IN THE COURT OF APPEAL

AT NAIROBI

CORAM: ONYANGO OTIENO, NYAMU & MARAGA, JJ.A.

CIVIL APPEAL NO. 321 OF 2002

BETWEEN

STEPHEN KIBATHI *t/a* MALAIKA BAR…….APPELLANT

AND

1. **KABU KAGERA**
2. **MUCHERU MUGO**
3. **SAMUEL NJUGUNA**
4. **M/S JERRI AUCTIONEERS…….RESPONDENTS**

(Appeal from the Ruling of the High Court of Kenya at Nairobi (Waki, J) dated 17th May, 2002

In

H.C.C.C. NO. 156 OF 1986)

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JUDGMENT OF THE COURT

The record before us shows that at all material times prior to June, 1999, ***STEPHEN KIBATHI*** (the appellant) who was trading together with ***FRANCIS WAKAHIU*** as ***Malaika Bar***, were the tenants of ***KABU KAGERA, MUCHERU MUGO, GIDEON NJUGUNA*** and ***SAMUEL GAKAO*** the then first second, third and fourth respondents in business premises then known as L.R. NO. 36/1/9 Eastleigh Nairobi. The monthly rent which was being paid by the tenants prior to October, 1984 was Kshs.2,400/-. The tenants maintained that that was the rent that obtained throughout their tenancy but the respondents disputed that and contended that in October, 1984, by agreement between both parties, that rent was increased to Kshs.5,000/= per month which the tenants duly paid for sometime before the dispute resulting into this appeal arose. The tenants alleged that on or about 15th January, 1986, the respondents, acting through the fifth respondent destrained goods belonging to them in an attempt to recover the arrears of rent which the respondents alleged had accumulated on the basis of the rent being claimed at Kshs.5000/- per month. The appellants felt aggrieved with that action, as to them the rent was Kshs.2,400/- per month which they had fully paid and so there was no arrears due. They proceeded to the High Court by way of a plaint dated 17th January, 1986 in which they sought six orders as follows:-

"(a) a declaration that the distress aforesaid is illegal.

(b) An injunction restraining the defendants from interfering with the plaintiff's possession of the suit premises until this suit is determined.

(c) An order that the distrained goods be returned forthwith.

(d) Damages for loss of profits/business.

(e) Costs of this suit together with interests until payment in full.

(f) Any other or further relief which this court may deem fit to grant."

It is clear to us that that plaint was not seeking court's decision on the dispute as to whether the tenants' contention that the rent was Kshs.2,400/- per month should be granted or whether the landlords claim that rent was Kshs.5,000/- per month was the correct position. All that suit was seeking in our view was that the levy of distress that was being carried out by the landlord at that time was illegal on account of a dispute on the rent payable and that being so the levy of distress be injuncted as the issue of the correct rent was being sorted out. Together with that plaint, the tenants also filed chamber summons dated 17th January, 1986 in which they sought injunction orders under ***Order 39 Rules 1*** and ***2*** of the Civil Procedure Rules and return of the goods that were already distrained by the auctioneer, the fifth respondent. That application was presented under certificate of urgency on the same day 17th January, 1986. On the same day, tenants obtained interim temporary orders issued by *O'Connor J*. 15th January, 1986 and goods were to be released forthwith. The matter was set for interpartes hearing on 24th January, 1986. The record shows that even as the landlord was distraining through the Auctioneer, the tenants goods in the suit premises on 15th January, 1986, there had been an ongoing case between the same landlords and tenant at the Business Premises Tribunal which started way back in 1983 namely Tribunal Case No. 134 of 1983, in which the landlords were the applicants and the tenants were the respondent. That tribunal matter, though we do not have full proceedings of it, the record appears to have been on the same issue of the correct rent as the only record of proceedings shows that the landlord was claiming rent at Khs.5,500/- whereas the tenants maintained it was Kshs.2,400/-. It was as a result of that claim that the landlord levied distress and the tenants sought injunction from the High Court as stated above for the Business Tribunal had no jurisdiction to grant injunctive orders. This strengthens what we have stated above that the issue of how much rent was payable by the tenants was not before the High Court. It was already an issue before the Tribunal. Indeed on 26th August, 1983, when Tribunal case came up for hearing, the proceedings read as follows:-

