



M. Dalmar Trading Company Ltd v Gakibe & another (Criminal Revision E170 of 2022) [2022] KEHC 13450 (KLR) (Crim) (4 October 2022) (Ruling)

Neutral citation: [2022] KEHC 13450 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL REVISION E170 OF 2022
DO OGEMBO, J
OCTOBER 4, 2022**

BETWEEN

M. DALMAR TRADING COMPANY LTD APPLICANT

AND

MARY WAMBUI GAKIBE 1ST RESPONDENT

NAIROBI CITY COUNTY 2ND RESPONDENT

RULING

1. This matter comes up before this court for the applicant's (M Dalmar Trading Company Limited) application dated July 28, 2022. The application has been brought under articles 50(1), 165(6)(7), 159(1)(2)(a)(d) and 258(1) of the [Constitution](#) and section 362 and 364 of the [Criminal Procedure Code](#). The respondents have been named as Mary Wambui Gakibe and Nairobi City County, respectively.
2. In the application, the applicant has prayed for the following orders:-
 1. That this honourable court be pleased to issue an order staying the ruling/order issued on July 18, 2022 in the Chief Magistrates Court in Criminal Case No 120A of 2021, at City Law Courts at Nairobi requiring or ordering the tenants to vacate from the premises within 1 month pending the hearing and determination of this revision.
 2. That this honourable court be pleased to review, vary, revise and or set aside the proceedings, ruling and orders of Hon R A Oganyo (Mrs), Chief Magistrate, issued on July 18, 2022.
 3. That this honourable court be pleased to issue an order recalling for purposes of review the said Criminal Case No 120A at City Law Courts for purposes of satisfying itself as to the legality



correctness or propriety of the order issued on July 18, 2022 and as to the regularity of the proceedings.

3. The respondents have opposed this application. This application was argued by the parties on August 29, 2022.
4. Mr Lakicha, for the applicant submitted that the applicant is a tenant of the 1st respondent on a 15-year lease from June 6, 2016. That on 28.10.21, the 1st respondent served on the applicant a notice to terminate the lease under section 4 of cap 301. That the applicant reacted by filing a reference to the Business Premises Rent Tribunal on December 22, 2021, which reference remains undetermined. That the applicant discovered that the 1st respondent had mischievously gone to the Nairobi City County and used public health grounds as a pretext to evict the applicants and his tenants from the premises without notice. That the tenants are not parties to these proceedings and had no notice.
5. That on July 18, 2022, the court made an order that the tenants vacate not later than 6 months. That not being parties in the proceedings the tenants were not heard. That the court had no power to issue such orders. Counsel relied on several authorities on this point including:-
 - i. [*JH Tumani & another versus Municipal Council of Mombasa*](#) (2008)eKLR, in which dealing with a similar situation, the court ruled that the order had been made without jurisdiction and the order was accordingly set aside.
 - ii. [*Republic versus Kabue Kigera*](#) (1986)eKLR.
 - iii. [*Amarnath Gupta versus Municipal Council of Mombasa*](#) (2008)eKLR.
 - iv. [*Malik Mohamed Kipsang versus Republic*](#) (2005)eKLR.
6. Counsel submitted the respondent even tried to demolish part of the premises.
7. Ms Ndungu for the 1st respondent submitted that the issues is whether this application is properly before the court. That clause 2.0 of the guidelines relating to action case management in criminal cases, Gazette Notice No 1340 defines parties to a criminal matter to include the prosecutor, accused and victim. That the applicant is 1st respondents former tenant and was not party to the suit. Further, that there is no existing landlord and tenant relationship between the applicant and respondent as tenants have all vacated and the whole structure demolished.
8. Further, that the applicant was not affected by the orders of Hon Oganyo as he was not the accused. The 1st respondent was the accused as the owners, such that the remedy of the applicant lies in a civil action.
9. The 1st respondent, further submitted that this is an abuse of the process of the court, as the applicant has also filed another case, being ELC Case No 263 of 2022, as well as the case before the tribunal, being BPRT Case No E734 of 2022. That therein the parties are litigating over the same issue.
10. Further, that this application lacks merit and has been overtaken by events since the tenants have vacated and the premises demolished. That the accused has since began the process of rebuilding. Counsel relied on the 2 cases of
 - i. [*Isaac Kimani Kamau versus Eunice Wangeci*](#) (2021)eKLR.
 - ii. [*Grace Wanja Njuguna versus Andrew Kingori*](#) (2021)eKLR.
11. Counsel went on that the multiplicity of suits is causing economic hardship on the respondent.



