



Ram Hospital Limited v Ramji Meghji Gudka Limited (Civil Appeal E005 of 2022) [2023] KEELC 16681 (KLR) (27 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16681 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
CIVIL APPEAL E005 OF 2022**

M SILA, J

MARCH 27, 2023

BETWEEN

RAM HOSPITAL LIMITED APPELLANT

AND

RAMJI MEGHJI GUDKA LIMITED RESPONDENT

JUDGMENT

(Being an appeal from the ruling of the Kisii Business Premises Rent Tribunal delivered on 10 March 2021 by Honourable Gakuhi Chege, in the suit Kisii BPRT No 78 of 2021)

1. The subject matter of this appeal is the ruling made on March 10, 2021 pursuant to an application dated September 13, 2021, and filed on September 14, 2021 by the appellant before the Business Premises Rent Tribunal (hereinafter simply referred to as 'the tribunal'). That application was filed pursuant to Section 4 (1), 12 (1) and 12 (4) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, Cap 301, Laws of Kenya (hereinafter simply referred to as Cap 301) and it sought the following orders (slightly paraphrased for brevity) :-
 - (a) Certification of urgency.
 - (b) Orders to stop eviction pending inter partes hearing.
 - (c) Interim orders pending determination of the application.
 - (d) A determination that the tenant/applicant is the lawful bona fide tenant of the respondent.
 - (e) Further to and consequent upon (d) above a determination that the tenant/applicant herein enjoys a controlled tenancy within the meaning and intentment of Section 2 of Cap 301, which tenancy cannot be terminated except and in accordance with the provisions of Section 4 (2) of Cap 301.



- (f) The OCS, Kisii Police Station do oversee implementation of the orders herein.
 - (g) Costs of the application.
2. What prompted the filing of the application before the tribunal was that the respondent had obtained an order of eviction issued against Dr Anil Ratilal Tailor (Dr Tailor) on June 18, 2021, in Kisii CMCC 37 of 2017. It was contended that the respondent was keen to evict the appellant on the guise that he was evicting Dr Tailor from the premises. The appellant averred that the premises Kisii Municipality/Block III/270 had been leased by the respondent to Dr Tailor sometimes in the year 2000 where he traded as Ram Hospital. It was averred that in the year 2011, Dr Tailor incorporated a company known as RAM Hospital Limited (the appellant) which assumed the position of tenant without there being any written lease. It was asserted that the appellant is tenant on the premises based on an oral lease thus the tenancy was a controlled tenancy under Cap 301 and that Dr Tailor was no longer a tenant.
 3. The motion of the appellant was heard by Hon. Gakuhi Chege, and he delivered ruling on March 10, 2022. In his ruling, he singled out the following issues:-
 - (i) Whether the tenant is entitled to the reliefs sought in the application dated September 13, 2021.
 - (ii) Who is liable to pay costs of the application?
 4. In his analysis of the application, he found that there was no single rent payment receipt exhibited by the appellant to confirm that he was tenant of the respondent. He held that there had been no evidence of change of tenancy status from Dr Tailor to the appellant which had approval of the landlord. He also found that the notice dated July 19, 2016 served upon Dr Tailor was not opposed as required by Section 6 of Cap 301 and that the notice took effect on October 1, 2016. He found that the issues before him had been litigated in previous proceedings between the same parties thus res judicata and could not be the basis of fresh proceedings. He referred to the suits Kisii CMCCC Misc. Application No 37 of 2017, Kisii High Court Civil Appeal No 52 of 2018, and Kisii HCCC No 7 of 2017. He found that the case before him was thus both res judicata and res subjudice and an abuse of the court process and proceeded to dismiss it with costs assessed at Kshs 50,000/=.
 5. Aggrieved by this ruling, the appellant has raised the following grounds of appeal:-
 1. The Honourable Tribunal erred by holding that the appellant had not proved that it was a tenant of the respondent in the premises appurtenant upon that piece of land known as LR No Kisii Municipality/Block III/270 notwithstanding that the respondent had themselves admitted in its pleadings and affidavits that the appellant was its tenant and thereby misdirected itself by holding that it had no jurisdiction over the reference presented to it by the appellant.
 2. The Honourable Tribunal having held, albeit erringly, that it did not have jurisdiction to entertain the reference before it should have downed its tools and accordingly had no jurisdiction to pronounce itself on the issue whether or not the reference was res judicata or sub judice.
 3. The ruling and order of the Honourable Tribunal is a travesty of justice because having found as a fact that it did not have in its record the application dated October 1, 2021 on which the appellant had relied upon and submitted on, the Honourable Tribunal ought to have called up the case file before writing and delivering its ruling.
 4. The Honourable Tribunal failed to reasonably analyse affidavit evidence placed before it by the parties and thereby arrived at demonstrably wrong findings of fact and decision.



