



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

MISCELLANEOUS APPLICATION NO. 21 OF 2018 (J.R)

REPUBLIC.....APPLICANT

VERSUS

HON. RESIDENT MAGISTRATE, KERICHO.....1ST RESPONDENT

THE BUSINESS PREMISES RENT TRIBUNAL.....2ND RESPONDENT

KERICHO MWALIMU HOTEL

ENTERPRISES LTD.....3RD RESPONDENT

EX-PARTE

MOSES KORIR.....SUBJECT

RULING

Introduction

1. This Ruling relates to the ex-parte applicant's Notice of Motion dated 22nd November 2016. The said application which is brought pursuant to Order 53 of the Civil Procedure Rules, the applicant seeks the following orders:

a) That this Honourable Court be pleased to grant orders of Certiorari to quash the order of the Honourable Resident Magistrates, Court Kericho which was issued on 28th September 2016 and further that this Honourable Court do issue another order of certiorari meant to quash the purported decree and/or determination of the Business Premises Rent Tribunal which is purported to have been issued on 14th September 2016, which said determination and/or decree emanated from the landlord's Notice to Terminate or Alter Terms of Tenancy dated 3rd May 2016 yet there is another Business Premised Rent Tribunal Case subsisting between the applicant and the 3rd Respondent.

b) That this Honourable Court be pleased to issue an order of Prohibition to prohibit the 3rd Respondent from illegally evicting the applicant from the demised premises situated on L.R No. KERICHO TOWN 631/289/11.

c) That this Honourable Court do grant an order of prohibition to prohibit the 3rd Respondent from adopting the purported determination and/or decree of eviction purported to have been issued by the Business Premises Rent Tribunal Court on 14th September 2016 yet the application herein was never at all served with the Landlord's Notice to Terminate or Alter Terms of Tenancy which Notice is dated 3rd May 2016.

d) That the costs of these proceedings ought to be provided for.

2. The application is supported by the applicant's affidavit sworn on the 22nd November 2017. In the said affidavit, the applicant mentions a letter from the Chairman of the Business Premises Rent Tribunal copied to the Resident Magistrates Court, Kericho confirming that the applicant has another case before the Tribunal to wit (Nakuru) BPRT Case No. 21 of 2013 and which confirms that the orders of the Magistrate's Court issued on 28th September 2016 were irregular. However, the said letter is not annexed to the affidavit. Other reasons in support of the application are found in the ex-parte applicant's affidavit in support of the application for leave to institute Judicial Review proceedings sworn on the 2nd November 2016. In the said affidavit he states that he was not served with the Landlord's Notice to Terminate or Alter the Terms of the Tenancy. He also mentions that at the time the purported notice was allegedly served upon him, there was a subsisting notice to which he had filed a Reference and the matter was still pending before the Tribunal. He also contends that the 1st

respondent issued an eviction order on the basis of a letter from the Tribunal dated 14th September 2016 but without a decree or order of the Tribunal.

3. In opposing the application, the 3rd Respondent's chairman one Daniel Kosgei has sworn a Replying Affidavit dated 3rd May 2017 and another one sworn on 17th May 2017 in which he summarizes the events leading up to the eviction of the applicant. The long and short of it is that the 3rd Respondent served the ex-parte applicant with a termination notice on 3rd May 2016 and the ex-parte applicant did not file a reference with the Business Premises Rent Tribunal signifying his refusal to comply with the notice as required under the law. The notice therefore automatically determined the ex-parte applicant's tenancy on 1st August 2016. This is what triggered the ensuing eviction on 7th October 2016 as the ex-parte applicant had effectively ceased to be a tenant in the 3rd Respondent's premises. The said eviction was carried out pursuant to the eviction order issued by the 1st Respondent on 28th September 2016. The 3rd Respondent therefore depones that the instant application has been overtaken by events and cannot be granted. He has attached copies of the notice and order of the Resident Magistrate's court dated 28th September 2016.

4. In his submissions, learned counsel for the ex-parte applicant argues that the Resident Magistrate Kericho had no jurisdiction to issue an ex-parte eviction order in Kericho CMC Misc Application No. 23 of 2016 without giving the ex-parte applicant an opportunity to be heard. He faults the Resident Magistrate for issuing an eviction order without satisfying himself that the tenancy between the 3rd Respondent and the ex-parte applicant had been determined in accordance with section 14 of the Landlord, Tenant (Shops, Hotels and Catering Establishments) Act Cap 301 of the Laws of Kenya, which requires that a Certified copy of a Determination or Order of the Tribunal to be filed in a subordinate court for enforcement as a decree of the court.

