



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ELC CASE NO 29 OF 2015

(FORMERLY NAIROBI HCCC NO. 397 OF 2012)

JUSTUS MUNYINYI MACHARIA

T/A GUSII PROPRIETY CLUB.....PLAINTIFF

VERSUS

DAKIANGA DISTRIBUTORS LIMITED..... DEFENDANT

RULING

INTRODUCTION

1. This Ruling is in respect of Preliminary Objection raised orally by the Defendant through its learned counsel on 24th May, 2021. In the Preliminary Objection counsel for the Defendant argued that the Plaintiff's suit violates the provisions of section 91 of the Civil Procedure Act which provides that where a decree of a court is varied or reversed, a party in whose favor the variation or reversal is made ought to go back to the court of first instance and seek a refund of costs, interests or compensation.
2. In order to determine this Preliminary Objection, it is necessary to give a background of the Plaintiff's suit against which the Preliminary Objection has been filed.
3. The Plaintiff's mother, Abigail Wanjiru Mbiri (now deceased) rented business premises in Kisii town known as KISII MUNICIPALITY/BLOCK 111/07 (hereinafter referred to as the "suit premises") where she operated a hotel business. She had been in occupation of the suit premises since 1996.
4. On 10th December 2004, the Defendant bought the suit premises from one of the former landlords. Six days later, on 16th December, 2004, the Defendant served the late Abigail with a termination of tenancy notice pursuant to section 4 (2) of the Landlord and Tenants (shops, Hotels and Catering Establishment) Act Cap 301.
5. The main reason for the termination notice was that the Defendant intended to occupy the suit premises for a period of not less than one year for purposes carrying on its business. The Defendant also stated that he intended to demolish and reconstruct part of the suit premises and could not do so without gaining possession of the suit premises.
6. On receipt of the termination of tenancy notice, the late Abigail filed a Reference on 14th January 2005, for determination by the Business Premises Rent Tribunal (BPRT) challenging the notice of termination of tenancy.
7. After hearing the parties the Tribunal made a determination in favor of the Defendant on 10th November 2005 and the Plaintiff was ordered to vacate the suit premises by 1st January, 2006.
8. On 1st December 2005, the late Abigail lodged an appeal against the Tribunal's decision. The main ground of her Appeal was that the chairman of the Tribunal failed to consider the provisions, section 7 (1) (9) of the Landlord and Tenants (shops, Hotels and Catering Establishment) Act Cap 301 which provides that the Defendant ought to have given her a termination of tenancy notice after expiry of 5 years as she was a protected tenant. Together with the Appeal she also filed an application for stay of execution of the Ruling of the Tribunal pending the hearing and determination of her Appeal.
9. On 14th December 2005, the late Abigail obtained an order stay pending the interpartes hearing on 20th December 2005, but when parties appeared before the court the Defendant was not ready to proceed hence the Appeal was fixed for hearing on 8th May 2006, and the interim orders of stay extended till that date. Unfortunately, the court was not sitting on 8th May 2006. The parties consented to have the matter heard

on 2nd June 2006. Further it was mutually agreed that the Defendant would not to execute the orders of the Tribunal.

10. Contrary to the mutual understanding between the parties, the Defendant filed an application in the Chief Magistrate's Court Kisii, by misleading the Magistrate's Court that there was no appeal against the Tribunal's order and obtained ex-parte orders adopting the decision of the Tribunal. The Defendant then proceeded to evict the late Abigail by removing her goods and equipment from the suit premises on 26th May, 2006.

11. Through an application dated 14th June, 2006, the late Abigail moved the High Court for an order of stay of execution of the Tribunal's orders adopted by the Chief Magistrate's Court. She also sought an order reinstating her back into the suit premises forthwith pending the hearing of her application.

12. Vide a Ruling dated 7th February 2007, the High Court held that the confirmation by the Chief Magistrate's Court of the Tribunal's decision was obtained by misrepresentation or non-disclosure of the fact that there was already an appeal against the Tribunal's decision. The court further held that the eviction of the Appellant in purported enforcement of the Tribunal's decision, was null and void.

13. Unfortunately, the late Abigail passed away on 7th September, 2007 and her Appeal abated. The Plaintiff thereafter filed an application seeking the revival of the Appeal. His application was allowed and the Appeal was revived on 28th September, 2008 after the court accepted his explanation that he required more time to take up letter of Administration.

14. However, the Appeal was not heard immediately until the year 2011 due to the length of time it took to constitute a two Judge Bench since this was the court of last Appeal. By the time the Appeal was being heard alot had happened as counsel for the Defendant submitted that the matter had been overtaken by events. He disclosed that the Defendant had demolished the suit properties and that a five storey building had been erected where the suit premises had been. When taken to task why the demolition had taken place despite the pendency of the Appeal, learned counsel argued that the Defendant had lawful orders of the tribunal which he acted upon.

