



REPUBLIC OF KENYA



KENYA LAW
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**Omwere v Momanyi & 2 others (Civil Case E003 of 2023)
[2023] KEHC 26931 (KLR) (18 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26931 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL CASE E003 OF 2023
RPV WENDOH, J
DECEMBER 18, 2023**

BETWEEN

HENRY OMWERE PLAINTIFF

AND

CHARLES MOMANYI 1ST DEFENDANT

HEZRON OMAMBIA OMBASA 2ND DEFENDANT

MINIMAX AUCTIONEERS 3RD DEFENDANT

RULING

1. Henry Omwere (the applicant) filed an application and a suit both dated 17/8/2023. In brief, the applicant's case is that on or about 8/4/2021, he entered into a lease agreement with Charles Momanyi (the 1st respondent) for land parcel number Bukira/Buhirimono/6087 (leased premises) for a period of 5 years from 8/4/2021 to 8/5/2026 and the parties agreed on the monthly rent of Kshs. 68,000/=; that the applicant was to use the leased premises to run the business of a club, guest house and restaurant; that the applicant did renovations to the premises to the tune of Kshs. 2,500,000/=. The applicant stated that the parties reviewed the terms of the agreement from the previous 5 years to 2 years which was to run from 30/1/2023 to 30/1/2025.
2. The applicant alleged that on 11/5/2023, the 1st respondent terminated the tenancy agreement effective 31/5/2023; that the 1st respondent filed a suit before the Business Premises and Rent Tribunal against the applicant but he later withdrew it. That the 3rd respondent broke into the applicant's premises alleging that they have break in orders to levy distress for rent; that the 1st and 3rd respondents obtained the court orders for distress of rent illegally which is contrary to section 18 of the *Distress for Rent Act*.
3. In response, the 1st respondent filed a replying affidavit dated 5/9/2023. The 1st respondent confirmed that he is the owner of the leased premises together with Bukira/Buhirimono/2187 together with and the buildings/developments standing thereon; that on 8/4/2011 he let the leased premises to the



- applicant at a monthly rent of Kshs. 35,000/= and Kshs. 33,000/= respectively; that in January 2023, the applicant and Hezron Omambia Ombaso (the 2nd respondent) asked for a review of the tenancy period from 5 to 2 years beginning 2/4/2021 and rent payable to Kshs. 68,000/=.
4. It was further agreed that the amount of Kshs. 30,000/= incurred by the tenants during renovation of the leased premises shall be deducted from the monthly rent until payment in full; that the applicant and 2nd respondent neglected to pay the rent and as of July 2023, they had arrears of Kshs. 280,000/= and outstanding electricity bill of Kshs. 92,513.66/= and for that reason, on 21/6/2023, the 1st respondent instructed the 3rd respondent to levy distress for rent. The 3rd respondent also obtained an order from the Principal Magistrate Court at Kehancha allowing execution to issue.
 5. The 2nd respondent also filed a response vide a replying affidavit 8/9/2023. The 2nd respondent admitted that together with the applicant, they are in breach of the tenancy agreement and the applicant is not deserving of the equitable remedies sought.
 6. The above precipitated in the Notice of Preliminary Objection dated 5/9/2023 (the objection) filed by Charles Momanyi (the 1st respondent) which is the subject of this ruling. The grounds upon which the objection is premised are as follows:-
 1. That this court lacks jurisdiction to entertain this suit as the dispute between the plaintiff/applicant and the defendants/respondents relate to an interest in land use, or the occupation of a title of the suit property.
 2. That the application is frivolous, scandalous and an abuse of the court process because landlord and tenant disputes are disputes that involve an interest in land and a party that is aggrieved by the actions on such properties can only approach the Environment and Land Court pursuant to article 162 (1) (2) (b) of the Constitution and section 13 (1) (2) of the Environment and Land Court Act.
 7. The 1st respondent filed written submissions dated 23/10/2023. On whether this court has jurisdiction in the matter. It was submitted that before a court is seized with a matter, it must be satisfied that it has authority to hear and determine the dispute before it as it was held in the case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (1989) KLR 1. The 1st respondent also referred to the case of Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others (2012) eKLR where the Supreme Court of Kenya emphasized that a court's jurisdiction flows from either the Constitution, legislation or both.
 8. The 1st respondent submitted that article 165 (3) (a) of the Constitution gives the High Court unlimited original jurisdiction in criminal and civil matters; that article 165 of the Constitution provides that the High Court should not entertain matters within the jurisdiction of courts contemplated in article 162 (2) of the Constitution; that this claim arises out of a tenancy agreement that lapsed by efflux of time which the applicant and the 2nd respondent failed to rectify by filing a reference in the Business Premises Rent Tribunal despite being served with a termination notice; that if this court does not allow the objection, it will be probing into matters related to land use, or the occupation of and title to the property.
 9. The 1st respondent referred to the cases of Kangatta Properties Co. Limited v Charity Njeri (T/A Winacom Crossline Suppliers) & 5 Others (2013) eKLR and Benedette Magoma Nyakabari v Bonareri Asiago & 4 Others (2017) eKLR where in both courts, it was held that disputes which involve an interest in Land by dint of article 165 (5) of the Constitution, fall within the jurisdiction of the Environment and Land Court. It was submitted that the claim before this court should be dismissed for want of jurisdiction.



