Walela v Chatur & 2 others (Tribunal Case E664 of 2023)
[2023] KEBPRT 1131 (KLR) (28 November 2023) (Ruling)

Neutral citation: [2023] KEBPRT 1131 (KLR)

REPUBLIC OF KENYA

IN THE BUSINESS PREMISES RENT TRIBUNAL

TRIBUNAL CASE E664 OF 2023

P MAY, MEMBER

NOVEMBER 28, 2023

BETWEEN

ELIAS BARASA WALELA ..... TENANT

AND

MADATALI CHATUR ..... 1ST RESPONDENT

MIRIHI LIMITED ..... 2ND RESPONDENT

PETER JOHN ..... 3RD RESPONDENT

RULING

1. The tenant approached the Tribunal by filing the reference dated 6th July, 2023 challenging the landlords' actions of breaking into the demised premises. Contemporaneous with the reference, the tenant filed an application under certificate on an even date. The application sought a plethora of orders against the landlords including an order to reopen the demised premises.

2. The application was placed before the Tribunal on 11th July, 2023 whereby the same was certified urgent and fixed for hearing on 19th July, 2023. The tenant sought an adjournment on the said hearing date and a fresh hearing date was fixed for 17/8/2023 since the respondents had failed to attend the Tribunal. On the said date, the hearing of the application proceeded in the absence of the respondents and the tenant was granted orders in his favour.

3. Subsequently the respondents filed an application dated 1st September. 2023 seeking to set aside the orders issued by the Tribunal. The landlords in the application stated that their failure to attend court was because of the mistake of counsel which should not be revisited upon them.

4. The application has been opposed by the tenant who reiterated that the landlords were duly served both electronically and physically. The tenant stated that he had expended a lot of their resources

to prosecute the application thus it was only fair that he be allowed to enjoy the fruits of the ruling delivered in his favour.

5. The parties elected to canvass the application by way of written submissions. I have considered the same and would proceed as follows:

Analysis

6. From the onset, it is important to determine whether the Tribunal has power to vary its orders. It is clear that in exercising the powers conferred under the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, this Honourable Court must restrict itself to the powers conferred to it under Section 12 of the said Act.

> 12. A Tribunal shall, in relation to its area of jurisdiction have power to do all things which it is required or empowered to do by or under the provisions of this Act, and in addition to and without prejudice to the generality of the foregoing shall have power—
>
> (i) to vary or rescind any order made by the Tribunal under the provisions of this Act;

7. This power of the Tribunal was elaborated by the High Court in the case of *Spares Corner (K) Ltd. v Maram Noormohamed, Abdul Hamid Noormohamed, Ismael Noormohamed*[2003] eKLR, in which the Tenant sought for review of a decision issued by this Tribunal, after the Tenant had been evicted from the suit property and the Tenancy relationship between the parties severed.

The High Court in affirming the power of this Tribunal to vary or rescind its orders as provided under Section 12 (i) of the Act, and in remitting the matter back to the Tribunal for consideration on merit despite the execution of earlier orders stated as follows:

> "It is difficult to see under what circumstances a Tribunal would be asked to vary or rescind any order made under the Act if it cannot reconsider its own orders dismissing a reference and ordering a tenant's eviction. The Act provides for it and it is in any event a fundamental principle of Justice."

8. 15. Based on the foregoing, it is therefore clear that this Honourable Court has the power to review or vary or rescind earlier orders issued by it. Subsequently, this raises the question on what grounds or under what circumstances is this Honourable Court required to consider an application to vary or rescind its earlier orders.

9. The grounds in which a court may exercise its power of review are clearly stated under Order 45 rule 1(1) of the *Civil Procedure Rules*. The said provision provides as follows:

> "any person considering himself aggrieved by a decree or order from which an appeal is allowed but from which no appeal has been preferred or by a decree or order which no appeal is allowed and who from the discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made or on account of some mistake or errors apparent on the face of the record or for any other sufficient reason desires to obtain a review of the decree or order may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."

10. Therefore, in order for the Tenant herein to succeed in this application, he must satisfy either of the conditions stipulated in Order 45 Rule 1 of the *Civil Procedure Rules* which are:

a) Discovery of a new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made;

b) A mistake or error apparent on the face of the record; and

c) Any other sufficient reason.

11. In the present application, the landlords have acknowledged that they were served with the impugned application but are quick to blame their advocates for inaction. The landlords have urged the Tribunal not to revisit the mistake of counsel upon them.

12. The issue of the mistake of counsel has been litigated upon and the superior courts have pronounced themselves time without number. It was stated *Tana & Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 others* [2015] eKLR,

> "From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel's duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side."

13. In the above case however, the court also stated that legal business should be conducted efficiently and we can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age.

14. In this case however, the legal officer who swore the affidavit stated that they inadvertently failed to instruct an advocate to take up the matter. While this may not be excusable, it should be noted that mistakes do happen. The Tribunal has also considered that the application for review was filed timeously.

15. In view of the foregoing and in the interest of justice the Landlords' application dated 1st September, 2023 is allowed in the following terms:

a. The landlords' application is allowed in terms of prayers 2 and 3.

b. The tenant is awarded throw away costs to be assessed as 1 month rent.

c. The tenant shall be granted quiet possession during the pendency of the present proceedings

d. The parties to fix a date for the hearing of the tenant's reference. Each party to file statements and documents that they seek to rely during the hearing within 7 days from the date hereof.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 28TH DAY OF NOVEMBER 2023.

HON. PATRICIA MAY - MEMBER - 28.11.2023

Delivered in the absence of the parties.