REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NYERI

CIVIL APPEAL 313 OF 2005

MONICAH NJOKI MAINA……..…….....
……..APPELLANT

AND

PATRICK NGUMI GITHAE……..…….....…..1ST RESPONDENT

RICHARD NJOROGE WACHIRA T/A GREEN BELLS AUCTIONEERS……....2ND RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nyeri (Khamoni, J.) 8th July, 2005

in

H.C.C.C. NO. 45 OF 2005)
****

JUDGMENT OF THE COURT

The entire saga giving rise to this appeal is, to say the least, disturbing. It does demonstrate the reasons why the lawmakers of our time found it necessary to incorporate the provisions of ***Article 159*** of our present Constitution. Because of what will be apparent later in this judgment, we will not delve into the detailed aspects of the entire case. However, because in our view, the learned Judge of the High Court *Khamoni, J* (as he then was) left out of his appraisal of facts some of the most crucial facts and history of the case, we will give a brief history of this case. We note however that had one of the firms of advocates in this case been aware of its professional requirements and acted accordingly, perhaps one of the parties would have had its suffering mitigated to an extent.

The appellant ***MONICAH NJOKI MAINA*** was as by 8th January, 1999, the tenant of the respondent ***PATRICK NGUMI GITHAE*** who is the husband of one ***AGNES MUTHONI NGUMI.*** We mention the date 8th January, 1999 because according to the record before us, on that date, respondent's firm of advocates *M/s Wahome Gikonyo & Company Advocates* wrote to the appellant's advocate, H.K. Ndirangu, demanding arrears of rent be paid by the appellant which according to them was a total of

Kshs.6,000/=. Thereafter, it would appear that nothing happened till 30th January, 2003 when ***Agnes Muthoni Ngumi*** moved to the Rent Restriction Tribunal at Nyeri vide Civil Case No. 4 of 2003 filed against the appellant. She claimed in that suit that the appellant was very irregular in paying rent and had fallen in arrears of rent upto January, 2003 amounting to Kshs.4,000/= and she demanded that sum together with vacant possession, mesne profits, and cost of the suit.

The appellant filed defence to that suit on 11th March, 2003 and denied the claim. She stated in an affidavit filed later in the High Court suit that that Rent Restriction Tribunal Suit, filed by the respondent's wife was dismissed. On the dismissal for that suit, she commenced payment of rent into the Tribunal. The first respondent said he was not aware of that. Be that as it may, the first respondent maintained again in an affidavit filed in the High Court that the appellant was still having rent arrears as she was allegedly not paying the full agreed rent into the Tribunal.

The record shows that vide a letter dated 16th November,2004, the advocates for the first respondent instructed the second respondent Richard Njoroge Wachira t/a Green Bells Auctioneers to levy distress upon the appellant in plot number 22 Mumbi Estate in Nyeri. As this letter is important in the entire case, we do reproduce it here below:-

"RE: DISTRESS FOR RENT CAP 293 LAWS OF KENYA PLOT NUMBER 22 MUMBI ESTATE

PATRICK NGUMI GITHAE…….LAND LORD

VERSES

MONICA NJOKI MAINA……TENANT

We refer to the above matter and to your letter of instructions to levy distress upon one M/S Monicah Njoki Maina in plot number 22 Mumbi Estate dated 16th Nov. 2004.

We have severally proceeded to the said tenant's residential premise in view of proclaiming her of her attachable assets, but in vain.

On 22nd November,2 004, we went to the said premise with the land lord who pointed to us the tenant's house but the tenant's daughter refused to open the gate for us.

On 6th December, 2004, we went there again and after knocking the gate, M/S Monicah Njoki came out of the said house and after we explained to her the purpose of us going there, she declined to open the gate for us and even went to an extend (sic) of letting her dogs free, thus denying us any further attempt of entering the compound.

We are now sure that M/s Monicah Njoki is not ready to let us into her compound and this view, we would recommend that a breaking in orders are essential to give us more powers to execute the assignment without any further delay.

We would thus be very grateful if the said orders are in our hands in good time.

