REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ELC APPEAL NO. 2 OF 2020

RICHARD ATANDI .....APPELLANT

VERSUS

JUDES GENERAL WHOLESALERS AND

SUPERMARKET LIMITED..... RESPONDENT

(Being an appeal from the Ruling of Hon. E.A. Obina (Principal Magistrate) dated the 3rd day of December 2019 arising out of Kisii CMCC Misc. Appl. No. 137 of 2019)

JUDGMENT

INTRODUCTION

1. Before me is an appeal from the decision of Hon. E.A. Obina allowing a Preliminary Objection raised by the Respondent in opposition to the Appellant's application dated 21st November 2019.

2. The case before the learned magistrate was as follows; the Appellant was the Respondent's tenant and he operated a bar known as "Armstrong" in its building located on L.R. No. Kisii Municipality /Block III/306 & 307. The Respondent filed Miscellaneous Civil Application No. 137 of 2019 dated 26th September 2019 against the Appellant seeking the adoption and ratification of what it claimed was a determination of the Business Premises Rent Tribunal issued pursuant to a Notice to Terminate Tenancy in accordance with **Section 14(1)** of the **Landlord and Tenant (Shops, Hotel & Catering Establishment) Act** (herein "the Act").

3. The Respondent claimed that it intended to carry out substantive repairs and major renovations of the premises and since the Appellant had not objected to the Notice to Terminate Tenancy by filing a reference as provided in the Act, the Notice took effect and tenancy relationship ceased. The Respondent claimed that the Business Premises Rent Tribunal had decreed the eviction of the Appellant, which the magistrate's court was obliged to adopt.

4. The matter proceeded ex parte before the trial court which adopted the said decision of the Business Premises Rent Tribunal. After the adoption of the orders by the court, the Appellant filed the application dated 21st November 2019, claiming that on 2nd October 2019, drunk goons and street boys stormed into his business premises and purported to evict him. He later learnt that the goons were acting pursuant to the order obtained by the Respondent in Misc. Civil Application No. 137 of 2019. He claimed that he had not been served with the Respondent's application as he was not in Kisii town on the said date. He argued that the affidavit of service sworn by the process server was full of falsehoods and he intended to cross-examine the process server on the contents of his affidavit.

5. He also averred that he had looked at the annexure referred to as the determination of the Business Premises Rent Tribunal and in his view it was not a determination capable of adoption and ratification since it was not a finding by the Chairman of the Business Premises Rent Tribunal. He thus urged the trial court to allow his application dated 21st November 2019 in which he sought orders that;

a. Spent;

b. Pending the hearing and determination of this application , the honourable court be pleased to grant an order of stay of the court's order issued on 2nd October 2019;

c. The honourable court be pleased to grant an order of stay of the order issued on 2nd October 2019;

d. The honourable court be pleased to review and/or set aside the orders made on 2nd October 2019.

6. The Respondent filed a notice of preliminary objection in opposition to the Appellant's application setting out the following reasons:

a. The application had been overtaken by events as the Applicant had already executed the same;

b. The honourable court, once it had issued order to the application the same was spent and the court became *functus officio*;

c. The suit has been instituted before the honourable court through unprocedural means and was thus fatally defective and incapable of determination;

d. The Notice of Motion application dated 21.11.2019 sought orders of mandatory injunction based on order 40 of the Civil Procedure Rules 2010 when there was no suit upon which the application was premised on and the orders sought.

7. Arguing the Preliminary Objection before the magistrate's court, the Respondent's counsel submitted that the prayers sought by the Appellant were spent as there was a new tenant in the premises. He submitted that the court could not issue orders that were incapable of execution. He also argued that the application was incompetent as the orders sought by the Appellant under order 40 Rule 1 of the Civil Procedure Rules were interlocutory orders and there were no substantive proceedings or a suit pending.

8. The Respondent's counsel countered that the application had been brought under other provisions other than order 40 Rule 1 of the Civil Procedure Rules. He also submitted that the preliminary objection did not raise pure points of law. For instance, the claim that the application had been overtaken by events was a fact that needed to be ascertained.

9. The subordinate court, in the ruling challenged in this appeal, held that Misc. Civil Application No. 137 of 2019 had been duly served upon the Appellant and having issued orders allowing that application, the matter had been finalized and there was nothing left to be heard. Accordingly, the court could not grant an interlocutory order since there was no main suit pending. The court was of the view that the situation would be avoided if the tenant had filed a response and went on to allow the preliminary objection.

