Muigai (Suing on Behalf of 9 others) v Nairobi City County Government & 2 others (Tribunal Case E1214 of 2022) [2023] KEBPRT 1228 (KLR) (Civ) (9 October 2023) (Ruling)

Neutral citation: [2023] KEBPRT 1228 (KLR)

REPUBLIC OF KENYA

IN THE BUSINESS PREMISES RENT TRIBUNAL

CIVIL

TRIBUNAL CASE E1214 OF 2022

P MAY, MEMBER

OCTOBER 9, 2023

BETWEEN

WILLIAM MUIGAI (SUING ON BEHALF OF 9 OTHERS) ..... TENANT

AND

NAIROBI CITY COUNTY GOVERNMENT ..... 1ST RESPONDENT

DIRECTOR CITY INSPECTORATE ..... 2ND RESPONDENT

DEPUTY SUB-COUNTY COMMANDER ..... 3RD RESPONDENT

RULING

1. The Tribunal delivered a ruling on the tenant's notice of motion application dated 22nd December, 2022 on 24th May, 2023. The import of the ruling is that the said application and the anchor reference were dismissed with costs. The tenant was aggrieved and filed the application dated 30th May, 2023 seeking to review the said ruling.

2. The tenant stated that the Tribunal failed to consider its further affidavit and submissions thus the decision was made based on incomplete information. The tenant has admitted to failing to file the said affidavit and submissions within the prescribed timelines but is quick to defend themselves that the failure was occasioned by the failure of technology on the part of the Tribunal. They have also alleged that the same was contributed by the transfer of the Registry and Tribunal from View Park Towers to Kenya Re Towers.

3. The application has been opposed by the respondents vide the replying affidavit sworn on 18th July, 2023. The respondents aver that the application is bad in law and that the same should not be entertained. They have stated that the grounds given by the respondents are not backed by any evidence and that the Tribunal should not come into the aid of an indolent party.

4. The parties elected to canvass the application by way of written submissions. I have considered the application, the affidavits and submissions on record and would proceed as follows:

5. It is clear that in exercising the powers conferred under the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, this Honourable Tribunal must restrict itself to the powers conferred to it under Section 12 of the said *Act*.

6. Section 12 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* clearly stipulates as follows:

> 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. Based on the foregoing, it is therefore clear that this Honourable Tribunal 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 Tribunal required to consider an application to vary or rescind its earlier orders?

9. In response to the above question, I stand guided by the decision in the case of; *Transallied Limited v Sakai Trading Limited* [2016] eKLR, where the Environment and Land Court addressed its mind on the grounds that should guide this Court in exercising its review powers as follows:

> " The appeal before us is against the decision of the tribunal that was made on 1st July 2011 by which the tribunal declined to review its order made on 3rd September 2010 striking out the Appellant's complaint for want of jurisdiction. What we have been called upon to determine is whether the tribunal acted correctly in rejecting the Appellant's application for review. Section 12(1) (i) of the Act gives the tribunal power to vary or rescind any of its orders. The Act does not provide for the circumstances under which the tribunal can exercise that power...We are of the view that the provisions of the *Civil Procedure Act* and the rules made thereunder would apply to the proceedings before the tribunal unless expressly stated otherwise in the Act and the regulations made thereunder which we have referred to above...What we are to determine is whether the Appellant's application for review before

the tribunal met the threshold set out under Order 45 Rule 1(1) of the *Civil Procedure Rules*."

10. 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."

11. Therefore, in order for the Tenant herein to succeed in this application, they 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.

12. In addition to the above grounds, the law further requires that an application for review of orders must be made by the Applicant without unreasonable delay.

13. With this background in mind, I shall proceed to analyse whether the Tenant herein has met the threshold to warrant review of the orders issued by this Honourable Tribunal on 24th May, 2023 .

14. As observed above, the starting point is that a review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.

15. In *Nyamogo & Nyamogo v Kogo* discussing what constitutes an error on the face of the record, the court rendered itself as follows:-

> " An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of un definitiveness inherent in its very nature and it must be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error

apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal."

16. The Indian Supreme Court made a pertinent observation that is it has to be kept in view that an error apparent on the face of record must be such an error, which must strike one on mere looking at the record and would not require any long-drawn process of reasoning on points where there may conceivably be two opinions.

17. The wisdom flowing from jurisprudence on this subject is that no error can be said to be apparent on the face of the record if it is not manifest or self-evident and requires an examination or argument to establish it. In the instant application therefore, I am not convinced that there is an error apparent on the face of the record. What the applicant is raising requires examination and argument. They argue that the failure by judiciary's technology made them not to comply with the timelines. I agree with the respondents that this claim has not been substantiated as no evidence has been tendered on the attempts to escalate the challenge to the relevant offices.

18. I have in the course of drafting this ruling taken considerable time to consider the further affidavit, submissions and the application that the tenants have accused the Tribunal of failing to consider and would respectfully state that the same did not deviate much from the contents of the supporting affidavit thus the Tribunal arrived at its decision from an informed point in rendering its ruling. Considering the nature of the present application, the Tribunal restrains itself from delving into the details of the merits of the said further affidavit and submissions.

19. I am alive to the provisions of Article 159 (2) (d) of the *Constitution* of Kenya 2010 which enjoins courts and Tribunals to determine cases without undue regard to technicalities. I Must however point out that Article 159 of the *Constitution* is not a panacea for all problems. It is not lost to this Tribunal that the failure to file pleadings and submissions within the prescribed timelines without any plausible reasons goes against the principles of expeditious delivery of justice. The applicant therefore cannot seek refuge under Article 159 (2) (d) of the *Constitution* under the present circumstances in view of the above.

19. Before I pen off, I believe it is prudent to remind the parties on the role of submissions as was discussed by Mwera, J in *Nancy Wambui Gatheru v Peter W Wanjere Ngugi* Nairobi HCCC No. 36 of 1993 where he expressed himself as follows:

> "Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case."

20. In view of the foregoing, it is clear that the application dated 30th May, 2023 is not merited and the same is dismissed with no orders as to costs.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 9TH DAY OF OCTOBER 2023.

HON. P. MAY - MEMBER

In the absence of the parties