10. In opposing the objection, the applicant swore an affidavit dated 25/9/2023. He deposed that at the time of filing the instant suit, the issues of landlord and tenant relationship, land use and occupation had been overtaken by events since he was unlawfully evicted from the leased premises; that the 1st respondent had filed a reference against him in the Business Premises and Rent Tribunal but he withdrew it; that the dispute herein arises out of the illegality of distress for rent that was conducted by the 3rd respondent but it does not relate to land use and occupation; that the conduct of the 3rd respondent was against section 17 of the *Distress for Rent Act*; that section 15 of the *Distress for Rent Act* provides that any party who is aggrieved by unlawful distress may recover special damages that he sustained; that section 26 of the *Distress for Rent Act* provides that matters that relate to collection of dues, rent and remedies fall within the jurisdiction of this court as outlined under article 165 (3) (a) of the *Constitution*. The applicant stated that the preliminary objection is meant to frustrate his efforts to recover what was taken away from his business premises on account of the ex-parte orders issued.
11. The applicant filed written submissions dated 28/9/2023 in which the applicant submitted that for an objection to succeed, it should raise a pure point of law, which should be argued on the assumption that all the facts pleaded by the other side are correct and it cannot be raised if any fact has to be ascertained or if what is sought, is an exercise of judicial discretion.
12. It was submitted that the dispute and the orders sought by the plaintiff are for unlawful distress for rent; that the objection does not raise a point of law and the 1st respondent cannot raise the objection to question the accuracy of the facts in this case.
13. On whether the preliminary objection can be argued on the assumption that all facts have been pleaded correctly, it was submitted that the 1st respondent has raised an issue of this suit being related to interest in land use or the occupation of land which is contrary to the pleadings. The applicant relied on the case of *Oraro v Mbaja* (2005) 1KLR 141 where it was held that a preliminary objection must not deal with disputed facts.
14. If there is any fact to be ascertained or if what is sought is an exercise of judicial discretion, and if this court is to ascertain whether the cause of action relates to land use, occupation or interest, it will require that all the pleadings filed in the Business Premises and Rent Tribunal and the one before the Kehancha Law Court will have to be probed. It was stated that this court cannot from the face of the objection, conclude that the suit reveals a cause of action which falls under land use, occupation and interest in land; that there is need for this court to consider factual evidence and exercise its judicial discretion.
15. On whether this court has jurisdiction to hear and determine this suit, it was submitted that at the time of filing this suit, there was no landlord - tenant relationship as the same had been terminated by the 1st respondent unlawfully; that when the court was faced with a similar objection as this one in *Risper Kerubo Onsare v Vijay Kumar Saidha & 2 Others* (2021) eKLR it dismissed the objection. The applicant further relied on the Court of Appeal decision in *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 Others* (2017) eKLR where it was held that matters involving mortgages, charges, collection of dues and rents fall within the civil jurisdiction of the High Court and not the Environment and Land Court. The applicant urged that the cause of action falls within this court's jurisdiction as set out under article 163 (3) which stated that this court has unlimited original jurisdiction in criminal and civil matters.
16. I have considered the pleadings before this court, the responses thereto, the objection by the 1st respondent and the rival positions taken by both parties. The question to be determined by this court is whether the objection is merited.



17. A preliminary objection is one which raises a pure point of law which has been pleaded or which arises by clear implications out of pleadings and which when argued, may dispose of the suit. An example is the objection to the jurisdiction of the court or a plea of limitation of time. Nyarangi J in *Owners of the Motor Vessel "Lilian s"* (*supra*) held;

“Where the court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given... Jurisdiction is everything. Without it, a court has no power to make one more step. Where the court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

18. In the instant case, the objection is premised on the jurisdiction of this court. The 1st respondent’s contention is that this court is divest of jurisdiction to hear and determine the instant suit by virtue of the provisions of articles 165 (5), 162 (2) (b) of the *Constitution* and section 13 (7) of the *Environment and Land Court Act*. The applicant’s position is that his complaint is on the illegal distress of rent. There is no valid landlord-tenant relationship since it was terminated.