"DATE; 26.8.83

Mr. G.S. Pall for landlord

Stephen Kibathi t/a Present in person

Mr. G.S. Pall: ***Rent at rate of Shs.2,400/- has not been paid. I am ready to accept rent with effect from this month.***

*Stephen Kibathi****: my partner is Francis Mwangi. We shall not be paying rent to the landlord.***

ORDER: ***Tenant will with effect from this month be paying rent to Kabui Kagera, Muchera Mugo, Samuel Kakuo and Gideon Njuguna, through their advocate Mr. G.S. Pall. Orders accordingly."***

That Business Premises Rent Tribunal order seems to have settled the issue of rent as at that time. The rent that *G.S. Pall* then learned counsel for the landlords accepted was Kshs.2,400/= which was to be paid to his clients through him. Later it would appear, the landlords decided to levy distress on the basis of Kshs.5,000/- per month as rent and hence the High Court case we have set out above. There is nothing

on record to show that the *inter partes* hearing that was ordered in the respect of that High Court case proceeded as was scheduled on 24th July, 1986, neither is there any record to indicate that the interim orders granted on 17th January, 1986 by *O'Cannor J*. were extended. Defence was filed on 12th March, 1986 and much as that defence delved at length on the issue of rent the balance due for the tenants to the landlord, it did not seek any counter-claim and ended up praying for dismissal of tenants' case with costs. On 10th July, 1986, the High Court case came up before *O'Connor J* in chambers and the two parties entered in an agreement which the court adopted as an order by consent. The effects of that order was that the tenants would pay the undisputed rent of Kshs.2,400/= to the landlords' advocates every month and the amount of Kshs.2,600/- being the difference between Kshs.2,400/= as rent by tenant and Kshs.5000/- claimed by landlords as rent, to be paid to a joint account opened in the names of both advocates for the tenants and advocates for the landlord. That agreement affected rents payable from 1st August, 1986. The landlords were to accept that amount of Kshs.2,400/- without prejudice to their claim of Kshs.5,000/- per month and of course the tenants were also to pay that difference of Kshs.2,600/= per month to that joint account in the names of the two advocates without prejudice to their right to pursue their stand that Kshs.2,400/= was the correct rent.

After that consent order recorded on 10th July, 1986, nothing was heard of the High Court suit until 27th September, 1996 as neither party moved the court for its hearing and determination. On that date, the file came up before *Khamoni J*. (as he then was) who made the following order:-

> *"ORDER**: Order (0.16 Rule 6):***
>
> ***After the inordinate delay of 8 years since last step was taken herein on 28.3.88 with a view to proceeding with the suit, the court in exercise of the powers conferred upon it by Order 16 Rule 6 of the Civil Procedure Rules hereby orders this suit dismissed."***

Thus the suit in which the court order was entered was dismissed for non-prosecution. No order was made on the fate of the amounts that were paid into the joint names of their advocates in respect of the Kshs.2,600/- per month being the difference between the claims by the tenant and by the landlords. We will revert to that in due course. In the meantime, the parties were back to the Business Premises Rent tribunal vide Tribunal cases Nos. 340 and 470 of 1998 in which one tenant *Stephen Kibathi* still trading as ***Malaika Bar*** was the applicant and the landlord remained the same. We need to state here that according to the information received from the appellant's counsel ***Mr. Nyaga*** on 10th February, 2010, the first respondent passed on in May, 1994. On 2nd March, 1999, a consent order was entered in those two Tribunal cases which were apparently consolidated and heard together. The orders by consent were:-

