



Ondicho v Angwenyi & another (Environment & Land Miscellaneous Case 10 of 2023) [2024] KEELC 5641 (KLR) (24 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5641 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND MISCELLANEOUS CASE 10 OF 2023**

M SILA, J

JULY 24, 2024

BETWEEN

JIM KENNEDY ONDICHO APPLICANT

AND

JOHN ANGWENYI 1ST RESPONDENT

JOSEPH NYACHOTI T/A MINMAX AUCTIONEERS 2ND RESPONDENT

RULING

(Application to file appeal out of time from a decision of the Business Premises Tribunal; applicant alleging that he was not served with the application lodged by the landlord at the tribunal; tribunal issuing orders for his eviction; principles to consider in such application; court not persuaded to exercise its discretion as the applicant could as well lodge an application to set aside the ex parte order at the tribunal; appeal in the circumstances not the most efficacious remedy; application dismissed)

1. The application before me is that dated 20 July 2023 but filed on 19 December 2023. It seeks two substantive orders which are prayers (2) and (3) in the application, that :
 - i. The court be pleased to enlarge time to lodge an appeal from the order of the Honourable Cyprian Mugambi Nguthari (Chairman) Business Premises Tribunal dated 29 May 2023.
 - ii. That an order do issue compelling Minmax Auctioneers to release the motor vehicle registration number KAT 969T unconditionally to the applicant.
2. The application is supported by the affidavit of the applicant. He avers that he has been a tenant of the 1st respondent in the premises Kisii Municipality/Block III/262 running a garage business; that his monthly rent is Kshs. 14,000/=; that on 11 January 2023 he paid Kshs. 20,000/= to the 1st respondent to cover rent for January and part of February 2023; that on 9 June 2023 without notice he found the 2nd respondent (Joseph Nyachoti t/a Minmax Auctioneers) come into the premises with police officers



and a group of people and they started removing the motorvehicles of his customers and demolishing a temporary structure that he had erected as sheds; that he inquired and he was informed that the 2nd respondent has an order to carry out eviction. He deposes that the 2nd respondent seized his motor vehicle registration number KAT 969T claiming that it was to cover a debt ordered by court. He states that he went into serious stress and ended up being admitted in hospital. He later instructed an advocate to follow up on the matter and his counsel obtained copies of pleadings and orders made by the Business Premises Rent Tribunal. He avers that he discovered that on 23 January 2023, when he had no rent arrears, the 1st respondent purportedly issued a Landlord's notice to terminate or alter terms of tenancy, which notice he swears was not served upon him. He refutes an affidavit of service sworn by Justus Orondo which asserts that he was served with the Landlord's notice on 23 January 2023 at 10.10am. He goes on to state that he was also not served with any application despite an affidavit to that effect stating that he was duly served on 25 May 2023 with an application dated 17 May 2023 and the tribunal's order dated 18 May 2023. He avers that he has also discovered that the licence of Justus Orondo was valid between 2021 and 2022. He adds that the order of the tribunal dated 30 May 2023 did not authorize the 2nd respondent to attach any of his properties and there is no justification for the seizure of his motorvehicle. He wishes to appeal but observes that the period to appeal expired on 4 July 2023. He avers he has given an honest explanation why he could not lodge his appeal within time and he believes that he has an arguable appeal with high chances of success. He has annexed a draft memorandum of appeal.

3. The 1st respondent (the landlord) filed a replying affidavit to oppose the motion. He first points out that the application herein has been filed by one Jim Kennedy Ondicho but according to him, his tenant has been Jimmy Ondicho Nyabuti. He has annexed a copy of the lease agreement. He avers that his tenant had occupied the premises for about 10 years at the monthly rent of Kshs. 14,000/= . He states that he issued a termination notice on 23 January 2023 and it gave his tenant one (1) month to contest it otherwise it would become effective on 1 April 2023. He avers that the tenant did not file any reference before the tribunal and that he then filed before the tribunal an application dated 17 May 2023 seeking orders to terminate the tenancy. He states that the tribunal was satisfied that proper service had been effected and it issued orders on 29 May 2023 terminating the tenancy and issued eviction orders. He avers that before the order of the tribunal of 29 May 2023 the tenant did not pay rent for January, February, March, April and May 2023. He has pointed at the treatment notes attached by the applicant and he states that they reveal that he was admitted on 19 June 2022 and discharged on 1 July 2023. He argues that the admission could not be as a result of the events that took place on 9 June 2023. He adds that there is no evidence that there was any property removed illegally. He states that in his termination notice he had recorded that the termination was because of non-payment of rent and to carry out developments on the premises. He avers that the appeal has been overtaken by events as there are developments on the suit premises. He urges that the application be dismissed.
4. The 2nd respondent also filed a replying affidavit. He deposes that on 8 May 2023 he received instructions from the 1st respondent to execute and recover rent arrears of Kshs. 70,000/= from the applicant. He avers that he proclaimed the goods of the applicant on 8 May 2023. He has annexed the letter of instructions and the proclamation. He avers that the tenant did not pay the rent arrears or his auctioneer's costs and did not challenge the proclamation. He adds that on 29 May 2023 he received an eviction order from the tribunal and on 9 June 2023 he executed it in the presence of police officers from Kisii Central Police Station. He also distrained the motor vehicle KAT 969T of the applicant due to the unpaid rent and costs. He continues to state that on 9 June 2023 he served a notification of sale upon the applicant who refused to sign. He states that the applicant called him and requested for 2 months to clear his rent and costs but he failed to make good his promises. He deposes that on 25 August 2023 he advertised the motorvehicle for sale and that the sale took place on 4 September 2023



