



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

MISC APPLICATION NO.34/2017

1. ROBERT LIMO

2. AMALI AHMED.....PROPOSED APPELLANT

-VS-

SAMUEL JEMBE TSUMA.....RESPONDENT

RULING

1. By notice of motion dated 28th July 2017 and brought under Section 1A, 1B, 3, 3A, 79G and 95 of the Civil Procedure Act, Order 42 Rule 6 (1) of the Civil Procedure Rules and Section 8 (2) of the Rent Restriction Act, the Appellants are seeking for orders:

1. THAT this Honourable Court grants leave to the Applicants herein to file an Appeal out of time against order of the Chairman of the Rent Restriction Tribunal made on the 20th February 2017 in Rent Restriction Case No. 65 of 2013.

2. THAT this Honourable Court makes an order for stay of execution of the said order of the Honourable Chairman made on the 20th February 2017 pending the hearing and determination of the application herein and the appeal.

3. THAT this Honourable Court stays any proceedings whatsoever in Rent Restriction Case No. 65 of 2013 pending the hearing and determination of this Application and the Appeal.

4. THAT this Honourable Court be pleased to call for the records of the Rent Restriction Tribunal in Rent Restriction Case No. 65 of 2013.

5. THAT the draft Memorandum of Appeal be adopted as properly filed after payment of the requisite fees.

2. The Application is based on the grounds on the face of the motion and supported by the Affidavit of Robert Limo and Amali Ahmed, the Applicants sworn on 28th July 2017. It is deposed that the Applicants are tenants of the Respondent on **PLOT NO.526/XVII, MOMBASA** and have been paying rent of Kshs.3,000 and Kshs.8,000 respectively. That the Respondent filed for valuation of his property in the Rent Tribunal Mombasa in **Rent Restriction Case No.65 of 2013** in which the Applicants were represented in the matter by the firm of Ms. Manwa Mabeya & Company. That both parties were to file independent valuation reports for the rent payable.

3. It is the Applicants' contention that they were kept in the dark with regard to the matter and did not know what was happening as they were not getting information from their then Advocate and when they paid rent for the month of May, they were issued with receipts of payments received "without prejudice". The Applicants aver that when they sought to know what had changed, they were informed to get in touch with their Advocate. That they then wrote to the Tribunal and copied to their then Advocate and the Respondent's Advocate requesting for proceedings and instructing their then Advocate to cease acting for them.

4. The Applicants state that they were issued with typed but uncertified proceedings plus a valuation report and it was then that they realized that there were subsisting orders against them that they were not informed of and which their Advocate had consented to a valuation report without the Applicants knowledge and/or consent. That they sought legal advice from their Advocates now on record who filed a Notice of Change of Advocates and unsuccessfully asked for copies of the pleadings and proceedings at the Tribunal.

5. The Applicants further depose that since the matter was delaying, their Advocate sought to file an application for stay of execution of the orders of 20th February 2017 but were informed that the file had been taken to Nairobi registry for certification of proceedings but the matter could not be heard even in Nairobi because the file went missing. The Applicants aver that they are running the risk of accumulated rent to their detriment which might result in their eviction from the suit premises.

6. The Applicants aver that they vehemently dispute the rent as valued by the Respondent's valuer and that their attempt to have the issue settled amicably has been unsuccessful. The Applicants further state that at the time the orders of 20th February 2017 were issued, they are reliably informed that the Respondent is deceased and therefore do not understand on whose instructions the Respondent's Advocate is acting since no grant has been issued. The Applicants contend that they have continued to pay rent faithfully and that their appeal has high chances of success. It is further the Applicants' contention that the Respondent will not suffer any prejudice if the orders sought are allowed and urged the Court to grant them as prayed.

7. I have considered the Application, the Affidavit in support as well as the annexures thereto. In paragraph 19 of the Supporting Affidavit, the Applicants aver that they are reliably informed that the Respondent is deceased. Order 24 Rule 4 of the Civil Procedure Rules provides as follows:

1. Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the Court, on Application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

9) In the Application of this order to appeals, so far as may be, the word "plaintiff" shall be held to include an appellant, the word "defendant" a Respondent, and the word "suit" an appeal.

8. From the facts of and pleadings in this case, the Respondent is the principal party. There is no application for substitution. The suit cannot be effectively proceeded with against a party who is deceased. The personal representative of the Respondent ought to be made a party. That process is governed by rule 4 of Order 24 of the Civil Procedure Rules. There are two important aspects of Rule 4 (1) of Order 24 of the Civil Procedure Rules. Under Rule 4(1) any party may apply and on such application being made, it is the Court which shall cause the legal representative of the deceased Respondent to be made a party and shall proceed with the suit.

9. The Applicants are seeking orders against the Respondent who is deceased yet they are aware he is deceased. There being no Respondent, the proceedings cannot proceed against a deceased person. The application in my view is incompetent as there is no Respondent.

10. I also note that the order sought to be appealed against was made pursuant to consent by the parties. It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside. No such circumstances have been shown to exist in this case.

11. Accordingly, I find the Notice of Motion dated 28th July 2017 incompetent and the same is hereby struck out with no order as to costs.

Ruling dated, signed and delivered at Mombasa this 16th day of May 2018.

C. YANO

JUDGE