REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

APPEAL NO. 163 OF 2015

ZIPPORAH MORAA ……………………………...….……...........APPELLANT

VERSUS

DAVID OKIOMA ……………………………..…….…........1ST RESPONDENT

CHRISTOPHER OMARIBA ………………..……….…..... 2ND RESPONDENT

J U D G M E N T

(Being an appeal from the Ruling of Hon. Mugendi Nyaga, RM issued in Kisii CM Misc. Application No. 48 of 2015 dated on 6th August, 2015)

1. This appeal is against the ruling of Mugendi Nyaga, Resident Magistrate delivered on 6th August 2015 in Kisii CM's Court Misc. Application No. 48 of 2015 where the learned Resident Magistrate dismissed the appellant's application dated 4th June 2015 whereof the appellant had sought interalia:

> **(i) An order for review and/or setting aside of orders given by the court on 21st May, 2015.**
>
> **(ii) An order requiring the respondents to restore the appellant back to the use and occupation of the space that she had rented on LR No. Kisii Municipality/Block III/266.**

2. The orders of 21st May 2015 which the appellant sought to have reviewed and/or set aside were made pursuant to the respondents Notice of Motion dated 12th May 2015. In the application the respondents sought the following orders:-

> **1. The honourable court be pleased to adopt and/or ratify the determination of the Business Premises Rent Tribunal made and/or issued on 24th day of July 2014, pursuant to Notice to Terminate Tenancy dated 28th March 2014.**
>
> **2. Consequent to prayer (1) hereinabove being granted, the determination of the said Tribunal be declared as a decree of this honourable court.**
>
> **3. Upon adoption of the determination of the Business Premises Rent Tribunal as the decree of this Honourable Court, the Honourable Court be pleased to issue an order of eviction against the respondents in respect of the demised premises situated on Kisii Municipality Block III/266.**
>
> **4. The eviction order herein executed by M/s Omani Auctioneers.**
>
> **5. The honourable court be pleased to order and/or direct that the Kisii Police Station to provide reasonable security to facilitate the execution and/or implementation of the eviction order.**
>
> **6. Costs of this application be borne by the respondents.**
>
> **7. Such further and/or other orders be made as the court may deem fit and expedient.**

3. The said application was predicated on the grounds set out on the face of the application and principally on the ground that the applicants (the respondents in this appeal) had served on the respondents who included the appellant a Notice to terminate their tenancies under the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Cap 301 Laws of Kenya who had failed to object to the notice and/or file a reference at the Business Premises Tribunal as required under Section 6 of the Act and consequently the notice had taken effect and the tenancies stood terminated on the effective date. By the application the respondents sought the court to adopt the affirmation that the tribunal had given vide its letter dated 24th July 2014 (**"D03"**) that the tenants had not filed any reference to the tribunal and were therefore not covered under the Act, as a determination by the tribunal to facilitate enforcement.

4. The application was fixed for interpartes hearing on 21st May 2015 when the respondents whom the court found to have been served did not attend and the application proceeded ex parte whereby the learned trial magistrate allowed the application as prayed. This decision by the magistrate triggered the application before the same court by the 1st respondent (appellant herein) dated 4th June 2015 referred to earlier in this judgment. The grounds on which the application was based were set out on the body of the application and the affidavit sworn in support. In particular it was the appellant's contention that she was never served with the Notice to Terminate the tenancy and/or the respondents Notice of Motion dated 12th May 2015. The appellant further contended there was no order or determination by the Business Premises Tribunal that the respondents could seek to have adopted by the court. Therefore it was the appellant's further assertion that the respondent's application dated 12th May 2015 could not lie as it lacked any basis and any orders obtained pursuant to the same were irregularly obtained. On that basis the appellant contended the orders obtained by the respondents on 21st May 2015 when the application proceeded ex parte ought to be reviewed and/or set aside.

5. The trial magistrate heard the appellant's application dated 4th June 2015 interpartes and rendered the ruling dated 6th August 2015. The learned trial magistrate made findings to the effect that the appellant was served with the Notice to Terminate the tenancy and she did not object to the same and/or file a reference to the Business Premises Tribunal as required under the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Cap 301 Laws of Kenya. That the appellant was equally served with the respondents' application dated 12th May, 2015 and lastly that the appellant had not satisfied the conditions for review to warrant the court to review, vary or set aside its orders of 21st May 2015. The appellant being dissatisfied with the trial Magistrate's ruling/decision has preferred the instant appeal and has set out the following grounds of appeal:-

> **1. The learned magistrate erred in law and infact not reviewing and/or setting aside his orders given on 21st day of May 2015.**
>
> **2. The learned magistrate erred in law and infact in not holding that the appellant was condemned unheard.**
>
> **3. The learned magistrate misdirected himself fundamentally in not holding that 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 himself fundamentally by failing to consider the issue of apparent errors on the face of the record, and/or mistake and/or sufficient cause.**

6. Although the record shows there were 8 respondents in the initial application before the subordinate court dated 12th May 2015, only the 1st respondent who is the appellant in this appeal challenged the decision by the trial magistrate of 21st May, 2015. The 2nd to the 8th respondents did not take any part in the proceedings before the subordinate court and are not parties to the present appeal.

7. The appeal was argued by way of written submissions. The appellant anchored her submissions on the provisions for review under Order 45 Rule 1(1) of the Civil Procedure Rules 2010. The appellant argued that there was no decision and/or order by the Tribunal as envisaged under Section 14(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301 Laws of Kenya that was capable of being adopted by the subordinate court for enforcement. The appellant contended that the letter issued by the Tribunal affirming that no reference had been filed by the appellant to object to the Notice of

Termination of Tenancy did not constitute a decision or order of the Tribunal within the meaning of Section 14(1) of the Act. The appellant submitted the trial magistrate erred in treating the letter as a decision of the tribunal and adopting the same as an order/decree of the court. On that account the appellant faulted the trial magistrate's refusal to review the orders he granted on 21st May 2015.

