



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC APPEAL CASE NO. 48 OF 2017**

**REGISTERED TRUSTEES OF CHRIST'S CO-WORKERS FELLOWSHIP.....APPELLANT**

**= VERSUS=**

**KENYA RAILWAYS STAFF RETIREMENT BENEFITS SCHEME .....1 ST RESPONDENT**

**NAIROBI RAILWAY CLUB .....2 ND RESPONDENT**

**JUDGMENT**

**Background**

1. The appellants brought this appeal on 13/12/2017. The appeal was expressed as challenging a decision made by the Business Premises Rent Tribunal (the **Tribunal**) on 13/10/2017. The typed record from the Tribunal, however, indicates that the impugned decision was made on 15/10/2017. A cursory perusal of the 2017 calendar reveals that 15/10/2017 was a Sunday, a day when the Tribunal does not ordinarily sit. It is however clear from the memorandum of appeal that the impugned decision related to the appellants' application dated 8/3/2017 through which the appellants sought a review of the Tribunal's order of 6/3/2017 dismissing the appellants' reference on the ground that it had been filed out of time and did not comply with the parties' consent order of 8/2/2017.

2. Aggrieved by the Tribunal's decision not to review its orders of 6/3/2017, the appellants brought this appeal citing the following 18 grounds. The preamble and the grounds of appeal read as follows:

**The Appellant REGISTERED TRUSTEES OF CHRIST'S CO-WORKERS FELLOWSHIP being dissatisfied with the Ruling dated 13th October, 2017 issued by the Honourable Chairman of the Business Premises Rent Tribunal Hon Mbichi Mboroki sitting at Nairobi appeals to the Environment and Land Court at Nairobi on the grounds:**

- 1. That the honourable Chairman of the Tribunal erred in law by dismissing the appellant's application dated 8th March, 2017 striking out the appellant's reference dated 16th February 2017 despite the fact that it raised triable issues.**
- 2. That the Tribunal erred both in law and fact in not finding that the determination of the issue of ownership of the suit premises had not been determined to give rise to the right to terminate the applicant's tenancy under Section 10 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Chapter 301.**
- 3. That the Tribunal misdirected itself and erred in law and fact by dismissing the applicant's reference on the basis of non-existent consent order of 8th March, 2017.**
- 4. That the Tribunal erred in law and in fact by purporting to infer a non-existent consent order of 8th March, 2017 as basis to refuse review of its orders dismissing the applicants reference.**
- 5. That the honourable Chairman of the Tribunal erred in law by holding that the 1st respondent's notice to vacate dated 28th July 2016 has taken effect and that the 1st respondent was at liberty to institute eviction proceedings against the appellant without hearing and determining the reference filed by the appellant in opposition to the notice on its merits.**
- 6. That the Tribunal misdirected itself in setting unrealistic timelines within which the applicant was required to file its reference;**

7. That the Tribunal erred in law and fact by purporting to issue enforcement orders for eviction through Messrs Moran Auctioneers which it did not possess.
8. The Tribunal erred in law and fact by inferring criminal and penal sanctions by purporting to enforce eviction orders through the OCS Railway Station, Nairobi.
9. That the honourable Chairman of the Tribunal erred in law in failing to address his mind to the provisions of Section 95 of the Civil Procedure Act which allow extension of time.
10. That the Tribunal in dismissing the appellant's application dated 8th March, 2017 erred in law and in fact by failing to take into consideration the submissions of the appellant's counsel.
11. That the Tribunal erred both in law and fact in failing to analyze the evidence and/or submissions tendered/placed before it by the appellants thereby reaching the wrong conclusions.
12. That the Tribunal erred in failing to invoke the provisions of Article 159 of the Constitution of Kenya 2010 which provides that justice shall be administered without undue regard to procedural technicalities.
13. That the Tribunal erred in failing to invoke the provisions of Article 47 of the Constitution of Kenya 2010 and the provisions of the Fair Administrative Action Act, 2015 which provide that everyone has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
14. That the Tribunal erred in failing to exercise its discretion judiciously and in furtherance of the ends of justice and just determination of the issues before it by declining to set aside its orders of 6th March, 2017 and hear the appellant's reference and adjudicate on its merits.
15. That the Tribunal erred in failing to take into consideration the appellant's right to be heard on merits as enshrined in the Constitution of Kenya.
16. That the Tribunal erred in law by failing to observe statutory obligations to ensure that substantive justice is served between the parties to the dispute before him as opposed to paying undue regard to procedural technicalities.
17. That the Tribunal erred by failing to address its mind to the judicial principle that pleadings should not be lightly and quickly struck out especially where they raise triable issues for determination, are not frivolous or scandalous, are not an abuse of the court process or otherwise embarrass or prejudice fair judicial and thereby failing to resolve in material terms the real controversy between the parties.
18. That the honourable Chairman of the Tribunal erred in law in that, in all the circumstances of the case failed to apply the law and his discretion judiciously.

3. Notwithstanding the apparent confusion regarding the date when the decision was made, I will pronounce myself on the substance of the appeal. I have taken this decision because it is clear from the record of appeal that the appeal arises from the Tribunal's decision on the appellants' application dated 8/3/2017 and challenges the manner in which the Tribunal exercised its review jurisdiction under Section 12(1) (i) of the Landlord and Tenant (Shops, Hotels and catering Establishments) Act, Chapter 301 of the Laws of Kenya (**the Act**).