> ***"1. That the tenant to vacate the tenancy premises on or before 1st June, 1999.***
>
> ***2. That the rent payable by tenant to remain at Kshs.2,400/= per month until vacation of the premises.***
>
> ***3. That each party to bear its own costs.***
>
> ***4. That in view of this consent the landlord's notice to increase rent in case No. 470/98 be marked as withdrawn.***
>
> ***5. That parties in case No. 470/98 to bear their own costs."***

Our understanding of those orders is that the rent upto the time the tenant was to vacate the premises on 1st June, 1999 was never altered. It remained Kshs.2400/-. Indeed that was even more emphatic by another consent order that in view of that order, the landlord's notice to increase rent was marked as withdrawn, meaning, as the tenant was vacating the subject premises on 1st June, 1999 and rent agreed upto then was Kshs.2,400/- any attempt to increase that rent would be in vain and hence it had to be

withdrawn and was thus withdrawn. Indeed the tenant vacated the premises in June – see tenants notice of motion dated 3rd May, 2000. Back to the High Court case which had been dismissed for want of prosecution; in a notice of motion dated 31st May, 2000, the tenants applied for setting aside of the order dismissing it and sought in that application its reinstatement to allow the court make orders regarding apportionment/distribution of the monies deposited in court on one hand and monies deposited in a joint bank account in the names of the firms of advocates then representing the parties on the other hand. That application was dismissed by *Khamoni J.* who referred to his order of 27th September, 1996 dismissing the suit and to his orders made on 6.4.2000 when parties mentioned the same matter before him for purposes of deliberating on the distribution of the same which he had also dismissed and stated:-

> ***"Since the parties are coming in disregard of the orders I made more than 3½ years ago on 27.9.96 plus what I said on 6.4.2000 this application dated 31.5.1999 is misconceived and the same should not be entertained by me as it amounts to a mere waste of my time and same application is hereby dismissed and the plaintiff being supposed to file a fresh suit."***

Earlier on 6.4.2000 when both parties went to him for mention of the same matter, the learned Judge had stated:-

> ***"From what Mr. Gachomba tells me this matter is intended to make me record a consent order making provisions, for some settlement I was not concerned with and did not know anything about when I dismissed this suit under order 16 Rule 6 some 3½ years ago. I do not think that is proper. I do hereby decline to make any such orders as I feel the orders already in this file be interpreted as they are as to their legal effect with regard to any refunds or payments of settlement that may be required."***

It will be observed that twice, *Khamoni J.* refused to be drawn into making orders directing who was to be paid the monies in the bank in the names of the two firms of advocates.

Undeterred by those rulings, the tenant filed yet another notice of motion dated 8th February, 2001 in the High Court and sought orders:-

> ***"1. That the court be pleased to make appropriate orders regarding the distribution of the monies deposited by the applicant both in court and at Barclays Bank, Moi Avenue Branch Alc NO. 4289899.***
>
> ***2. That the costs of this application be provided for."***

That application was placed before *Waki J* (as he then was) who after full hearing delivered a ruling on 17th May, 2002 in which he ordered that the money held in a joint account in the Barclays Bank Moi Avenue Branch A/C 4289899 and the money held in court be released to the landlord forthwith. He also ordered the appellant/tenant to pay to the landlord/respondent costs of the application assessed at Kshs.5,000/=. In making that order, the learned Judge had this to say:-

> ***"The dismissal of the main suit; which dismissal the tenants say they are not challenging meant that the tenants prayers failed and that there was no challenge to the averments made by the landlords. The inevitable consequence therefore is that the money kept in escrow should be paid over to the landlords. The tenants simply failed to prove their claim aid (sic) out in the plaint. That is the appropriate order that I would make in the matter."***

Still not satisfied, the tenant, who is now one but still trades as *Malaika Bar* has now come to this Court on appeal premised on four grounds of appeal which we feel can be summed up in one ground namely that the decision of the learned Judge went against the evidence and facts that were availed to the court, and was thus bad both in law and in fact.