6. In this appeal, the appellant seeks the following orders:-
- (a) The ruling of March 10, 2022 be vacated and in place thereof it be ordered that:-
 - (i) The appellant is the lawful bona fide tenant of the respondent.
 - (ii) The appellant enjoys a controlled tenancy over and in respect of those premises appurtenant upon that piece of land known as land parcel LR No Kisii Municipality/Block III/270 within the meaning and intendment of Section 2 of Cap 301, which tenancy can only be terminated except and in accordance with the provisions of Section 4 (2) of Cap 301.
 - (iii) Costs of Kisii BPRT No 78 of 2021 be borne by the respondent.
 - (b) Costs of this appeal.
7. I invited both counsel for the appellant and counsel for the respondent to file submissions to argue the appeal and I have taken note of the submissions filed by Mr Nyamurongi, learned counsel for the appellant, and Ms Ochwal, learned counsel for the respondent.
8. It will be prudent for me to go through the facts before setting out my determination.
9. The genesis of the dispute between the parties is a Landlord's notice to terminate lease, dated July 19, 2016 and issued by the respondent. It was addressed to "Dr Anil Ratilal Tailor t/a Ram Hospital Limited". In that notice, the landlord averred that he wished to terminate the tenancy as he had not been paid for two years and four months. There was no response to that notice and the respondent obtained, from the tribunal, a letter October 6, 2016 confirming that nothing has been filed to oppose that notice. The respondent, on February 24, 2017, then filed the suit Kisii CMCC Miscellaneous Civil Application No 37 of 2017, seeking that the letter of October 6, 2016 be adopted as an order of the court and for an eviction order to be issued against the person/s named in the notice of July 19, 2016. The appellant, filed a motion dated March 1, 2017, seeking to dismiss the miscellaneous cause, on the basis that the tenancy notice was served on a non-existent entity. Ruling on that application was delivered on July 4, 2018 by Hon. Shiundu, Chief Magistrate. In his ruling, he made three substantive orders :-
- (a) A stay of proceedings on the order of October 6, 2016.
 - (b) The matter be returned back to the tribunal for inter partes hearing and determination on priority basis.
 - (c) The applicant to have costs of the application.
10. The above orders were challenged in the High Court at Kisii through an appeal registered as Kisii HCCCA No 52 of 2018. The appeal was heard by Ougo J, who delivered judgment on March 25, 2021. The court allowed the appeal and expressed itself as follows :-

“...the appeal is allowed only to the extent that the ruling and orders of the trial court issuing a stay of proceedings on the order dated October 6, 2016 by the Chairman of the Business Premises Rent Tribunal and the order of the court returning the matter back to the Business Premises Rent Tribunal for inter partes hearing and determination on a priority basis are



hereby set aside. The orders of the court allowing the application dated March 1, 2017 is hereby upheld. Each party to bear its own costs.”