8. The appellant's contention before the trial magistrate that she had not been served with application dated 12th May 2015 on the basis of which the orders of 21st May 2015 were made was rejected by the trial magistrate who made a finding that indeed the appellant was served. This was a factual finding of the trial court and this court sitting as an appellate court of first instance would be slow to interfere with the findings of the lower court unless it is clear and manifest that the lower court acted on wrong principles and/or the finding was obviously against the weight of the evidence so as to occasion a miscarriage of justice. This court has a duty to analyze the evidence on record and reach its own conclusions in the matter. The Court of Appeal in the case of **Selle -vs- Associated Motor Boat Co. [1968] E. A 123** put the issue succinctly thus:-

> **"An appeal to this court from a trial by the High Court is by way of a retrial and the principle upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif –vs- Ali Mohamed Sholan [1955], 22 EACA 270)".**

9. The trial magistrate made findings that the appellant was, firstly served with notice to determine the tenancy and secondly, that the appellant was served with the application dated 12th May 2015 on 19th May 2015 and proceeded to hear the application ex parte on 21st May 2015 after satisfying himself service had been effected. The Magistrate relied on the filed affidavit of service by William Morara Ogwara. The learned magistrate stated that other than the deposition that she was not served, the appellant did not tender any evidence to prove she was not served. The surest way of establishing whether there was service would have been to have the process server summoned for cross examination on the contents of the affidavit of service. Although this opportunity was available to the appellant to apply to cross examine the process server, she did not avail herself of the opportunity with the result that the affidavit of service stood unchallenged. I on that basis cannot fault the learned trial magistrate for rejecting the appellant's assertion that she was not served. The burden to prove non service of the application upon her rested with the appellant and my view is that she failed to discharge that burden.

10. Having come to the determination that the appellant did not establish that she was not served with the application the other issue to determine is whether the appellant had satisfied the grounds for review to warrant a review of the trial magistrate's orders of 21st May 2015. Order 45 Rule 1(1) under which the application was predicated provides as follows:-

> **45(1)(1) Any person considering himself aggrieved –**
>
> **(a) By a decree or order 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 the 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.**

11. For an applicant to succeed in an application for review such an applicant must bring himself/herself within one or more of the grounds under which a review may be granted under Order 45 Rule 1 of the Civil Procedure Rules. One has to demonstrate:

> (i) There has been discovery of new and important matter or evidence which was not available at the time the order or decision was made; or
>
> (ii) There is a mistake or error apparent on the face of the record that needs to be corrected/rectified; or
>
> (iii) There is other sufficient reason; and
>
> (iv) The application is made without unreasonable delay.

12.The Court of Appeal in the case of **Ruhangi –vs- Kenya Reinsurance Corporation Civil Appeal No. 208 of 2006** (unreported) while considering review jurisdiction stated as follows:-

> **"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."**

13.The appellant submitted before the learned trial magistrate and before this court that there was no decision or determination from the tribunal which could be adopted. Though it is not explicit from the trial magistrate's ruling, it is clear that the magistrate accepted that he could adopt the affirmation of the Tribunal that the respondents had not opposed the notices to terminate their tenancies and were thus not covered by the Act (Cap 301) and were liable to be evicted as a determination of the tribunal. The learned magistrate stated thus at page 6 of the ruling:-

> **"On 24th July 2014 the Business Premises Rent Tribunal wrote to the applicants and informed them that the notices had not been opposed and for that reason the respondents were not covered under the Act and were supposed to be evicted forthwith. It is after the determination of the tribunal that the applicants filed the application dated 12th May 2015 inter alia seeking to have the determination enforced as a decree of the court as contemplated under Section 14(1) of Cap 301. From the foregoing, I do find that there was proper filing and service of notice to terminate but the 1st respondent (present appellant) failed to oppose the same by filing a response pursuant to Section 6(1) of Cap 301).**

14. The application dated 12th May 2015 was made pursuant to Section 14(1) of Cap 301 of the Laws of Kenya and in granting the order sought the learned trial magistrate definitely held the said provision of Cap 301 was applicable and hence adopted the Tribunals letter dated 24th July 2014 as constituting a determination by the Tribunal as envisaged under Section 14(1) Cap 301 Laws of Kenya. Could this be a mistake or error apparent on the face of the record which the trial magistrate could have corrected in an application for review? My view is that the Magistrate made the decision to adopt the affirmation by the Tribunal consciously and that was his understanding of the law. The determination by the magistrate could not be construed as an error apparent on the face of the record but was rather his understanding and appreciation of the law.

15. The learned trial magistrate could not properly revisit the decision that he had made respecting the application of Section 14(1) of Cap 301 Laws of Kenya 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 which it has no jurisdiction to do. If the appellant was of the view, as is apparent from the memorandum of appeal and her submissions before this court, that the trial magistrate had made an erroneous decision or acted without jurisdiction the remedy she had was to appeal the decision and/or seek the quashing of the proceedings by way of judicial review. Seeking a review before the same magistrate was ill advised and was bound to fail. This appeal being one against the rejection of the application for review by the trial magistrate must invariably also fail.

16. Accordingly, I find no merit in this appeal and the same is ordered dismissed with costs to the respondents.

JUDGMENT DATED, SIGNED and **DELIVERED** at **KISII** this **4TH DAY** of **MAY, 2018**.

J. M. MUTUNGI

JUDGE

In the presence of:

Ms. Momanyi for the appellant

N/A for the 1st and 2nd respondents

Ms. Milcent court assistant

J. M. MUTUNGI

JUDGE