



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

PETITION NO.3 OF 2014

**IN THE MATTER OF: ARTICLES 21 (1), 23 (1), 27 (1) 50(1) & 159 OF THE CONSTITUTION,
2010**

AND

**IN THE MATTER OF: VIOLATION AND/OR INFRINGEMENT ON THE FUNDAMENTAL
RIGHTS OF THE PETITIONER**

AND

**IN THE MATTER OF: LANDLORD & TENANT (SHOPS, HOTELS & CATERING
ESTABLISHMENT) ACT, CHAPTER 301, LAWS OF KENYA**

AND

IN THE MATTER OF: ILLEGAL AND FRAUDULENT ORDERS OF EVICTION

AND

IN THE MATTER OF: KISII CMCC MISC. APPLICATION NO.6 OF 2014

AND

IN THE MATTER OF: DENIAL AND DEPRIVATION OF RIGHT TO FAIR HEARING

AND

IN THE MATTER OF: DISCRIMINATION AGAINST THE PETITIONER

AND

IN THE MATTER OF: LR NO. KISII MUNICIPALITY/BLOCK III/141

AND

**IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS &
FUNDAMENTAL FREEDOM) PRACTICE AND PROCEDURE RULES, 2013**

BETWEEN

ROBERT NDIRITU GITONGA PETITIONER/APPLICANT

AND

ALICE KERUBO NYAMBATI)

THE CHIEF MAGISTRATE'S COURT, KISII LAW COURTS) RESPONDENTS

THE HONOURABLE ATTORNEY GENERAL)

RULING

1. The Petitioner herein, Robert Nderitu Gitonga filed his petition on 10th February 2014 asking for a raft of prayers numbered (a) – (g) among them a declaration to the effect that he is entitled to protection under the Constitution.
2. Contemporaneously with the petition, the petitioner filed a Notice of Motion dated 10th February 2014. The application, filed under Certificate of Urgency seeks orders in the following terms:-
 1. *The application herein be certified urgent and the same be heard Ex-parte in the first instance.*
 2. *Pending the hearing and determination of the instant application, the Honourable Court be pleased to grant an Interim Conservatory Order, to protect, preserve and/or conserve the status of the demised premises, namely Whitestone Hotel and Restaurant, situate on LR NO. KISII MUNICIPALITY/BLOCK III/141 (hereinafter referred to as the suit property), and in particular, from being alienated, leased, dealt with, put to such use and/or interfered with in a manner, that would be adverse to the interests of the petitioner/applicant herein who has been a lawful Tenant therein, todate.*
 3. *Pending the hearing and determination of the instant application, the Honourable Court be pleased to grant an order of temporary injunction prohibiting and/or restraining the 1st respondent either by herself, agents, servants and/or employees from taking over possession, alienating, leasing, interfering with the fixtures in the demised premises and/or in any other manner dealing with the demised premises namely Whitestone Hotel and Restaurant situate on the suit property, that is, LR NO. KISII MUNICIPALITY/BLOCK III/141, without complying with the provisions of Sections 4, 11 & 14 of the Landlord and Tenant (Shops, Hotels & Catering Establishment) Act, Chapter 301, Laws of Kenya.*
 4. *The Honourable Court be pleased to grant Conservatory Order, to Protect, Preserve and/or Conserve the status of the demised premises, namely Whitestone Hotel and Restaurant, situate on LR NO. KISII MUNICIPALITY/BLOCK III/141 (hereinafter referred to as the suit property), and in particular, from being alienated, leased, dealt with, put to such use and/or interfered with in a manner, that would be adverse to the interests of the petitioner/applicant herein who has been a lawful tenant therein, todate, pending the hearing and determination of this petition.*
 5. *The Honourable court be pleased to grant an Order of Temporary Injunction, prohibiting and/or restraining the 1st Respondent either by herself, agents, servants and/or employees from taking over possession, alienating, leasing, interfering with the fixtures in the demised premises, and/or in any other manner dealing with the demised premises, namely, Whitestone Hotel and Restaurant situate on the suit Property, that is, LR NO. KISII MUNICIPALITY/BLOCK III/141, without complying with the provisions of Sections 4, 11 & 14 of the Landlord and Tenant (Shops, Hotels & Catering Establishment) Act, Chapter 301, Laws of Kenya, pending the hearing and determination of this petition.*
 6. *The Honourable Court be pleased to grant an Order of Mandatory Injunction compelling and/or directing the 1st Respondent to forthwith restore and/or re-instate the Petitioner/Applicant unto the demised premises, situate on LR NO. KISII MUNICIPALITY/BLOCK III/141, (hereinafter referred to as the suit property), wherein the Petitioner/Applicant has been carrying on Hotel Business, namely, Whitestone Hotel and Restaurant, before and/or prior to the unlawful Eviction anchored on the illegal Orders issued by the 2nd Respondent, pending the hearing and determination of this petition.*

