



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

JUDICIAL REVIEW CASE NO. 7 OF 2016

**IN THE MATTER OF AN APPLICATION BY KABORE KARIUKI FOR LEAVE TO APPLY
FOR AN ORDER OF PROHIBITION & CERTIORARI**

AND

IN THE MATTER OF KIAMBU CCM CASE NO. 407 OF 2016

BETWEEN KAVORE KARIUKI & KENNETH NJOROGE

NDUMBI

BETWEEN

KAVORE KARIUKI.....APPLICANT

-VERSUS-

CHIEF MAGISTRATE COURT, KIAMBU.....RESPONDENT

AND

KENNETH NJOROGE NDUMBI.....INTERESTED PARTY

J U D G M E N T

1. For all the voluminous briefs and affidavits filed in this case, the legal issue presented is eminently simple: Did the Kiambu Chief Magistrate’s Court have jurisdiction to entertain and give consequential orders in Kiambu CMCC No. 407 of 2016?

2. It is not disputed that the *Ex Parte* Applicant herein, Kavore Kariuki, entered into a Lease Agreement with the Interested Party, Kenneth Ndumbi Njoroje, on 14/08/2015. The Lease was for a Club/Restaurant building erected on the plot known as 147/146 Ruiru BTL Phase III along Ruiru-Kamiti Road. The lease period is explicitly stated in paragraph 3 of the Agreement as 5 years.

3. The *Ex Parte* Applicant took possession of the premises and set up a restaurant branded as “Sarafina Bar & Restaurant.”

4. It would appear that it did not take long for the Landlord and the Tenant to fall out. The *Ex Parte* Applicant (the Tenant) responded to the early disagreement by approaching the Business Premises Tribunal established under Chapter 301 of the Laws of Kenya. The case is Thika BPRT No. 15 of 2016 filed on 01/03/2016. The main issue was alleged disconnection of electricity and water by the Interested

Party (the Landlord) to the premises. The Tribunal gave orders directing the Interested Party to restore the utilities.

5. It is unclear if the utilities were ever restored. What is clear, however, is that the animosity between the two parties deepened. It would seem that even before the Tribunal had given its orders, the Interested Party had given the *Ex Parte* Applicant a Notice to Terminate the Tenancy which was filed at the Tribunal on 29/02/2016. The *Ex Parte* Applicant responded to the Notice by filing a new Tribunal matter to wit BPRT No. 26 of 2016. This case is yet to be fully determined due to four intervening matters.

6. The intervening matters are as follows. First, on 10/10/2016, acting on the instructions of the Interested Party, Kiiriyu Merchants Auctioneers went to the Suit Premises, distrained and carried away goods belonging to the *Ex Parte* Applicant. Second, in response to this action by the Landlord, the *Ex Parte* Applicant filed an application for relief at the Tribunal. On 14/10/2016, the Tribunal gave interim orders directing the Landlord and the Auctioneers not to advertise the goods, and further, to restore all the goods removed from the Tenant's premises pending the hearing and determination of the Tenant's Application.

7. Seven days after the Tribunal's orders directing the Interested Party and his agents (the Auctioneers) to return the goods and put the *Ex Parte* Applicant back in possession of the premises, the Interested Party and his advocate changed tack: they moved the dispute from the Tribunal to the Chief Magistrate's Court. They filed a suit on 21/10/2016 seeking two prayers: a permanent injunction barring the *Ex Parte* Applicant from accessing the premises and rents amounting to Kshs. 361,400 which the Interested Party claimed was due.

8. The Interested Party filed, contemporaneously with the Plaint, a Notice of Motion under Certificate of Urgency. This allowed his lawyer to go *ex parte* in the first instance where he obtained orders restraining the *Ex Parte* Applicant herein from going to the suit premises. All attempts by the *Ex Parte* Applicant to lift or vary those orders in the Magistrates Court have failed. It is, in particular, the refusal by the Learned Magistrate to lift the *ex parte* orders that has aggrieved the *Ex Parte* Applicant most.

9. Meanwhile, the procedural history of the case will be incomplete without pointing out that the Tribunal Case had been slated for hearing on 03/11/2017 – and that date was taken at the Tribunal by both parties. Hence, by the time the Interested Party filed the case at the Chief Magistrate's Court, he was well aware that the matter had a date at the Tribunal. It probably bears repeating that the main issue in that Tribunal matter was the legality of the Interested Party's Notice to Terminate the Tenancy Agreement. It is, also, probably necessary surplusage to recall that the *Ex Parte* Applicant had on 03/11/2016 obtained, from the Tribunal, orders permitting him to forcibly re-enter the premises with the assistance and supervision of the area OCS. Finally, it is important to recall that the Interested Party had attempted, without success, to get the Tribunal to vary or discharge its orders requiring him to restore the distrained goods. It is when he could not get those orders at the Tribunal that he approached the Magistrate's Court.

