



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC MISC APP NO. 3 OF 2015

1. **OLIVER TAVARES**
2. **GUDDY K. HARBHAJAN BIRKIT.....APPLICANTS**

=VERSUS=

PRICILLA GACERI MUGAMBI.....RESPONDENT

RULING

Introduction:

1. What is before me is the Application by the Applicants dated 6th February 2015 seeking for the following orders:
 - (a) **That pending determination of this application the honourable court be pleased to stay the orders of the chairman Business Premises Rent Tribunal dated the 30th January 2015.**
 - (b) **That pending determination of this application and the intended appeal, the orders of the chairman of the Business Premises Rent Tribunal dated 30th January be temporary stayed.**
 - (c) **Any other order that the court may deem fit in the circumstance.**
2. The Application has been filed pursuant to the provisions of Order 43 Rule 1(3) of the Civil Procedure Rules, Section 3A, 75, 78 and 79a of the Civil Procedure Act.

The Applicant's case:

3. According to the Affidavit of the 1st Applicant, the Respondent filed Malindi HCCC No. 2 of 2012 seeking for an order of adverse possession, which was dismissed on 4th October 2014; that the net effect of the Judgment was for the Respondent to vacate the suit property or continue paying the rent as a tenant and that when they levied distress, she filed case number 246 of 2014 in the lower court.
4. According to the 1st Applicant, the Respondent's Application was heard on merit and the same was dismissed on 20th January 2015.

5. It is the 1st Applicant's deposition that the Respondent filed in the Business Premises Rent Tribunal a suit being Reference Number 31 of 2015, Mombasa and obtained orders restraining the auctioneers from levying distress.
6. According to the 1st Applicant, the Chairman granted to the Respondent final orders and that when the Respondent's Application in CMCC No. 246 of 2014 was dismissed she should have filed an appeal and not move to the Tribunal.

The Respondent's case:

7. In her Replying Affidavit, the Respondent deponed that she has been carrying on business on plot number 816 Malindi for the last eighteen years having entered into a lease agreement with Richard Karl Zips; that she has never entered into any agreement with the Applicants and that the Applicants do not have authority to deal with the business premises.
8. The Respondent deponed that the orders that were granted by the Business Premises Rent Tribunal are interim orders and that the substantive complaint filed against the Applicants is yet to be heard and determined by the Tribunal; that the prayers which were sought in CMCC No. 246 of 2014 are different from the ones being sought in the Business Premises Rent Tribunal and that this Application was filed prematurely.

Submissions:

9. The Applicant's counsel submitted that this court has supervisory jurisdiction over Tribunals by dint of Article 165(6) of the Constitution and that the Chairman of the Tribunal issued substantive orders at an interlocutory stage and without a proper basis.
10. According to counsel, the Respondent obtained injunctive orders from the Tribunal without disclosing material facts which includes the numerous suits that had been filed by her in other courts.
11. Counsel submitted that the Respondent did not also disclose to the Tribunal that she has sublet the property and that she used to pay to the Applicants rent.
12. Counsel finally submitted that the Respondent has been wearing different hats to suit her interests at the expense of the Applicants and that she has perfected the art of forum shopping to defeat the ends of justice.
13. The Respondent's advocate submitted that the Applicants have no locus standi in this matter because the subject suit premises belong to Richard Karl zips; that the Applicants have not demonstrated that they made an Application for leave to file the appeal out of time and that the tenancy enjoyed by the Respondent is a controlled tenancy.
14. Counsel finally submitted that the matter before the Tribunal shall be heard interpartes on 8th June 2015.

Analysis and findings:

15. The Applicants are seeking for an order to stay the orders of the Chairman of the Business Premises Rent Tribunal dated 30th January 2015 pending the hearing of the intended appeal.
16. The Applicants have not filed an appeal in this court. Indeed, the current application is not seeking for leave to file an appeal out of time.
17. This court cannot stay an order of the lower court when the Applicant has not filed an appeal against the said orders or before leave to file an appeal out of time is granted.
18. In any event, the order that the Applicants are seeking to impugn was granted by the Business Premises Rent Tribunal at an ex-parte stage.
19. Being aggrieved by the said order, the Applicants' recourse was to file an Application in the same court to vary or discharge the said order. Alternatively, the Applicants should raise the arguments that they have raised in the current Application during the interpartes hearing. It is only after the Tribunal has heard both parties that the Applicants could move this court on appeal.
20. In the circumstances, and for the reasons I have given above, I find and hold that the Application before me is unmeritorious and I strike it out with costs.

Dated and delivered in Malindi this 15th day of May, 2015.

O. A. Angote

Judge