7. *The Conservatory Orders, if any, granted by this Honourable Court to be implemented and/or enforced by the OCPD, Kisii Central police Division and/or such other officer as the Honourable Court may Decree.*
8. *Costs of this Application be borne by the Respondents jointly and/or severally.*
9. *Such further and/or other orders be made as the court may deem fit and expedient.*

3. The application is supported by the grounds set out on its face and by a 41 paragraph affidavit sworn by the petitioner on 10th February 2014. The petitioner has brought this application as an administrator of the estate of Charles Gitonga Kariuki, having been issued with the Grant of Letters of Administration Ad Litem on the 3rd day of February 2014 vide Kisii HCC Succession Cause No.21 of 2014. The dispute concerns a lease agreement entered into between the deceased, Charles Gitonga Kariuki and the 1st Respondent herein over and in respect of the premises situate on LR NO. KISII MUNICIPALITY/BLOCK III/141 whereby Charles Gitonga Kariuki demised a portion of the suit property to the deceased for a period of 5 years commencing the 5th day of April 2009 up to 31st December 2013. The petitioner's complaint is that the 1st respondent has irregularly served him with a notice for vacant possession vide a letter dated 13th January 2014, seeking to terminate the tenancy over and in respect of the suit property, without any prior notice whatsoever, hence the instant application.

4. The application is opposed vide the Grounds of Opposition dated 25th February 2014 as well as a Replying Affidavit sworn by Alice Kerubo Nyambati of the same date. The 7 grounds of opposition are that:-

1. *The only Tenancy Agreement over subject premises lapsed on 31/12/2014. (sic)*
2. *The petitioner stands to suffer neither loss, prejudice nor injustice whatsoever.*
3. *As a stranger by name REVIEW INVESTMENT LTD. was I actual possession of the premises at least from 1/1/2013. (sic)*
4. *The above notwithstanding, the petitioner as son to the deceased, was duly and adequately notified that the 1st Respondent required the premises back; and to which was entitled to retake pursuant to **Section 10 of Cap 301 Laws of Kenya.***
5. *The petitioner never lodged reference with the Business Premises Rent Tribunal.*
6. *That the Business Premises Rent Tribunal duly recorded and communicated absence of reference accordingly.*
7. *In the circumstances, the petitioner had no right over the premises.*

5. The Replying Affidavit reiterates the above grounds, and the deponent says that though the deceased was 1st Respondent's tenant, the tenancy lapsed on 31st December 2013, the same not having been renewed. That in any event neither the deceased nor the petitioner herein and worse still the stranger known as REVIEW INVESTMENT LTD ever paid any rent (s) to the 1st Respondent. The respondent prays that the application which is intended to intimidate and/or blackmail the respondents be dismissed with costs.

6. On the 12th February 2014, prayer (2) of the Notice of Motion was allowed for a period of 14 days and inter partes hearing was fixed for 26th February 2014. On the 26th February 2014, the matter was stood over to 19th March 2014 with the consent of the parties, with the interim orders being extended until 19th March 2014, but because the court was sitting on a 2-Judge Bench in Homa Bay on 19th March 2014, the matter proceeded on 8th April 2014. On the 19th March 2014, the interim orders were extended.