10. In the face of this, the question then becomes obvious: did the Chief Magistrate's Court have jurisdiction to entertain the suit filed before it and grant injunctive relief to the Interested Party?

11. The Respondent, in conceding to the Judicial Review Application, has correctly stated the legal position. It is readily obvious that the tenancy created by the Interested Party and the *Ex Parte* Applicant in their Agreement dated 14/08/2015 was a controlled tenancy as defined in section 2 of the Landlord and Tenant (Shops, Hotels and Catering Establishments Act, Chapter 301 of the Laws of Kenya)(Hereinafter, "Chapter 301"). Section 2(1) defines a Controlled Tenancy as a tenancy of a shop, hotel or catering establishment:

- a. Which has not been reduced into writing; or
- b. Which has been reduced into writing and which is:
 - i. Is for a period not exceeding five years; or

ii. Contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof.

12. Under both qualifying prongs, the tenancy herein was a Controlled Tenancy. Indeed, that is not disputed. If so, it follows that by dint of sections 11 and 12 of Chapter 301 that any disputes related to payment of arrears of rent or to permit the levy of distress for rent are matters that are within the exclusive jurisdiction of the Business Premises Rent Tribunal. Indeed, there are two pending suits between the *Ex Parte* Applicant and the Interested Party before the Thika BPRT to wit BPRT No. 15 of 2016 and BPRT No. 26 of 2016. As outlined above, there are subsisting orders by the Tribunal which were still in effect by the time the Interested Party approached the Chief Magistrate's Court. Indeed, the parties had a hearing date of 03/11/2016 at the Tribunal.

13. How, then, does the Interested Party justify approaching the Chief Magistrate's Court and not the Tribunal in these circumstances?

14. It seems useful to say that in the first instance, both in its pleadings and submissions before the Learned Magistrate, the Interested Party, who appeared *ex parte*, did not disclose to the Court that there were two matters at the BPRT related to the same dispute. However, it is also true that when the matters came up *inter partes* and the issue was canvassed, the Learned Magistrate formed the opinion that she had jurisdiction. In the relevant part in her short ruling the Learned Magistrate reasoned as follows:

[Counsel for the Respondent] has clearly pointed out that there is a BPRT case pending where the defendant herein is seeking restorative orders and that by granting the interim orders in place, this court has stayed the Tribunal's decision.

It is not in dispute what the cause of action herein is and the stratum of the suit brought by the Plaintiff.

It is the basis of this upon which the Court guided itself on the orders sought under Certificate of Urgency and granted interim orders.

This Court has no jurisdiction to supervise or direct the BPRT in any way. The orders in this case do not in any way interfere with those in the BPRT case. This court has no mandate to guide and or (sic) direct the BPRT in any way but that does not stop this court from exercising its discretion and stepping in where it deems necessary such as in the instant case to issue orders that are relevant to what is before it.

15. Respectfully, the Learned Magistrate failed to appropriately address the issue of jurisdiction of the Court to deal with a matter that was pending before the BPRT. While the Learned Magistrate remarked that the substratum of the suit was "not in doubt" it is not clear what she determined that substratum to be if it were not the rental dispute between the parties – which was the foundational dispute in BPRT No. 26 of 2016. Further, it seems readily clear that the orders issued by the Court directly interfered with those of the BPRT: The BPRT had, in effect, ordered that possession remains with the *Ex Parte* Applicant; the Court ruled the opposite. Finally, the Court takes refuge in its authority to exercise discretion to step in "where it deems necessary such as the instant case..." Suffice it to say a Court cannot exercise discretion where it has no jurisdiction to entertain a matter. See the famous ***Owners of the Motor Vessel***

"Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1.

16. The only transient legally cognisable argument that the Interested Party has raised in response to the jurisdictional argument is a factual one: that the *Ex Parte* Applicant voluntarily abandoned the tenancy and vacated the premises hence ousting the jurisdiction of the Tribunal. On a balance of probabilities, I easily find this claim patently made up. It is so implausible that I conclude that the Interested Party's theory cannot reasonably possibly be true. I say so because all through the legal battles the two parties fought, it was clear all along that the *Ex Parte* Applicant was committed to remaining in possession of the premises. Indeed, immediately after the distress, the *Ex Parte* Applicant went to the Tribunal and obtained orders that the goods be restored. He later on obtained further orders, on 03/11/2016, in the nature of a mandatory injunction permitting him to regain possession of the premises through forcible re-

entry. It is simply absurd and a stretch of credulity to theorize that the *Ex Parte* Applicant vacated the premises in the midst of all these legal interventions. It is noteworthy that at the Tribunal, the Interested Party never once made the dispositive argument that the Tribunal had been stripped of jurisdiction by the *Ex Parte* Applicant's act of vacating the premises. On the contrary, the Interested Party unsuccessfully attempted to persuade the Tribunal to vary its orders.