10. The Appellant enumerated the following grounds of appeal against that decision of the trial court;

a. The learned trial magistrate erred in law and fact in upholding a preliminary objection which did not raise a pure point of law;

b. The learned trial magistrate erred in law and fact in not making a finding that there was an error apparent on the face of the record since the court had proceeded to adopt an award that did not emanate from the Business Premises Rent Tribunal;

c. The learned trial magistrate erred in law and fact in entertaining evidence from the bar on a preliminary point of law;

d. The honourable magistrate erred in law and fact in not finding that what the court had adopted as being a judgment of the Business Premises Rent Tribunal was incapable of adoption and/or ratification;

e. The ruling of the learned trial magistrate has occasioned a failure of justice and/ or resulted in a gross miscarriage of justice.

11. The appeal was canvassed by way of written submissions. The Appellant's learned counsel filed written submission on 22nd September 2020 but the Respondent did not file its submissions.

ISSUES FOR DETERMINATION

12. Having considered the memorandum of appeal, the record of appeal and the Appellant's submissions, I find that the issues arising for determination are twofold and can be summarized as follows;

a. Whether the preliminary objection raised pure points of law; and

b. Whether the court became *functus officio* after issuing orders allowing Misc. Civil Application No. 137 of 2019;

ANALYSIS AND DETERMINATION

13. As this appeal concerns a preliminary objection, it is appropriate to begin with the *locus classicus* on the matter, **Mukisa Biscuits Manufacturing Company Limited -vs- West End Distributors (1969) EA 696** where Ojwang' JA. held as follows;

A 'Preliminary Objection' correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point....

Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.....

14. In his written submissions, the Appellant's learned counsel challenged the decision of the trial court to allow the Respondent's objection

to the application dated 21st November 2019 on the basis that it had been overtaken by events because the Respondent had already executed the same. He argued that this ground of preliminary objection did not constitute a pure point of law and was argumentative and could only be proved by calling evidence.

15. The Respondent's learned counsel made submissions before the trial court to the effect that the orders sought were spent, as there was a new tenant in the premises and the court could not issue orders incapable of execution. This statement by the Respondent's counsel from the bar did not suffice as evidence and could not, in any case, be relied upon in determination of the preliminary objection since it related to a fact that was not agreed upon by the parties. From the Appellant's application it was not conclusive that he had been evicted from the premises. This was a disputed issue that did not constitute a pure point of law.

16. Moreover, the fact that the Respondent might have executed the orders did not preclude the court from determining whether to review or set aside its orders for the reasons given by the appellant. In a similar case, the court in ***Charles Dickens v Walter Achango Oloo CIVIL APPEAL NO. 48 OF 2015 [2015] eKLR*** held as follows;

> *"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****."* ***(Emphasis added)***

17. The next issue for determination is whether the court became *functus officio* once it allowed the Respondent's application dated 26th September 2019. Closely related to this, was the argument that the mandatory injunction sought by the Appellant could not be granted as there was no suit pending the orders of the court allowing the Respondent's miscellaneous application.

18. The learned magistrate held that once the court had issued the orders sought by the Respondent, the matter was finalized and there was no pending suit upon which the court could issue an interlocutory order. To support this position, the court relied on the cases of ***Nyamira F.C.S. v The Chief Land Registrar & Another Misc. Civil Case No. 15 of 2000 [2005]eKLR*** and ***Anastacia Wagieciengo versus Ezekiel Wafula trading as Wafula and Associates Advocates Misc. App. No. 216 of 2018 [2018]eKLR***.

19. The Appellant's Counsel objected to the finding that the matter had been finalized. He submitted that it was not apparent from the application that the Appellant was seeking issuance of interlocutory orders. Instead, the Appellant was seeking a review, setting aside and/or stay of the orders of the trial court. He argued that the court could not be rendered *functus officio* merely because it had already made a decision.

