



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISII**

**ENVIRONMENT AND LAND CASE APPEAL NO. 11 OF 2016**

**SEREPHEN NYASANI MENGE ..... APPELLANT**

**VERSUS**

**RISPAH ONSANSE .....RESPONDENT**

**J U D G M E N T**

**(Being an appeal from the Ruling of Hon. S. N. Makila, SRM issued in Kisii CM Misc. Application No. 162 of 2015 dated on 3<sup>rd</sup> March, 2016)**

**1. Introduction and Background:**

This appeal is against the ruling made on 3<sup>rd</sup> March 2016 by Hon. S. N. Makila, Resident Magistrate in Kisii CM Misc. Application No. 162 of 2015 dismissing the appellant's application dated 22<sup>nd</sup> December 2015. By the application the appellant who was admitted in the proceedings as an interested party had sought inter alia the following orders:-

**4. That the honourable court be pleased to review and/or set aside its orders given on 18<sup>th</sup> day of December 2015.**

**5. That a mandatory injunction do issue compelling the applicant/ respondent to remove the padlocks and fully restore the interested party/applicant back unto the rented premises situated on land parcel number Kisii Municipality/Block III/128.**

**6. That the court do give such directions as it may deem fit and just to be given.**

2. The learned resident magistrate after hearing the application interpartes held that the initial application dated 18<sup>th</sup> December 2015 filed by the landlord sought to have a determination by the Business Premises Rent Tribunal adopted by the court under the provisions of Section 14 of **the Landlord and Tenant (shops, Hotels and Catering Establishments) Act** Cap. 301 Laws of Kenya. The learned magistrate held the court properly adopted the Tribunal's decision/determination and there was therefore no basis to review the order adopting the decision/determination as sought by the interested party. Further, the learned magistrate held she lacked the jurisdiction to entertain the application by the interested party as the court became *functus officio* upon determining the initial application by the landlady dated 18<sup>th</sup> December 2015. It is against these findings and decision that the instant appeal has been brought.

3. The appellant has set out in her memorandum of appeal the following grounds of appeal:

**1. The learned magistrate erred in law and in fact in not reviewing and/or setting aside his**

orders given on 18<sup>th</sup> day of December 2015.

**2. The learned magistrate erred in law and in fact in not holding that the appellant was condemned unheard.**

**3. The learned magistrate misdirected herself fundamentally in not holding there existed no lawful order or at all from the Business Premises Rent Tribunal to be adopted as judgment of the subordinate court.**

**4. The learned magistrate acted on wrong principles of law hence arrived at a wrong decision.**

**5. The learned magistrate misdirected herself fundamentally by failing to consider the issue of apparent errors on the face of the record and/or mistake and/or sufficient cause.**

The appellant prays that the appeal be allowed and the ruling of the subordinate court be varied accordingly.

4. The parties argued the appeal by way of written submissions. Both parties filed their written submissions on 24<sup>th</sup> January 2018.

**5. Appellant's submissions:**

The appellant submits that where a tenant is served with a notice to terminate a tenancy under Section 4 of Cap 301 Laws of Kenya and the tenant does not file a reference at the Business Premises Tribunal as envisaged under Section 6 of the Act, the landlord can only enforce the notice, which under Section 10 is deemed to take effect from the date the notice specifies to be the date of termination, by filing a substantive suit in court. The appellant argues that the letter issued by the tribunal to the effect that no reference was filed by the tenant does not constitute an order or determination of the tribunal that a party can file in court under Section 14 of the Act for adoption as the respondent did. The appellant further submits Section 14 of the Landlord and Tenant Act, Cap 301 Laws of Kenya mandatorily requires that a duly certified copy of any determination or order of the tribunal be filed in court and that in the case before the subordinate court there was no such determination or order of the tribunal that was capable of being adopted. The appellant argues that in the circumstances the learned magistrate was obliged to grant the prayer for review as sought in the appellant's application dated 22<sup>nd</sup> December 2015 and hence erred in dismissing the said application on the grounds she did on 3<sup>rd</sup> March 2016.

6. The appellant further submits there were sufficient grounds adduced that ought to have persuaded the learned magistrate to set aside and/or review the court's order of 18<sup>th</sup> December 2015.

