



IN THE HIGH COURT OF KENYA

AT MACHAKOS

HIGH COURT MISC. NO.153 OF 2014

QUEEN NDERI AND 12 OTHERS APPLICANTS

VERSUS

MONICA TULU NDUU..... RESPONDENT

RULING

1. The Respondent who owns **Kitui town plot No.4096/96** did on 29.3.2014 issue notices under Section 4 (2) of Cap 301 to the Applicants to the effect that the tenancy between her and the Applicants would effectively be terminated on 1.6.2014.
2. The Applicants failed to act in line with Section 6 of Cap 301 by way of filing a reference to the tribunal. The tenancy was effectively terminated with effect from 1.6.2014 under Section 10 of Cap. 301.
3. The Applicants did not vacate the subject premises thus prompting the Respondent to lodge Application dated 27.10.2014 vide Kitui CMCMisc. No.9 of 2014 seeking to evict the Applicants. After inter parties hearing the court granted the orders for eviction on 14.10.2014.
4. The Applicants moved with speed under certificate of urgency and filed Application dated 15.10.2014 a day after the subordinate court's ruling. For unknown or unexplained reasons, the matter was filed as a Miscellaneous Application HCMisc.153/2014 seeking orders of stay of execution of the lower court decree pending filing of the intended appeal. By then no appeal was filed nor reasons assigned as to why appeal was not filed.
5. On 16.10.2014 the court herein issued temporary orders of stay and fixed matter for direction on 23.10.2014. The matters came for direction on 23.10.2014 and the same was fixed for inter partes hearing on 27.10.2014.
6. On 23.10.2014 the Applicant lodged an amended notice of motion and also notified the court that an appeal No.220/2014 had been lodged dated 22.10.2014. The matter came for hearing on 27.10.2014 for the Amended Motion dated 23.10.2014 with an amendment to the prayer No.3 to read “... ***there be stay of execution of the lower court decree pending hearing and determination of the appeal.***”
7. There was no decree attached only a ruling in CM.Misc.9/2014 Kitui. The Application is brought under order 22 rule 52, order 42 rule 6 Civil Procedure Rules and Section 3 of Civil Procedure Act Cap. 21. The Application is based on the grounds 1 to 8 on the face of the application and supported by the Affidavit of Queen Nderi sworn on 23.10.2014.
8. The Respondent filed on 21.10.2014 grounds of application and a replying affidavit sworn on 21.10.2014 to oppose the application.
9. The Applicant case is that, an order of eviction has been made against them and thus may be evicted any time. The affidavit of Queen Nderi also states that the matter is a preserve of the business premises tribunal and that the procedure of eviction was wrong. The applicants aver that the respondent will suffer nothing since Applicants are still paying rent to date. They aver that they have arguable appeal. They aver that they have been in the premises in the last 15 years and

- they complain that the eviction was wrong *ab initio* as it was commenced by way of an application. The Respondent case is set out in the Moinca Tulu Nduu's affidavit and grounds of opposition dated 21.10.2014. The Respondent avers that she is still owner of the subject premises in Kitui town vide Municipal Council of Kitui records dated 22.10.02 MN.1. She avers that the said business premises were being ran by her 2 sons up to 1.3.2014 and Applicants were her tenants.
10. She continues to state that on 26.2.2014 she wrote to all Respondents notifying them of changes and asked them to sign new lease agreements with effect from 1.3.2014. By a letter dated 28.2.2014 the Applicant's advocate wrote letter asking Applicant to ignore the Respondent aforesaid letter. On 31.3.2014 the Respondent caused notices issued served upon all the Applicants seeking to terminate the tenancy with effect from 1.6.2014. By a letter dated 16.4.2014 the Applicant's advocate M. M. Kimuli & Co. Advocate advised the Applicant to ignore the aforesaid notices.
 11. On 4.6.2014 the BPRT tribunal confirmed that non of the Applicant opposed the notice nor file a reference. The Respondent depones that in absence of the reference of opposition to notice by 1.6.2014 the tenancy was terminated. This prompted the Respondent on 27.6.2014 to seek order of eviction which were granted on 14.10.2014. Thereafter on the 15.10.2014 the Applicants were evicted from the premises by **Ms. MAX AUCTIONEERS** and Respondent given possession of the premises vide MTNII letter from Auctioneer returning warrants to court dated 15.10.2014.
 12. The Respondent thus avers that there is nothing to stay as eviction was carried out and the applicants are trying to forcibly retake possession. In the grounds of opposition, the Respondent states that she opposes the application on the following grounds:

That the non-disclosure of the parties on whose behalf of application is brought renders application incurably objective. Further eviction having taken place, application has been overtaken by events. Further the applicant has no authority to bring the application on behalf of others for failure to comply with orders 1 rule 13 sub rule (2) Civil Procedure Rules.

