



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

CIVIL APPEAL NO. 37 OF 2015

GRACE MUTHONI MAHINDI (Suing as the Personal Representative of the Estate of JACKSON MAHINDI GITONGA)..... APPLICANT

VERSES

ANDREW KIMANI.....1ST RESPONDENT

JOSIAH MWANGI2ND RESPONDENT

WANJOHI WATHEKA.....3RD RESPONDENT

RULING

1. The respondents are the registered proprietors of all that parcel of land known as LR. NO. 209/230/1 (hereinafter referred to only as **“the suit property”**). At all material times, Jackson Mahindi Gitonga, deceased (hereinafter referred to only as **“the deceased”**) was carrying out business on the suit property as the respondents’ tenant under the business name Macbones Hotel. On or about 13th August, 2008, the respondents served the deceased with a notice under section 4(2) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Cap 301 Laws of Kenya (hereinafter referred to as **“the Act”**) of their intention to increase rent for the suit property from Kshs.80,000/= per month to Kshs.253,600/= per month with effect from 1/11/2008. The deceased objected to the proposed new rent and filed a reference to the Business Premises Rent Tribunal (**“the tribunal”**) on 25/8/2008 for the tribunal to investigate the matter and determine the appropriate rent. The tribunal in a judgment delivered on 24/6/2009 found the new rent that was proposed by the respondents of Ksh. Kshs.253,600/= per month fair and reasonable and ordered the deceased to pay the same with effect from 24/6/2009.
2. The deceased was not satisfied with the decision of the tribunal and decided to appeal against the same to this court. The deceased filed a memorandum of appeal on 22/7/2009. Together with the said memorandum of appeal, the deceased filed an application seeking a stay of execution of the said decision of the tribunal pending the hearing and determination of the appeal. The stay application was opposed by the respondents and the same was heard by Okwengu J.(as she then was) who in a ruling delivered on 29/10/2009, granted the stay conditionally. Among the conditions imposed by the court were that; the deceased was to pay an enhanced rent of Kshs.155,000/= per month, file and serve a record of appeal within 90 days and take necessary steps to have the appeal heard within 12 months from the date of the order failure to which the stay would lapse unless otherwise extended by the court. The deceased filed and served a record of appeal within the time that was prescribed by the court. The deceased however failed to have the appeal heard within 12 months from the date when the stay order was granted. The deceased applied for the extension of the said order and succeeded in having it extended from time to time as indicated hereunder.

3. From the court record, on 13/10/2010, Sitati J. on an oral application by the deceased's advocate extended the stay order for a further twelve (12) months from 28/11/2010. On 26/11/2010 Onyancha J. extended the same until 15/11/2011. On 7/12/2011, Onyancha J. extended the said orders again generally. On 20/2/2012, the parties recorded the following consent before Angawa J.;

“By consent of the parties the appellant (Tenant) is to continue paying rent at Kshs.155,000/= per month pending the hearing and determination of the appeal.”

When the foregoing consent was recorded, Mr. Wachira A. M. advocate held brief for Kanyi G. for the appellant while Mr. M. M. Gachimu advocate appeared for the respondents. Attempts were made thereafter to have the appeal heard but for one reason or the other, the hearing did not take off.