17. Consequently, there is no doubt that there were two suits subsisting before the Tribunal by the time the Interested Party commenced his suit at the Chief Magistrate's Court. It is also my finding that the *Ex Parte* Applicant had not voluntarily vacated the premises but was, in fact, violently and illegally removed by the Interested Party despite the existence of the Tribunal's orders. This is borne out by the Tribunal's orders of 04/11/2016 directing that the *Ex Parte* Applicant is permitted to break into the suit premises and gain access into the same and resume his business. The result is that the Chief Magistrate's Court had no jurisdiction to entertain the suit – both because jurisdiction lay with the Tribunal and because it was a blatant abuse of the Court process for a new parallel suit to be filed in this way. See *The luji Dry Cleaners Ltd v Muchiri [2002] 2 KLR 764* which is in accord.

18. The result, then, is that I have reached the conclusion that the two orders of Judicial Review prayed for by the *Ex Parte* Applicant (and conceded by the Respondent) are merited. The Order for Prohibition in prayer (1) and that of *certiorari* in prayer (2) in the Notice of Motion dated 11/11/2016 will be granted.

19. Yet, this raises a consequential matter I should deal with before giving final orders. The Interested Party argues that there is now a third party in possession of the premises. The implication is that any orders setting aside or quashing the orders of the Learned Magistrate in *Kiambu CMCC No. 407 of 2016* will have the paradoxical effect of ordering the return of *status quo ante* in circumstances where a third party is already in possession of the suit premises (the Court had sent a verification team led by the Executive Officer at the interlocutory stage to confirm the status quo. The independent conclusion by the Executive Officer was that a third party was already in possession). My response to that seeming dilemma is to let the chips fall where they may. In my view, this is one case where we should prescribe a little bit of Justice Mwera's deontological dose as he did in *Kamau Mucuha v Ripples Case [1992] eKLR*:

In any case where installing the new tenant after an unlawful act by the defendant [landlord] is in circumstances as these, then that new tenant should be left to him to sort out with his landlord when a mandatory injunction to reinstate the old tenant is issued.

20. Here, the *Ex Parte* Applicant was forcibly removed from his tenancy in what comes closest to what I can only call "procedural impunity." A landlord who is fully aware that there are pending matters at the Tribunal where there are interim orders in place decides to short circuit the legal process by, first, forcibly removing the tenant and then seeking to inoculate his unlawful action through an order from a Court that had no jurisdiction to entertain the suit. Meanwhile, that same landlord seeks to perfect his "procedural impunity" by installing a new tenant with dizzying speed – barely six days after illegally removing the former tenant – and fully aware that the Tribunal matter had a hearing date.

21. It was Cockar J.A. who stated on appeal in the *Ripples Case* that "a party, as far as possible, ought not to be allowed to retain a position of advantage that it obtained through a planned and blatant unlawful act." So shall it be here.

22. In the end, therefore, the orders granted by this Court shall be as follows:

a. An Order of Prohibition is hereby issued directed to the Chief Magistrate's Court, Kiambu prohibiting any magistrate there from any further hearing or determining *Kiambu CMCC No. 407 of 2016 (Kenneth Ndumbi Njoroge v Kavore Kariuki)* or the claim therein or any other claim related to the *Ex Parte* Applicant's tenancy, possession, and occupation of all that premises on Plot No. 147/146 Ruiru BTL Phase III which the *Ex Parte* Applicant is a controlled tenant by virtue of the agreement dated 14/08/2015.

b. An Order of *Certiorari* is issued bringing up to this Court and quashing the order of the

Kiambu Chief Magistrate's Court in Kiambu CMCC No. 407 of 2016 (Kenneth Ndumbi Njoroge v Kavore Kariuki) issued on 21/10/2016 and extended on 04/11/2016.

c. The Orders given by the Business Premises and Rent Tribunal in Thika BPRT 15 of 2016 and Thika BPRT 26 of 2016 shall remain in force unless varied or vacated by that Tribunal or are validly vacated by a Court of competent jurisdiction.

d. The Interested Party shall pay the costs of this suit.

23. Orders accordingly.

Dated and delivered at Kiambu this 11th Day of May, 2017.

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JOEL NGUGI

JUDGE