



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MARAGA, MWILU & GATEMBU, JJ.A)

CIVIL APPEAL NO. 218 OF 2005

BETWEEN

LOINGE PRINTERS & 29 OTHERS.....APPELLANT

AND

THE CITY COUNCIL OF NAIROBI.....RESPONDENT

(An appeal from the Ruling of the High Court of Kenya at Nairobi

(Hon. Mr. Justice Philip Ransley) dated 23rd June 2005

in

HCCC NO. 464 OF 1999

JUDGMENT OF THE COURT

1. The appellants, according to their amended plaint filed in Nairobi HCCC No. 464 of 1999 on 24th June 2002, are month to month tenants occupying 4th to 16th floors of the respondent's building in the city centre known as City Hall Annexe. They claimed in that case that it is a term of their respective tenancies that the respondent will supply water and electricity to the premises and service the lifts serving the premises. In breach of that term, from 7th December 1998 the respondent failed to supply water into the premises and also failed to settle electricity and lift maintenance bills. As a result electricity supply to the premises was disconnected thereby plunging the building, especially the corridors and staircase, into complete darkness and the company maintaining the lifts withdrew its services rendering the floors the appellants occupy inaccessible. They therefore prayed for damages for loss of business and an order directing the respondent to settle the said bills to restore electricity to the premises and have the lifts maintained. Pending that, they sought a further order freezing payment by them to the respondent of rent and service charges.

2. In its defence the respondent denied the appellants' claims and averred that although it had kept the premises in a tenable state, the appellants had since 1997 frustrated its efforts by their failure to pay their respective rent on due dates. It therefore counter-claimed for arrears of rent and interest as well as costs.

3. On 29th March 2005, the appellants filed a Chamber Summons application under the provisions of **Order VIA Rules 1 and 2, Order XXX IX Rules 1, 2 and 3 and Order XLIX Rule 5** of the old **Civil Procedure Rules** as well as **Section 3A** of the **Civil Procedure Act** and mainly sought an injunction to restrain the respondent from implementing Gazette Notice No. 8494 of 14th December 2001 by which the respondent had allegedly sought to increase the appellants' respective rents by 283%. They also sought leave to sue out of time by further amending their plaint to challenge the legality of the said Gazette Notice and seek a further order to compel the respondent to grant them leases of the spaces each occupied.

4. After hearing the application, in a short ruling dated 23rd June 2005, Ransley J dismissed it on the ground that in an appeal arising from a Judicial Review application the appellants had earlier on filed against the respondent, this Court had held that the said Gazette Notice was legal. In the circumstances, the learned Judge said he would not restrain the respondent from implementing a legal notice and accordingly dismissed the application with costs. This appeal is against that decision.

5. When the appeal came up for hearing before us on 10th June 2014, Mr. Okindo, learned counsel holding brief for Mr. Matwere for the appellant, sought to adjourn the hearing on the ground that Mr. Matwere was unwell. Finding no good reason for adjourning the hearing, we dismissed that application and directed counsel for both parties to argue the appeal.

6. In his submissions, Mr. Okondo argued that the learned Judge erred in dismissing the appellants' application simply on the ground that, in another case, this Court had found that the respondent's said Gazette Notice purporting to increase the appellants' respective rents by 283% was legal. He faulted the learned Judge for failing to determine the application on its merits. With no serviceable lifts and no supply of water and electricity to the premises, counsel submitted that the appellants had made out a prima facie case which entitled them to the orders of injunction sought in the application.

7. On his part Mr. Nakhone, learned counsel holding brief for Mr. Omotii for the respondent submitted that the appellants had not made out a prima facie case to warrant the issue of the injunction sought. In the circumstances the learned Judge was perfectly entitled to dismiss their application as he did.

8. In the said Judicial Review application, the appellants had challenged the validity of the Gazette Notice on the grounds that, under the **Landlord and Tenant (shops, Hotels and Catering Establishments) Act, Chapter 301** of the **Laws of Kenya**, they were protected tenants and that the respondent had sought to increase rent contrary to the provisions of that Act; that contrary to **Section 148(1)(b)** of the **Local Government Act**, the respondent had not obtained the consent of the Minister for Local Government to increase their rents; and that the Gazette Notice was discriminatory as it was addressed to only a few of the respondents tenants in the premises.

9. Section 2 (1)(b) of the **Landlord and Tenant (Shops, Hotels and Catering Establishments) Act** excludes the tenancies to which the Government or Local Authority is a party from the application of the Act. That and the fact that the appellants had not placed before court any evidence that the Minister's consent to increase their respective rents had not been obtained or that the Notice was discriminatory as they claimed, left this Court with no option but to find that the Gazette Notice was valid. In its judgment delivered on 18th March 2005 in Civil Appeal No. 301 of 2002 this court accordingly dismissed the appellants' appeal against the ruling of the High Court dismissing their Judicial Review application.

10. We have considered the matter. We agree with counsel for the appellants that the learned Judge erred in failing to determine the entire application on merit. That notwithstanding, however, we are constrained to dismiss this appeal. This is because the appellants sought two main orders in their Chamber Summons under review: leave to sue the respondent out of time by further amending their plaint to challenge the validity of the Gazette Notice dated 14th December 2001 by which the respondent had sought to increase their respective rents and an injunction to restrain the respondent from implementing that Gazette Notice. The order of injunction was therefore predicated upon the court granting the appellants leave to further amend their plaint and challenge the validity of that notice. If that leave was not granted, the prayer for

injunction would have no legs to stand on.

11. In the judgment arising from the said Judicial Review application, this Court stated that the appellants had, between 19th and 28th March 2002, been individually served with notices increasing their respective rents and service charges pursuant to the said Gazette Notice dated 14th December 2001. Pursuant to **Section 3(2)** of the **Public Authorities Limitation Act**, the appellants should have challenged those notices within one year but they did not hence their application for extension of time to sue the respondent out to time.

12. The relationship between the appellants and the respondent was contractual. Under **Section 27** of the **Limitation of Actions Act**, time cannot be extended to commence claims based on contract. In the circumstances, even though this point was not canvassed before us, we are of the view that remitting this matter to the High Court to determine the appellants' said application on merit will be an exercise in futility and a complete waste of time and expense.

13. It is for these reasons that we find no merit in this appeal and we accordingly dismiss it. Given the fact that the High Court failed to determine the appellants' application on merit and we have dismissed this appeal on a legal point not canvassed before us, we order that each party bears its own costs of this appeal and those of the proceedings before the High Court.

DATED and delivered at Nairobi this 25th day of July 2014.

D.K. MARAGA

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JUDGE OF APPEAL

P.M. MWILU

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

I certify that this is a true Copy of the original

DEPUTY REGISTRAR