4. On 9/5/2014, the deceased filed a formal application of the same date seeking the extension of the said stay order. The deceased's application came up for hearing before Onyancha J. *ex parte* on 12/5/2014 when the order for stay was extended temporarily until 10/6/2014. By the time the said application was filed on 9/5/2014, the deceased had already passed away on 13/3/2014. When the application came up for hearing *inter partes* before Waweru J. on 10/6/2014, the same was stood over generally after the court was informed that the deceased had passed away on 13/3/2014 as aforesaid.
5. On 11/7/2014, the respondents instructed Pyramid Auctioneers to levy distress against the deceased for the recovery of rent arrears based on the new rent that had been determined by the tribunal. The said auctioneers are said to have proceeded to the deceased business premises on the suit property and removed therefrom several movable properties without first serving the deceased's legal representative with a proclamation. This move prompted the application now before me that was brought by the deceased's legal representative, Grace Muthoni Mahindi by way of Notice of Motion dated 16/7/2014.
6. In the application, the deceased's legal representative aforesaid (hereinafter referred to only as ***“the applicant”***) has sought among others, the following orders;
 - i. Leave to substitute the deceased appellant with his legal representative, Grace Muthoni Mahindi (Applicant).
 - ii. A temporary injunction to restrain the respondents from taking over possession, alienating, leasing, interfering with the fixtures or in any other manner dealing with the suit property without complying with the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act, Cap 301 Laws of Kenya (***“the Act”***) pending the hearing and determination of the appeal herein.
 - iii. Extension of the order of stay of execution that was granted by Okwengu J. on 29/10/2009, pending the hearing and determination of the appeal.
7. In her affidavits sworn on 16/7/2014 and 10/11/2014 in support of the application, the Applicant has stated that; the deceased was dissatisfied with the tribunal's assessment of the new rent for the suit property and decided to file this appeal, the deceased was granted a stay of execution of the said decision of the tribunal for 12 months which could be extended, the deceased complied with all the conditions on which the stay order was granted save for the hearing of the appeal that has not taken off due to reasons beyond his control, the stay order aforesaid was extended from time to time as attempts were made to have the appeal heard, the parties had agreed to dispose of the appeal by way of written submissions which have been filed by both parties and that, what remains is for the court to give a judgment date. The applicant has stated further that the deceased died on 13th March, 2014 and that, while this appeal is pending determination and the stay order still in force, the respondents purported to execute the decree of the tribunal on 11th July, 2014 by entering the suit property and carrying away the deceased's movable properties therefrom. The respondents have also threatened to dispossess the applicant of the suit property without following the due process.
8. The application was opposed by the respondents through a replying affidavit and further replying

affidavit sworn on 17/10/2014 and 27/11/2014 respectively. The respondents contended that the order for stay of execution that was made in favour of the deceased by Okwengu J. on 29th October, 2009 was conditional and that the same lapsed when the appellant failed to fulfill the conditions upon which the same was given. The respondents contended that the order for stay of execution having lapsed as aforesaid, they were entitled to claim from the applicant the entire rent then outstanding in respect of the suit property based on the new rent that was determined by the tribunal. The respondents contended that they were justified in levying distress for rent against the applicant who had failed to come up with the rent arrears even after a demand was made upon her to do so. The respondents contended further that the applicant's goods were removed from the suit property because the applicant had hatched a plan to flee from the suit property with the said goods so as to defeat the distress for rent that the respondents had warned her would be levied against her if the rent in arrears remained unpaid. The respondents contended further that the issue of stay of the tribunal's decision was heard and conclusively determined by Okwengu J. whose decision was neither appealed nor reviewed. The respondents contended that that issue is now *re judicata* and as such cannot be re-visited by this court.

9. On 21/10/2014 directions were given that the applicant's application be heard by way of written submissions. The applicant filed her written submissions on 26/11/2014 while the respondents did so on 9/12/2014. I have considered the application together with the affidavits filed in support hereof. I have also considered the affidavits filed by the respondents in opposition to the application. Finally, I have considered the parties' respective submissions and the authorities cited in support hereof. In my view, the issues which arise for determination in the application before me are as follows:

- i. Whether the order for stay of execution that was granted in favour of the deceased by Okwengu J. on 29/10/09 pending the hearing and determination of this appeal is still in force?
- ii. Whether the respondents were entitled to levy distress against the applicant?
- iii. Whether the distress was lawfully levied?
- iv. Whether the applicant should be substituted in this appeal as appellant in place of the deceased, Jackson Mahindi Gitonga?
- v. Whether the applicant is entitled to the reliefs sought in the application?