as scheduled. He has annexed the certificate of sale. He contends that this application is an afterthought and that the orders sought would be in vain since the motorvehicle is currently with a third party. He avers that he acted lawfully as an officer of the court.

5. I directed counsel to file submissions on the application and I have taken note of the submissions filed by counsel for the applicant and the 1st respondent.
6. At the hearing of the application, Mr. Ombachi, learned counsel for the applicant did state that he has abandoned the second substantive prayer in the application, that of release of the motor-vehicle registration number KAT 969T, and that he would only pursue the prayer to file an appeal out of time.
7. All that I need to address myself on is whether I should exercise my discretion to allow the application to file an appeal out of time. Appeals from the Business Premises Rent Tribunal are supposed to be filed before this court within 30 days of such decision. This is addressed in Section 15 (1) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, Cap 301, Laws of Kenya which provides as follows :

15. Appeal to court

- (1) Any party to a reference aggrieved by any determination or order of a Tribunal made therein may, within thirty days after the date of such determination or order, appeal to the Environment and Land Court :

Provided that the Environment and Land Court may, where it is satisfied that there is sufficient reason for so doing, extend the said period of thirty days upon such conditions, if any, as it may think fit.

8. I observe that the applicant had filed a similar application of even date on 20 July 2023 before the High Court, which found that it had no jurisdiction, and had the matter referred to this court. It was probably not necessary for the applicant to file a fresh application of similar nature on 19 December 2023 as the entire application was transferred to this court.
9. Be that as it may, the applicant seeks the discretion of this court so as to benefit from an extension of time to lodge his appeal. The Act does not specify the manner in which the court should exercise its discretion nor does it state what factors the court needs to take into consideration. In my view, the following are material :
 - i. The reason for the delay;
 - ii. The period of delay;
 - iii. Whether an appeal would still be effective and orders will not be made in vain;
 - iv. Whether the appeal is arguable;
 - v. Whether there are other alternative remedies.
10. Each case will be of course need to be decided on the merit of its own facts.
11. Considering the above, the applicant has stated that he delayed filing the appeal because he was unwell and admitted in hospital. He has annexed a discharge summary showing that he was admitted in hospital on 19 June 2022 (sic) and discharged on 1 July 2023. I will assume that the date of 19 June 2022 is erroneous and it is supposed to be 19 June 2023. It will be recalled that the decision sought to be appealed from was made on 29 May 2023 meaning that the applicant had up to 29 June 2023 to file his appeal. If it is true that he was in hospital at this time, that would be a plausible reason to enlarge



time to lodge appeal. I observe that the applicant moved court for the first time on 20 July 2023 albeit he moved the wrong court. On the scale of things, if we take it that he left hospital on 1 July 2023, that wouldn't be too late.

12. My main issue is whether, even if I allow him to appeal out of time, the appeal would still be effective; whether alternative remedies are available to the applicant; and whether the appeal sought to be preferred is arguable. Combining these, I observe that the applicant has been out of the premises for more than one year now. So what if he appeals? What does he intend to achieve? The best that this court will do is to set aside the order of 29 May 2023 and direct that the Landlord's application be heard inter partes by the tribunal. The applicant can very well achieve that by moving the tribunal to set aside the ex parte order and have the Landlord's notice heard inter partes. It is in fact the tribunal, which proceeded to hear the matter ex parte, that is best placed to interrogate whether proper service of the notice was effected or not, for it is the contention of the applicant that he was never served with the Landlord's notice nor the application lodged at the tribunal. In those circumstances, I do not see an appeal being the most efficacious remedy to the applicant.
13. For that reason I am not persuaded to exercise my discretion in favour of the applicant.
14. I proceed to dismiss this application with costs to both respondents.
15. Orders accordingly.

DATED AND DELIVERED THIS 24 DAY OF JULY 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

