



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL CASE NUMBER 12 OF 2014

NANCY MUTHONI MWANGI.....PLAINTIFF/APPLICANT

VERSUS

SAID ABDALLA ZUBEDI.....DEFENDANT/RESPONDENT

RULING

1. The Applicant by her Notice of Motion dated 27th April 2015 and filed on even date seeks the orders that:

1 Spend

2. The defendant stand committed to jail for a period of 6 months or any other period as the court may deem fit for acting in contempt of the court order dated 28th July 2014, 17th February 2015 and 23rd February 2015 or until he purges the contempt of the said orders.

3. The defendant be ordered to deliver back to the plaintiff the suit premises with vacant possession.

4. The new tenant be ordered to vacate the suit premises immediately and unconditionally.

5. Costs of the application be provided for.

2. The application is supported by grounds appearing on the face of the application that the defendant broke into the suit premises stole stock in trade and cash and gave the premises to a new tenant when orders restraining eviction of the plaintiff were in force. The application is further supported by an affidavit sworn by the Applicant.

3. The application is opposed by an affidavit on the 29th April 2015. The court orders said to have been disobeyed by the Respondent are:

(1) Order/Ruling dated 28th July 2014 was to the effect that the defendant is restrained from attaching the plaintiff's properties attached on the 3rd February 2014, subject to the applicant/paying the rent arrears to the current date within 21 days in default of which the orders will stand vacated. (21 days would have expired by the 19th August 2014)

(2) Order dated 17th February 2015 restrained the defendant from evicting the

plaintiff from the suit property until the suit is heard and decided.

(3) Order of 23rd February 2015 the court extended its orders issued on the 17th February 2015 to the 25th June 2015.

The plaintiff states that despite the above injunctive orders against attachment and eviction, the defendant on the 17th April 2015 evicted the plaintiff from the suit premises and took away all stock in trade valued at Kshs.10 million to an unknown destination and immediately brought a new tenant into the premises.

The applicant argued that the defendants actions were in total disregard of the above court orders prompting the present application.

4. The defendant denies having disobeyed any court order and states that on 29th July 2014, a day after the High Court orders of 28th July 2014, he served the plaintiff with a notice to terminate the tenancy/lease in terms of **Clauses 5 of the Lease Agreement**. I have seen the notice. It is premised on **Section 4(2) of Chapter 301** and the reason given for the notice is failure by the tenant to comply with **Clause 6 of the Lease Agreement** on yearly revision of rent. In objection to the notice, the plaintiff filed a reference in **Nakuru BPRT Case No 24/2014**, and on the 9th March 2015, the tribunal granted the defendant an order of eviction of the plaintiff by the 1st April 2015. The plaintiff did not give vacant possession and on the 17th April 2015 the defendant engaged Auctioneers who evicted the plaintiff from the suit property and put in a new tenant.

5. According to the defendant, he had a lawful order of eviction and states that he cannot be said to have been in contempt of the earlier High Court Orders. He further submitted that there being a tenant in the suit premises who is not a party in this suit, an order to give vacant possession to the plaintiff cannot issue.

6. The issues for the courts determination, in my view are:

1. Is the defendant in contempt of the three court orders stated above?

2. What is the effect of the Business Premises Rent Tribunal order issued on the 9th March 2015?

3. Was the **BPRT** seized with jurisdiction to issue the eviction orders in **BPRT case No. 24 of 2014** in the face of the earlier High Court Orders against eviction of the plaintiff?

4. Did the defendant disclose to the Tribunal of the existence of the High court Orders?

7. Mr. Kimatta Advocate for the Plaintiff/Applicant submitted that the order issued on 28th July 2014 is still in force. He however did not inform the court whether the plaintiff complied with the terms of the order, that within 21 days of the order thus, by 19th August 2014, the rent arrears had been paid by the plaintiff or not.

8. I have seen the replying affidavit by the Defendant sworn on the 18th May 2015 in response to the application hereof. He states that despite the orders issued on the 27th April 2014, the plaintiff paid rent for the month of August 2014 only and was in arrears for nine months in disregard to the court order. He further deponed that he was not served with the BPRT order dated 13th March 2015 staying the orders of eviction issued on the 9th March 2015 prior to the eviction and was served after the eviction of the plaintiff.

9. For the Respondent, Mr. Murimi Learned Advocate submitted that the plaintiff failed to pay rent from August 2014 and that no evidence was tendered to support that the plaintiff had paid rent up to 2017 as stated by the plaintiff. The failure to pay rent as ordered by the High Court prompted the matter being taken to the BPRT by giving the plaintiff two months notice to terminate the lease on account of non-payment of rent. As I stated earlier, the reason stated by the defendant to the Tribunal for termination of the Lease was failure by tenant to comply with Clause 6 of the Lease Agreement on yearly revision of rent, and not non-payment of rent as alleged.

10. On the application for contempt of court orders, Mr. Murimi submitted that the procedure adopted was wrong, that it did not state the facts relied on, and does not support each act by affidavit. In response, Mr. Kimatta urged that an application for contempt may be filed within the suit, and that leave is not necessary. On service of the application, the defendant urged that it ought to have been served personally upon the alleged contemnor to which the plaintiff stated the defendant having been served through his Advocates and being aware and having responded to the same by a replying affidavit, that was satisfactory service and the application was competently before the court. To buttress his submissions on point, he quoted several authorities.

