



Colts Construction Limited & another v Njuguna (Environment and Land Appeal E052 of 2022) [2023] KEELC 17883 (KLR) (31 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17883 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E052 OF 2022**

JG KEMEI, J

MAY 31, 2023

BETWEEN

COLTS CONSTRUCTION LIMITED 1ST APPELLANT

JANE WAMBUI MWANGI 2ND APPELLANT

AND

JAMES NDATHE NJUGUNA RESPONDENT

(Being an appeal against the Ruling and Order issued on the 27/5/2022 by the Business Premises Rent Tribunal at Nairobi by Hon Andrew Muma in BPRT Case No E0109 OF 2022)

JUDGMENT

1. On the 2/2/2022 the Respondent (tenant) filed a Reference at the Business Premises Rent Tribunal (BPRT) under Section 12(4) of the *Landlord and Tenant (shops, hotels and catering establishment) Act*, Cap 301.
2. The complaint or Reference concerned the issuance of notice of vacation/eviction by the Appellants (sub landlord and agent respectively) against the Respondent.
3. Alongside the Reference the Respondent filed a Notice of Motion dated the 31/1/2022 seeking interalia orders of temporary injunction against the Landlord and agent from evicting distress for rent auction disconnecting of water or electricity and or interfering with the peaceful and quiet and uninterrupted occupation of the suit premises known as L.R No. 10521.
4. In response to the Application and the Reference the Appellants filed a Preliminary Objection on the following grounds;



- a. The Tribunal lacks jurisdiction to hear and determine this matter in accordance with Section 2 and 12 of the *Landlord and Tenant (shops Hotels and Catering Establishments Act* Cap 301 of the Laws of Kenya as:
 - i. there is no tenancy agreement between the Applicant and the Respondents capable of determination by this Hon Tribunal.
 1. Upon hearing the objection the Tribunal in its Ruling dated the 27/5/2022 dismissed the Preliminary Objection on the grounds that land is also considered as premises and as such falls within the scope of a business premises for which the Tribunal was seized with jurisdiction.
 2. Aggrieved by the decision of the Tribunal the Appellants proffered this appeal on the grounds that;
 - a. That the Honourable Tribunal erred in law by holding that it had jurisdiction to hear and determine the Reference filed by the Respondent contrary to the clear provisions of Sections 2 and 12 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, Cap 301 of the Law of Kenya.
 - b. That The Honourable Tribunal erred in law by importing meaning to terms clearly defined by in the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, Cap. 301 of the Laws of Kenya and thus expanded the jurisdiction of the Honourable Tribunal through judicial innovation contrary to law.
 - c. That the Honourable Tribunal erred in law by arrogating to itself jurisdiction on matters exclusively reserved for the Environment and Land Court contrary to law.
 - d. That the Honourable Tribunal erred in law in dismissing the Notice of Preliminary Objection without valid legal reasons known in law.
 3. The Appellants seek orders as follows;
 - a. The appeal be allowed.
 - b. The whole of the Ruling /order delivered on the 5/5/2022 in the Business Premises Rent Tribunal at Nairobi delivered on the 27/5/2022 be set aside.
 - c. The Preliminary Objection dated the 1/3/2022 be allowed and the Reference filed on the 31/1/2022 be dismissed with costs.
 - d. Costs be provided for.

The written submissions

8. The Appellants submitted that the Tribunal has no jurisdiction to hear and determine disputes relating to the use and occupation of suit land. That the essence of the Ruling of the Hon Tribunal is that the Respondent was operating a shop on the suit land contrary to the undisputed facts placed before the Tribunal by the parties, a position that is contested by the Appellants.
9. It was submitted that the Business Premises Rent Tribunal is a creature of statute and derives power from the statute that created it. Its jurisdiction therefore is limited by statute and it can only do those things which the statute has empowered it to do since its powers are expressed and cannot be



implied. That business premises tenancies are subject to the Act. The Act confers jurisdiction on the Tribunal where the business premises is leased for the purposes of running shops hotels and catering establishments.

10. It was further submitted that the Tribunal erred when it held that the suit land is a business service and therefore it has jurisdiction over the dispute. The subject of the contest was a parcel of land and which scope was outside its vested powers. It relates to the rights to exploit one acre of the land for purposes of quarrying purposes. The Appellants impugned the Ruling on the grounds that the alleged lease was never placed before the Tribunal and contend that the Respondent failed / refused and or neglected to enter a lease agreement with the 1st Appellant. On that basis the Court was urged that this is a dispute that falls within the jurisdiction of the Environment and Land Court.
11. As to whether the Preliminary Objection is a pure point of law the Appellants reiterated their submissions that this is not a dispute for the Tribunal but the Court. The Tribunal was faulted that it failed to ascertain from the pleadings whether the dispute related to shops hotels and or catering establishment in order to find and hold that it had jurisdiction over the subject matter.
12. The Respondent submitted that the relationship between the Appellants and the Respondent is that of a controlled tenant as envisioned in Section 2 of the Act. That the Respondent entered into a verbal agreement of lease to utilise the premises for purposes of quarrying of building stones (quarry mining purposes) for which he has been paying the rent to the proprietors of the land. It was submitted that the relationship fell within the provisions of Section 2 of the Act that of a controlled tenancy.
13. Relying on the decision in *Al Riaz International Limited Vs Ganjoni Properties Limited* (2015) eKLR where the Court held;

