



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC PET NO. 16 OF 2019

KENNEDY ONYANGO.....PETITIONER

VERSUS

IDIME ENTERPRISES

ZUBEDA ALLI.....RESPONDENTS

JUDGMENT

PETITIONER'S CASE

1. By a petition dated 22nd January, 2019 and filed on 21st February, 2019, the petitioner is seeking the following orders: -

1. a) A declaration that the actions by the 1st and 2nd respondents jointly and severally, as far as their failure, neglect and refusal to disclose to the petitioner, the nature of the agency relationship or any relationship at all between the 1st and 2nd respondents and the recipient of monthly rental payments is concerned are a gross violation of his right to access information being held by the 1st and 2nd respondents contrary to the provisions of Article 35 (1) (b) of the constitution of Kenya 2010;

b) A declaration that the 1st respondent's action to raid the petitioner's premises, namely House Number 860 situated at Bamburi, Palestina area, break his padlock, gain forceful entry thereto and empty the house of all items therein, including the petitioner's house furniture, clothes, utensils, documents, monies, and all other personal items and items of comfort to the petitioner and his family, amount to gross violation of the privacy under Article 31 (a) and (b) of the Constitution of Kenya 2010;

c) A declaration that the 1st respondent's action to raid the petitioner's premises, namely, House Number 860 situated at Bamburi Palestina area, break his padlock, gain forceful entry thereto and empty the house of all items therein, including the petitioner's house furniture, clothes, utensils, documents, monies and all other personal items and items of comfort to the petitioner and his family, amount to a gross violation of the petitioner's right to own property under Article 40 (1) (a) and (b) of the Constitution of Kenya 2010;

d) A declaration that the actions by the 1st and 2nd respondents or their agents, assigns and/or representatives, jointly and severally to unlawfully break into the petitioner's house, namely House Number 860 situated at Bamburi, Palestina Area damage his locks and replace the same with new locks, and even willfully refuse to re-open the house notwithstanding the petitioner's complaints to them, amounts to a gross violation of the petitioner's right to have his dignity respected contrary to Article 28 of the Constitution of Kenya 2010.

2. That this Honourable Court do make an order for compensation by way of damages payable to the petitioner on account of the violation of the petitioner's rights by the 1st and 2nd respondents jointly and severally;

3. That this Honourable Court do make such orders, issue such writs and gives such directions as it deems appropriate to prohibit the respondents from interfering with the peaceful tenancy of the petitioner herein;

4. That costs of this application be provided for.

2. In support of the petition, the petitioner filed a supporting affidavit sworn on 22nd January, 2019. The petitioner's case is that he has been a tenant occupying the 2nd respondent's house Number 860 located at Bamburi, Palestina Area, since November 2016. The petitioner avers

that he has been faithfully making his rental payments when and as they fall due directly to the 2nd respondent as per the 2nd respondent's instructions and without any fail. That the 2nd respondent as the landlady briefly issued the petitioner with receipts for payments made before abruptly stopping sometime in or about June 2017. The petitioner states that a few weeks after the 2nd respondent stopped the issuance of receipts, the petitioner decided to be paying the rent directly by Mpesa and sometimes on very urgent occasions via direct cash payments to the landlady as directed. That a month thereafter, the 2nd respondent verbally indicated to the petitioner that she was thinking of engaging a real estate manager (the 1st respondent) to collect rent on behalf of the 2nd respondent. That a month later before even the 1st respondent started collecting rent as indicated, the 2nd respondent went to the petitioner and informed the petitioner to proceed with the earlier arrangement of payment of rent by way of direct deposits of cash to the 2nd respondent or via m-pesa. The petitioner avers that he asked the 2nd respondent to clarify the position on payment of rent in writing to avoid any confusion, but that the 2nd respondent refused and/or neglected to listen to the petitioner. That sometime on or about 14th May 2018, the 2nd respondent resorted to switching off the petitioner's electricity denying the petitioner access to electricity.