Yours faithfully

RICHARD NJOROGE WACHIRA

AUCTIONEER"

In our view this is the letter that sparked off the entire problem that has bedelved the entire dispute. This letter from the second respondent was clearly innocent and honest. It stated that the second respondent had been instructed by the first respondent's advocates to levy distress pursuant to the provisions of

Chapter 293 of the Laws of Kenya, but he had been hindered in the carrying out that duty by the appellant who was, according to him, hostile. He thus needed a breaking in order to enable them have more power to levy distress – levy of distress is what he later referred to as "the assignment". In law, levy of distress procedure is not and cannot be synonymous to eviction. In case of levy of distress, only the goods in the subject premise are removed for sale to recover the rent arrears while the tenant remains in continuous occupation of the premises, whereas eviction means and incorporates removing the tenant from the premises. In any case, whereas the procedure for levy of distress is simple and only requires authority of the Tribunal in case of protected tenant, the procedure for eviction includes proper hearing before the Tribunal and a full decision of the Tribunal. Back to the facts of this case.

It is apparent that when the first respondent's advocates received the above letter from the second respondent, they did not move to the Rent Restriction Tribunal or to the Chief Magistrate to obtain breaking in order as was requested by the second respondent. Instead, they moved to the Chief Magistrate's court at Nyeri and filed an application for assistance (Miscellaneous Civil Application No. Nai. 7 of 2005) by way of forcible eviction. This is when matters went hay wire. This is when application for levy of distress for rent became an application for eviction. This entire part we have narrated hereinabove was not set out in the learned Judge's ruling nor was it considered in his ruling.

There is no record to indicate whether that application for eviction was duly considered by the learned magistrate for there is no proceedings nor order in the record issued by the magistrate in respect of that application. It is not even clear that it was placed before a magistrate. However, a warrant to the Bailiff to give possession of plot number 22 Mumbi Estate was issued on 12th May, 2005. The warrant stated as follows:-

"WARRANT TO THE BAILIFF TO GIVE POSSESSION OF PLOT NUMBER 22 MUMBI ESTATE

To M/s Green Bells
Auctioneers
Githungu House
NYERI

Whereas the under mentioned property in the occupancy of MONICAH NJOKI MAINA has been decreed to belong to PATRICK NGUMI GITHAE the applicant in this suit. You are directed to put the said PATRICK NGUMI GITHAE in occupation of the same and you are hereby authorized to remove any person their structures and properties bound by the decree who may refuse to vacate the same and if necessary use force to remove them and their structures from the premises.

The O.C.S. Nyeri Police Station is hereby directed and ordered to enforce these orders.

GIVEN UNDER MY HAND AND THE SEAL OF THE COURT THIS 12TH DAY OF MAY, 2005.

MAGISTRATE

SCHEDULE
PLOT NUMBER 22 MUMBI ESTATE"

Going by what is in the record before us, several disturbing questions arise from this warrant which was issued to the bailiff. Some of these are where is the ruling delivered by the learned magistrate from which an order could be extracted? Does the warrant emanate from any decision made by a competent court of law? Whereas the warrant is for eviction, what happened to the distress for rent that had been commenced by the two respondents? Where is the application for breaking in order which the second respondent had asked the first respondent to seek? And lastly, was the appellant made aware of all these actions that were proceeded with against her and to her detriment? All these are matters that the learned Judge of the High Court should have reflected upon before striking out the plaint for they were matters that called for ventilation by a seat of justice once they were brought to its attention. The warrant we have reproduced above was signed on 12th May, 2005. On or about 26th May, 2005, the second respondent, with the help

of the Police Officers broke into the appellant's house, removed her belongings and evicted her from the premises. On 27th May, 2005, she went to court and sought to know whether such a case resulting into her eviction existed. All she found were a letter dated 16th February, 2005 addressed to the first respondent's advocate by the second respondent and warrant to the bailiff. By that date she was already out of the premises. She then moved to the High Court and filed a suit against the two respondents by way of plaint dated and filed on 31st May, 2005. Together with that plaint, she also filed chamber summons dated 31st May 2005, in which she sought, inter alia, mandatory injunction to issue compelling the respondents to open subject premises and to have her return to the same premises. That chamber summons was supported by a detailed affidavit sworn by the appellant giving the historical background of the dispute. The plaint alleged fraud at paragraphs 11 and 12, and maintained that as the warrant was procured illegally and without any orders of the court, it was invalid in law and could not found just and legal eviction of the appellant. She also alleged in the same plaint that as a result of the illegal eviction, she incurred huge losses through theft of her household items that were left unattended at the time of the illegal eviction. She prayed for mandatory injunction and a declaration that her eviction was illegal and invalid in law. She also prayed for punitive general damages, special damages and costs of the suit.