12. For the 2nd respondent, Ms Merichi, submitted that this application is defective as the criminal proceedings were initiated by the county government against the 1st respondent, as a public health issue under section 119 and 120 of the Public Health Act, as a nuisance in a dwelling. That the premises were inhabitable and granting the orders sought would expose the public to health risks. And lastly, that this claim is civil in nature.
13. I have considered the submissions of the parties herein. I have also perused the respective affidavits filed and the cases referred to and attached in support of the opposing sides. This application arises from the orders of the Hon Chief Magistrate R A Oganyo dated July 18, 2022 in Criminal Case No 120A of 2021. In the case, the 1st respondent had been charged before the court for offences of nuisance under the Public Health Act (sections 118 and 119), cap 242 laws of Kenya. The learned chief magistrate proceeded to make the following substantive orders:-
 1. That a notice is hereby issued for the accused's tenants to vacate as soon as possible but not more than 1 month later.
 2. That accused is given at least 6 months within which to repair the building after the tenants vacate the premises.
14. It is now the contention of the applicant herein that this order was made by the court whereas the affected tenants were not party to the proceedings and had no notice of the same. The respondents on the other hand have maintained that it is the 1st respondent who was the accused person, and so the one the order was directed to, and not the applicant, a tenant in the premises.
15. There is no doubt in my mind that the order aggrieved of affected the applicant as it was required to vacate within the period specified therein, even though the applicant was not party to the proceedings. The procedure of executing orders under the Public Health Act (of this nature), are well settled in the Court of Appeal decision in Republic versus Kabue Kigeria (1986)eKLR, in which it was held:-

"The procedure is as under;

1. Upon receipt of a complaint under section 120(1) of the Public Health Act, the court should deal with the criminal matter in the normal manner until completion as provided for under the Criminal Procedure Code.
2. If the court is *prima facie*, satisfied that a nuisance had been proved such as renders the premises unfit for human habitation, whether or not there is a conviction, it should adjourn further proceedings so as to summons before it all persons who are reasonably likely to be affected by an order of closure or demolition, if made. The summons or notice should give particulars of the nuisance, the order proposed to be made, the date they are required to appear and, of course, require them to appear to show cause why the order proposed should not be made.
3. On the appointment date and time, the court will then hear all those who have responded to the court's summons or notice and who wish to be heard. If upon conclusion of proceedings the court is satisfied, on a balance of probabilities, that a nuisance does exist as renders the premises or dwelling unfit for human habitation, it should record such finding and proceed to declare them as such and make the necessary order as provided under the Public Health Act."



16. Several authorities relied on by the parties herein including *JH Jumani and another versus Municipal Council of Mombasa* (2008)eKLR, *Amarnath Gupta versus Municipal Council of Mombasa* (2008)eKLR, and *Malik Mohamed Kipsang versus Republic* (2005)eKLR, are all in tandem with and supportive of this position.
17. Following the procedure as enumerated above, the trial court ought to have summoned and or given notices to the applicant and indeed the other tenants and given them a hearing before the orders of vacation of the premises and repairs of the same could be issued. This apparently was not the case as the court proceeded to issue the said orders immediately the 1st respondent, the accused before the court, entered a plea of guilty to the charges brought under the *Public Health Act*.
18. From the pleadings filed by the applicant, this application is brought, “In the matter of *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*”, chapter 301, laws of Kenya. The preamble to this Act states;

“An Act of Parliament to make provision with respect to certain premises for protection of the tenants of such premises from eviction or from exploitation and for matters connected therewith and incidental thereto.”
19. In the same Act, a “shop” is defined as;

“Shop means premises occupied wholly or mainly for the purposes of a retail, or wholesale trade or business or for the purpose of rendering services for money or money’s worth.”
20. The above presupposes that for a landlord and tenant relationship to exist (or subsist), there must be premises that the tenant must occupy. Conversely, where there are no premises for occupation, then the landlord – tenant relationship as envisaged under the Act cannot exist. This to me, is material in determining if the orders prayed for can issue. And it is incumbent upon the applicant to show that the relationship indeed exists between it and the 1st respondent.
21. It has been submitted by the respondent, that pursuant to the orders of July 18, 2022, and in compliance with the same, the premises have since been demolished and pulled down and that the 1st respondent is in the process of putting up a new building at the site. The 1st respondent has exhibited photographs showing that the building has indeed been pulled down. The applicant has admitted that at least part of the building has been demolished.
22. In my view, if the building has been pulled down. The applicant has admitted that at least part of the building has been demolished.
23. In my view, if the building has been pulled down, it follows that there are no premises that the applicant may occupy at to sustain the landlord and tenant relationship that this application is grounded on. Even if only part of the building has been brought down, any occupation of the remaining part of the building could only lead to further breaches under the Public Health Act as well as exposing the occupants to nuisance and hazards.
24. This court also noted that the applicant has filed various suits over this subject. One such suit is before the Environment and Land Court. Another is also pending before the Business Premises Rent Tribunal. This court was not however; told with any specificity the nature of claims the applicant has made in these 2 cases. This court all the same takes notice that whereas the tribunal has jurisdiction on landlord and tenant matters, the Environment and Land Court exercises jurisdiction over issues of environment and land, which this court does not exercise jurisdiction to preside over.



25. This application seeks revision of the orders of the Hon Chief Magistrate ordering the tenants to vacate the premises amongst other related orders. As observed above, the tenants have vacated. The premises themselves have also been demolished. In all practical purposes therefore, the orders prayed for cannot issue, for orders of the court ought not and cannot issue in vain. It is for this reason that I do not find merit in the application of the applicant dated July 28, 2022. I accordingly dismiss the same wholly. It is so ordered.

D. O. OGEMBO

JUDGE

4TH OCTOBER 2022

Court:

Ruling read out in open court in the presence of Mr. Lakicha for applicant, Ms. Mwaura for Ms. Ndungu for 1st Respondent.

D. O. OGEMBO

JUDGE

4TH OCTOBER 2022.

Lakicha:

We pray for copy of the proceedings and ruling.

Court:

Certified copies of proceedings and ruling to be prepared and supplied.