3. The petitioner avers that he opted to continue making payments directly to the 2nd respondent by m-pesa. The petitioner has annexed the m-pesa statements. It is the petitioner's contention that the 2nd respondent has never informed the petitioner of the existence of an existing agency relationship between the 2nd respondent and the 1st respondent enabling the 1st respondent to collect rent and distress for the same on the 2nd respondent's behalf and that the 1st respondent has failed, refused and/or willfully neglected to provide the petitioner with the notice of their appointment as agents of the 2nd respondent despite repeated demands, thereby grossly infringing on the petitioner's right of access of information under Article 35 (1) (b) of the constitution. The petitioner avers that he is married with two school going children who they all occupy the suit premises which they know as their only home.

4. The petitioner avers that despite being up to date with monthly rental payments, on 27th June 2018, the 1st respondent without any color of right, through its appointed agents, descended upon the suit premises, broke the padlock, gained forceful entry and emptied the house of all items therein, including the petitioner's house furniture, clothes, utensils, documents, monies and other personal items and items of comfort before changing the padlock. The petitioner has annexed an inventory of the items seized. The petitioner states that when he sought an explanation from the 2nd respondent, the 2nd respondent denied giving anyone instructions, prompting the petitioner to report the matter as a burglary at Kiembeni Police Post. That the house was later reopened after more than 10 days and some of the seized items returned to the petitioner through the village elder, but the petitioner declined to sign for the same, alleging that his constitutional rights had been violated. The petitioner believes the seized items that were not returned are either lost and/or sold.

5. The petitioner avers that he later filed suit before the Rent Restriction Tribunal at Mombasa Case No. 134 of 2018, and annexed a copy of the plaint and 1st respondent's defence. That the Tribunal issued orders against the 1st and 2nd respondents herein from harassing and/or evicting or in any manner interfering with the petitioner's tenancy in the suit premises, but the 1st respondent has continuously threatened to revisit and deal with the petitioner as they please, notwithstanding the said orders. That todate, the 2nd respondent has never issued the petitioner with a notice to vacate the suit premises. The petitioner avers that a demand letter was issued to the respondents which did not elicit any response, hence the filing of this petition.

RESPONDENTS' CASE

6. The respondents filed a reply to petition dated 6th March, 2019 in which they denied the allegations of the petitioner as regards the case and the injuries claimed. It is their contention that the petitioner is a liar who has been consistently in rent arrears. That the petitioner has been dealing with the 1st respondent as an agent of the 2nd respondent and was making payments to the 1st respondent. That the petitioner was fully aware of the agency relationship between the 1st and 2nd respondents and that the petitioner's claim is misguided. That the petitioner's decision to pay rent to the 2nd respondent was irrational and was meant to confuse the respondents on the right for payment of monthly rents. It is the respondents' contention that the actions of the 1st respondent were legal and well protected by the Distress for Rent Act. That the petitioner was a chronic rent defaulter who was legally distressed. The respondents admit that the petitioner obtained orders from the Rent Restriction Tribunal Case No. 134 of 2018 which they state the respondents observed and obeyed, adding that the said orders were later vacated by the same tribunal and the respondents allowed to levy distress. The respondents aver that all the items were removed from the suit premises in the presence of the petitioner's wife and the village elder and that the same items were returned to the petitioner in the presence of two village elders, with no item recorded as missing. The respondents contend that they had no obligation to take care of the petitioner's family as that was a responsibility of the petitioner which he could honour by paying rent to the 2nd respondent as landlord. The respondents urged the court to dismiss the petition with costs.

SUBMISIONS

7. The petition was canvassed by way of written submissions. Only the petitioner filed his submissions on 13th March, 2020. The respondents did not file submissions within the time granted or at all.