**7. Respondent's Submissions:**

The respondent in his submissions argues that as the appellant had not objected to the notice of termination of tenancy, the notice took effect on the effective date and that the lower court only adopted the decision by the Business Premises Tribunal that the tenant had not filed a reference before it, which meant the notice of termination had indeed taken effect. The respondent further argues the lower court lacked the jurisdiction to entertain the appellant's application dated 22<sup>nd</sup> December 2015 before it and maintains the lower court properly ruled that it lacked jurisdiction. The respondent argued that the appellant could only have challenged the decision of the magistrate of 18<sup>th</sup> December 2015 not by an application to review and/or set aside but by way of appeal as there were no grounds upon which the decision/order could be reviewed.

8. The present appeal is against the learned magistrates decision of 3<sup>rd</sup> March 2016 declining to set aside and/or review the learned magistrate's order/decision of 18<sup>th</sup> December 2015 permitting and/or allowing the adoption of and consequent enforcement of the purported decision of the Business Premises Rent

Tribunal communicated vide the tribunal's letter of 17<sup>th</sup> December, 2015. The letter dated 17<sup>th</sup> December, 2015 addressed to the respondent was in the following terms:-

**Re: Landlord's Notice to Terminate Tenancy – Kisii Block III/128**

**Tenants:1. Serephine Otundo2. Charles Onchieku**

**This is in reference to your letter dated 16<sup>th</sup> September 2015 on the above subject matter.**

**The notice you issued to the above mentioned tenants in accordance to the provision of Cap 301 Section 4(2) expired on 1<sup>st</sup> December 2015 without being opposed as required in Section 6(I) of the same Act.**

**They are therefore not covered by the Act and are supposed to be evicted from the demised premises forthwith.**

**Signed**

**Rent Control Inspector**

**South Nyanza Region**

#### **9. Analysis and Determination:**

The learned trial magistrate on 18<sup>th</sup> December 2015 pursuant to an ex parte Notice of Motion made in a Miscellaneous Civil Application of the same date granted orders adopting the determination by the tribunal that the notice to terminate tenancy had taken effect and further ordered for the eviction of tenants from the demised premises. It is necessary to set out the relevant provisions of the **Landlord and Tenant (Shops, Hotels and Catering Establishments) Act**, Cap 301 Laws of Kenya to contextualize the issues for determination.

**S. 6(1) A receiving party who wishes to oppose a tenancy notice and who has notified the requesting party under Section 4(5) of this Act that he does not agree to comply with the tenancy notice, may, before the date upon which such notice is to take effect, refer the matter to a Tribunal whereupon such notice shall be of no effect until, and subject to, the determination of the reference by the Tribunal.**

**S. 10. Where a landlord has served a notice under Section 4 of this Act on a tenant, and the tenant fails to notify the landlord within the appropriate time of his willingness to comply with such notice or to refer to a Tribunal, then, subject to Section 6 of this Act, such notice shall have effect from the date herein specified to terminate the tenancy or terminate or alter the terms and conditions, thereof or the rights or services enjoyed thereunder.**

**S.14(1) A duly certified copy of any determination or order of a Tribunal may be filed in a competent subordinate court of the first class by any party to the proceedings before such Tribunal or by the Tribunal, and on such copy being filed and notice thereof being served on the Tribunal by the party filing the same such determination or order may, subject to any right of appeal conferred by or under this Act, be enforced as a decree of the court.**

**S.15(1) Any party to a reference aggrieved by any determination or order of Tribunal made therein may, within thirty days after the date of such determination or order, appeal to the High Court.**

10. Having regard to the above provisions of the law it is clear that where a Notice to Terminate a Tenancy is given under Section 4(2) of Cap 301 Laws of Kenya, the receiving party is obligated under

Section 4(5) of the Act to notify the landlord of his intention to oppose the notice. Further, such a tenant is obligated under Section 6(1) of the Act to file a reference before the Tribunal to enable the Tribunal to hear and determine the reference. Where the tenant fails to give notice of objection to the notice and to file a reference before the Tribunal, the notice in terms of Section 10 of the Act takes effect from the date specified in the notice to terminate the tenancy. Once the notice has taken effect, it is my view, in the case where the notice was to terminate the tenancy, that the tenancy ceases to be a controlled tenancy as the tenancy is deemed to have come to an end from the effective date of the notice.