15. The High Court thereafter allowed the Appeal and set aside the Ruling by the Tribunal on grounds that the eviction was unlawful and against the rights of the Appellant who was a protected tenant. The court also held that the Plaintiff was at liberty to approach the court for the assessment of damages that arose since it was impossible for him to be reinstated back to the suit premises.

16. It is on basis of the Court's ruling that the Plaintiff approached the court vide a plaint dated 20th June, 2012 seeking special damages of 9,929,767, aggravated damages for embarrassment, ridicule and inconvenience occasioned as a result of the unlawful eviction, costsof the suit together with interests.

17. The Defendant on the other hand filed a Defence dated 13th August 2012 denying the claim by the Plaintiffs. In the said Defence he avers that the decree arising from the adoption of the Business Premises Rent Tribunal's decision in Kisii CMCC Misc Appl No. 58 of 2006 has never been challenged and is still in force, and therefore the Plaintiff's claim is misconceived and incompetent.

18. The matter was eventually transferred from the High Court at Nairobi to the High Court at Kisii after which it was transferred to this Court. The Plaintiff and his witnesses testified and the Plaintiff closed his case on 3rd April, 2019. The matter was fixed for defence hearing on 26th July, 2019.

19. However, the Defendant has on several occasions sought adjournments and on 30th September, 2020 the court granted the Defendant the last adjournment. When the matter came up for defence hearing on 24th May, 2021, counsel raised the Preliminary Objection which is the subject of this ruling.

ISSUES FOR DETERMINATION

20. Having considered the background of this case and the oral submissions of counsel for both parties the sole issue of determination is whether the Preliminary Objection should be sustained.

ANALYSIS AND DETERMINATION

21. The Defendant's Preliminary Objection is based on Section 91 of the Civil Procedure Act, CAP 21 which provides as follows;

*"91. (1) Where and in so far as a decree is varied or reversed, the **court of first instance shall**, on the application of the party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position they would have occupied but for such decree or such part thereof as has been varied or reversed; and for this purpose the court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal.*

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under subsection (1).

22. Learned counsel for the Defendant submitted that the Plaintiff's suit is for restitution after the appeal was allowed. It is his contention that in accordance with section 91 of the Civil Procedure Act the Plaintiff should have filed an application for compensation, damages and costs in the court of first instance. He argued that since the decision of the Tribunal was adopted by the Chief Magistrate's Court vide Miscellaneous No.58 of 2006, the Plaintiff should have made an application within the Miscellaneous Application instead of filing a

substantive suit.

23. On his part, learned counsel for the Plaintiff submitted that the Preliminary Objection by the Defendant was an afterthought after the Defendant had adjourned the defense hearing several times. Counsel further argued that the High Court had made a decision that the eviction of the Plaintiff was unlawful and that the Plaintiff was at liberty to pursue compensation for damages. He contended that the Plaintiff filed this suit in pursuit of the compensation in line with the directions of the court after deciding the Appeal in his favor. It was counsel's contention that since the tenant/landlord relationship had ended, the Plaintiff could not file a suit in the Business Premises Rent Tribunal as the court of first instance because the same lacked jurisdiction to handle a claim for compensation.

24. It is not in dispute that the appeal arose from the decision of the Chairman of the Business Premises Rent Tribunal. At the time the appeal was filed, the said decision had not been adopted by the Chief Magistrate's Court and therefore the appellate court did not reverse the decree of the Chief Magistrate's Court in Miscellaneous Application No. 58 of 2005. The Defendant has alluded to this at paragraph 8 of its Defence. What this means is that if the Plaintiff were to file an application for restitution, the same would not be filed in the Chief Magistrate's Court as the court of first instance would be the Business Premises Rent Tribunal.

25. As correctly submitted by counsel for the Defendant the Tribunal has no jurisdiction in matters where the Landlord/Tenant relationship has ceased. Section 91 (1) of the Civil Procedure Act does not contemplate a scenario such as the one presented in this case as it presupposes that the court of first instance has jurisdiction to deal with restitution, compensation and damages arising out of a reversal of its decisions. However, subsection 2 of section 91 (2) is more carefully worded as follows:

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under subsection (1).

The use of the word could in this this sub-section is significant.

According to Oxford Advanced Learners Dictionary 7th Edition:

“the word could is used to show that something is or might be possible”

26. In the instant case the reliefs sought by the Plaintiff cannot be obtained by way of an application under section 91(1) of the Civil Procedure Act and the said section is therefore inapplicable.

27. In view of the foregoing, I find and hold that the claim for compensation for unlawful eviction from the business premises is rightfully within the jurisdiction of this court.

28. The upshot is that the Preliminary Objection is not well founded in law and the same is dismissed with costs to the Plaintiff.

DATED, SIGNED AND DELIVERED AT KISII THIS 29TH DAY OF SEPTEMBER, 2021.

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J.M ONYANGO

JUDGE