7. At the hearing, Mr. Oguttu Mboya for the Petitioner/Applicant submitted that:-

- a. *There existed a controlled tenancy between the 1st respondent and the estate of the deceased for a period of 5 years with effect from 13th April 2009. Upon the death of the deceased, the petitioner/applicant was constituted legal administrator of the deceased's estate and in that capacity, petitioner took the mantle of leadership of the deceased's estate and thereby became a bona fide tenant in respect of the suit property.*

- b. *The subject lease being a controlled tenancy could only be terminated in line with the provisions of **Section 4 (1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301**, to the effect that no termination can occur without the issuance of a suitable statutory notice of 2 calendar months. That no such notice was given in the instant case, and further that even if such a notice were given, the same clearly showed the lease was to terminate on 31/12/2013 and that the notice could only commence on 31/12/2013 for a period of 2 months. That the purported notice of 06/02/2014 was premature.*
- c. *That though 1st respondent purported to have issued the notice of 06/02/2014, there is no mention of such notice in the 1st respondent's replying Affidavit.*
- d. *That because of the letter dated 03rd January 2014 from M/s B.N. Ogari & Company, calling for vacant possession of the suit premises, then it cannot be true that the 1st respondent issued the statutory notice at the same time. That the purported notice was a fraud and a hoax and never in fact existed.*
- e. *Under the provisions of **Cap 301**, a determination in respect of any issue or matter under the jurisdiction of the Business Premises Rent Tribunal can only be rendered by and under the hand of the Chairperson for the reason that such a determination is an equivalent of a court order because such a determination carries and attracts adverse consequences one of which is termination of a tenancy and eviction of such a tenant in the event of non-compliance.*
- f. *A determination under **Cap 301** cannot be issued under the hand of a clerical officer by whatever named description.*
- g. *In the instant case a determination was issued by a Rent Control Inspector who had no authority to declare that the petitioner herein was not covered by the act and was therefore supposed to be evicted from the rent premises thus the said notice dated 6th February 2014 is likely to be a nullity.*
- h. *Furthermore, at the time the alleged notice was issued, the Business Premises Rent Tribunal (BPRT) had no chair person from June 2013 to 5th February 2014 when a chair person was appointed though not sworn. The purported termination was in fact an illegality.*
- i. *Whenever a determination issued by Business Premises Rent Tribunal is laid before a magistrate for adoption in this case the 2nd respondent is enjoined to observe certain conditions:-*

- *there must be a certified copy of that determination that being so the letter dated 6th February 2014 is not a certified determination;*
- *the subordinate court must ensure that a notice of the filing of that certified copy has been notified to the tribunal by the party filing the determination for adoption. There is no notice that was ever issued in this case and 2nd respondent did not care to comply and ensure compliance with this essential condition;*
- *there must be a notice to the adverse party under **Section 14 of Cap 301**; the law does not envisage that adoption of the notice is ex-parte unless the law clearly says so;*
- *the adoption of that order will be subject to any right of appeal conferred upon the adverse party so that the adoption order/decreed cannot be executed until the time for appeal under **Section 15 of the Act** has lapsed. The adopting court must establish that there is a determination and not a letter.*
- *In the instant case, the 2nd respondent threw caution to the wind and failed to establish that what was presented before him was capable of adoption nor did he afford the petitioner an opportunity to be heard pursuant to **Article 50 (1)**.*

8. Finally Mr. Oguttu submitted that:-

- a. *The petitioner was denied an opportunity to be heard contrary to **Article 50 (1)**, the doctrine of natural justice and the provisions of **Article 27 (1) of the Constitution**.*
- b. *The decree issued by 2nd respondent violated the fundamental constitutional rights of the petitioner under **Articles 22, 27, 47 (1) and 50 (1)**.*
- c. *The decree issued by the 2nd respondent was a nullity since there was no determination by the Business Premises Rent Tribunal to be adopted. Reliance was placed on the case of **Provincial Insurance Company East Africa Limited –vs- Mordekai Mwanga Nandwa – Civil Appeal No.179***

of 1995 (unreported) for the following principles on natural justice:-

“Those cases appear to me to establish that an order which can properly be described as nullity is something which the person affected by it is entitled ex debito justitiae to have set aside. So far as the procedure for having it set aside is concerned, it seems to me that the court in its inherent jurisdiction can set aside its own order; and that an appeal from the order is not necessary. I say nothing on the question whether an appeal from the order, assuming that the appeal is made in proper time, would not be competent.