11. Under Section 14(1) of the Act a duly certified copy of any determination or order of the Tribunal is required to be filed in a competent subordinate court and may subject to any right of appeal conferred under the Act, be enforced as a decree of the court. The appellant has argued that there was no determination or order of a Tribunal as envisaged under Section 14(1) of the Act capable of being certified for filing before the subordinate court. The appellant submitted that the letter from the Tribunal dated 17<sup>th</sup> December 2015 did not constitute a determination or order and that the trial magistrate erred in treating the same as such.

12. The letter of 17<sup>th</sup> December 2015 from the Tribunal in my view was not a determination of the Tribunal as envisaged under Section 14(1) of the Act. Section 14(1) of the Act envisages that some proceedings either arising from a complaint or a reference made to the Tribunal has been heard and a determination made by the Tribunal. It is such a determination which is required to be duly certified and filed in a competent subordinate court. In the premises, the Tribunal's letter dated 17<sup>th</sup> December 2015 was merely an affirmation that the receiving party of the Notice to Terminate the Tenancy had not opposed and/or filed a reference before the Tribunal and hence the Notice had taken effect.

13. While the procedure adopted by the respondent to obtain the enforcement of the Termination Notice of the tenancy which allegedly the receiving party had failed to object to by way of the ex parte Notice of Motion vide CMC Misc. Civil Application NO. 162 of 2015 raises questions of competency, the subordinate court went ahead to entertain the same and made a determination. It is that determination that provoked the appellant's application dated 22<sup>nd</sup> December 2015 as an interested party where the appellant sought to have the decision of the court adopting the decision of the Tribunal set aside and/or reviewed. The appellant in the application dated 22<sup>nd</sup> December 2015 claimed that she was the tenant in respondent's premises and that she had not been served with the Notice to Terminate the Tenancy as alleged by the respondent. The respondent for her part maintained that the person named Serephina Atundo who was served with the Notice was one and the same person as the applicant now going by the name of Serephen Nyasani Menge.

14. The subordinate court granted the orders sought in the Notice of Motion dated 18<sup>th</sup> December 2015 ex parte on the premise that the receiving party of the Notice to Terminate the tenancy had not objected to and/or filed any reference before the Tribunal as the law requires. The court's position no doubt was fortified by the Tribunal's affirmation vide the letter dated 17<sup>th</sup> December 2015 that the tenant had not filed any reference at the Tribunal and hence the Notice had effectively taken effect. If it is admitted, which however is not the case, that the appellant/interested party is the party who was the tenant and not the party allegedly served with the Notice to Terminate the Tenancy by the respondent, then the appellant's complaint ought to have been to the Tribunal which is the institution vested with the authority and power to deal with all matters relating to controlled tenancies under Section 12 (1) (a) – (n) of Cap 301 Laws of Kenya. The respondent approached the subordinate court on the premise that there had been compliance with the provisions of Cap 301 Laws of Kenya and sought to have the sanction of the court to have the notice terminating the tenancy that had taken effect enforced. The subordinate court seized itself of the jurisdiction to deal with the application before it, and granted the orders sought by the respondent.

15. The appeal is not against the orders granted by the court on the application by the respondent dated 18<sup>th</sup> December 2015 but against the decision made by the said court on 3<sup>rd</sup> March 2016 on the application dated 22<sup>nd</sup> December 2015 refusing to set aside and/or review the decision made on 18<sup>th</sup> December 2015. The court also declined to grant the mandatory injunction sought. Interestingly, the appellant submits that the subordinate court lacked the jurisdiction to make the orders it made on 18<sup>th</sup> December 2015 and thus

the said orders are null and void and relies on the case of **Macfoy –vs- United Africa Co. Ltd [1961] 3 ALL ER 1169** where the court stated thus:-

**“...If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado though it is sometimes convenient to have the court declare it to be so.”**