8. The petitioner submitted that whereas there existed a tenancy relationship between the petitioner and the 2nd respondent, there is no nexus and/or relationship established between the 2nd respondent and the 1st respondent and by extension, there exists no plausible relationship between the petitioner and the 1st respondent as to clothe the 1st respondent with the authority to act against the petitioner in the manner complained of in this petition. The petitioner maintained that he was not in rent arrears and that the return of the seized items without any payment made only lead to the inference that the respondents knew that what they were doing was wrong. It is the petitioner's submission that the respondents' action amounted to burglary and theft and that indeed he filed a complaint at Kiembeni Police Post. The petitioner submitted that he has suffered great injuries by gross violation of his right to access information under Article 35 (1) (b) of the constitution, gross violation of his right to privacy under Article 31 (a) of the Constitution, gross violation of his right to own property under Article 40 (1) (a) and (b) of the constitution and gross violation of the petitioner's right to have his dignity respected contrary to Article 28 of the constitution. The petitioner abandoned prayer 3 as he has since moved out of the suit premises and prayed to be awarded Kshs.377,090.00 being the value of the items not returned and Kshs.6,000,000.00 general damages. The petitioner relied on the case of **MWK & Another –v-**

9. Having analyzed the pleadings and the submissions filed, I find that the following issues are for determination:

- a. Whether the petition raises any constitutional issue.
- b. Whether the petitioner is entitled to the reliefs sought.

10. In order for the petitioner to succeed in any constitutional petition, the law requires that the petitioner must demonstrate that the constitutional rights subject matter of the petition have actually been denied or violated or are threatened with denial or violation. Further, in the case of **Bernard Murage – v- Fine Serve Africa Ltd & 3 Others (2015)eKLR**, the Supreme Court held that:

“Not each and every violation of the law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first.”

11. In this case, it is not denied that the petition arises from the tenancy relationship between the petitioner and the 2nd respondent. The petitioner contended that the respondents unlawfully distressed him for rent arrears when he was not in default. The petitioner stated that he filed Mombasa Rent Restriction Tribunal Case No. 134 of 2018 against the respondents herein. The petitioner further stated that he lodged a complaint with the police at Kiembeni Police Post vide OB Number 39/27/6/018 to investigate alleged burglary in the suit premises.

12. In view of the foregoing, I have no doubt in my mind that the petition is premised on the alleged unlawful distress for rent. I do not think that the dispute herein qualifies to be a constitutional issue. In my view, this is an issue that falls squarely in the realm of private law. There are a host of authorities that elucidate the principles that private law claims should not form the basis of constitutional petitions and should be resolved by using the usual process of litigation.

13. In the case of **Uhuru Muigai Kenyatta –v- Nairobi Star Publications Limited (2013)eKLR**, Lenaola J (as he then was) applied the holding in **Re Application by Bahadur (1968)LR (cost) 297** and held that:

“Where there is remedy in civil law, a party should pursue that remedy and I say so well aware of the decision in Haco Industries (supra) where the converse may have been expressed as the position. My mind is clear however that not every ill in society should attract a constitutional sanction.....”

14. In Re-application by Bahadur case (supra), the court in Trinidad and Tobago held as follows:

“The constitution is not a general substitute for the normal procedures for invoking judicial control of administrative action. Where infringement of rights can found a claim under substantive law, the proper course is to bring the claim under that law and not under the constitution.”

15. I wholly agree with the above prepositions of the law. More importantly, and going by the petitioner’s own averments, if there was any burglary or theft committed, then to me that amounts to a crime that ought to be investigated by the relevant agencies, as the petitioner admitted reporting to Kiembeni Police Post. The petitioner has also admitted filing a case with the Rent Restriction Tribunal though has not stated the status or what became of that case. It is my view that there exists a robust statutory procedure within the area of private law where the petitioner could pursue the dispute herein, including the filing of an ordinary civil suit for appropriate remedies.

16. From the material on record, I am not satisfied that the petitioner has made out a case to show that his constitutional rights as envisaged in the Articles cited in the petition have been violated or threatened to be violated. It is therefore my finding that the petition has no merit and I hereby dismiss it with costs.

DATED, SIGNED and DELIVERED at MOMBASA virtually due to COVID-19 Pandemic this 8th day of February, 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant