



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED, J.J.A.)

CIVIL APPEAL NO. 83 OF 2016

BETWEEN

RASHID KALUMA OKEDI.....FIRST APPELLANT

JOSEPH K. NDUNG’U.....SECOND APPELLANT

AND

SHAMSHAD AHMED YAKUB.....FIRST RESPONDENT

FRARHAN MOHAMMED YUSUF.....SECOND RESPONDENT

Appeal from the order of the Environment and Land Court of Kenya at Kitale (Obaga, J.) dated 20th July, 2016

in

KITALE E & L CASE NO. 153 of 2014)

JUDGMENT OF THE COURT

[1] On 20th July, 2016, the Environment and Land Court (Obaga J), dismissed a notice of motion that had been lodged by **Rashid Kaluma Okedi** and **Joseph K. Ndung’u** who are now the appellants before us. By the notice of motion, the appellants had sought to have an *ex parte* judgment which had been entered against them together with all consequential orders set aside.

[2] The circumstances leading to the litigation were, that the respondents who were the owners of property known as Kitale Municipality Block 6/39 (suit premises), were landlords of the appellants in the suit premises. The respondents served the appellants with notices to terminate their tenancy under **section 4(2)** of the **Landlord and Tenant (Shops, Hotels and Catering Establishment) Act (Cap 301)** (herein referred to as Landlord and Tenant Act). The appellants did not file any response to the notices prompting the respondents to file a suit in the High Court for an order of eviction against the appellants.

[3] Despite having been served with summonses to enter appearance, the appellants neither entered appearance nor filed a defence. The suit proceeded before Obaga J, by way of formal proof, and on 15th April, 2015, Obaga J delivered a judgment in which he granted an order of eviction against the respondents. Thereafter the appellants filed their motion which led to the ruling the subject of the appeal now before us.

[4] In the motion, the appellants maintained that they were never served with notices for termination of their respectful tenancies, nor were they served with any summonses to enter appearance; that they only became aware of the litigation when police officers invaded their premises in a bid to execute the eviction order; that the *ex parte* judgment entered against them was irregular; and that the eviction orders were issued without proper jurisdiction.

[5] In his ruling delivered on 20th July, 2016, Obaga J, found that the appellants were duly served with notices issued on 1st July, 2014, to terminate their tenancies, and that they were also served with summons to enter appearance to the respondents’ High Court suit, but failed to enter appearance or file any defence; that the notices served under the **Landlord and Tenant Act**, took effect; that the appellants were therefore trespassers liable to eviction from the suit premises; and that this gave the High Court jurisdiction over the matter. The learned judge therefore dismissed the appellants’ motion.

[6] The appellants' counsel **Mr. George Wambura**, has filed an amended memorandum of appeal listing 53 grounds. In effect the appellants fault the learned judge: in exercising jurisdiction in a matter that was solely within the jurisdiction of the Business Premises Rent Tribunal; in denying the appellants their constitutional rights to a fair hearing; in finding that the appellants were trespassers; in failing to find that the appellants' eviction was illegal as it was based on an expired order; in giving undue weight to procedural considerations; and in failing to consider the principles applicable in the setting aside of *ex parte* judgments.

[7] Both parties filed written submissions which were duly highlighted during the hearing of the appeal. In the submissions, the appellants contended that there was a miscarriage of justice occasioned by the joinder of the appellants as this prejudiced the appellants at the hearing; that the court with exclusive jurisdiction to determine tenancy issues, arising under the **Landlord and Tenants Act** is the Business Premises Tribunal (BPT); that under section 15(1) of the said Act, the Environment and Land Court only has appellate jurisdiction over decisions of the BPT; that the learned judge erred in exercising original jurisdiction in the suit filed by the respondents; that the notices issued by the respondents were invalid as they were issued contrary to **sections 7(1)(g)(2)&(3)** of the **Landlord and Tenants Act**; and that the court erred in accepting that all notices and summonses were duly served on the appellants.

[8] In highlighting the submissions, Mr. Wambura reiterated that the appeal raises a substantive legal issue concerning an illegality which was committed, and the question of the High Court exercising original jurisdiction in a tenancy covered by the **Landlord and Tenants Act**. He maintained that these are matters of law that the Court ought to settle.

[9] **Mr. Onyancha**, learned counsel for the respondents, submitted that the High Court properly found that the appellants were duly served with notices to terminate the tenancy, and summons to enter appearance; that the appellants having ignored the notices and the summons to enter appearance, the *ex parte* judgment was properly entered against them; that the learned judge had jurisdiction to hear and determine the respondents' suit for the appellants' eviction; and properly exercised his discretion in disallowing the application for setting aside the *ex parte* judgment.