11. This is a court of substantive justice. The application is filed within the suit. In my view no leave is necessary when applicant files application for contempt within the suit.

I am aware that there are divergent views on this point by different courts. I go by the school that leave is not necessary to file a contempt of court application within the suit. Procedures are not cast on stone. They may be varied to suit different circumstances.

It is stated in **Sher Karuturi Ltd -vs- Berg Roses Kenya Ltd HCCC No 347 of 2008**, that the purpose of punishing a person for contempt of a court order is to uphold the authority and dignity of the court. I am not persuaded that in this day and age, our Kenyan courts ought to follow the procedure in the High Court of Justice in England. The Judges in the above case expressed their dissatisfaction to their being no home grown procedure in respect of such application. Suffice to state that in this case, the application was served and the respondent responded to it. What matters is that the respondent has been afforded an opportunity to participate in the application and he has done so. See also **Kariuki and 2 Others -vs- Minister of Gender Sports and Social Services (2004) KLR**.

12. A careful analysis and consideration of the court orders stated in the body of the application *vis-a-vis* whether the defendant disobeyed them. It has been stated that the plaintiff did not pay the rent arrears as per the orders issued on the 28th July 2014.

The default clause therefore came into play after 21 days. The injunction orders in my view, automatically lapsed. The respondent was at liberty to proceed to attach the plaintiff's properties to recover his rent arrears. However, the plaintiff rushed to court and obtained the order dated 13th February 2015 *ex parte* after telling the court that she had paid all outstanding rent but the defendant had failed to issue payment receipts and had closed the business premises, contrary to the court orders.

13. In his replying affidavit, the defendant admitted that the plaintiff had paid rent for only June, July and August 2014 and since then, no other payments were made.

The application was never heard *inter partes*. I am not persuaded that the defendant disobeyed the court order in trying to recover the rent arrears. The interim order of injunction was extended on the 25th June 2015. All the above orders were subject to the plaintiff complying with the 1st order issued on the 27th April 2014 and since that order was not fully complied with all subsequent attempts and eventual eviction of the plaintiff from the suit premises were not in contempt of the orders of the High Court as alleged by the plaintiff. However, was the defendant procedurally right in involving the jurisdiction of the Business Premises Rent Tribunal when orders of the High

Court were in force? This takes us back to the Lease Agreement between the parties, that was for a period of 10 years.

14. The **Business Premises Rent Tribunal Act, Chapter 301** is mandated to adjudicate on controlled Leases/tenancies whose terms do not exceed 5 years. The tenancy between the parties hereof was not controlled. It was for 10 years. The tribunal had no jurisdiction to adjudicate on the said lease dispute as that fell under the Jurisdiction of the High Court. It is said that jurisdiction is everything. Anything done by a court or tribunal that is not seized with the necessary jurisdiction is a nullity.

The defendant rushed to the Business Premises Rent Tribunal one day after the orders of the High Court in m view, to defeat Justice. He did not give the plaintiff an opportunity to comply with the High Court orders issued on 28th July 2014. The application in the BPRT was made in bad faith.

15. The Defendant in his submissions by his advocate did not respond to issues raised as to why he ignored lawfully obtained orders. The court was not informed whether the defendant disclosed to the Tribunal Chairman of the existence of the High Court orders. This was an act of mischief and deceit by the Defendant. He went to the Tribunal with unclean hands. He can not now approach this court for assistance when he ignored its orders.

Having stated that the jurisdiction of the **Business Premises Rent Tribunal** is limited to determination of controlled leases/tenancies of upto five years period, it therefore follows that the order issued therefrom, upon which the eviction was carried upon the plaintiff was illegal and a nullity. The said order was set aside after the eviction had taken place.

16. I have held that the tenancy hereof was not controlled. The Defendant required no leave of the court to recover the rent arrears by way of distress for Rent – which is governed by the **Distress for Rent Act, Chapter 293 Laws of Kenya** – by instructing the Auctioneers to levy distress upon the plaintiffs properties. The Act does not allow eviction of the tenant but only distress for rent. The eviction was unlawful, but nonetheless the Landlord – tenant relationship lapsed upon eviction of the tenant.

17. The court has been asked to order reinstatement of the plaintiff back to the suit premises, by directing the new tenant to give back vacant possession to the plaintiff unconditionally. It has been submitted that if the orders sought are not granted, there would be no suit to be tried.

I have looked at the plaint. There are several claims and reliefs sought by the plaintiff against the defendant. Denial of the injunctive orders that have in any event been overtaken by events will not terminate the plaintiffs claims and reliefs sought. These are claims that ought to go for trial for the trial court to determine the same upon evidence and on merit.

18. Having analysed and evaluated the affidavit evidence it is my finding that the Applicants application dated 27th April 2015 was overtaken by events when the Plaintiff/Applicant was evicted from the suit premises albeit illegality. This court is unable, for reasons stated above, to reinstate the plaintiff therein. Her recourse lies in having the case heard fully where all parties will have an opportunity to ventilate their issues, and urge their prayers and sought in their respective pleadings.

For the reason stated the application is dismissed with no orders as to costs.

Dated, signed and delivered in open court this 3rd day of December 2015

JANET MULWA

JUDGE

