



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELCA NO. 9 OF 2020

JANE NGUYAL.....APPELLANT

VERSUS

FATMA MOHAMED AHMED.....RESPONDENT

RULING

(Application for stay of a ruling of the Business Premises Rent Tribunal pending hearing of appeal; applicant having been given a termination notice; applicant then filing a case before the Tribunal; respondent proceeding to file a second suit before the Tribunal and obtaining ex parte orders of eviction; applicant stating that she was never served with the latter suit; clear that applicant had filed a reference contesting the termination notice; that suit still pending; wrong for the respondent to have proceeded to file a second suit and obtaining order of eviction ex parte; court ordering consolidation of the two suits pending before the Tribunal; eviction orders set aside)

1. The application before me is that dated 12 May 2020 filed by the appellant. It principally seeks a stay of the ruling of the Chairman of the Business Premises Rent Tribunal (the Tribunal) issued on 7 May 2020 in BPRT Case No. 123 of 2020, which ordered the eviction of the applicant from the suit premises. The application is opposed.

2. I have gone through the material presented by both the applicant and the respondent. I have discerned that the respondent is landlord to the applicant. On 10 February 2020, the respondent issued to the applicant a termination notice, on the grounds that she wants to carry out renovation works on the demised premises. The applicant then filed a reference to the tribunal, against two persons being *Shariffa Said Abdulrehman* and *Fatma Mohamed Ahmed* (the latter being the respondent herein), challenging the termination notice. This is the case filed as BPRT Case No. 73 of 2020. It is averred by the applicant that the said reference was due for hearing on 3 June 2020. On 11 May 2020, the respondent demanded that the applicant vacates the suit premises, based on an order that she had obtained ex parte from the tribunal. That order was obtained in the suit BPRT Case No. 123 of 2020 and was issued on 7 May 2020, on the sole application of the said Fatma Mohamed Ahmed, who stated that she is the landlord of the premises. In that suit, she sought orders to have the applicant vacate the premises to enable her undertake repairs. Within that application, she averred that she issued to the applicant a notice on 10 May 2020 to vacate and that the applicant had failed to file a reference. It is on the basis of that claim that the tribunal issued orders of eviction. The applicant has filed an appeal to this court against those orders, and pending the hearing of that appeal, she has filed this application.

3. The replying affidavit to this application is sworn by Maryam Ahmed Said Mandhry who has deposed that she is the beneficial owner of the suit premises. She has averred that the applicant was issued with a termination notice. She has contended that she is not aware that the applicant had filed a reference to the tribunal. She has claimed that the applicant was served with the pleadings in BPRT Case No. 123 of 2020 and failed to file an appearance which led to the issuance of the ex parte orders of eviction. She has also raised issue that the supporting affidavit to the application is defective as it has been sworn by an advocate and not the applicant.

4. I invited counsel for the applicant and respondent to file submissions which they did and I have taken account of these.

5. It is clear to me that the applicant filed the reference BPRT Case No. 73 of 2020 before the tribunal and that reference is pending hearing. The reference is against Shariffa Said Abdulrehman and Fatma Mohamed Ahmed (Ms. Shariffa and Ms. Fatma) who are the persons who issued the termination notice. I wonder where Maryam Ahmed Said Mandhry, who swore the replying affidavit, comes in and it is not clear to me why she is the one who swore the replying affidavit and not either of the two persons who had been sued at the tribunal. Ms. Mandhry alleges not to be aware of the BPRT Case No. 73 of 2020, which may be so, because she is not a respondent in the matter. But Ms. Fatma and Ms. Shariffa have not sworn any affidavit to say that they are not aware of BPRT Case No. 73 of 2020, and they are the respondents in that case. Ms. Fatma has also not explained why she thought it fit to file the suit BPRT Case No. 123 of 2020, while the case No. 73 of 2020 was still pending. Without there being an explanation, it appears to me that the later suit was filed so as to steal a march on the applicant.

6. The respondent has raised the technical issue that the supporting affidavit to this application has been sworn by an advocate. Indeed, it is sworn by Shithakha Tom Ambwere Advocate, who is also on record for the applicant. Within that affidavit, Mr. Ambwere has explained why it is him who has sworn the affidavit. He has deposed that his client is held up in Nairobi and unable to come to Mombasa owing to the

order on cessation of movement due to Covid-19 disease. He was informed by his client that the respondent has moved to evict her employees from the demised premises. Given the urgency of the matter I find no fault in Mr. Ambwere swearing the affidavit. In any case, the matters that he has deposed are matters relating to the two cases before the tribunal and there is nothing which is contentious. I am unable to dismiss this application based solely on that technical issue.

7. From my above discourse, I find merit in this application. I am aware that what the applicant wants is stay pending appeal, but I think this matter can be resolved if I set aside the order of eviction, and direct the consolidation of the two pending cases before the BPRT. The status quo before the dispute was referred to the tribunal needs to be maintained until the two cases are determined. Given the above, I make the following orders :-

i. That the order issued on 7 May 2020 by the Business Premises Rent Tribunal, in Tribunal Case No. 123 of 2020, *Fatma Mohamed Ahmed vs Jane Nguyai*, is hereby set aside.

ii. That I order the consolidation of Tribunal Case No. 123 of 2020, *Fatma Mohamed Ahmed vs Jane Nguyai*, with Mombasa Tribunal Case No. 73 of 2020, *Jane Nguyai vs Sharifa Said Abdulrehman and Fatma Mohamed Ahmed*.

iii. That pending the hearing and determination of the proceedings before the tribunal the status quo prevailing at the time of issue of the termination notice be maintained.

8. There is an appeal pending, but I do not see the need for it, because I believe that it is spent with the above orders. The applicant can consider withdrawing it.

9. The applicant will have the costs of this application.

10. It is so ordered.

DATED AND DELIVERED THIS 14TH DAY OF JULY, 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA