Mohamed v Imani (Environment and Land Appeal 72 of 2021)
[2023] KEELC 15761 (KLR) (22 February 2023) (Judgment)

Neutral citation: [2023] KEELC 15761 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND APPEAL 72 OF 2021

SM KIBUNJA, J

FEBRUARY 22, 2023

BETWEEN

NUR SHEIKH MOHAMED ..... APPELLANT

AND

MOHAMED IMANI ..... RESPONDENT

(Being an appeal from the Ruling of Hon M.L Nabibya. SRM dated 7{{^th}} October 2021 in Mombasa CMCC 1745 of 2014)

JUDGMENT

1. This appeal was instituted through the Memorandum of Appeal dated October 28, 2021and supported by the Record of Appeal dated April 7, 2022. The appellant seeks to set aside the ruling dated October 7, 2021that dismissed the appellant's applications dated the February 9, 2015 and June 16, 2015. The application dated February 9, 2015 sought summary judgement as prayed in the plaint dated September 4, 2014, and the application dated June 16, 2015 sought to strike out the defendant's defence and for judgement to be entered.

2. The five (5) grounds on the memorandum of appeal are as summarized here below;

    a. The learned trial magistrate erred in dismissing the two applications on the basis that there were triable issues for determination through trial, but the issues were not set out.

    b. That the learned trial magistrate erred in determining the applications before her like a verdict under section 210 of the *Criminal Procedure Code*.

    c. The learned trial magistrate erred in law and in fact in failing to find that the respondent's tenancy had been properly and effectively terminated vide the notice issued under section 4 of the *Landlord & Tenant (Shops, Hotels and*

Catering Establishments) Act, as the respondent had not filed a reference under section 6 of the said Act and section 10 thereof had set in.

d. The learned trial magistrate erred in law in failing to grant the order of possession notwithstanding the finding that there existed triable issues on arrears and mesne profits.

e. The learned trial magistrate erred in law in declining the two applications on the basis that there were triable issues, while the respondent's response thereto amounted to mere denials, and the prayer for rent arrears and or mesne profits had not been specifically challenged.

3. The appellant therefore prays for the appeal to be allowed with costs, the ruling ofOctober 7, 2021 in CM ELC No. 1745 of 2014 be set aside, and the appellant's applications for entry of judgement be allowed.

4. The learned counsel for the appellant and the respondent filed and exchanged their submissions dated the November 4, 2022 and January 17, 2023 respectively, which the court has considered.

5. This being a first appeal, the court has the duty to consider the pleadings, proceedings and evidence presented before the trial court and come to its own conclusions, while cautioning itself that it did not see the witnesses, if any, testify. That as the documents in the record of appeal have confirmed that no viva voce evidence taken by the trial court yet, and that the hearing that had taken place was through affidavit evidence and submissions, this court finds it necessary to set out the parties' cases before embarking on analyzing the same.

6. The suit in the lower court was filed on the September 5, 2014, through the plaint dated the September 4, 2014. The plaintiff, who is now the appellant, prayed for judgement against the defendant for:

a. Vacant possession.

b. Rent arrears of Kshs 315,000/=.

c. Mesne profits at Kshs 14,300/= per month from 1st September 2013 till possession is delivered up.

d. Costs and interest.

7. The defendant, who is the respondent herein, entered appearance in person by filing a Memorandum of Appearance dated and filed September 23, 2014and proceeded to file his Statement of Defence on November 12, 2014. The respondent denied the appellant's claim, and inter alia averred that the appellant had no locus standi to file the suit without a power of attorney from the registered owner of the suit property, and prayed for the suit to be dismissed with costs.

8. The appellant then filed the two applications dated the February 9, 2015 and June 16, 2015.The issues raised for determinations in the said applications are:

a. Whether the two applications could be heard together.

b. Whether the respondent's defence was properly on record, and if so, whether it raises triable issues to go to trial.

c. Whether the court should enter summary judgement against the respondent, and if so, on what terms.

d. Who bears the costs of the applications.

That from the grounds and the two supporting affidavits, the appellant contended that the defence was filed and served out of time, and further to that the said defence was frivolous, vexatious, scandalous and was a delaying tactic to the expeditious disposal of the suit. That the parties had entered a consent before the Tribunal dated the April 16, 2012that among others provided the rent payable was ksh.13,000/- up to April 2013, and thereafter ksh.14,300/- per month. That the respondent fell into arrears of Ksh.315,500/- and the appellant issued and served him a notice in June 2013. That the respondent did not comply with the notice and the suit was filed. The respondent entered appearance on the September 23, 2014, and was obligated to file the defence in 14 days, and serve appellant's counsel in another 14 days thereof. However, the respondent only filed the defence on the November 12, 2014, but did not serve the appellant's counsel until theMay 20, 2015. That the defence should be struck out for both being filed outside the time prescribed, and being frivolous and vexatious.