“In my view the provisions of Section 2 of Cap 301 are clear. If a tenancy satisfied any of the conditions provided the tenancy automatically becomes a controlled one and subject to the provision of Cap 301.”
14. It was further submitted that the Environment and Land Court does not enjoy jurisdiction over the relationship between the parties in this case as there is no contention on the right to the ownership of the land nor the proposed user of the said land as the Respondent leased the parcel for quarrying.
15. The Respondent added that the lease between the parties has never been terminated by either party under Section 7 of the Act which provides for termination of a controlled tenant for failure to comply with his obligations under the tenancy agreement, default in payment of rent for two months and breach of agreed tenancy and usage of the premises.

Determination

16. The key issue for determination is whether the appeal before the Court is merited. Put differently is whether the Tribunal had jurisdiction over the hearing and determination of the dispute before it.
17. It is not in dispute that the dispute between the parties is that of a sub-landlord tenant relationship. Though no lease was availed by the parties it commonly accepted that there was a verbal lease between the parties to lease the land for quarry and mining of stones.
18. I have examined the copy of title adduced on record and note that the land measuring 957 acres situate in Muranga County belongs to the Salvation Army. The 1st Appellant claims that the Land lord has contracted it to oversee a section of the land measuring 16 acres on the northward side specially mapped out and reserved for quarrying of stones. No agreement or contract between the Salvation Army and



the 1st Appellant was tabled for the Court to appreciate. Neither was there any agreement between the Landlord and the Respondent over the suit land for purposes of quarrying.

19. From the above para it is clear that the land was to be used for the purpose of mining quarry stones by the Respondent. The question for the Court is whether mining of quarry stones amounts to a shop for purposes and intents of the definition of a shop in the Act.
20. The Tribunal derives its jurisdiction from the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, with respect to certain premises for the protection of tenants of such premises from eviction or from exploitation and for matters connected therewith and incidental thereto.
21. A controlled tenancy is defined under Section 2 of the Act to mean a tenancy of a shop, hotel or catering establishment let out under certain conditions. 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.
22. A Hotel means any premises in which accommodation or accommodation and meals are supplied or are available for supply to five or more adult persons in exchange for money or other valuable consideration.
23. A catering establishment means any premises on which is carried out the business of supplying food or drink for consumption on such premises, by persons other than those who reside and are boarded on such premises.
24. The Respondent argued that the Tribunal had jurisdiction because the relationship between the parties was a controlled tenancy. The Act is very specific and going by the definition of the premises the subject of the Act are shops, hotels and catering establishments. I do not agree with the Respondent that when interpreting the question of jurisdiction, one relies on the term-controlled tenancy only. The Court must look into the controlled tenancy and the nature of the activities being carried out in the premises. Without limiting the interpretation of the Act, I am convinced the jurisdiction of the Tribunal is scoped by the definition given in the Act.
25. In the case of *Panesar Vs Balbir* (1972) EA 208 the Court held that; -

“There is something termed a lease for manufacturing purposes (S. 106 of the Transfer of Property Act of India) and the lease here was such a lease. The long title to the Act refers only to shops, hotels and catering establishments, not to factories or premises for manufacturing goods.”

Mustafa J.A who wrote the unanimous decision further stated as follows: -

“I am also of the view that “Premises occupied ... for the purposes of rendering services for money or money's worth,” would be applicable to offices like those of advocates, accountants, manufacturer's representatives, barbers and so forth, and cannot apply to a factory or the suit premises.”

26. In the case of *Owners of the Motor Vessel 'Lillian' (S) Vs. Caltex Oil (Kenya) Ltd* [1989] KLR1, as follows:

“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court had no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.



27. It is not in dispute that the parties had let the land for purposes of quarrying stones. These activities in my considered view can neither be termed as shop, hotel and or catering establishment.
28. The Tribunal found that the nature of the business suffices as one that can be characterized as business service as the activities rendered therein involve the rendering of service for money or monies worth as per the definition of the Act. I agree with the decision in Paneser case above that premises occupied for the purposes of rendering services for money or money's worth," would be applicable to offices like those of advocates, accountants, manufacturer's representatives, barbers and so forth, and cannot apply to a factory or the suit premises. By parity of reasoning, the Court holds that in the circumstances of this case land used for mining or quarrying building stones cannot be equated to offices for which services for money or money's worth are undertaken.
29. I therefore find that the Tribunal had no jurisdiction to entertain the dispute. Its proceedings and decision are a nullity and must be set aside.

Final orders for disposal:-

30. The appeal succeeds and it is allowed as follows;
 - a. The whole of the ruling /order delivered in the Business Premises Rent Tribunal at Nairobi on the 27/5/2022 be and is hereby set aside.
 - b. The preliminary objection dated the 1/3/2022 be allowed and the Reference filed on the 31/1/2022 be dismissed with costs.
 - c. Costs shall be in favour of the Appellants.**

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 31ST DAY OF MAY, 2023
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of;

Situma for 1st and 2nd Appellants

Respondent - Absent

Court Assistants – Kevin & Lilian