The respondent opposed the application and filed ground of opposition together with replying affidavit to it. They went further; they also filed through their firm of advocates, notice of preliminary point of objection. Later before the hearing, a further notice of preliminary point of objection was filed by the respondents. The first notice of Preliminary Objection raised three points which were that:-

"i. The warrants of distress and breaking in orders are duly signed by the court and remain court orders and remain in force and have not been quashed, reviewed or set aside and the same cannot be challenged by way of a plaint and this suit is therefore incompetent.

ii. The distress was carried out pursuant to orders signed by the court and enforced by police officers and in, so far as the Attorney General is not a party to this suit on behalf of the court and the police, this suit is incompetent and untenable.

iii. The suit is also fatally and incurably defective, a gross abuse of the process of the court, bad in law and not properly before the court."

We do pause here to observe that the first respondent in this notice of preliminary point of objection is now introducing warrant of distress, a matter that was in the original instruction to second respondent but which on his Advocates being asked by the second respondent to help in enforcing by seeking breaking in order, his advocates filed application for forcible eviction instead of seeking only breaking in orders. Whether this was deliberate act to confuse issues and mislead the court is for another day perhaps in another forum, but it is clear to us that the warrant of distress they are talking about in this notice of preliminary point of objection cannot be the same as the warrant to the bailiffs to give possession of plot number 22 Mumbi Estate which was signed by the magistrate whether inadvertently or not none knows. Be that as it may, in the further notice of preliminary point of objection only one ground was stated which was that:-

"(i) The jurisdiction to grant the prayers sought only vested in the Rent Restrictions Tribunal and not any other court."

There is no evidence in the record that the respondents filed statement of defence to the plaint, but that is understood as the chamber summons filed by the appellant was certified urgent and it came up for hearing on 6th June, 2005, before the time for entering defence had expired. It was however adjourned from time to time until 24th June, 2005 when it was heard and ruling reserved to 8th July, 2005. In a ruling dated and delivered on 8th July, 2005, *Khamoni J* (as he then was) allowed the preliminary objection and struck out the chamber summons and appellant's plaint for being incompetent and unmaintainable. In doing so, he addressed himself thus:-

"From what I have been saying therefore, the preliminary objection raised by Mr. Wahome Gikonyo is

upheld and this suit together with chamber summons dated 31st May, 2005 filed by the plaintiff/applicant in this court be and is hereby struck out for being incompetent and unmaintainanble on the following grounds:-

Firstly, the plaintiff/applicant has Tribunal case No. 4 of 2003 and the Tribunal has jurisdiction to grant virtually all the reliefs the plaintiff/applicant is asking this court to grant. Both defendants can be dealt with in the Tribunal under the Rent Restrictions Tribunal Act.

Secondly, even if it were proper for the plaintiff/applicant to come to the High Court to file this suit, it is irregular to file the suit while what has been done in the chief magistrate's court Miscellaneous Civil Application No. 7 of 2005 remains unchallenged however irregular that case may be. This is more so in view of the fact that this High Court case is asking the High Court to undo what was done in the chief magistrate's court case where those proceedings are not being challenged in the normal manner either by way of a review or by way of an appeal or by way of judicial review. Under review by the magistrate or judicial review by the High Court the presence of a formal court judgment/order and decree is necessary.

Otherwise this Court cannot just ignore what has been done by a subordinate court. It remains, whether it is irregular or null and void or not any of those, until it is vacated in a lawful manner."

That is the ruling that has prompted this appeal before us. The appellant felt aggrieved and has come to us vide a memorandum of appeal citing several grounds of appeal which are that as the appellant had been evicted by the respondents from the premises, she ceased to be a tenant and the Rent Restriction Act could no longer apply to her; that the learned Judge failed to note that the eviction was procured by a stranger and not the landlord; that he failed to note that the Tribunal Case No. 4 of 2003 included different parties and the said matter had been effectively determined by the Tribunal; that the learned Judge erred in failing to note that no orders were made by Chief Magistrate in CMCC Misc. Civil Application Number 7 of 2005 capable of being challenged either by way of review, appeal or judicial review or otherwise; that he failed to observe that an appeal, review or judicial review could not grant any relief and such proceedings could be superfluous and in futility; that he failed to note that in law, nullities are nullities and no benefit can accrue from the same; and that the learned Judge was openly biased in his analysis of the entire proceedings before the court.

Mr. Karweru, the learned counsel for the appellant and *Mr. Wahome Gikonyo,* the learned counsel for the respondents both addressed us at length on their respective stands on the matter with *Mr. Karweru* highlighting the various grounds of appeal we have set out above in support of the appeal whereas Mr. Gikonyo opposed the appeal. As we have stated above, we feel reluctant to go into details on the facts and legal issues involved in the entire matter for the fear of prejudicing any future court action on the matter.