5. The said section provides as follows:

“S.14 (i) 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 filling 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.

ii) The Tribunal shall upon being served with a notice under subsection (1) of this section or upon its own filing of such copy in the court, transmit to the court its record of the proceedings before it, and the same shall be filed in court along with the certified copy of the determination or order.”

6. On the other hand, learned counsel for the 3rd Respondent contends that the 3rd Respondent exhausted the procedure laid down in the law before evicting the ex-parte applicant. He submits that once the ex-parte applicant failed to file a reference to the Tribunal after being served with the Notice to Terminate or Alter Terms of the Tenancy, the relationship between him and the 3rd Respondent ended and the 3rd Respondent was within his rights to obtain an eviction order against him.

Issue for Determination

7. The main issue for determination is whether the order issued by the Kericho Resident Magistrate's Court on 28th September 2016 should be quashed.

Analysis and Determination

8. Counsel for the ex-parte applicant has cited the case of **Republic V Attorney General & 4 Others Ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji (2014) eKLR** where the Court stated as follows:

“Judicial Review applications do not deal with the merits of the case but only with the process. In other words, Judicial Review determines whether the decision-maker had jurisdiction, whether the persons affected were heard before it was made and whether in making the decision the decision-maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings Judicial Review proceedings with a view to determining contested matters of fact and in effect urges the court to determine the merits of two or more different versions presented by the parties, the court would not have jurisdiction in Judicial Review proceedings to determine such a matter and will leave the parties to resort to normal forums where such matters ought to be addressed”

9. Under section 13 (6) and (7) of the Environment and Land Court Act, the Environment and Land Court has the jurisdiction to grant prerogative orders and to call for the record of any proceedings before any subordinate court, body or authority or local tribunal exercising judicial authority or quasi-judicial functions and make any order or give any direction it considers appropriate to ensure fair administrative justice.

10. In the instant case, the 1st Respondent acted without any legal basis by issuing an eviction order against the ex-parte applicant, without confirming that the procedure for determining a controlled tenancy provided for in section 14 of Cap 301 had been followed. No certified decree or order of the Tribunal determining the tenancy was filed in the Resident Magistrate's court as required by section 14(ii) of the Act.

11. Furthermore, it has been contended by the ex-parte applicant that he was never served with the Miscellaneous application giving rise to the eviction order. Indeed the record shows that the said application was made ex-parte. This contention has not been controverted by the 3rd Respondent. It is a cardinal principle of natural justice that both sides must be given an opportunity to be heard before any decisions are to be made. In **Republic V Chief Magistrate Milimani Commercial Court & 2 Others Ex-parte Violet Ndanu Mutinda & 5 Others (2014)**

eKLR the Court citing the case of **Msagaha V Chief Justice & 7 Others Nairobi HCMCA No. 1062 of 2004 (2006) 2 KLR** stated as follows:

“An essential requirement for the performance of any judicial or quasi- judicial function is that the decision-makers observe the principles of natural justice. A decision is unfair if the decision maker deprives himself of the views of the person who will be affected by the decision. If indeed the principles of natural justice are violated in respect of any decision, it is immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of natural justice. The decision must be declared to be no decision”

12. It is not clear why the 1st Respondent granted an eviction ex-parte, this was a clear subversion of the cause of justice. It matters not whether the tenant/ landlord relationship between the ex-parte applicant and the 3rd respondent had come to an end.

13. For the foregoing reasons, I find merit in the application and grant the following orders:

a) An order of certiorari is hereby issued removing into this court for the purposes of being quashed the 1st Respondent’s decision and order dated 28th September, 2016 in Kericho CM Misc Civil Application No.23 of 2016 which decision is hereby quashed.

b) An order of prohibition is hereby issued prohibiting the Respondents from taking any further proceedings, execution or enforcement of the 1st Respondent’s decision dated 28th September 2016.

c) The 3rd Respondent shall pay the costs of this application to the ex-parte applicant.

Dated, signed and delivered at Kericho this 9th day of May, 2018.

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J.M ONYANGO

JUDGE

In the presence of:

1. Mr. Weldon Ngetich for the ex-parte Applicant.
2. Mr. Sigei for Mr. Koske for the 3rd Respondent.
3. Court Assistant - Faith