19. The jurisdiction of courts or any competent dispute resolution fora, flows from the Constitution, legislation or both. The Supreme Court in *Samuel Kamau Macharia* (*supra*) expressed itself as follows:-

A Court’s jurisdiction flows from either the *Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the *constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred on it by law.”

Article 162 of the *Constitution* provides for systems of courts. It provides that Parliament shall establish courts with the status of the High Court. In particular, article 162 (b) provides that the court shall hear and determine disputes relating to:- “the environment and the use of and occupation of, and title to, land.”

20. Parliament was required under article 162 (3) of the *Constitution* to determine the jurisdiction of and functions of the Environment and Land Court (ELC Court). In exercise of its legislative powers, it enacted the *Environment and Land Court Act*, 2012. Section 13 of the Act provides for jurisdiction of the court as follows:-

(2) In exercise of its jurisdiction under article 162(2)(b) of the *Constitution*, the Court shall have power to hear and determine disputes-

- a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
- (b) relating to compulsory acquisition of land;
- (c) relating to land administration and management;
- (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
- (e) any other dispute relating to environment and land.

Sub - section 7 provides:-



- (7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—
- (a) interim or permanent preservation orders including injunctions;
 - (b) prerogative orders;
 - (c) award of damages;
 - (d) compensation;
 - (e) specific performance;
 - (g) restitution;
 - (h) declaration; or
 - (i) costs.

21. From the above provision, the Constitution as read together with the *ELC Court Act*, confers specific jurisdiction to the ELC Court. The jurisdiction is to hear and determine any matters relating to the occupation of land and its use. The question this court has to grapple with is whether the fact that parties entered into a lease agreement, whether such a landlord - tenant relationship amounts to occupation and use of land which falls within the jurisdiction of the Environment and Land Court.
22. In *Co-operative Bank of Kenya Limited (supra)* the appellant therein challenged the decision of the High Court to assume jurisdiction in determining matters pertaining to charge of a land by the financial institution. The appellant contended that by charging the land as security, that was use of land and disputes arising therefrom should be heard and determined by the Environment and Land Court. The Court of Appeal considered the definition of “land use” as per the draft Land Use Policy 2016 which defined land use as the economic and cultural activities on the land. From this definition, the Court of Appeal addressed itself extensively as follows:-

Accordingly, for land use to occur, the land must be utilized for the purpose for which the surface of the land, air above it or ground below it is adapted. To the law therefore, land use entails the application or employment of the surface of the land and/or the air above it and/ or ground below it according to the purpose for which that land is adapted. Neither the *cujus* doctrine nor article 260 whether expressly or by implication recognizes charging land as connoting land use.”

23. On the charge instrument, the Court of Appeal held:-

By definition, a charge is an interest in land securing the payment of money or money’s worth or the fulfillment of any condition (see section 2 of the *Land Act*). As such, it gives rise to a relationship where one person acquires rights over the land of another as security in exchange for money or money’s worth. The rights so acquired are limited to the realization of the security so advanced (see section 80 of the *Land Act*). The creation of that relationship, therefore, has nothing to do with use of the land (as defined above). Indeed, that relationship is simply limited to ensuring that the chargee is assured of the repayment of the money he has advanced the chargor.



Further, section 2 aforesaid recognizes a charge as a disposition in land. A disposition is distinguishable from land use. While the former creates the relationship, the latter is the utilization of the natural resources found on, above or below the land. As seen before, land use connotes the alteration of the environmental conditions prevailing on the land and has nothing to do with dispositions of land. Saying that creation of an interest or disposition amounts to use of the land, is akin to saying that writing a will bequeathing land or the act of signing a tenancy agreement constitute land use. The mere acquisition or conferment of an interest in land does not amount to use of that land. Else we would neither speak of absentee landlords nor would principles like adverse possession ever arise. If a disposition were held to constitute land use, an absentee landlord with a subsisting legal charge over his land would never have to contend with the consequences of adverse possession, for he would always be said to be ‘using’ his land simply by virtue of having a floating charge/disposition over the property.

Another contention advanced by the appellant was that the dispute fell under the jurisdiction of the ELC on account of section 13 (2) (d) of the *ELC Act*... Furthermore, the jurisdiction of the ELC to deal with disputes relating to contracts under section 13 of the *ELC Act* ought to be understood within the context of the court’s jurisdiction to deal with disputes connected to ‘use’ of land as discussed herein above. Such contracts, in our view, ought to be incidental to the ‘use’ of land; they do not include mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court.”