The question we have to deal with is whether the admitted failure to serve the summons upon which the order in this case was based was a mere irregularity, or whether it was something worse, which would give the defendant the right to have the order set aside. In my opinion, it is beyond question that failure to serve process where service of process is required, is a failure which goes to the root of our conceptions of the proper procedure in litigation. Apart from proper ex parte proceedings, the idea that an order can validly be made against a man who has had no notification of any intention to apply for it is one which has never been adopted in England. To say that an order of that kind is to be treated as a mere irregularity, and not something which is affected by a fundamental vice, is an argument which, in my opinion, cannot be sustained.”

9. The above quotation were the words of Lord Greene, **MR M Craig –vs- Kanseen (1943) 1KB at p.262.**

10. Counsel also relied on the case of **M/S Gusii Mwalimu Investment Co. Ltd. & 2 others –vs- M/s Mwalimu Hotel Kisii Limited – Court of Appeal Civil Appeal No.160 of 1995** (unreported) for the principle that where a party obtains/secures possession through an illegal process and thereby steals a match on the adverse party that party cannot retain possession on that basis. That in the instant case, the 1st respondent’s contention that she had obtained possession through a sublease endorsed on 13th February 2014 even after the conservatory order was issued on 12th February 2014 cannot be sustained.

11. Mr. Nyatundo for the 1st respondent responded as follows:-

- *It is a fact that the petitioner has come to court as legal representative of deceased.*
- *The applicant has shown the court a tenancy between the deceased and 1st respondent, which agreement lapsed on 31st December 2013 and was never renewed.*
- *The 1st respondent acted humanely and gave the applicant an opportunity to assume the premises which opportunity petitioner squandered. The opportunity came in the form of a letter from B.N. Ogari and Company as well as the statutory notice that was presented dated 1st October 2013.*
- *There are 2 affidavits of service evidencing service of both the letter from B.N. Ogari and the statutory notice.*
- *The court below properly acted upon material before it and made a finding that was factual to the effect that there was no reference made or pending or determined before the Business Premises Rent Tribunal. This was based on the self explanatory communication from the tribunal.*
- *Acting on that material court proceeded to order:-*
 - *that petitioner was not protected and*
 - *that he had no right to be in the premises hence the orders of the court.*
- *Whether the court was right or wrong is a matter that would properly be dealt with in accordance with **Section 14 & 15 of Cap 301** that the petition and notice of motion is an attempted blackmail against both 1st and 2nd respondent in an attempt to get back premises that belong to 1st respondent.*
- *There is a single business permit issued to one Review Investment Limited which was clearly a*

limited liability company which is a corporate entity with its own identity. That was the entity permitted to be in these premises and that corporate entity is not the petitioner nor is it the applicant. That the applicant has not established a nexus between himself and the said company. Therefore the petitioner is not in actual possession of the premises; he has not suffered any loss, prejudice or injustice of any kind arising from the fact that Review Investment Limited was a tenant and applicant should not be taken back to the premises because he has never been in possession and lastly because the lease expired on 31st December 2013.

12. On counsel for the petitioner's submission that it would be

improper for subject premises to be given to a 3rd party, Mr. Nyatundo submitted that the petitioner fully recognizes and understands the premises are in the hands of a 3rd party. Further that petitioner's counsel did not say whether orders of 12th February 2014 were served upon the 1st respondent and that in any event, available information showed that registration of sub-lease was made much earlier than the order of 12th February 2014. Counsel was also of the view that this matter should have been filed before the Land Court since it deals with an interest in land.

13. He further submitted that petitioner's actual tenancy lapsed on 31st December 2013; Petitioner's capacity was granted on 3rd February 2014 thus there was no representation of deceased's estate before 3rd February 2014; furthermore that it was also clear from the grant that C.G. Kariuki died on 29th November 2012 so his tenancy could not lawfully have proceeded to 31st December 2013 though 1st respondent humanely respected the same. Finally, counsel submitted that there was a valid notice terminating the tenancy dated 1st November 2013.

