



REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL NO. 48 OF 2015

BETWEEN

CHARLES DICKENS APPELLANT

AND

WALTER ACHANGO OLOO RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. S. O. Ongeri, Ag PM at the Principal Magistrates Court at Mbita in Misc. Civil Application No. 6 of 2014 dated 14th January 2014)

JUDGMENT

1. This is an appeal against an order by the subordinate court dismissing the appellant's application to set aside a wrongful attachment.
2. The facts leading up to this appeal are that the respondent is the proprietor of Manchester House which is situated on Plot No. 271 in Nyandiwa Centre. He leased it to the appellant at a monthly rent of Kshs. 9,500/-. As a result of appellant defaulting in payment of rent, the respondent issued a notice to terminate the tenancy under **section 4(2) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Chapter 301 of the Laws of Kenya)*** ("the Act"). According to the respondent, the appellant did not file a reference to the Business Premises Rent Tribunal ("the Tribunal"). By a letter dated 30th October 2014 written to his counsel, the Rent Control Inspector, Nyanza region stated as follows;

30th /10/2014

Odero Osiemo & Co

Advocates

P O Box

Rongo

RE: LANDLORD NOTICE TO TERMINATE TENANCY

CHARLES DICKENS

We are confirming to you that the notice you issued to the above tenant on behalf of your

client Mr Walter Achango Oloo, under the provisions of Cap 301, expired on 1/9/2014 without any reference made to the Hon. Tribunal as required by section 6(1) of the same Act.

He is therefore not covered by the Act and supposed to be evicted forthwith.

RON

RENT CONTROL INSPECTOR

NYANZA REGION

3. Armed with the letter from the Rent Control Inspector, the respondent moved the court by way of a Notice of Motion dated 6th November 2014 seeking the following order;

[2] THAT the Honourable court be pleased to order the OCPD SUBA DISTRICT to ensure compliance by providing security to HOMELAND AUCTIONEERS in the course of eviction of the respondent herein, CHARLES DICKENS from the Applicant's Plot No. 271 known as Manchester House situated in Nyandiwa Trading Centre.

4. The respondent's application was granted by the learned magistrate on 18th November 2014. When the auctioneers proceeded to effect the eviction and in order to forestall such eviction, the appellant moved the court way of the Notice of Motion dated 16th December 2014 seeking the following substantive orders;

[b] That the Honourable court be pleased to grant an order restraining the respondent, his agent and or servant from selling disposing off the applicants properties as listed in the attached list of which is in custody of the respondent's auctioneers.

[g] That wrongful attachment be set aside.

5. The appellant's application was heard inter parties and by a ruling dated 14th January 2015, the learned magistrate pronounced himself as follows;

The applicant and respondent appear to have a landlord – tenant dispute on rent which is pending before the Rent Business Tribunal. There is an order of the Tribunal dated 13/6/2014 in which the Business Premises Rent Tribunal appears to have given the applicant (sic) notice of the intention of the Respondent to terminate the tenancy for defaulting to pay rent. Subsequently by the letter dated 30th October 2014 the Tribunal informed the advocate for the Respondent that the Respondent could evict the applicant.

In my own assessment it is pursuant to those directions from the Tribunal that [the] Respondent sought to evict the Applicant and sought this court's intervention in providing security.

If any attachment was done, it was done pursuant to the order of the Tribunal and not this court. I find therefore that this court cannot interfere with the process that was initiated at the Tribunal. In essence this court lacks jurisdiction to question the attachment done.

6. Although the appellant raised several issues in the memorandum of appeal, the substantial and decisive issue for consideration is whether the subordinate court had jurisdiction to direct the security agencies to assist the respondent's auctioneer evict the appellant. Counsel for the appellant, in his written submissions, contended that the purported order relied upon by the respondent to commence proceedings in the subordinate court was not an order of the Tribunal. He further contended that there was already a case pending before the Tribunal to wit; **Kisumu**

BPRT Case No. 48 of 2013.

7. Counsel for the respondent supported the decision of the subordinate court and submitted that the court had jurisdiction to enforce orders of the Tribunal. He submitted that the orders of Tribunal had already been effected and therefore the appeal would serve no purpose. He also submitted that the appellant had defaulted in paying rent hence the respondent was entitled to levy distress for rent.
8. The learned magistrate held that the court was enforcing the order of the Tribunal. The Tribunal does not have the power to execute its own orders hence **section 14** of the **Act** provides as follows;

14(1) A duly certified copy of any determination or order of a Tribunal may be filed in a competent subordinate court of the first class by any party to the proceedings before such Tribunal or by the Tribunal, and on such copy being filed and notice thereof being served on the Tribunal by the party filing the same such determination or order, may subject to any right of appeal conferred by or under this Act, be enforced as a decree or order.

9. I find that letter dated 30th October 2014 issued by the Rent Control Inspector was not an order or determination by the Tribunal. It was not certified as such and the same could not be executed by the subordinate court as provided in **section 14** of the **Act**. It was a mere letter from an officer expressing an opinion which was incapable of execution or enforcement. It must be recalled that eviction can only be carried out by a lawful court order. In **Gusii Mwalimu Investment Company Ltd v Mwalimu Hotel Kisii Ltd Civil Appeal No. 160 of 1995(UR)**, the Court of Appeal held that;

It is trite law that unless the tenant consents or agrees to give up possession the landlord has to obtain an order of a competent court or a statutory tribunal (as appropriate) to obtain an order of possession.

10. Had the learned magistrate examined and considered the letter dated 30th October 2014 in light of the provisions of **section 14** of the **Act**, he would have come to the conclusion that the Tribunal did not issue any order capable of enforcement or execution in any manner. In this respect the court erred in directing the security agencies to provide security for the eviction.
11. Mr Odero, learned counsel for the respondent, submitted that the appellant had defaulted in paying rent hence the respondent was entitled to levy distress. The evidence suggests otherwise as the respondent's deposition in support of the founding notice of motion states that the purpose of seeking security assistance was to provide, "*the Auctioneers with security in the course of carrying out eviction.*"
12. I therefore find and hold that as there was no order from the Tribunal capable of being executed or enforced in the manner sought by the respondent, the appeal is allowed to the extent that the attachment and sale of the appellant's property is declared null and void. As the attachment and sale was complete, the appellant's remedies must now lie elsewhere.

13. The appellant shall have the costs of the proceedings in the subordinate court and of this appeal.

DATED and DELIVERED at HOMA BAY this 1st day of July 2015.

D.S. MAJANJA

JUDGE

Ms Nyarige instructed by S. M. Sagwe and Company Advocates for the appellant.

Mr Odero instructed by Odero Osiemo Advocates for the respondent.