9. The respondent opposed the application dated the June 16, 2015through his replying affidavit sworn on theJune 29, 2015, *inter alia* deposing that he filed the memorandum of appearance on the June 26, 2015 (sic) and defence on the November 12, 2014 while acting in person; that the defence raises triable issues and the suit ought to be heard and determined on merit; that he should be granted leave to deem the memorandum of appearance and defence as properly filed and he would pay the appellant thrown away costs; that the appellant's applications dated the June 16, 2015 and February 9, 2015 be dismissed and a hearing date for the suit to be fixed for it to be determined on merit.

10. The applications were heard and dismissed with costs through the ruling delivered by Hon L. T. Lewa, SRM, on the March 3, 2017, on the basis that the court had no jurisdiction. An appeal on that ruling was filed in Mombasa ELCA No.3 of 2017. The appeal was heard, the ruling of 3rd March 2017 set aside, and the two applications reinstated for hearing before the trial court. The proceedings in the record of appeal show that the two applications were heard before Hon. M. Nabibya, PM, before the ruling of October 7, 2021, subject matter of this judgement was delivered. The ruling is herein below reproduced verbatim;

> "**RULING**
>
> For determination are two applications dated February 9, 2015 and June 16, 2015. In the application dated February 9, 2015 applicant argued that the defence didn't raise any triable issues to warrant the suit to proceed for full trial therefore, the plea for summary judgement be allowed.
>
> I have perused the response to the application and the statement of defence which I find to have regard issue of power of attorney amongst other to me those are triable issues.
>
> Concerning all factors in the application I dismiss the application. For the ruling in application dated June 16, 2015which seeks the two applications be heard together was undertaken by events after court made those directions pending hearing of the suit.
>
> The defence reason that he delayed in filing the defence because he was acting in person has not included sufficient reason but on the basis of triable issues, applications are allowed.
>
> Because this is a very old case, hearing shall be within 1 month of the date of this ruling. Right of appeal 30 days."

11. Now turning to the court's own analysis, I have considered all the grounds on the memorandum of appeal, record of appeal, submissions by the learned counsel, superior courts decisions cited and come to the following determinations;

a. That it is apparent that there is no dispute the Memorandum of Appearance was filed on theSeptember 23, 2014. The respondent ought to have filed their statement of defence by October 7, 2014in accordance with Order 7 Rule 1 of the *Civil Procedure Rules* provides that:

> " Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service."

It is therefore crystal clear that when the respondent filed his defence in person on November 12, 2014, it was outside the prescribed time of 14 days, and no leave had been sought and or obtained to extend the time. The respondent subsequently instructed counsel, Ms Were Geoffrey & Company Advocates, who filed replying affidavit on June 29, 2015in response to the appellant's application dated June 16, 2015. The advocate representing the respondent did not make a formal application to extend time and or for leave of the court to admit the pleadings, like the defence, and documents filed out of time. A statement of defence that is filed outside the prescribed time and without leave to extend time having been sought and obtained, is not a pleading that can be said to be regularly and properly filed. A court of law is without jurisdiction to consider a pleading, like the statement of defence herein, that is not regularly and properly filed while considering whether the contents thereof raises triable issues to the claim before the court.

b. The prescription of Order 7 Rule 1 of the *Civil Procedure Rules* is in mandatory terms and in the absence of a formal application outlining a reasonable explanation from the respondent as to why he was unable to file his pleadings in time, as required by law, the court can only strike out the defence for being filed out of time. The rules of procedure prescribe various time lines within which to file and serve documents and those timelines ought to be adhered too. Where the same are not adhered to, a party is at liberty to seek the indulgence of court to extend or enlarge the timelines. Instead of making a formal application to court for leave to file and serve the defence outside the timelines, counsel for the respondent casually inserted in the replying affidavit a statement to the effect that the court ought to excuse the respondent who filed the said pleadings in person. That cannot amount to a formal application seeking leave to file the pleadings out of time. The trial court never granted leave to the respondent to file his pleadings out of time and as such there is no defence on record for consideration by court, as to whether it raises triable issues.

c. An application for summary judgment can be applied for where the defendant has entered appearance but has not filed a defence, under Order 36 Rule 1 of the *Civil Procedure Rules* which states,

> " In all suits where a plaintiff seeks judgment for—
>
> a. a liquidated demand with or without interest; or
>
> b. the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of

rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser, where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits."

It has not been disputed that the appellant was in a tenancy agreement with the respondent in relation to the premises situated on Mombasa Block/XVII/682, which was subject to the Business Premises Rent Tribunal Case No 180 of 2011. It has further not been disputed that in the Tribunal matter, the appellant as the landlord, entered into a Consent judgement dated April 16, 2012 with the respondent as the tenant on the following terms:

i. "The rent to be and is hereby agreed at Kshs 13,000/= per month w.e.f the date of notice and to continue till April 2013.

ii. Effective May 2013 the rent shall be Kshs 14,300/= per month.

iii. In absence of agreement between the parties the landlord be at liberty to issue a notice to alter the terms of tenancy under section 4 of the *Landlord & tenant (Shop, Hotels & Catering Establishment) Act* cap 301."

It is the appellant's case that the respondent was in default of the consent order and on June 28, 2013the appellant issued and served him with Landlord's Notice to Terminate Tenancy as persection 4 (2) of the *Landlord & tenant (Shop, Hotels & Catering Establishment) Act* cap 301.

d. That in the said notice, the appellant informed the respondent that the tenancy stood terminated with effect from September 1, 2013 on the ground of the rent arrears of Kshs 286,000/= as at June 2013 at the rate of Kshs 13,000/= up to April 2013 and Kshs 14,300/= from May 2013 till the said date of the notice. Section 10 of the *Landlord & tenant (Shop, Hotels & Catering Establishment) Act* cap 301 provides that;

"Where a landlord has served a notice in accordance with the requirements of section 4 of this Act, on a tenant, and the tenant fails within the appropriate time to notify the landlord of his unwillingness to comply with such notice, or to refer the matter to a Tribunal then subject to section 6 of this Act, such notice shall have effect from the date therein specified to terminate the tenancy, or terminate or alter the terms and conditions, thereof or the rights or services enjoyed thereunder."

The respondent, who has not disputed receipt of the notice did not file a reference to the Tribunal in accordance with section 6 (1) of the Act, which provides that;

"A receiving party who wishes to oppose a tenancy notice, and who has notified the requesting party under section 4(5) of this Act that he does not agree to comply with the tenancy notice, may, before the date upon which such notice is to take effect, refer the matter to a Tribunal, whereupon such notice shall be of no effect until, and subject to, the determination of the reference by the Tribunal:"

e. That upon respondent failing to file a reference to the Business Premises Rental Tribunal as provided by section 6 (1) of the Act, Section 10 of the Act took effect, meaning that the Notice to terminate the tenancy dated June 28, 2013became effective from the date specified. This

position has been buttressed by the Court of Appeal decision in *Jitendra Mathurdas Kahabar & 2 others v Fish and Meat Limited* [1997] eKLR held that,

> " From what we have said above, once a reference in accordance with section 6(1) of the Act has not been made to the Tribunal and a tenancy notice to terminate the tenancy has taken effect from the date specified therein in terms of section 10 of the Act, the landlord/ tenant relationship comes to an end. Thereafter, one can no longer talk of the existence of a controlled tenancy in terms of section 2 of the Act without which the Tribunal under the Act has no jurisdiction. In the instant appeal, the respondent's failure to refer the appellant's tenancy notice to the Tribunal in accordance with section 6(1) of the Act resulted in the cessation of its tenancy of the appellants' godown/warehouse with effect from 1st June, 1995 in terms of section 10 of the Act. Henceforth, there was no controlled tenancy to talk about in regard to the said godown/warehouse and the appellants became entitled to possession of the same which the respondent did not give to them. In these circumstances therefore, the appellants had to come to court to enforce their rights to their property."

It is therefore the finding of this court that the landlord/tenant relationship between the appellant and respondent came to an end on September 1, 2013. The appellant became entitled to vacant possession of the premises, but the respondent did not surrender the premises. It was within the appellant's right to seek the intervention of the court to enforce his rights by filing the suit in the lower court and seek for summary judgement against the respondent.

f. In my view, the appellant is entitled to summary judgement as prayed for the reason that his case is plain and clear in terms of facts and the law. The material facts herein have been adequately established and the law has been fully argued without the benefit of trial. In the case of *Zola v Ralli Brothers Limited* (1969) EA 691, it was held that;

> " Order 35 is intended to enable a plaintiff with a liquidated claim to which there is clearly no good defence to obtain a quick and summary judgement without being unnecessarily kept from what is due to him by the delaying tactics of the defendant."

There is neither a regularly and properly filed statement of defence on record before the trial court nor had the respondent responded to the application for summary judgement dated February 9, 2015by filing an affidavit in reply. The respondent simply had no answer or reasonable reply to the appellant's claim that the learned trial magistrate could have given consideration to and conclude it raised triable issues to go to trial for hearing and determination on merit. For the learned trial magistrate to have held otherwise, as she appears to have done, was in error both in fact and the law. The court therefore finds merit with the appeal.

g. That as the appellant has been successful in this appeal, then under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, the appellant is entitled to cost in the appeal and the trial court.

12. That flowing from the above determinations, the court finds and orders as follows;

a. That the appeal is merited and is hereby allowed.

b. The learned trial magistrate's Ruling dated October 7, 2021delivered in CMCC 1745 of 2014 by Hon. M. Nabibya, PM, is hereby set aside, and in its place, the appellant's applications dated the February 9, 2015 and June 16, 2015 are hereby allowed, and summary judgement entered in terms of the prayers in the plaint dated September 4, 2014.

c. The appellant will have the costs in the appeal and trial court.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 22nd DAY OF FEBRUARY 2023.

S. M. Kibunja, J.

ELC MOMBASA.

IN THE PRESENCE OF;

APPELLANT : Absent

RESPONDENT : Absent

COUNSEL Mr Mwakisha for Appellant

GILLIAN .. COURT ASSISTANT.

S. M. Kibunja, J.

ELC MOMBASA.