[10] On the issue of jurisdiction, the respondents submitted that it had a right to file a suit for eviction as the appellants were trespassers on the suit premises. In this regard, reliance was placed on this Court's decision in **Reuben Muli vs Wayua Mutisya Kinothia & another, Civil Appeal No. 3 of 2002**. It was maintained that the eviction of the appellants was not illegal at all, as it was sanctioned by the court; that the appellants were also served with a notice to show cause before the eviction order was issued, but ignored the notice; that upon taking possession the suit premises were found to be in a deplorable state and that the suit premises could not be available for business as they needed major renovations.

[11] We have considered this appeal, the submissions and the authorities cited. The main issues are whether the High Court had jurisdiction to hear the suit which concerned the eviction of the appellants from the suit premises, and whether the learned judge erred in dismissing the appellants' motion for setting aside the *ex parte* judgment.

[12] On the issue of jurisdiction, **section 11** of the **Landlord and Tenants Act**, establishes the BPT. Under section 4 of the said Act, the powers of the BPT includes: dealing with issues for termination and/or alteration of terms and conditions of controlled tenancies. Section 2 of the Act, defines controlled tenancy to include a tenancy of a shop, hotel or a catering establishment which has not been reduced into writing or which is in writing but is for a period not exceeding five years.

[13] In the suit the respondents pleaded that the appellants were each served with termination notices under **section 4(2)** of the **Landlord and Tenants Act**, to terminate their tenancy in the suit premises. It is not disputed that at the time the appellants were alleged to have been served with the notices, they were protected tenants. The respondents maintained that the appellants did not respond to the notices, and therefore, the notices took effect, and the appellants ceased to be protected tenants.

[14] In **Reuben Muli Musyoki t/a Konza Merchants vs Wayua Mutisya Kinothya & another, Civil Appeal No. 3 of 2002**, this Court dealing with a similar appeal in which former protected tenants were evicted from premises after the notice of termination under **section 4(2)** of the **Landlord and Tenants Act**, took effect, upheld the judgment of the High Court, that issued the eviction order, stating that the notice having taken effect, the former tenants occupation of the suit premises, amounted to a tortious act of trespass. This was precisely the position of the appellants in this appeal.

[15] The appellants had been served with termination notices issued under the Landlord and Tenants Act, which notices took effect because they did not file any reference to the BPT objecting to the termination notices. The suit filed by the respondent before the learned Judge, was one of trespass, as the appellants were no longer protected tenants subject to the jurisdiction of the BPT, as their tenancy had been terminated by the termination notices. In the circumstances, the learned Judge had jurisdiction to determine the suit and if appropriate issue the order of eviction. The ground of appeal relating to jurisdiction therefore fails.

[16] The second issue relates to the propriety of the order issued by the trial court dismissing the appellant's motion for setting aside the *ex parte* judgment. In making the order, the learned Judge was exercising powers conferred under **Order 10 Rule 11** of the **Civil Procedure Act** that gives the Court the discretion to set aside or vary any *ex parte* judgment and any consequential decree. In his wisdom, the learned Judge rejected the application for setting aside the judgment. The question is therefore, whether the learned judge exercised his discretion judicially in refusing to set aside the *ex parte* judgment.

[17] In the case of **Mbogo & another vs Shah [1968] EA. 93, Sir Charles Newbold, President**, of the former Court of Appeal for East Africa, dealing with an appeal similar to that before us stated as follows:

“We now come to the second matter which arises on this appeal, and that is the circumstances in which this Court should upset the exercise of a discretion of a trial judge where his discretion, as in this case, was completely unfettered. There are different ways of enunciating the principles which have been followed in this Court, although I think they all more or less arrive at the same ultimate result. For myself I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as

a result has arrived at a wrong decision or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.”

[18] In the appellants’ case, it is evident that termination notices were duly issued against them under the **Landlord and Tenants Act**. Although the appellants denied being served, the learned judge found that both appellants were served at the suit premises on the same day by the same process server who duly filed affidavits of service. We have no reason to fault this finding. The appellants having failed to provide a satisfactory explanation for their failure to enter appearance and file a defence, the learned judge properly exercised his discretion in rejecting the application for setting aside the judgment.

[19] We can do no better than reiterate what this Court stated in **Reuben Muli Musyoki t/a Konza Merchants vs Wayua Mutisya Kinothya & another** (supra), that:

“The Act upon which the appellants places much reliance protects the tenant, such as the appellant, against violation of that basic tenant of the rule of law namely; that no one shall be forcefully evicted from his property except under a due process of law. But unfortunately, the appellant himself has abused and ignore the provisions of the law and was not deserving of any protection from either the tribunal or the Superior Court he disregarded the notice and sat back on a flimsy excuse.”

[20] We add that the appellants’ having ignored the summons to enter appearance, and failed to file appearance and defence to the respondents’ suit, they relinquished their right to be heard and cannot blame the learned judge for doing what the law empowered him to do in the circumstances. Nor is it within our jurisdiction at this stage to examine the appellants’ defence to the respondents’ suit. For the above reasons, we find no merit in this appeal and dismiss it with costs to the respondents.

Those shall be the orders of the Court.

DATED and delivered at Eldoret this 9th day of May, 2019

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR