



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA

CIVIL APPEAL NO. 79 OF 2012

TOTAL KENYA LIMITED.....APPELLANT

V E R S U S

DRUMCON (1973) LIMITED.....RESPONDENT

*(Being an appeal from the judgment of the Chairman Business Premises Rent*

*Tribunal, Mrs. D. Mochache Case No. 95 of 2007 Mombasa dated 20<sup>th</sup>*

*April 2012 in the Business Premises Rent Tribunal at Mombasa)*

**RULING**

1. **TOTAL KENYA LIMITED**, the Appellant, being aggrieved by the judgment delivered on 20<sup>th</sup> April 2012 at the **Business Premises Rent Tribunal (BPRT) Mombasa Case No. 95 of 2007** filed this appeal on 7<sup>th</sup> May 2012. **DRUMCON [1973] LIMITED** is the Respondent. The Respondent is a tenant on the Appellant's premises.

2. Appellant has filed a Notice of Motion dated 9<sup>th</sup> April 2014 seeking the following orders-

- **THAT the Court be pleased to give directions on the hearing of the appeal.**
- **THAT the Court be pleased to issue an Order that B.P.R.T.C No. 95 of 2007 be sent back for re-trial before another Court of competent jurisdiction.**

3. By its judgment of 20<sup>th</sup> April 2012 BPRT dismissed Appellant's notice to evict the Respondent. The Appellant's Learned Counsel wrote letters to the Executive Officer of BPRT seeking the typed proceedings for the purpose of preparing the record of this appeal. When the Learned Counsel failed to get response from the Executive Officer she opted to use a firm of Advocates in Nairobi Wanyonyi & Muhia that would be able to make physical inquiries on her behalf. After several attempts to obtain typed proceedings that firm wrote a letter to Appellant's Counsel dated 6<sup>th</sup> September 2013 saying-

**“September 6, 2013**

**V. N. Okata & Co.**

**Advocates**

**Palli House, 1<sup>st</sup> Floor**

**Nyerere Avenue**

**MOMBASA**

**Dear Sirs,**

**RE: BPRTC NO. 95 OF 2007**

**DRUMCON (1973) LIMITED –VS- TOTAL KENYA LIMITED**

**We refer to the above matter, your various letters and the telephone conversations related thereto.**

**The Court file has not yet been traced, though the Executive Officer has facilitated our obtaining copies of the proceedings and judgment copies of which we forward herewith for your records.**

**She (the Executive Officer) is in the process of verifying the said proceedings/judgment and will have the certified copies available for our collection early next week.**

**We advise that as we are not very clear about the source of the said proceedings and judgment, it is imperative that you scrutinize the same and in the event you have issues to raise, let us know at the earliest before we collect the certified copies next week.**

**She also asked that you supply copies of the pleadings and other relevant documentation in the matter to enable them reconstruct the court file for your further action.**

**My take is that it may be prudent/lawful to do so by way of application to reconstruct file.**

**Please find enclosed copies of the proceedings and judgment and also your letter to the said Executive Officer served on the 6<sup>th</sup> of August, 2013.**

**Kindly let us hear from you.**

**Yours faithfully,**

**For: WANYONYI & MUHIA ADVOCATES**

**Ruth Wanyonyi (Ms.)**

**Encls.”**

4. On receiving proceedings it is deponed on behalf of appellant that they were not complete, in that there were several witnesses who testified on behalf of the Appellant and Respondent whose evidence was not reflected in the proceedings provided by the Executive Officer. This is evident from the submissions filed by both parties before BPRT which shows that each party relied on more than one witness. The proceedings however reflect only the evidence of one witness for the appellant and one for the Respondent. Todate the BPRT file has not been traced. The likelihood of it being traced, according to the Appellant are nil. That is why the Appellant by its Notice of Motion seeks an order for re-trial.

5. The application is opposed by the Respondent. Respondent has opposed the prayer for re-trial arguing that to grant that prayer would be tantamount to making summary determination of the appeal; that this Court has no jurisdiction to grant such a prayer; and that such a prayer does not have support of any prescribed law or support of the Constitution.

## ANALYSIS

6. The whole file of BPRT which includes proceedings, judgment and the exhibits submitted during trial is missing and has been missing since 20<sup>th</sup> April 2012. We are now in the year 2015. The prospects, as stated by Appellant of getting the original file are non-existent. To proceed with the appeal without that file would in my view lead to prejudice to the parties. Does the Court in those circumstances fold its hands, tell the Appellant that it is your lot, learn how to live with it? Absolutely not, such an order would be tantamount to giving in to forces who may arrange the disappearance of Court files or documents knowing that the Court would be powerless. This is the gist of the holding of the case **CRIMINAL APPEAL NO. 137 OF 2002 JOHN OOKO OTIENO –Vs- REPUBLIC** where the Court of Appeal stated-

**“What we can take from Zaver’s case is that the Courts must try to hold the scales of justice and in doing so, must consider all the circumstances under which the loss has occurred. Who stands to gain from the loss? Is it merely coincident that both the Magistrate’s file and that of the Police are lost? Does the available evidence point to anyone as being responsible for the loss? And if so can such a party be allowed to benefit from a situation of his own making? .... the interest of justice as a whole must be considered.”**

7. Taking it from the last statement of the Court of Appeal in the above case, I ask a rhetorical question, what is the interest of justice? The loss of the file cannot be attributed to any party. Nor can the incomplete typing of the proceedings. Appellant has opted to appeal against the BPRT’s decision. Appellant has that right protected under the Constitution of Kenya.

8. Similarly under Article 165(6) and (7) of the Constitution of Kenya provides-

**6. The High Court has supervisory jurisdiction over the Subordinate Courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a Superior Court.**

**7. For the purpose of Clause (6), the High Court may call for the record of any proceedings before any Subordinate Court or person, body or authority referred to in Clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.**

It will be seen from that Article that this Court has supervisory power over Subordinate Court and exercising such jurisdiction may make appropriate orders or directions to ensure fair administration of justice. BPRT is one such body subject to the Article.

9. I also find support of making appropriate orders from Section 1A and 1B of the Civil Procedure Act under which the overriding objective is given impetuous. The overriding objective has been the subject of several decisions. In the case **Raila Odinga and Others –Vs- Independence Electoral and Boundaries Commission and 3 Others [2013] eKLR (Nairobi Petition No. 5 of 2013)**, the Justices of the Supreme Court observed-

**“... A Court of Law should not allow the prescriptions of procedure and form to trump the primary object, of dispensing substantive justice to the parties. This principle of merit, however, in our opinion, bears no meaning cast-in-stone and which suits all situations of dispute resolution. On the contrary, the Court as an agency of processes of justice is called upon to appreciate all the relevant circumstances and the requirements of a particular case, and conscientiously determine the best cause.”**

10. In the case **Walter Enock Nyambati Osebe v Justus Mongumbu Omiti & 2 Others [2011]eKLR** the Court stated-

**“With the advent of the overriding objective and Article 159(2)(d) of the Constitution the**

exercise of judicial power or authority by the Courts has acquired a higher dimension. Article 159(2) (d) demands that the Courts be guided in such a way that they administer justice without undue regard to procedural technicalities. In the situation before us we are dealing with an interlocutory application filed in an Election Petition filed in 2009, and we think that justice can only be promoted and attained by facilitating the hearing of the actual petition on merit.”

11. The Court of Appeal in the case MUTHIKE MWANIKI –Vs- GENESIO KABUNYA NJAGI APPLICATION NO. NAI 92 OF 2009 stated-

“We also take into account the provision of Section 1A and 1B of the Civil Procedure Act and Section 3A and 3B of the Appellate Jurisdiction Act which provisions came into force on 23<sup>rd</sup> July, 2009. The Courts including this Court in interpreting the Civil Procedure Act or the Appellate Jurisdiction Act or exercising any power must take into consideration the overriding objective as defined in the two Acts. Some of the principle aims of the overriding objective include the need to act justly in every situation; and the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the Courts by ensuring that the principle of equality of arms is maintained and that as far as it is practicable to place the parties on equal footing.”

12. In addition the Court’s inherent jurisdiction which, such as in this case would assist to ensure the ends of justice are met. The Court of Appeal in the case SAFARICOM LIMITED –Vs- OCEAN VIEW BEACH HOTEL LTD & 2 OTHERS [2010]eKLR in discussing that jurisdiction stated-

“Thus, I. H. Jacob, *The Inherent Jurisdiction of the Court (1770) Current Legal Problems* had this to say concerning the juridical basis of inherent jurisdiction:-

‘On what basis did the Superior Courts exercise their powers to punish for contempt and to prevent abuse of process by summary proceedings instead of by ordinary course of trial and verdict? The answer is, that the jurisdiction to exercise these powers was derived not from statute or rule of law but from the very nature of the Court as a Superior Court of law, and for this reason, such jurisdiction has been called “inherent.” This description has been criticized as being “metaphysical” but I think nevertheless that it is apt to describe the quality of this jurisdiction. For the essential character of a Superior Court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a Superior Court; it is its very lifeblood, its very essence, its immanent attribute. Without such a power, the Court would have form but would lack substance. The jurisdiction which is inherent in a Superior Court of law is that which enables it to fulfil itself as a Court of law. The juridical basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner.”

In my view, this Court would lose both form and substance if it were to shy away from enforcing the rule of law.”

13. No doubt the Courts have been empowered to ensure that justice is attained in each and every case. That being so the order that commends itself to me is that the BPRT Case No. 95 of 2007 be re-tried.

14. I make the following orders-

a. The BPRT Case No. 95 of 2007 shall be re-tried. The Executive Officer of BPRT on being served with this order shall open a file under the Case No. 95 of 2007 and shall place the same before the Learned Chairman of BPRT for his directions on the re-trial.

b. There shall be no orders as to costs in the Notice of Motion dated 9<sup>th</sup> April 2014.

**c. The parties, once the BPRT file is opened, shall write to this Court to indicate whether this appeal can be marked as 'Withdrawn' or may take dates for any further directions of this Court.**

**DATED and DELIVERED at MOMBASA this 3<sup>RD</sup> day of MARCH, 2015.**

**MARY KASANGO**

**JUDGE**