4. It is noted from this court's record that on 4/10/2018, this court rendered a ruling in which it rejected the appellant's attempt to incorporate a subsequent decision made by the Tribunal on 24/10/2017 as being part of the subject of the appeal herein. The appellants have nonetheless filed submissions indicating that the submissions relate to the ruling and orders made by the Tribunal on **13/10/2017** and **24/10/2017**. It is clear from those submissions that the appellants do not appreciate the legal implications of bringing an appeal in relation to a particular decision and subsequently filing submissions in relation to a different decision. I will ignore the submissions relating to the decision of 24/10/2017 because I am not seized of any appeal relating to the decision of 24/10/2017. Lastly, before I dispose the appeal, I will summarize the facts leading to the impugned decision.

#### **Facts of the Appeal**

5. On 27/7/2016, the 1st respondent issued a two months tenancy termination notice upon the appellants. The appellant intimated to the respondent their unwillingness to comply with the termination notice but did not file a reference to challenge the termination notice before the effective date of the notice as prescribed under Section 6(1) of the Act. On 4/10/2016, the appellants filed an application at the Tribunal seeking extension of time within which to file a reference. The application was allowed on 8/2/2017 by consent of the parties on condition that the reference would be filed within 7 days.

6. The appellants did not file the reference within the seven days. Subsequently, without obtaining an extension order, the appellants filed a reference on 22/2/2017. The respondent subsequently applied to have the reference struck out on the ground that it was filed outside the seven days and without leave of the Tribunal. On 6/3/2017, the Tribunal rendered a ruling in which it struck out the reference on the ground that it was incompetent and violated the consent order of 8/2/2017. Subsequently, the appellants filed a notice of motion dated 8/3/2017 seeking among other prayers, an order setting aside the striking out order of 6/3/2017. The Tribunal heard the application and dismissed it in a ruling expressed in the typed proceedings presented by the appellant as having been rendered on 15/4/2017. The ruling is at page 96 of the record of appeal. The said ruling is the subject of this appeal.

## **Analysis and Determination**

7. I have considered the Tribunal's record as presented by the appellants, the grounds of appeal set out in the memorandum of appeal, and the parties' rival submissions. I have also considered the authorities cited by both counsel. Many of the grounds set out in the memorandums of appeal do not relate to the impugned decision and are therefore irrelevant. The single issue falling for determination in this appeal is whether the Tribunal improperly exercised its jurisdiction under Section 12(1) (i) of the Act in declining to vary or rescind its decision of 6/3/2017.

8. The Tribunal's jurisdiction to vary or rescind its orders under the Act is similar to the review jurisdiction of a court of law under Order 45 of the Civil Procedure Rules. That jurisdiction is exercised on well settled principles. A review order would ensue only if the applicant satisfies the following criteria: (i) he demonstrates that he has discovered new and important matter or evidence which was not within his knowledge or could not be produced by him at the time when the order sought to be reviewed was made; or (ii) he demonstrates existence of some mistake or error apparent on the face of the record; or (iii) he demonstrates any other sufficient reason warranting a review of the order. The Court of Appeal emphasized this criteria in the case of **Pancras T Swea v Kenya Breweries Limited (2014) eKLR**. Suffice to observe that whenever called upon to exercise review jurisdiction, the court is to be guided by two competing yet equally important principles; the principle of finality in litigation, and the justice principle which looks at the need to do justice as the key purpose of litigation.

9. In the impugned decision, the Tribunal found that the orders recorded by the Tribunal on 8/2/2017 were consent orders and the Tribunal did not have powers to vary them. Secondly, the Tribunal noted that the appellants had not given sufficient reason why there was non-compliance with the terms of the consent order which extended the time for filing the reference. Consequently, the Tribunal dismissed the application.

10. I have on my part examined the grounds set out on the face of the notice of motion dated 8/3/2017. I have also examined the grounds set out in the supporting affidavit of Kenneth O Odhiambo sworn on 8/3/2017. None of them satisfied the criteria for variation or rescission (review) of an order of the Tribunal under Section 12 (1) (i) of the Act. Similarly, none of them addressed the criteria for review of a consent order. In my view, the Tribunal properly exercised its jurisdiction in rejecting the application for review because the appellants did not satisfy the criteria for review under Section 12(1) (i) of the Act. Similarly, the appellants did not satisfy the criteria for review of a consent order.

11. Secondly, it is clear from the record that instead of the appellants applying for extension of time within which to file a reference beyond the seven days which had been granted by consent of the parties, they elected to file an application for variation and/or rescission (review) of the striking out order. In so doing, they failed to satisfy the criteria for review. In my view, the predicament in which the appellants find themselves is self-inflicted.

12. My finding on this appeal therefore is that it has no merit. The appeal is dismissed. The 1st respondent shall have costs of the appeal to be borne by the appellants.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 2ND DAY OF JULY 2019.**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

Mr Ochieng for the 1st respondent

Mr Muthoni for the appellant

Court Clerk - June Nafula