10. The first issue:

As I have stated earlier in this ruling, the decree of the tribunal was to the effect that the deceased was to pay to the respondents new rent at the rate of Kshs.253,600/= per month with effect from 24/6/2009. The execution of this decree was stayed by Okwengu J. on 29/10/2009 on certain conditions one of which was that the deceased was to pay enhanced rent of Kshs.155,000/= per month until the appeal is heard and determined. The stay was to lapse at the expiry of 12 months from the date of the order unless extended. It was expected that the appeal would be heard and determined within the said 12 months. The stay order was to lapse on 29/10/2010 if the appeal herein remained pending unless extended as aforesaid. Before the said order lapsed on 29/10/2010 as aforesaid, the appellant made an oral application before Sitati J. on 13/10/2010 for its extension. Sitati J. extended the same for a further period of 12 months with effect from 28/10/2010. This means that the next expiry date for the said stay order was 28/10/2011. On 26/10/2011 the said order was extended by Onyancha J. upto 15/11/2011. When the matter came up on 15/11/2011, the order was not extended. However, on 7/12/2011, Onyancha J. extended the said order again for unspecified period. When the parties appeared before Angawa J. on 20/2/2012, they agreed by consent that the appellant shall continue to pay monthly rent at the rate of Kshs.155,000/= per month until the appeal herein is heard and determined. This in effect extended the stay order that was granted by Okwengu J. on 29/10/2009 until the hearing and determination of this appeal. The consent order that was made by Angawa J. on 20/2/2012 has neither been varied nor set aside. This means that the applicant is only required to pay to the respondents a sum of Kshs.155,000/= per month as rent and not the sum of Kshs.253,600/= per month that was determined by the tribunal. Due to the foregoing, it is my finding that the stay order that was granted to the deceased by Okwengu J. on 29/10/2009 is still in force and that the deceased's application dated 9/5/2014 that sought extension of the said order was unnecessary and as such superfluous.

11. The second Issue;

According to the respondents' advocates letter dated 22/4/2014 to the applicant's advocates that was written before the purported distress for rent was levied, the respondents had demanded rent deficit of Kshs.98,600/= per month with effect from 24/6/2009 amounting to Kshs.5,620,200 as at 31/3/2014. This means that the deceased had all along been paying rent at the rate of Ksh.155,000/= as was ordered by Okwengu J. on 29/10/2009 instead of the new rent of Kshs.253,600/= that was determined by the tribunal. The sum of Kshs.98,600/= that the respondents' claimed as rent deficit is the difference between the two rents, Ksh.253,600/= and Ksh.155,000/=. In the notification of sale dated 11/7/2014, the applicant's goods were distrained to recover rent arrears of Kshs.5,775,200/=. The alleged rent arrears was based on the new rent of Kshs.253,600/= per month that was determined by the tribunal. As I have held above, the execution of the tribunal's decree was stayed. According to the consent order that was made by Angawa J. on 20/2/2012 mentioned above, the appellant supposed to continue paying rent at the rate of Kshs.155,000/= per month until the hearing and determination of this appeal. It is not contested that this appeal is yet to be heard and determined. There is no basis therefore upon which the respondents can demand from the applicant rent at the rate other than that which was agreed upon by the parties before Angawa J. on 20/12/2012 aforesaid. The purported distress for rent that was levied by the respondents against the applicant to recover the alleged rent deficit of Kshs.98,600/= per month from 24/6/2009 based on a monthly rent of Kshs.253,600/= was therefore illegal and in breach of this court's order made on 20/2/2012 aforesaid. It is my finding therefore that the respondents were not entitled to levy distress to recover the new rent that was determined by the tribunal, the recovery of such rent having been stayed by this court. Even if the respondents were entitled to levy distress which I have held they were not, the manner in which the purported distress was levied was irregular. The respondents' action was not justified even if the applicant had attempted to flee from the suit property with her movable goods or chattels to defeat the distress for rent that the respondents had planned to levy. I am in agreement with the submission by the applicant that the purported distress was carried out contrary to the provisions of the Auctioneers Rules, 1997. Goods distrained for rent cannot be removed from the tenant's premises before a proclamation is first made and the tenant given time to pay the rent said to be outstanding. Rule 12(b) of the Auctioneers Rules 1997 applies with equal force to the execution of decrees and distress for rent. In the case of, **Lakeland Motors limited vs. Harbhajan Singh Sembi Civil Application No. 42 of 1998 (unreported)** that was cited by the applicant, the Court of Appeal at Nairobi held that non compliance with the said rule amounts to gross irregularity and an abuse of the court process which renders the execution process liable to be set aside.