14. Mr. Oguttu for the petitioner in reply submitted as follows:-

- *Lease between 1st respondent and estate of deceased did survive death of deceased leading to 1st respondent giving him a notice to terminate lease so it was a wrong interpretation since remaining part of lease composed part of assets of deceased so it survived. He referred to **Section 82 of Laws of Succession Act.***
- *On the contention that since lease had terminated by 31st December 2013 therefore petitioner and deceased estate had no interest in same; counsel submitted that if that were so, 1st respondent would have had no business going to Business Premises Rent Tribunal which deals with controlled tenancies in this case upto February 2014.*
- *That tenancy had lapsed and therefore petitioner was not protected, 2nd respondent only and merely adopted clerk's decision.*
- *That issues in petition and motion should be dealt with in an appeal. He submitted this position is incorrect as Section 15 donates right of appeal against orders of Business Premises Rent Tribunal, not against illegalities and in any event there was no order by Business Premises Rent Tribunal for adoption by the Magistrate's Court.*
- *That applicant was not in possession of deceased premises and that applicant suffered no loss cannot be correct as 1st respondent was contradicting herself in the same breath.*
- *That even if court were to assist the petitioner/applicant he submitted petitioner is here ventilating his case and not seeking assistance.*
- *On appeal of applicant he submitted that the person against whom adverse orders were made was applicant and not 3rd party. Secondly that applicant is the administrator of deceased's estate and he is interested in the matter and in that capacity he can rightfully come to court under **Article 20 (1) of the Constitution.***

15. After listening to the rival submissions in this matter firstly the court needs to establish whether indeed the lease agreement between the 1st respondent and the deceased Charles Gitonga Kariuki continued after the death of the deceased. A similar situation was decided upon in the Court of Appeal decision in **Waijee –vs- Rose [1976] KLR 25** in which it was held at p.28:-

“It is to be noted that there is nothing in the Landlord and Tenant (Shops, Hotels and Catering Establishment Act) to suggest that death of the tenant would terminate a controlled tenancy under [the] common law. A tenancy does not determine by the death of the lessee, but will rest in his legal personal representatives who are entitled to give or receive proper notice to quit. See Woodfall, Landlord and Tenant (27th Edn.) page 964.”

16. Therefore applying the above case law to the instant case, the lease agreement between the 1st respondent and the deceased did not terminate on 31st December 2012 when he died, since upon his death the lease agreement now rested in his legal personal representatives and in this case the petitioner.

17. The second issue for determination is whether and when the lease agreement between the 1st respondent and the petitioner (the latter acting as a personal representative of the deceased) terminated. According to the documents filed by the petitioner, the tenancy agreement between the 1st respondent and deceased commenced on 5th April 2009 and was to terminate on 31st December 2013. However, the tenant in this case (deceased) died before the expiry of the tenancy period and as was held in the **Waijee case** (supra) such a lease rests in the personal representatives of the deceased and in this case the petitioner. However, **Clause 4 (iii)** of the Tenancy agreement between the 1st respondent and the deceased provided as follows:-

iii. If the tenant shall desire to renew this agreement on expiry of the present five (5) years term hereby granted, the tenant shall give to the Landlady Two (2) calendar month notice in writing and observe all the other conditions herein agreed.”

18. The 1st respondent then engaged the firm of B.N. Ogari and Company Advocates to write a letter to the petitioner on 31st January 2014 advising him that since the lease term had lapsed without him giving the 1st respondent a 2 months’ notice of his intention to renew the lease, he was required to give vacant possession of the suit premises

to the 1st respondent within 30 days from the date of the letter.

19. As counsel for the petitioner has correctly pointed out in his submissions, the lease agreement between the 1st respondent and the deceased was a controlled tenancy since it was reduced in writing and:-

- i. *was for a period not exceeding five years;*
- ii. *contained a provision for termination otherwise than for breach of covenant within five years from the commencement thereof (See section 2(b) of the Landlord and Tenant (Shops, Hotels and Catering Establishments Act) Cap 301.*

20. Furthermore **Section 4** of the same **Act** deals with termination of and alteration of terms and conditions in a controlled tenancy. **Section 4** provides:-

“No tenancy notice shall take effect until such date, not being less than two months after the receipt thereof by the leasing party as shall be specified therein.”