16. The appellant’s contention was that as the Tribunal’s letter dated 17<sup>th</sup> December 2015 was not a determination by the Tribunal, the subordinate court could not properly adopt the same as a determination of the Tribunal under Section 14(1) of Cap 301 of the Laws of Kenya as it did. The appellant argues that this was an error on the part of the learned magistrate and hence the court ought to have set aside and/or reviewed its decision as was sought vide the application dated 22<sup>nd</sup> December 2015. The respondent does not agree and submits the appellant was in essence asking the court to sit on appeal on its own decision which it had no jurisdiction to do. The respondent referred the court to Mulla. The **Code of Civil Procedure Vol. III pages 3652-3653** where it states thus:-

**“The power of review can be exercised for correction of a mistake and not to substitute a view. Such powers should be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated as an appeal in disguise. The mere possibility of two views on the subject is not a ground for review. The review proceedings are not by way of appeal and have to be strictly confined to the scope of order 47, rule 1, Code of Civil Procedure.....**

**The review court cannot sit as an appellate court. Mere possibility of two views is not a ground for review. Thus re-assessing evidence and pointing out defects in the order of the court is not proper.”**

17. The Court of Appeal in the case of **Ruhangi -vs- Kenya Reinsurance Corporation Civil Appeal No. 208 of 2006 (unreported)** stated thus in regard to review jurisdiction:-

**“It is important to bear in mind that Order 44 Rule 1 (now Order 45 Rule 1) of the Civil Procedure Rules sets out the purview of the review jurisdiction. A point outside that purview is not a ground for review. A point which may be a good ground of appeal like an erroneous view of law or evidence is also not a ground for review. That a court reached an erroneous conclusion because it proceeded on an incorrect exposition of the law or misconstrued a statute or other provision of law is no ground for review. All these are grounds of appeal.”**

18. Order 45 Rule 1 of the Civil Procedure Rules sets out the conditions that an applicant for review requires to satisfy to succeed in a review application. It provides:-

**45(1)(1) Any person considering himself aggrieved-**

**(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**

**(b) By a decree or order from which no appeal is hereby allowed,**

**And who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.**

The applicant’s application dated 22<sup>nd</sup> December 2015 clearly did not satisfy the conditions for grant of a review. There was no discovery of new and important matter; there was no error apparent on the face of

the record that needed to be corrected. The learned magistrate consciously made the decision to adopt the affirmation by the Tribunal that no reference had been filed and that the notice had taken effect. That determination could not be construed as an error apparent on the face of the record. If the applicant was aggrieved by the learned magistrate's interpretation and/or application of the law, her recourse was not to seek a review but to appeal against the decision.

19. The trial magistrate on making a determination on the respondent's application dated 18<sup>th</sup> December 2015, he became *functus officio*. The court could not revisit the decision and review the same on the basis that the decision was reached on an incorrect exposition of the law or misconstruing of a statute or other provision of the law. To do so the court would be sitting on appeal on its own decision. The learned magistrate who heard the application by the appellant dated 22<sup>nd</sup> December 2015 in my view properly held that she had no jurisdiction to entertain the application. The court had on 18<sup>th</sup> December 2015 made what amounted to final orders and the application dated 22<sup>nd</sup> December 2015 seeking to set aside and/or review the orders on the grounds expressed thereon amounted to inviting the learned magistrate to constitute herself into an appellate court. The magistrate in holding that the letter of 17<sup>th</sup> December 2015 from the Tribunal constituted a determination or decision which he could adopt under Section 14 (1) of Cap 301 Laws of Kenya in essence was his understanding of the law and that could only be challenged through an appeal to the High Court and/or by way of judicial review to quash the proceedings.

**20. Decision:**

Upon my evaluation of the proceedings before the subordinate court, I am satisfied that the learned resident magistrate arrived at the right decision in dismissing the appellant's Notice of Motion dated 22<sup>nd</sup> December 2015 as she clearly lacked the jurisdiction to sit on appeal on her colleague's decision made on 18<sup>th</sup> December 2015. Having held she lacked the jurisdiction to deal with the matter, a finding with which I agree, the magistrate had no basis to consider the other prayers sought in the application. I find no merit in the appeal and I dismiss the same with costs to the respondent.

21. Orders accordingly.

**JUDGMENT DATED, SIGNED and DELIVERED at KISII this 13<sup>TH</sup> DAY of APRIL, 2018.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

Ms. Momanyi for the appellant

Mr. Sonye Ondari for Nyatundo for the respondent

Ruth court assistant

**J. M. MUTUNGI**

**JUDGE**