24. Both parties agree that there is no longer a landlord - tenant relationship. The applicant is no longer in occupation of the leased premises. Therefore, inferring to the decision in the *Co-operative Bank (supra)*, this court finds that in a scenario where parties have entered a tenancy agreement, it cannot be said that the occupation by a tenant of the said premises equates to use of land.
25. The applicant in his suit, prayed for damages for illegal distress and eviction pursuant to section 26 of the *Distress Rent Act*, refund/compensation for the damaged goods, loss of sales income, general damages and the plaintiff is not in any rent arrears of Kshs. 302,513/= and costs of the suit. There is nothing to suggest that he is still in occupation of the leased premises for this court to interrogate further the terms of using the leased premises. In my view, the dispute filed before this court, does not fall within the jurisdiction of the Environmental and Land Court.
26. Furthermore, the tenancy agreement between the parties was to run for two years. Under the *Landlord and Tenants (Shops, Hotels and Catering Establishments) Act* (cap 301) controlled tenancies are defined under section 2 (1) as a tenancy of a shop, hotel or catering establishment which has been reduced into writing and which is for a period not exceeding five years. The proper jurisdiction in the first instance for the parties to be heard was in the Business Premises and Rent Tribunal since the tenancy was one of less than 5 years. The 1st respondent rightly filed a suit in the Business Premises and Rent Tribunal but he later withdrew it. The 1st respondent then issued a notice terminating the tenancy agreement.
27. Section 6 of *cap 301* provides the procedure through which a tenant who wishes to oppose the termination notice can follow. The applicant did not oppose the issuance of the termination notice nor refer the matter to the Business Premises and Rent Tribunal as required by law. Since the applicant is not in occupation of the leased premises, the provisions of *cap 301* are not applicable herein. If at all the parties had exhausted the Procedure under the Business Premises Tribunal section 12 of *cap 301* would have applied which provides that appeals from the Tribunal shall be in the Environment and Land Court.



28. The applicant contends that the distress for rent was contrary to the provisions of the *Distress for Rent Act* cap 293. In particular, the applicant states that the 3rd respondent breached the provisions of section 17 of the *Distress for Rent Act*. The applicant deposed that the 3rd respondent failed to give him a copy of the charge signed by him as required under section 17 of the *Distress for Rent Act*. In my considered opinion, it is important that evidence be led to determine if the applicant was served with a copy of the charges in order to determine the lawfulness of the distress for rent.

29. On the jurisdiction of this court to determine this suit, section 15 of the *Distress of Rent Act* provides that:-

Where the distress is made for any kind of rent justly due, and any irregularity or unlawful act is afterwards done by the party distraining, or by his agents, the distress itself shall not be therefore deemed to be unlawful nor the party making it be deemed a trespasser ab initio, but the party aggrieved by the unlawful act or irregularity may recover full satisfaction for the special damage he has sustained thereby in a suit for that purpose.

Provided that-

- a. when the plaintiff recovers in that suit, he shall be paid in full costs of this suit and have the same remedies for them as in other cases of costs;
- b. no tenant or lessee shall recover in any suit for such unlawful act or irregularity, if tender of amends has been made by the party distraining or his agent before the suit is brought.”

30. The law is silent on which court is of first instance in which a party aggrieved by the process of distress of rent should file its suit for remedy. Since this court has unlimited jurisdiction to hear and determine disputes, I will allow the suit as filed and proceed to hear and determine the suit.

31. In the end, I find that the Preliminary Objection dated 5/9/2023 is unmerited and is hereby dismissed. In the interest of timely disposal of this matter, the following orders do issue:-

- a. The application dated 17/8/2023 is hereby dispensed with;
- b. The Defendants are directed to comply with Order 11 of the Civil Procedure Rules within 30 days hereof;
- c. The Defendants to serve all their pleadings within 7 days of filing;
- d. Mention on 4/3/2024 to confirm compliance with Order 11 of the Civil Procedure Rules and to take directions on the hearing of the main suit.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 18TH DAY OF DECEMBER, 2023.

R. WENDOH

JUDGE

Ruling delivered in presence of:-

Ms Ooro for the Applicant.

Mr. Nyaribo for the 1st Respondent.

Mr. Nyaribobo holding brief Mr. Makori for the 2nd Respondent.

No appearance for the 3rd Respondent.



Emma & Phelix - Court Assistants.