13. The Respondent further states that tribunal matters are executed in regular courts and thus the court had jurisdiction to deal with execution. The Respondent further argues that termination of notice having expired without opposition, the eviction was lawful and applicant now can sue for damages if aggrieved.
14. The Applicant relying on an authority of **MKS HC.Misc.46/02 MWANGANGI MUTHOKA VS. MUTUA NZIVO NGUI & 2 OTHERS** submits that reliefs sought being substantive eviction included. Court cannot grant them on basis of miscellaneous application. Miscellaneous application is normally resorted to when interim measure is being sought. The court opined that a suit should be filed in such circumstances.
15. The Applicant argues that the subordinate court did not have jurisdiction as the matter is within BPRT jurisdiction. The Applicant submit that they are still paying rent and that they have arguable appeal thus entitled to orders for stay of execution.
16. The Respondent submits that the application has been overtaken by event eviction having been carried out. The Respondent counsel submitted further that Applicant Queen Nderi purporting to act for others who are not named is wrong as she has no authority as same are unnamed.
17. The advocate submits further that the execution took place after termination of the tenancy under provisions of cap.30. He submits that the court had jurisdiction as tenancy had lapsed by application of the law. He relied on authority of **REUBEN MULI MUSYOKI T/A KONZO MERCHANTS VS. WAYUA MUTISYA KINOTHYA & ANOTHER Civil Appeal 3/02 NAI** to support his submission that the notice of termination of tenancy having been served and Applicants having failed to file a reference under Section 6 Cap.301, the tenancy lapsed on 1.6.2014 under Section 10 of Cap 301 and thus Applicants became trespassers. On the issue of continuation of payment by the Applicant the Respondent advocate submits that the same rent if paid, same is paid to the wrong party not to the Respondent.
18. The Respondent submits that she has never received even a single coin from the Applicants. She urged the court to dismiss the application as even the conditions for stay under order 42 rule 6 as confirmed by cited case of **NAI HCC 1529/09 DEPOSIT PROTECTION FUND BOARD VS.**

PANACHAND JIUBAJ SHAH & 2 OTHERS have not been satisfied.

19. In quick rejoinder, the Applicant advocate submitted that the tenancy landlord relationship still exists. He cites a receipt dated 6.10.2014 for payment of rent. On authority to act, he refers to court to a document dated 21.10.2014 signed by Applicant Queen Nderi and other 11 people which authorises Queen Nderi to Act for them in the matter herein. He reiterates that the eviction is illegal as there was no decree to execute. He finally submits that Respondent will not suffer if orders sought are granted since she is receiving rent from the Applicants.

ISSUES FOR DETERMINATION

1. **Whether the application is incurably defective?**
 2. **Whether the application was overtaken by event?**
 3. **If 1 and 2 is negative, whether the applicant has satisfied conditions for stay of execution under order 42 rule 6 of Civil Procedure Rules?**
 4. **What is the order as to costs?**
20. Order 42 rule 6(1) Civil Procedure Rules mandates court entertaining an appeal to grant stay of execution pending appeal as may to it seem just. By the time the application herein was lodged, there was no appeal. AND after the lodging of the appeal the Applicant never filed the application in the appeal. He only amended his application this time to read “*pending appeal*”.
21. The practice is that application for stay of execution pending appeal be filed in the appeal with exception for informal applications under order 42 rules 6 (3) and (5) and as pertains to appeal to the Court of Appeal where notice of appeal is deemed to be an appeal for the purposes of stay of execution pending intended appeal.
22. This was a breach of the practice and procedure which court may not hold to be fatal. This is borne out of the provisions of Article 159 (2) (d) Constitution of Kenya and Section 1A and B Civil Procedure Act.
23. On the issue of the application being overtaken by event, the court notes that the Applicants ignored legal notice issued and served upon themselves. The Applicants do not deny the service. The law took its course in that upon the lapse of the notice period without a reference, the tenancy ended on the 1.6.2014. The Applicants became trespassers and the legal possession vested in the Respondent.
24. The execution and/or eviction on 5.10.2014 ousted the physical possession from the Applicants. The Applicants argue that since the orders used as tool of eviction were issued without jurisdiction and/or irregularly, the eviction is null and void. But Applicants' tenancy had lapsed and are not seeking to be reinstated to the tenancy landlord relationship. The stay would not cure the fact that the Applicants were trespassers vide **Civil Appeal 3/02 – REUBEN MUSYOKI VS. WAYUA MUTISYA KINOTHYA AND ANOTHER.**
25. The Applicants allege to be paying rent to the Respondent but nowhere has the Respondent acknowledged receipt of the same. If she did acknowledge, the same would create new tenancy as the earlier one was terminated. The court therefore holds that the application has been overtaken by event. The applicants have themselves to blame for ignoring a valid notice which terminated their tenancy.
26. If the Applicants find that they were unprocedurally and illegally evicted at the conclusion of the appeal, they can seek damages. The court thus makes the following orders:

1. Application herein dated 23.10.2014 is dismissed with costs.

Signed and delivered at Machakos this 21st day of November, 2014.

CHARLES KARIUKI

JUDGE