



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 9 OF 2016

ESTHER WAMBUA.....APPELLANT

VERSUS

MOMBASA PORT SACCO LTD

NAIROBI HOMES(MSA) LTD.....RESPONDENTS

J U D G M E N T

1. This appeal was instituted by the appellant by a memorandum of appeal dated 12th February 2016 by which the appellant faults the trial court, G. Kimenga, in his decision dated 2/2/2016 in the original Mombasa CMCC No. 1785 of 2014 by which the court allowed a Notice of Motion brought by the Respondent before that court and dated the 14/8/2015. In the ruling now challenged the court said:-

“As at this point and going as per the findings of the high court the tenancy arrangements expired on the 31st day of December 2012 and the plaintiff is therefore not estopped from accessing vacant possession as requested under provisions of Order 36 Civil Procedure rules, the court is empowered to enter judgment for the claim of the Plaintiff under consideration if it clear the Defendant defence raises no triable issues and is a sham.

This is a classical case where upon expiry of the tenancy as I have found above, renders the Defendant Defenceless and without option but to give vacant possession as the plaintiff landlord wants. There is no evidence of any tenancy on new terms the mere fact that the tenant continued or is willing to continue paying rent does not mean the tenancy is extended or is renewed under section 60(1) of the Land Act No. 6 of 2012 the tenant is under obligation to continue paying rent pending the resolution of any pending suits before court. It is trite law that a lease cannot be extended by implication where an express notice of non-renewal has been given. This was the holding in the Court of Appeal at Nyeri Civil Appeal No. 248 of 2012.

2. It is that decision the appellant now challenges on the 10 grounds of appeal in the memorandum of appeal and prays that the appeal be allowed and the ruling of the trial court set aside and in its place substituted an order dismissing the application dated 14/8/2015.

3. In summary the appellant faults the trial court on grounds that the orders granted by the trial court were not simultaneously available to the two plaintiffs; that contrary to the trial court's finding, the provisions of Order 2 Rule 15 and those of Order 26 Rule 1 are mutually exclusive; that the application was allowed

when it was bad for having been supported by an affidavit; that the defence filed disclosed a triable issue in the nature of a statutory tenancy; that there was error in reliance on the decision of this court in HCC Miscellaneous Application No. 46 of 2014 when that decision related to a different period from the period in dispute in the suit giving rise to this appeal; that reliance on section 60, to the exclusion of section 2 of the Land Act, 2012, was erroneous; that the invocation of the inherent powers of the court was erroneous as there existed a clear and applicable provision and that the facts having been in contest, it was improper for the trial court to consider an application grounded on an affidavit sworn by Counsel for the Respondent.

4. Although the grounds are divided into 10, I hold the view that grounds 1 is omnibus or indeed nebulous and runs through all the grounds. Grounds 2,3,4, & 10 can be handled together just like grounds 5 and 8, 6 & 7 while ground 9 stands alone. Having grouped the grounds of appeal as aforesaid, the issues that then stand out for determination by the court are as follows:-

a) Did the court properly invoke its inherent powers?

b) Ground 2, 3, 4 & 10: Was the application incompetent for simultaneously seeking striking out and summary

Judgment and being supported by an affidavit sworn by a Counsel?

c) Grounds 5&8: Was there a defence on record which dis-closed a triable issue?

d) Grounds 6 & 7: Was there created a statutory tenancy; where tenancy at will or tenancy at sufferance between the parties?

5. I propose to address the issues in the sequence of a, b, c and d. Thus, I have chosen to do nothing that the 1st two issues address preliminary issues and not necessary the merits while issues b & c decree into issues and are closely related and interdependent.

Invocation of the Inherent powers of the Court

6. This court proceeds from the stand point that the power attributed to courts of law and called inherent powers are residual and intrinsic authority available to courts of law, and available at any time, to put right what would otherwise be an injustice and therefore a departure from the attributes of a court of law. This is the position accepted by the courts of this country without departure and I would add that inherent powers of the court are the powers without which a court of law losses its very character and purpose. This power exists with an appreciation that the law is not static and that novel, situations do arise that call for novel solutions and that legislature is never ahead of situation calling for legislative action. Therefore a court of law is entitled to invoke the intrinsic authority whenever the justice of the case demands.

7. I am aware of the decision of the court of appeal in Kenya *Commercial Bank Ltd vs James Osebe [1982] KLR* which laid to principle that the inherent powers of the court is only available to serve a launce in the law. However that decision was made many years before we strengthened that power with the provisions on overriding objective of the court provisions.

8. As the authors of Halsbury's Laws of England, 4th Edition Vol 37 Paragraph 14, has eloquently written, a writing which has been adopted by the court of appeal in *KP & L Co. Ltd vs Benzene Holdings Ltd t/a Cryco Paints [2016] eKLR*, this power is intrinsic in a court, it exists naturally and essentially for the very purpose of the existence of the court. To that extent, I hold the view that this power is always and readily available for exercise and need not wait for a lacunce to show its face before it can be exercised. However, this is not to say that it is a Panacea for all ills curable by clear provisions of law nor does it render otiose the rules of procedure where the same provide effective and efficient remedies.