As we have indicated above, the learned Judge in his summary of facts left out a most salient aspect of the entire case namely that the first respondent's advocates and for that matter the first respondent had set out to carry out levy of distress under the provisions of Chapter 293 of the Laws of Kenya. That was because they alleged that the appellant was in rent arrears. The second respondent set out to do that but as a result of the appellants alleged hostility towards his team and alleged refusal to allow the access into the premises, the second respondent wrote a letter dated 16th February,2005 to the advocates only to ask them to seek breaking in orders to enable them carry out distress. The first respondent's advocates in what appears to us was a determined desire to evict the appellant from the premises, instead of seeking for breaking in orders, sought eviction of the appellant. This was even made worse by the fact that a warrant for eviction was prepared and a magistrate made to sign it whereas there were no proceedings for such a warrant and further that when preliminary points of objection were raised before the court, the fact that what was in issue was as to whether the eviction was illegal or not was camouflaged by the preliminary points referring to warrants of distress and not warrants of eviction as indeed the warrants were for eviction for the warrant was headed "warrant to the bailiff to give possession of plot number 22 Mumbi Estates." The effect of all these is that the learned Judge acted on a preliminary objection which was not relevant to the complaint in the plaint as read with the history of the case. Had he realized that aspect, he may have come to a difficult conclusion.

In his ruling, part of which we have reproduced above, the learned Judge appears to have appreciated that certain irregularities might have been committed, but he felt caught up with the technicalities mainly on the way in which the complaint was brought to court and he also felt the remedy of the appellant could have been to evoke the proceedings of Tribunal Case No. 4 of 2003 and seek her remedies there. It appears to us that that case was brought into the Tribunal by the wife of the first respondent and was only for demand of rent arrears. It was dismissed long before the plaint was filed into the High Court. In short, it was between the appellant and a different party and was on a different matter whereas the party who sought and obtained her eviction never joined his wife in the matter.

As to the manner in which the matter came to court, ***Article 159 (2)(d)(e)*** of the present constitution though was not in existence then, could help in demonstrating what a court of law could do when faced with such a situation. It states:-

"(***2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles:-***

(a) ……..……..
(b) ……
(c) ……

(d) justice shall be administered without undue regard to procedural technicalities; and

(e) the purpose and principles of this constitution shall be protected and promoted."

In this case, the learned Judge had before him and he appreciated a situation that we believe cried out for justice. Parts of the plaint complained against the respondent's action as opposed to the magistrate's action. Parts of the plaint claimed fraud as against the respondent. Parts of the affidavit in support of the chamber summons indicated that the appellant was claiming that she had paid rent in respect of which she was being evicted. All these, in our view, whether true or not true had been brought to the attention of the court and they demanded investigation and ventilation; certainly not to be driven out of the seat of justice. See what *Madan JA* (as he then was) said in the well known case of ***D.T DOBIE & COMPANY (KENYA LTD VS. MUCHINA, (1982) KLR 1:-***

"A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without full facts of a case before it.

These sentiments echo what is now in our constitution namely that a litigant should not be sent away from the seat of justice merely because he has not followed certain procedural requirements in accessing the courts of justice and particularly in the case such as this where it would appear that one party may have changed its approach midstream and relied on a cause of action different from the original one. Such needed court's intervention *suo moto* on its supervisory capacity to ensure justice.

In our view, application for review before the magistrate's court could not have resulted into desired relief for the appellant as the warrant for eviction had been acted upon and as in any case there were no recorded proceedings upon which that court could have reviewed, the warrant having been plucked from no orders of the court. As for judicial review, the best the High Court could have done would have been to quash the warrant but that would not have had the same effect as mandatory injunction which the court would not have granted on judicial review application. All we are saying is that upon the complaints that were raised before the High Court we cannot say the High Court on its unlimited original jurisdiction, and on its supervisory jurisdiction could not hear the matter. As we have stated above, we refrain from saying

any more.

The appeal has merits. We allow it, set aside the order of the High Court striking out the plaint and reinstate the plaint. Let the suit be heard by any Judge of the High Court after pleadings are closed. Costs of the appeal and of the chamber summons dated 31st May, 2012 to be paid to the appellant.

DATED and DELIVERED at NYERI this 5th day of JULY, 2012.

J.W. ONYANGO OTIENO
…….
JUDGE OF APPEAL

ALNASHIR VISRAM
…….
JUDGE OF APPEAL

R.N. NAMBUYE
…….
JUDGE OF APPEAL

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

DEPUTY REGISTRAR