20. In the case of **Nyamira F.C.S. (supra)** which was cited with approval by the court in **Anastacia Wagieciengo (supra)** it was held;

> *"Although as stated earlier on the specific provisions upon which the application is grounded are not cited, I infer from the contents of section 63 Civil Procedure Act that it must be based on section 63 (e). Section 63 (e) provides as follows:-*
>
> ***63r "In order to prevent the ends of justice from being defeated, the court may***
>
> ***(a) Make such other interlocutory orders as may appear to the court to be just and convenient."***
>
> *I emphasise here the word interlocutory. The word interlocutory refers to something that is intermediate – between the beginning and the end. In a civil suit, it denotes any application between the filing of the suit and the final judgment or decree. The main suit has to be alive for there to be an interlocutory order.*
>
> *In my considered view there is no pending suit in this case. Further OL r.10 (2), which appears to be the provision the applicant is relying on, refers to "any stage of the proceedings". In my view, OL r.10 (2) does not apply to a situation where the case has already been finalized. Nor does section 63 (e) Civil Procedure Act.*
>
> *The parties in this suit filed a consent on 4/3/2002. The same was adopted by the court and an order was issued pursuant to that consent order. A decree was also issued on 26/3/2002. That in effect sealed the fate of that matter.* ***The parties never came to court to ask that the said decree be set aside.*** *They must even have executed the decree, which was issued over 3 years ago. My finding therefore is that there is no pending suit in this case where the applicants herein can be enjoined. I also find that OL r. 10 refers to "Suits" where you have plaintiffs and defendants. It cannot apply to applications brought under OLIII Civil Procedure Rules such as Misc. case No. 15/00."****(Emphasis added)***

21. A comparison of the facts in the above case with the facts in the present case clearly shows that the circumstances in this case vary from those in the case alluded to above. First, it is clear that the Appellant herein sought an order for stay of the orders of the court pending the determination of his application as opposed to a mandatory injunction and must have wrongly cited order 40 Rule 1, 2 and 4 of the Civil Procedure Rules, which is in *pari materia* with OL r.10 (2) of the previous Civil Procedure Rules. Secondly, the Appellant in the present case had sought an order to review and/or set aside the orders made by the court unlike the applicant in the cited case.

22. The Appellant, having sought to review or set aside the orders made by the court, it could not be said that the court was *functus officio.* Applications for review are provided for under **Order 45 (1)** of the **CPR**. The provision stipulates that any person may apply for review of a decree or order if there is a discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decree or the order was made. An application for review may also be made on account of a mistake or an error apparent on the face of the record, or for any other sufficient reason.

23. Courts also have a wide discretion to set aside orders where sufficient cause is shown. The holding of the Court of Appeal in ***CMC Holdings Ltd v James Mumo Nzioki Civil Appeal No. 329 Of 2001 [2004]eKLR*** is pertinent in this respect. The Court held;

> *"In law, the discretion that a Court of law has, in deciding whether or not to set aside ex-parte order…was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would...not be proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error..."*

24. Going back to the Appellant's application, he claimed that he had not participated in the matter since he had not been served with the Respondent's application dated 26th September 2019. The court's expansive discretion to set aside *ex parte* orders and decrees stems from the constitutional right to be heard before an adverse decision is taken against a person.(See ***James Kanyiita Nderitu & another v Marios Philotas Ghikas & another Civil Appeal No. 6 of 2015 [2016] eKLR).***

25. The Supreme Court in ***Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others PETITION NO. 5 OF 2013 [2013] eKLR*** defined the doctrine of *functus officio* as a doctrine which prescribes that a person vested with decision making powers may only exercise those powers over the same matter once and such a decision cannot be varied or revoked by the decision maker. The Apex Court went on to cite with approval the decision in ***Jersey Evening Post Limited v. A1 Thani [2002] JLR 542 at 550*** where the court held that the doctrine did not prevent the court from correcting clerical errors or prevent it from having a judicial change of mind even when a decision has been communicated to the parties. The court held that proceedings are only fully concluded, and the court *functus*, when its judgment or order has been perfected.

26. The trial court's decision to allow the preliminary objection for the reason that the matter had been finalized was clearly erroneous. The court erred in its interpretation of the law by allowing the preliminary objection and shying away from its duty to determine the application dated 21st November 2019 as it was clothed with adequate jurisdiction to review, stay or set aside its orders.

27. For these reasons, I allow the appeal with costs to the Appellant. The ruling dated 3rd December 2019 is substituted with an order dismissing the preliminary objection dated 25th November 2019.

Dated, **signed** and **delivered** at **Kisii** this 25th day of November, 2020.

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J.M. ONYANGO

JUDGE