9. Put in the context and facts of this appeal I have not seen any part of the decision which adverted to or employed the inherent jurisdiction of the court to merit that ground of appeal. Infact that must have been

a stray ground of appeal in this matter because even the appellant's counsel has not bother to submit on it.

Are the remedies of striking out and summary

Judgment mutually exclusive?

10. The application whose decision has provoked this appeal is to be found at pages 92-93 of the Record of Appeal. It is expressed to be brought under and invokes the provisions of Order 2 Rule 15, Order 36 Rule 1(b) as well as section 1 of and 3A of the Civil Procedure Act. It's prayers were that:-

1. THAT this application be certified as urgent and an early date be given by this Honourable court.

2. THAT this Honourable Court to Order the Defendants Respondents herein to vacate Plot No. 232/XIX/MI MWAKILINGO ROAD, MOMBASA and give the Landlord vacant possession and in default eviction Orders to issue.

3. THAT this Honourable Court be pleased to strike out the Defence filed herein and to enter judgment as prayed in the Pleint.

4. THAT costs of this suit be provided for.

11. That application was premised on the plaint dated 592014 which was essentially seeking an order for vacant possession. That plaint pleads the fact that there existed between the Appellant (as the defendant then) and the 1st Respondent (as first plaintiff) a lease for a period of 5 year 3 months which was due to terminate by effluxion of time on the 31.12.2012. Prior to the termination date the Appellant was informed of the intention not to renew but instead of complying, the appellant went to the business premises tribunal but his reference there was dismissed and it was declared that the Appellant was not a protected tenant by a ruling dated 29/4/2014. That decision was never appealed against but, a judicial review order in the nature of certiorari and mandamus were sought before the High Court in Misc. Application No. 46 of 2014 seeking that the decision be quashed and that the Tribunal be compelled to investigate and establish whether there was a contract of lease established by conduct of the parties. That application was dismissed by Emukele J; on the 29th July 2015 with costs to the current Respondent.

12. To this court the question whether or not the Appellant was a tenant of the Respondent was a matter that had been litigated upon between the parties at the Business Premises tribunal was concluded and a challenge mounted in the High Court but the Challenge also failed. As at the date the lower court delivered itself on the matter that question whether or not there had been created a statutory tenancy was a foregone conclusion by the doctrine of *res judicata*.

13. When therefore the Appellant filed his defence and pleaded at Paragraph 4, 5 & 6 a matter that had been determined by courts of competent jurisdiction such pleadings were not bonafides regard being had to the fact that the judicial review was heard determined and resolved against it. Even the averment that there had been subsequent payment of rent are to this court the issues that were said and determined in a judicial review application. I hold the view that the same were not open for a litigation before the trial court and that the trial court was never mistaken when it held and said that the matter had been decided by the High Court that the tenancy terminated on 31/12/2012.

14. If the defence was grounded on facts which were contended against the decision of the court can such a defence be said to raise a triable issue and to be *bona fides*? This being a first appeal, this court is entitled to reassess and reappraise the matters of evidence before the trial court and come to own conclusion. The fault on the trial court that striking out and summary judgment are naturally exclusive are to this court a position that stresses on procedural technically rather than substance. In both cases, the court concerns itself with the merits and bonafides of the defence filed. Should the court find that there is no bonafide defence raising a triable issue the court strikes out the defence and the natural and inevitable consequence is that a claim to which there is no defence ought to be allowed. However even if the same

were to be held to be mutual exclusive, what prejudice has the citing of the two provisions visited upon the Appellant. I have read the record before the court and it is apparent to me that the order the trial court gave was an order of striking out having found the defence to have been a sham.

15. Even this court finds that the defence filed is not a bonafide defence. Paragraphs 4,5 & 6, I have said before, were taken care of by the res judicata doctrine justice like paragraph. It might as well be said that a party who insist on a fact, well within its knowledge to have been determined and concluded by a court of competent jurisdiction is attempting to abuse the process of court if not just out to vex the opposite party rather than seeking the just determination of a legitimate dispute. I find as the trial court that there was no triable issue raised in the defence and therefore there was no justice to be served by allowing the matter to proceed on a defence that was clearly, evasive and unmerited. See *Kasturi Ltd vs Nyeri Wholesalers Ltd [2014] eKLR*.

16. The foregoing determines the appeal but I wish to just add that there being a finding that the defence raised no triable issue, there was no magic in letting the matter proceed further. To do that would defeat the overriding objective of the court to do substantial justice to the parties and to achieve expeditious disposal of court disputes as enshrined in Article 159 2(b). Once the defence was struck out, it followed that judgment be entered for vacant possession and it did not require a prayer for summary judgment to make such an order. That was the Natural Consequence of Striking out and entry of judgment.

17. The upshot is that this appeal fails and it is dismissed with an order that, the appellant should yield up and give vacant possession to the premises to the Respondent at the earliest opportunity but not later than the 31/3/2017. I have made this order so that there is not generated a need for any party to apply in that regard.

18. I award the costs of the appeal to the Respondent. It is so ordered.

Dated and delivered at **Mombasa** this 17th day of **March 2017**.

HON. P.J.O. OTIENO

JUDGE