REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 265 OF 2013

AGNES NJERI NJAVANI.....APPELLANT

VERSUS

ELIZABETH MWARI MAINGI.....RESPONDENT

R U L I N G

This application is dated 2nd July, 2013 and seeks orders:

(a) That this application be certified urgent and it be heard ex-parte in the first instance.

(b) That the Honourable Court be pleased to stay the execution of the order dated 21.6.2013 in Meru C.M.C. No. 179/2013 until this Honourable Court issue (sic) further orders.

(c) That the Hon. Court be pleased to confirm prayer (b) above until this appeal is hard (sic) and determined.

(d) That costs of this application be provided for.

Prayer 1 is spent.

The parties, by consent, resolved that the application be heard by way of written submissions.

The applicant has submitted that the order should have read "**HEREBY"** issued instead of "**HEREBY ordered**". It was also submitted that any dispute between a tenant and a landlord had to be ventilated under Cap.301 of the Laws of Kenya and that the suit filed in the lower Court by the respondent was improper.

The applicant argued that since she had filed a reference in Tribunal Case No. 28 of 2013, that reference should be determined first. It was also said that the tenant had been depositing rent in the respondent's account and for that reason "the respondent cannot eat his cake and have it."

It was submitted that since the applicant was in possession, the orders urged should be granted. It was also submitted that the main lower Court case was **SUB-JUDICE** since there was a pending Tribunal Case. The advocate for the applicant then interestingly said: "I am not giving any (authority?) Since 'some advocates' have made it a nuisance because they give 1001 Authorities and it becomes tasteless and even annoys our able Judges (sic) give one or two authorities."

The Respondent submitted that the appellant did not seek leave of Court before filing of the intended appeal. As the order being appealed against was an order for injunction, leave of Court was mandatory as

enunciated by the Court of Appeal in C. A. No.214 of 1997 – Michael Njoroge "B" versus Vincent Chege.

It was also argued that the lower Court's order was not vague or illegal and that the wrongly worded order was promptly corrected. It was also argued that if the applicant felt that there was something wrong with the order, she should have sought a review of the same by the Court instead of lodging an appeal.

It was also submitted that the applicant was not a protected tenant and the case of **Velji Shamji Constructions Ltd V. Westmall Supermarket Ltd [2005} e KLR** was offered as an authority. The Court said as follows: "The parties entered into a tenancy of 5 years and 3 months over the subject premises with effect from 1st March, 1999 to 31st May, 2004. Thus by the time this suit was brought to Court the defendant had overstayed for some 6 months in the premises. That was not a controlled tenancy which started by yielding Khs. 20,000/= per month."

It was denied for the respondent that the principle of *resjudicata* and *subjudice* could apply in this case. The respondent accused the applicant of perpetrating a mere ploy of mischief to allow her stay illegally in the suit premises by contriving belated tribunal proceedings. It was clear from correspondence between the parties lawyers that the applicant had accepted that the apposite lease had expired. By moving to the Tribunal, it was submitted, she wanted to disguise her relationship with the Respondent to be that one of a protected tenancy.

I have considered the pleadings, averments, submissions and the authorities proffered by the parties.

I will start with the Applicant's submissions that the suit in the lower Court is *Res Judicata*. The order of Hon. M. Nasimiyu, Resident Magistrate, was made on 21.6.2013. It is not demonstrated that there had been a previous case in the Tribunal involving the same subject matter and the same parties which had been heard and determined. Indeed the applicant does not reveal howsoever when she filed the Business Premises Rent Tribunal proceedings. In the submissions by the Appellant, it has however been admitted that the proceedings in the Tribunal had not been heard and determined.

I will now turn to the Applicant's submission that

"any dispute between a tenant and a tribunal is covered under Cap 301 and any dispute must be filed in the Tribunal Court... ."

With due respect, this laconic and categorical claim is not true. The truth is that the Business Premises Tribunal deals with Controlled tenancies. Other disputes are ventilated through the normal Courts as long as they have the requisite geographical and pecuniary jurisdiction. I agree with the opinion contained in Velji Shamji Constructions Ltd V. Westmall Supermarket Ltd (Supra) that parties should not Contrive Controlled tenancies through the back door, which to me the applicant is doing.

I will now deal with the issue of filing of the Intended Appeal without the leave of Court. The applicant has not denied that she did not seek the leave of Court. The requirement that the apposite leave of Court be sought is not a mere technicality. It is a substantive legal issue which can only be eschewed with ramifications which would spawn veritable confusion.

In the circumstances, I find the applicant's application dated 2nd July, 2013 unmerited. I, therefore, dismiss it with costs to the Respondent.

Delivered and dated in Open Court at Meru this 4th day of October, 2013 in the presence of:

Cc. Mwonjaru/Daniel

Ogoti present for Appellant

Muthomi h/b Kirimi for Respondent's

P. M. NJOROGE

JUDGE