12. The fourth issue:

The respondents have objected to the substitution of the deceased appellant with the applicant in this appeal on two main grounds. First, the respondents have contended that the applicant has sought to be joined in the appeal only for the duration of this application. The respondents' contention is that the applicant is not keen on prosecuting the appeal and as such need not be substituted in place of the deceased appellant. The other ground put forward by the respondents in opposition to the substitution of the deceased appellant with the applicant is that, the tenancy relationship between the respondents and the deceased determined on the death of the deceased and as such did not survive him for the benefit of his estate. There is no basis therefore according to the respondents upon which the applicant can be substituted in this appeal in place of the deceased appellant. On the first objection which I think is technical in nature, I am in agreement with the respondents that the applicant's prayer for substitution is not properly worded. The substitution of the applicant in this appeal in place of the deceased appellant cannot be done pending the hearing and determination of the application before me. The substitution of the deceased with the applicant gives applicant the power to step into the shoes of the deceased and to do all that the deceased appellant could have done in this appeal. I am of the view that the objection by the respondents is on the form and not the substance of the relief sought by the applicant who is the legal representative of the deceased appellant and who seeks to be substituted in this appeal in place of the deceased appellant pursuant to the provisions of order 24 of the Civil Procedures Rules. The court is enjoined under Article 159 (2) (d) of the Constitution of Kenya, 2010 to dispense Justice without undue regard to procedural technicalities. I would therefore ignore the respondents' objection to the substitution of the deceased appellant with the applicant which is based on the form in which the prayer is worded for

the sake of substantive justice.

13. On the other objection by the respondents which is more substantive, I am in agreement with the applicant's submission that death of a tenant does not determine a tenancy relationship unless otherwise agreed by the parties to such tenancy. The respondents have not cited any statute or case law in support of this bold and novel argument. The tenancy agreement between the deceased, appellant and the respondents was not reduced into writing. This explains why the tenancy became a controlled one under the provisions of Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301 Laws of Kenya ("Act"). I am in agreement with the decision in the case of *Waljee Vs. Rose (1976) KLR 25* that was cited by Sitati J. in the case of Robert Nderitu Gitonga –vs- Alice Kerubo Nyambati & 2 others, Kisii High Court Petition No. 3 of 2014 (unreported) in which it was stated that:

“It is to be noted that there is nothing in the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act to suggest that the death of a tenant would terminate a controlled tenancy under common law. A tenancy does not determine by the death of the lessee, but will rest in the legal personal representatives who are entitled to give or receive proper notice to quit”.

Since the applicant has been appointed as a legal representative of the deceased, appellant, and the cause of action herein survives the deceased, I see no reason why her application to be substituted in this appeal in place of the deceased appellant which has been brought within the time provided for by the Civil Procedure Rules should not be allowed.

14. The fifth Issue;

From what I have set out above, the distress for rent that was levied against the applicant was illegal, the same having been carried out irregularly and in breach of an order of this court which had fixed the rent payable by the deceased, appellant at Kshs.155,000/= per month pending the hearing of this appeal. From the material before me, the respondents seem to have taken possession of the suit property which they claim to have already let out to a third party. I am in agreement with contention by the applicant that possession of a controlled tenancy cannot be acquired through distress for rent or in any other manner apart from the procedure laid down under Section 4 of the Act. The purported repossession of the suit property by the respondents and the leasing of the same to one, Milton Chege Kimani is therefore unlawful. The respondents having acquired the suit property in unlawful manner cannot enter into any lawful tenancy agreement with the said Milton Chege Kimani. This court has power to safeguard and to protect its process. The respondents attempt to evict the applicant from the suit property through an illegal distress carried out in defiance of a stay order by this court must be halted. I am satisfied that the applicant has made out a case for the grant of prayers 2 and 5 of the application dated 16/7/2014. The other prayers save for prayers 9 and 10 were sought until the hearing and determination of this application and as such are spent. I am not inclined to grant prayer 9 for reasons that I have already given above. The order for stay given herein earlier is in force until the hearing and determination of this appeal. There is no need therefore for extending the same. As for prayer 10, no good reason has been given to justify the involvement of the police in this civil dispute.

15. The upshot of the foregoing is that the applicant's application dated 16/7/2014 succeeds in part. The same is allowed in terms of prayers 2 and 5 thereof save that the applicant Grace Muthoni Mahindi is substituted in this appeal in place of the deceased appellant until the hearing and determination of the appeal and any appeal that may be preferred against any decisions made herein so long as she is alive and not incapacitated in any respect. In the interest of justice, I hereby make a future order that applicant's movable properties which were unlawfully distrained by Pyramid Auctioneers on the instructions of the respondents be restored or returned to the applicant forthwith. The applicant shall have the costs of the application.

Delivered, Dated and signed at Nairobi this 26th Day of October, 2015

S. OKONG'O

JUDGE

In the Presence of

N/Afor Applicant

N/Afor Respondents