



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CASE NO. 343 OF 2016**

**AJESHKUMAR AGRAVAT & HASMIYA V. AGRAVAT**

**T/A AGRAVAT & CO.....PLAINTIFF/RESPONDENTS**

**-VERSUS-**

**NAZERALI HASSANALI & 7 OTHERS.....DEFENDANTS/APPLICANTS**

**RULING**

1. For the Court's determination is the notice of motion dated 10.2.2017 seeking the orders that:

**i) The plaint be struck out**

**ii) The suit subsequently be dismissed with costs.**

2. The motion is supported by the affidavit of Amiruddin A. Chakera advocate for the applicant and the grounds inter alia

**a) The applicants' notice to increase rent dated 1.10.2012 stands and the Plaintiff/Respondent has exhausted all avenues to impugne it.**

**b) Consequently the substratum of the suit is spent and this suit is merely an academic exercise and the same ought to be dismissed.**

3. The application is opposed by the affidavit of Ajeshkumar Agravat sworn on 3<sup>rd</sup> May 2017. Mr Agravat deposed that the Defendants/Applicants issued them with 3 notices two of which were withdrawn by the respective letters leaving the notice of 1.10.12. That inspite of this notice being withdrawn, the applicants acknowledged receipt of the old rent vide a cheque issued on 7.1.2013 for payment which cheque was accepted. The Respondents admit their application to file a reference out of time was not granted by the Business Premises Tribunal. He deposed that this did not change the fact that;

**i) The notice was rendered void by the actions of the landlord.**

**ii) The distress levied was illegal.**

4. That it is the issue of nullity of the notice and the illegal distress that is the subject of this case and which is yet to be adjudicated on. Therefore the plaintiff should not be deprived of his day in Court as the

order for striking out is unconstitutional, unjust and unfair. He therefore urged the Court to dismiss the application with costs and the matter be listed for trial soonest.

5. The advocates for the parties herein made oral arguments in support of and opposition to the application. Mr Hamisi advocate submits that under section 15 of Cap 301, once an appeal to the High Court is determined, it closed the avenue for the plaintiff to challenge the rent increment. That the present suit was filed because the plaintiff was challenging the levying of distress on account of an improper notice. That once the application to file a reference was determined, this suit lost its legs to stand on. The applicants quoted the provisions of Order 2 rule 15 (a) of the Civil Procedure Rules and the decision of **Muchanga Investments Ltd vs Safaris Unlimited (Africa) Ltd & 2 others (2009) KLR 229** in support of their submissions.

6. The Respondents in their submissions also gave a background of facts leading to the filing of this case. They rely on the decision of **Aroko vs Ngotho & Another (1991) KLR 178** where Githinji J. stated that acceptance of rent after the expiry of the notice would be taken as evidence of the Landlord's consent to the tenants' continued occupation. That this same legal principle would apply to acceptance of the old rent. The Respondents submit that the dismissal of the suits on the subject **Reference** do not erode the cause of action herein as this Court is yet to determine whether the rent did actually increase. That the present application is intended to enforce the already voided notice.

7. The Respondents further submitted on the subject of striking out of suits and gave an analysis of the following case laws:

**i) Kiama Wangai vs John Mugambi & Another (2012) eKLR**

**ii) Aroko vs Ngotho supra**

**iii) Nurchin Bates Ltd vs Mediacom E. A Ltd & 2 others (2004) eKLR**

8. From the pleadings, it is not in dispute that a notice to alter the terms of the tenancy of the plaintiffs by increasing the rent was served. It is also not in dispute that a reference was not filed to the Business Premises Tribunal within the prescribed time and that an attempt to file a reference out of time failed by the reason of the application for extension of time being dismissed and the subsequent appeal also struck out. The issue before this Court thus is:

**(a) Whether in the absence of a reference the notice stands unchallenged hence there is nothing for the Court to determine**

**or**

**(b) That the cause of action herein is different and can be sustained on the basis that the notice served was voided by the Applicants' acceptance of the old rent.**

9. In the plaint filed on 26.3.2013 at paragraph 7, the plaintiffs confirmed being served with a notice dated 1.10.2012. The plaintiffs pleaded in paragraph 8 thereof that because of being served with numerous notices and their withdrawals, they were confused and therefore failed to file a reference to the notice of 1.10.2012. According to the plaintiffs, the defendants' action of receiving the old rent on January 2013 corroborated and confirmed to them that this notice was also withdrawn. In paragraph 11, the plaintiffs pleaded that the distress was illegal because there are no rent arrears as the landlord had waived the notice of 1.10.2012.

10. The rent for the suit premises was being paid quarterly. The plaintiffs did issue a cheque for payment of the old rent on 7<sup>th</sup> January 2013. However on 18.3.2013, the defendants levied distress for rent arrears plus advocate's fee giving the total amount owed at Kshs 450,000= . The distress in this circumstance was levied before the end of the quarter when the new rent was presumed to be effective. In the statement of defence filed at paragraph 7 & 8 thereof, the defendants pleaded that they accepted the old rent before

receiving communication from the tribunal and on receipt of the letter that no reference had been filed, they communicated to the plaintiffs that the new rent was effective vide their letter dated 20<sup>th</sup> February 2013. In paragraph 11, the defendants denied there was any waiver of the notice.

11. Under Section 10 of the Landlord & Tenant Act Cap 301, where a notice is served on a tenant and the tenant fails to notify the Landlord within the appropriate time of his unwillingness to comply with such notice or refer the matter to a tribunal, then subject to section 6 of this Act, such notice shall have effect from the date therein specified to terminate or alter the terms and conditions of the tenancy. Section 6 deals with references made to the Tribunal therefore inapplicable in this case. The Court is thus presented with a scenario where there is no reference filed and the argument of action that would entitle a waiver if any; was done before the expiration of the due quarter. Can this be treated as a waiver by the defendants/applicants when they notified the plaintiffs in February 2013 that the new rent took effect? I am persuaded otherwise.

12. The plaintiffs also claim that their cause of action is premised on the fact that the distress was illegal. They have not however denied being reminded in February 2013 that the new rent was due and payable. The distress was levied almost one month after the communication given to them in February. Therefore the plaintiffs' claim for illegal distress without the support of the law (Section 10 of Cap 301) and facts (notice) may not sustain a reasonable cause of action as set out in Order 2 rule 15 (1) (a) of the Civil Procedure Rules.

13. The case of **Aroko vs Ngotho supra** is distinguishable from the instant case because the Aroko case was in respect of where the issue in dispute was how to obtain vacant possession after the expiry of the notice with the Landlord accepting subsequent rent payments after July 1990. Secondly section 56 (2) of Cap 300 (repealed) provides that the right to forfeiture may be:

**a) Exercised where neither the lessee is in occupation of the land by entering upon and remaining in possession of the land: or**

**b) Enforced by action in the Court**

14. I am in agreement with the principles set out by the Courts in the cases cited by the Plaintiffs/Respondents governing striking out of pleadings. However there is nothing to go for trial in the suit before Court because if I proceed to determine the validity or otherwise of notice of 1.10.2012 will be tantamount to me hearing a reference which, this Court lacks jurisdiction to do and/or re – opening the hearing of proceedings already dealt with by a Court of competent jurisdiction. For the foregoing reasons, I am satisfied that the application before the Court has merit. It is allowed with the consequence that the plaintiffs' suit be and is hereby struck out for disclosing no reasonable cause of action. The costs of this application and of the suit is awarded to the defendants in any event.

**Dated, signed & delivered at Mombasa this 6<sup>th</sup> December 2017.**

**A. OMOLLO**

**JUDGE**