11. The way I understand the judgment is that the High Court upheld the dismissal of the application dated February 24, 2017. In essence, Kisii CMCC Miscellaneous Civil Application No 37 of 2017 was declared dismissed. In my opinion, since it was an originating application, having been dismissed, no other application could be piled on it.
12. Nevertheless, the respondent still went back to the same Miscellaneous Civil Application No 37 and yet again lodged the same tenancy notice dated July 19, 2016 now seeking an order of eviction against the person of Dr Tailor. The order of eviction was issued on June 18, 2021 and it is this which provoked the proceedings before the tribunal and another application within that miscellaneous cause to have the eviction order set aside. I have seen that in a ruling delivered on November 24, 2021, the Chief Magistrates’ Court held that it had no jurisdiction over the matter, and that the avenue of the appellant was to appeal the decision of the tribunal to this court pursuant to Section 15 of Cap 301. It will be recalled that at the tribunal, ruling was delivered that the tribunal had no jurisdiction in the matter, as it was *res judicata* and/or *sub judice*. Nevertheless, it does appear that within the ruling of the Vice Chairman of the tribunal, the tribunal did make substantive findings which are to the effect that it is Dr Tailor who is tenant in the premises and indeed this is one of the grounds upon which this appeal is premised.
13. I agree with the appellant, that if the tribunal was of opinion that the matter was *res judicata*, and/or *res subjudice*, then it ought to have downed its tools and not proceeded to make any substantive determination. In other words, it could not hold that it has no jurisdiction, because the issues have been determined elsewhere, yet still proceed to pronounce itself on the same issue that it has held is already determined. These two findings could not exist in the same breadth.
14. Given the above, I am persuaded to upset the decision of the tribunal and hereby set it aside.
15. The next issue is what orders to give and/or what determination to make in respect of the application lodged before the tribunal. I observe that the said application sought orders that it be determined that the tenant of the premises is the appellant and not Dr Tailor. Within this appeal, the appellant has indeed asked this court to hold as much. I think this is an issue that first needs to be heard, through evidence, before a determination can be made, and it is best that the issues be remitted back to the tribunal with directions that the tribunal does make a determination on the following four issues, being :-
 - (i) Who between Dr Anil Ratilal Tailor and Ram Hospital Limited, is the tenant of the landlord in the premises Kisii Municipality/Block III/270.
 - (ii) Whether the tenancy existing is a controlled tenancy falling within Cap 301, and if so, the terms thereof including terms on rent.
 - (iii) Whether the notice of July 19, 2016 was a proper notice in the circumstances.
 - (iv) Who ought to be served with any future notices over the tenancy.
16. I am aware that all that was before the tribunal is the application dated September 13, 2021. However, what is being challenged remains the tenancy notice of July 19, 2016. I will direct that the said application dated September 13, 2021 be deemed also as a reference to the tribunal pursuant to Section 6 of Cap 301 and any attendant formalities thereof be waived. I would direct the tribunal, without too much technicality of procedure, to proceed and determine the four issues that I have directed above and pronounce itself substantively on the same.



17. The final issue is, what ought to be the status of the premises pending hearing of the above reference? I am aware that there was a suit, being Kisii HCCC No 7 of 2017, Ramji Meghji Gudka Limited v Dr Anil Ratilal Tailor and Ram Hospital Limited. In the judgment delivered on November 14, 2018, an order was made against both defendants jointly and/or severally for accrued rent of Kshs 37,000,000/= . This is an existing judgment and I have not been informed that there is any appeal against it. The appellant cannot continue being in the premises while the reference at the tribunal is being heard without satisfying this decree otherwise it would constitute an injustice to the respondent. Thus, if the appellant wishes to continue remaining in the premises while the reference at the tribunal is being heard, she will need to settle what has been determined by a court to be accrued rent which is outstanding. I will order that while the reference is being heard, the appellant can remain in the premises subject to satisfying the decree in Kisii HCCC No 7 of 2017 within the next 60 days. If the decree is not satisfied within that period of time, the respondent is given liberty to evict the appellant from the premises and the reference by the appellant will be heard while the appellant is out of the premises.
18. The last issue is cost. The appellant has succeeded in persuading this court to set aside the order of the tribunal but given that she has accrued unpaid rent on the decree in Kisii HCCC No 7 of 2017, I am unable to award her costs. Each party to bear his/her own costs of this appeal.
19. Judgment accordingly.

DATED AND DELIVERED AT KISII THIS 27 DAY OF MARCH 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