In his submission before us, *Mr. Njenga*, the learned counsel for the appellant stated that according to the plaint that was filed in the High Court the Court was not asked to determine rent that was payable. That was the work of the Tribunal and it had determined it. The High Court was merely asked in the plaint to declare distress illegal and to issue injunction orders. In his view, the disagreement on rent payable was raised in the High Court only to enable it decide on whether to stop distress by way of injunctive orders but not as a dispute for its decision. He added that the effect of the dismissal of the High Court suit for want of prosecution was only to the effect that injunction orders could not be availed to the tenant, and the distress would not be declared illegal, and damages for loss of profits, and/or business would not be granted. He ended his submission by referring us to the consent order entered at the Business Premises Rent Tribunal to the effect that rent was to remain at Khs.2,400/- per month till the tenant vacated the suit premises on 1st June,1 999. He also informed us that the other respondent had also passed on, and that only one respondent ***Gideon Njuguna*** remained as a party to this suit.

Mr. Wachira, the learned counsel for the only remaining respondent opposed the appeal contending that the issue of rent payable was never determined at any forum. He argued that the rent of Ksh.2,400/- set out in the consent order of the tribunal was only to facilitate the appellants vacation of the premises but was not the rent payable. On being referred to the second order in that consent order, which stated specifically that the rent payable by tenant was to remain at Khs.2,400/=, *Mr. Wachira* conceded that the phrase "to remain" meant the rent was determined. He submitted further that as the suit filed by the tenant had been dismissed for want of prosecution, there was no suit to sustain the application that was before the learned Judge, but he maintained that notwithstanding that *Waki J.* was right in entertaining the application but he conceded that the matter that was originally before the High Court was distress for rent.

We do not apologise for the detailed summary of the facts of the cases that eventually gave rise to this appeal. Our view is that the same detailed summary is necessary for proper apprehension of the matters that were before the learned Judge. It was certainly necessary to appreciate that as part of the dispute was commenced and was proceeding before the Business Premises Rent Tribunal, it became necessary for the tenants to move to the High Court for matters that the Tribunal had no jurisdiction to entertain, namely injunction orders. That is what might have caused confusion in the entire case. We have also made certain observations as we continued with the summary of facts. Those observations are to be treated as part of our judgment.

Having anxiously considered the entire record, the various decisions of the Business Premises Rent Tribunal together with the High Court decisions including the consent order entered by *O'Connor J.* and the decision of *Khamoni, J.* of 27th September, 1996, dismissing the entire suit, the two decisions of the same learned Judge dated 6th April, 2000 and 26th July, 2000 and the decision of *Waki J*. appealed from together with the submissions of the two counsel and the law, we are of the view that the matter that was brought to the High Court by way of a plaint we have referred to hereabove did not invoke that court's jurisdiction on the issue of rent payable by the tenant to the landlords in respect of the suit premises. All it did, was to seek an injunction to stop distress for rent that the respondent had commenced executing notwithstanding that the issue of rent had been the subject of Business Premises Rent Tribunal case No.134 of 1983 and was apparently settled by that Tribunal in an order made on 23rd August, 1983. The tenants went to the High Court not to seek decision on rent payable but only to state that distress could not proceed as they were paying the rent that was acceptable to them and so they claimed they had not defaulted on that rent whereas the landlord was of the view that the tenant had defaulted for the rent was according to him Kshs.5,000/= and not Kshs.2,400/=. Those arguments were advanced to persuade the High Court on whether or not to issue injunction. None of the parties was asking the High Court to decide on the rent payable. Thus when the parties entered a consent on what to do about payment of that rent, all they were doing was, in our view, to see what arrangement could be made to enable the tenants continue trading in the premises unmolested with threat of distress while the landlords also had a hope that if they succeeded in the Business Premises Tribunal and rent payable is increased to the amount of Kshs.5,000/= they wanted, they would readily lay their hands on it through that arrangement. They both were not relying on the High Court to decide that issue of rent payable for them. This line of approach is demonstrated by the conduct of the parties as evidenced by the record before us. In 1983 when the issue of rent payable was in dispute, they went to Business Tribunal. Again in 1998 when rent became an issue and the landlord issued notice for increase of rent, they went to the Business Tribunal. They did so

because they knew that was the institution that could decide on their perennial issue of rent payable. In our view, the findings of the learned Judge that the dismissal of the main suit, which dismissal was not challenged by the tenants, meant that the tenant's prayers failed and that there was no challenge to the averments made by the landlord, were perhaps as a result of the learned Judge's misapprehension of the prayers made by the tenant in the plaint in the High Court. The four main prayers as we have reproduced hereinabove were a declaration that the distress was illegal; an injunction to restrain respondent from interfering with the tenants possession of the suit premises; return of the goods distrained and damages for loss of profits/business. These were the tenants' prayers that failed and not a prayer for the rent payable as that was not a prayer by the tenant. The order to pay the money kept in escrow to the respondent could not be an inevitable consequence of the dismissal of the four prayers in the plaint for there was no prayer by the tenant/appellant that money in the escrow should not be released to the respondent. We do not appreciate how releasing the money in the escrow to the respondent could be a consequence of dismissal of prayer for injunction or of dismissal of prayer for declaration that distress was illegal or of dismissal of prayer for damages for loss of profits or business.

We also note that in the consent order of 2nd March, 1999 entered by the Business Tribunal, it was clearly stated that the tenant was to vacate the suit premises on or before 1st June,1999 and that rent payable by him was to remain at Khs.2,400/= per month until vacation of the premises. We are told that he indeed left as per that consent order. In that scenario common sense dictates that the last rent he paid was Kshs.2,400/= and that was the rent as per that order. The landlord, upon that order, withdrew the notice to increase of rent. How then, one may ask could the difference kept in escrow still be paid to the landlord when he had agreed that the rent was to remain at Kshs.2,400/= and had withdrawn his notice to seek increase? We think the landlord was bound by that order and could not be heard to say he was entitled to anything more.

Lastly, we note that *Khomoni J.* had dismissed two similar applications, one made verbally by way of a mention and one by a notice of motion. We find it difficult to appreciate why the learned Judge *(Waki J.)* still entertained a third application between the same parties on the same issue. We shall not belabor this aspect as it was not agitated before us.

From what we have stated above, we are minded to allow the appeal. However the next issue we need to consider is what orders to make. Ideally, we would have referred the matter as regards to whom that amount in the escrow should be paid to the Business Rent Tribunal so as to avoid falling into the same pit the learned Judge fell into. We note however that that would be an exercise in futility as vide consent order of 2nd March, 1999, that Tribunal had made a decision on the matter to the effect that the rent payable by tenant to remain at Khss.2,400/= per month until the date the tenant was to vacate the premises which was to be on or before 1st June, 1999. That in effect meant that the landlord did not succeed in his attempts to increase the rent and he in fact withdrew the notice he issued for any increase of rent upon that order being made. In that case to refer the issue of the rent payable to the Tribunal again would mean asking the tribunal to repeat what it had done. Further, we note that this is an old matter which went to the Tribunal way back in 1983. It is now over 30 years old. Most of the landlords have died and it appears even the other partner of the tenant has also faced out of the case for one reason or the other. It is a matter that should be brought to an end. We therefore conclude that the orders prayed for in the memorandum of appeal be allowed and thus put an end to the matter.

The appeal is allowed. The order of the High Court dated 17th May, 2002 is set aside. In its place we order that the money deposited into Barclays Bank, Moi Avenue Branch account No. 4289899 be released to the appellant ***Stephen Kibathi t/a Malaika Bar.*** Further, Kshs.20,800/= out of the money deposited into the court be paid out to the appellant *Stephen Kabathi*. The balance of the money deposited into the court be released to the respondent. Orders accordingly. The appellant to have costs of this appeal and costs in the High Court.

DATED and DELIVERED at NAIROBI this 20th day of APRIL, 2012.

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APPEAL

D.K. MARAGA

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR