrate was therefore correct in granting an order to prevent any further injustice. It was on the same basis that an order to deposit the rent in court was arrived at. The appellant herein however did not wait for the matter to be heard inter-party give magistrate an opportunity to decide whether to confirm the said orders or discharge them but filed the appeal herein. I would have dismissed the appeal at this point but there is a point of law raised by Mr. Obura touching on the competency of the appeal that requires consideration. He says the appeal is incompetent, defective and bad in law in that the appellant failed to seek leave of the court. Order 42 rule (1) m provides that appeals from orders and rulings under Order 19 shall lie as of right.

On the issue of the order appealed against not have been certified, the record is clear it was not. Order 41 rule 1A only envisages a situation where the omission is noted at the time of admitting the appeal and the party appealing is allowed to do so within time the court may order. In this case, the omission went undetected by the court at the time of admitting the appeal. The provisions therein of Order 41 rule 1A are mandatory as concerns the filing of the certified copy of order. It reads:

“1A. Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible ...”

Underlining mine

In the absence of such a certified copy of the order, the appeal is defective and together with other reasons earlier given, the appeal is hereby dismissed with costs. The application is to be set down for hearing interparty within a period of 30 days from the date here of and the Registry is to accord the parties the opportunity to do so. And the court so rules.

Dated and delivered this 9th May 2003.

P.M. TUTUI

COMMISSIONER OF ASSIZE