21. On the other hand, the petitioner contends that the 1st respondent received rents of the suit property until March 2014 and this according to him signified that the 1st respondent had accepted to continue with the lease agreement. The 1st respondent denies this contention vehemently and categorically states in paragraph 6 of her replying affidavit that she has never received any rent from the petitioner after 31st December 2013 when the lease agreement expired. I have looked at the petitioner’s bundle of documents and note that he has not attached any payment receipt for such alleged rents to the 1st respondent after 31st December 2013. It is to be noted that in civil cases the burden of proof is on a balance of probability and he who alleges must prove. Since the

petitioner has averred that he paid rent upto and including March 2014, it was incumbent upon him to exhibit receipts for such payment made to the 1st respondent. He has not done so.

22. When a person seeks injunctive orders, this court will rely on affidavit evidence and any allegation of fraud or misrepresentation cannot be heard at this point as such allegations need formal proof during the trial. See **Archibald Wambuni Kahora –vs- National Bank of Kenya Ltd. & another [2013] e KLR.**
23. As I pointed out earlier, the 1st respondent's advocate did indeed give the petitioner notice to vacate the suit premises. The petitioner did not give the 1st respondent 2 months' notice as required under **Clause 4 (iii)** of the **Tenancy agreement** that he wished to continue with the tenancy agreement. Further, the petitioner/applicant has not exhibited evidence of payment of rents to the 1st respondent after 31st December 2013.
24. It therefore follows in my humble view, that the 1st respondent had every right to seek vacant possession of the suit premises. The petitioner contends they never received the said notice but if that was the case why is the said notice in the petitioner's bundle of documents? Secondly an affidavit of service found in the 1st respondent's bundle of documents by one Benjamin H.O. Were who depones as follows:-

“That on 3rd January 2014 at 11.00 a.m. I went to Gilta Plaza Ground Floor where both tenants carry out a wholesale business off Kisii Hospital Road. While at the counter of the said shop, I served both the tenant with the said notice. They accepted service but refused to sign for reason that they had to consult their Advocate first before committing themselves to signing. They retained their copies. Alice N. Kariuki and Mr. Robert Nderitu Gitonga have been personally known to me for a long period on or before this date of service.”

25. In **Moses Okware Opari & another –vs- Amagi Okamu Kasiaka & 2 others in Bungoma HCCC NO.11 of 2008** (unreported) Muchemi J. stated the following:-

“Although service is disputed, the applicants did not apply to call the process server for cross examination. This is the only way to test the genuineness of the alleged service. In the absence of such examination, the court will scrutinize the affidavit of the process server against the evidence of the parties contained in their affidavits.”

I agree wholly with the above holding by Muchemi J.

26. On close scrutiny of the affidavits of service, I find that they all contain vivid details of how service was effected. The date and time and place of service is shown. The mode of identification of the applicant has been explained as required. The affidavits are therefore reliable and are satisfactory evidence of service.
27. Further, I find that the circumstances under which the notice was served to the petitioner are well explained and since the petitioner did not state categorically that they wanted to cross examine the process server, it is my humble view that the petitioner was indeed served with the notice and failure to file a reference in accordance with **Section 6** of the **Landlord and Tenant (Shops, Hotels and Catering Establishments)** meant that the 1st respondent's notice was not disputed and was valid.
28. In the circumstances therefore, it is my humble view that the petitioner has not satisfied the requirements to obtain an injunction as per **Giella –vs- Cassman Brown Ltd [1973] EA 358** as he has not presented a *prima facie* case with a probability of success and neither has he demonstrated that he will suffer irreparable injury which is not compensable in damages. The petitioner's notice of motion dated 7th February 2014 is hereby dismissed with costs to the 1st Respondent.

Dated and delivered at Kisii this 11th day of June, 2014

R.N. SITATI

JUDGE.

In the presence of:

Mr. E. Ntabo h/b for Oguttu-Mboya for the Petitioner

Mr. B.K. Gichana for Nyatundo for the 1st Respondent

A.G. (absent) for the 2nd Respondent

A.G. (absent) for the 3rd Respondent

Mr. Bibu - Court Assistant