



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

E.L.C. CIVIL APPEAL NO. 71 OF 2016

MANSOFT LIMITED.....1ST APPELLANT

VARIZON LIMITED.....2ND APPELLANT

BASELINE ARCHITECTS LIMITED.....3RD APPELLANT

VERSUS

PROF. MUTUKU JOHN MUTINGA.....RESPONDENT

RULING

Being dissatisfied with the judgement and order of the Chairperson of the Business Premises Rent Tribunal, Nairobi, the Honourable Mrs. D. Mwachache delivered on 29/5/2013 in Tribunal Cases numbers 286, 287 and 294 of 2011, the Appellants filed this appeal against that decision.

Parties appeared before this court on 26/4/2017 when the matter came up for highlighting of submissions. Counsel for the Appellants applied to have the supplementary record of appeal dated 25/4/2017 expunged from the record for having been filed late after parties had exchanged submissions. Counsel for the Respondent informed the court that the supplementary record contained a receipt which ought to have been included in the record of appeal. He argued that the Appellant would not be prejudiced by the filing of the supplementary record of appeal. He urged that under Article 159 of the Constitution the court needs to do substantive justice without paying undue regard to procedural technicalities. The court directed that the supplementary record of appeal would be admitted as part of the record for purposes of the appeal. The court granted the Appellant 7 days to file further submissions and directed that parties would highlight their submissions on 13/6/2017.

The Appellants filed the application dated 12/5/2017 seeking to have the court review the order made on 26/4/2017 by striking out the supplementary record of appeal on the grounds that the receipt dated 28/9/2012 bearing serial number 091348 did not form part of the record in the proceedings before the Business Premises Rent Tribunal (BPRT). And that the supplementary record of appeal therefore constitutes new documentary evidence which did not form part of the original record at the BPRT.

The Appellants contend that the court admitted the supplementary record of appeal on the misdirection by the Respondent that these documents were part of the proceedings before the BPRT. The Appellant also argues that there has been inordinate delay which is inexplicable in filing the supplementary record of appeal almost a year after the record of appeal was filed on 12/5/2016 and the memorandum of appeal filed on 3/6/2013. The Appellants contend that they stand to suffer serious prejudice if the supplementary record of appeal is allowed to remain on record because their main contention in the appeal is that the Respondent did not file his valuation report and there was no receipt to that effect in the BPRT record.

They urge that the receipt which the Respondent introduced in the supplementary record of appeal constitutes new evidence which should not be allowed. The application is supported by the affidavit of the Appellant's advocate.

The Respondent opposed the application and relied on the replying affidavit filed on 9/6/2017. Mr. George Brian Akello states in the affidavit that when the matter came up on 5/7/2012 before the BPRT, the Respondent informed the Tribunal that it had already filed and served its valuation report. The advocate depones that by the time the tribunal delivered its judgement on 24/5/2013 the Respondent had paid the requisite fee for his valuation report. He urges that expunging the receipt will grossly prejudice the Respondent and will be tantamount to defeating his case and obstructing the cause of justice since its authenticity is not questioned. The Respondent contends that since this court granted the Appellants leave to file a further affidavit and submissions they do not stand to suffer any form of prejudice.

The Appellants filed a supplementary affidavit on 20/6/2017 in which it is deponed that the receipt dated 28/9/2012 bearing serial number 091348 does not exist and that it does not form part of the record of BPRT. In further prove of the fact that the Respondent had not filed a valuation report at the time the judgement was written, the Appellant referred the court to the record of appeal at page 141. The court has looked at page 141 of the record of appeal paragraph 13 of which reads as follows:

“Up to the time of writing this judgement, the landlord's report has not been filed i.e. unless valuation fees is paid, the report cannot be deemed to be filed. I therefore find that the delay to finalize this matter has been caused by the landlord and not the tenant.”

The court agrees with the Appellant that it ought to review its order made on 26/4/2017 by striking out supplementary record of appeal having been misdirected by the Respondent that the Respondent had filed its valuation report before the BPRT after paying the requisite fees. The judgement delivered on 24/5/2013 by BPRT confirms that the landlord had not filed its valuation report nor had it paid the valuation fees for the report to be deemed filed. This is the contention in the appeal. The Appellant will be prejudiced by the filing of the supplementary record of appeal.

The court may review its orders under Order 45 of the Civil Procedure Rules on account of mistake or error apparent on the face of the record or for other sufficient reason.

The court finds that the application is merited and reviews the orders made on 26/4/2017. The supplementary record of appeal is struck out. The Appellants will have the costs of the application.

Dated and delivered at Nairobi this 9th day of October 2017

K. BOR

JUDGE

In the presence of: -

Mr. Muchoki for the Appellants

Mr. Macharia for the Respondent

Mr. V. Owuor- Court Assistant