



REPUBLIC OF KENYA



**Mogaka v Miyonga (Environment and Land Appeal E004 of 2022)
[2023] KEELC 17513 (KLR) (11 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17513 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT AND LAND APPEAL E004 OF 2022**

MD MWANGI, J

MAY 11, 2023

BETWEEN

DUNCAN MOKAYA MOGAKA APPELLANT

AND

KEFA N MIYONGA RESPONDENT

*(Being an Appeal against the Ruling of Hon. P. MAY – Vice Chair, Kisii
Business Premises & Rent Tribunal dated and delivered on the 23rd day of May
2022 in the Original Kisii Premises & Rent Tribunal Case No. E006 of 2022)*

JUDGMENT

1. In the Business Premises & Rent Tribunal – Tribunal Case No. E006 of 2021 at Kisii, Duncan Mokaya Mogaka, the Tenant made a Reference in the laid down manner through Form C (v.s) under section 12 (4) of the *Landlord and Tenant (shops, Hotels and Catering Establishments) Act* Cap 301 Laws of Kenya against his Landlord, Kefa Minyonga. His complaint was that the Landlord had issued illegal Notices threatening to evict him from the premises contrary to the provisions of *Cap 301*, Laws of Kenya. Accordingly, he sought the Court’s intervention against the alleged illegal eviction. The same was dated 18/01/2022. The offending Notice read as follows: -

“Ref: A Polite Request Notice: -

As you are aware, our home is leaking terribly from 2nd floor.

The situation is getting worse from time to time. We have tried several times to repair it in vain. Now the management has no option other than renovation and reconstruction (sic) the whole building. The purpose of this letter is to request you to make convenient arrangements and evaluate the premises before it becomes a threat to You, Me or Your esteem (sic) customers



Hoping for cooperation.”

2. There was a similar letter by the Landlord’s Advocates, S.O. Omwenga & Co. Advocates also claiming that the Tenant’s lease had already expired on 30/11/2020. On the same date, 18/01/2022, the Tenant moved the Court urging the Court to restrain the Landlord from evicting him from the suit premises and/or harassing him or in any way from interfering with his quiet possession and occupation of the suit premises. The grounds upon which the Application was made were that there was an illegal Notice to vacate, that he was/is a lawful Tenant and that if he is evicted, he would suffer irreparable losses and damage yet there were no outstanding rents. He also conjectured that the Landlord is jealous of his business. And that the manner in which he is being evicted is unlawful. The Application was temporarily granted on 20/01/2022 by Honourable P. May (Vice Chair of the Tribunal).
3. In his response to the Application which was scheduled to be heard inter partes on 03/02/2022, the Landlord deponed that there was a tenancy agreement which terminated on 31/12/2020 and that since January 2021 the Tenant had not paid any rent. On 20/04/2021 officers from the Ministry of Health Services of the County Government, Nyamira had visited the suit premises and condemned the building as being unsafe for human habitation vide Report dated 20/04/2021 and that he therefore wanted the suit premises vacated for purposes of repairing the same. The Tenant had also changed the user of the premises. He also deponed that he had not issued any eviction Notice although the Tenant was in Rent arrears. But in a turn of events, in the same Replying Affidavit, the Landlord says he had issued a Notice of termination which he attached to the said Affidavit. The same is dated 15/01/2022. In a Supplementary Affidavit, the Tenant depones that there was a 15 years lease agreement which is still in existence and in fact annexed a copy of the same. On 31/01/2022, a cross reference was also filed by the Landlord seeking the following orders: -
 1. That the Learned Trial Vice Chairman erred both in Law and principle, by holding that both the Appellant and the Respondent were at fault but gave adverse against the Appellant.
 2. That the Learned Trial Vice Chairman erred both in Law and principle by granting final orders at the Interlocutory/Application stage without affording parties an opportunity to be heard.
 3. That the Learned Trial Vice Chairman erred both in Law and principle by placing reliance on a disputed inspection report whose maker was not called for interrogation by the Court thus condemning the Appellant unheard.
 4. That the Learned Trial Vice Chairman erred both in Law and principle by giving the Appellant 21 days only to vacate the said premises despite the same having not been specifically pleaded notwithstanding the fact that the period was unreasonably short considering the nature of business therein.
 5. That the Learned Trial Vice Chairman acted in error by failing to properly consider the Law applicable thus reaching erroneous decision.
 6. That the Learned Trial Vice Chairman abdicated the role of being a Neutral Arbiter by descending to the arena of the dispute by looking the pertinent issues raised by the Appellant.
4. Simultaneously, a Notice of Motion of even date was filed with the same prayers. On 23/05/2022, the Vice Chair of the Tribunal Honourable P. May made the following orders: -
 - a. The Landlord to file and serve an updated statement of account from January 2021 within 3 days.



- b. The Tenant shall settle the rent arrears due upon receipt the statement of account within 7 days. In default the Landlord shall be at liberty to levy distress.
 - c. The Tenant shall vacate the demised premises within 21 days from the date hereof.
 - d. Each party shall bear its own costs.
5. It is these orders that the Tenant has appealed against in this Court. The grounds of Appeal are as follows: -
- a. That the Landlord's notice of termination of tenancy dated 15th January, 2022 be allowed and upheld.
 - b. That the Tenant be Ordered to pay the Landlord Kshs. 200,000/= towards restoration of the business premises to the previous state before the Tenant vacates the premises pending the hearing and determination of the reference.
 - c. That the Tenant be Ordered to pay the Landlord Ksh. 300,000/= being rental arrears from December 2020 to date pending the hearing and determination of the reference.
 - d. That in the alternative, an Order be issued allowing the Landlord to levy distress and recover the rent arrears in the sum of Kshs. 300,000/= pending the hearing and determination of the reference.
 - e. That the Tenant shall Vacate and Hand Over vacant possession of the business premises to give way for the intended renovations on or before 1st April 2022 in default an eviction order shall issue without further reference to the Tribunal pending the hearing and determination of the reference.
 - f. That the OCS, Nyaronde Police Station to ensure compliance of the orders issued by this Court and to provide security to the Landlord.
 - g. That costs of this reference be awarded to the Landlord.
6. I have considered the parties' Submissions in respect of this Appeal. I must first address the issue as to whether the Vice Chair of the B.P.R.T. had jurisdiction to entertain any of the References before him.
7. The BPRT is a creature of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, Cap 301, Laws of Kenya. The preamble to the statute provides that it is "An Act of Parliament to make provisions 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"
8. Under Section 2, "controlled tenancy" means 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.
9. Both parties are in agreement that the dispute arises out of an existing Landlord and Tenant relationship between the Appellant and the Respondent created firstly, by the lease agreement dated 1/12/2010 being a lease for part of the building erected on Plot Number 887 at Nyansiongo for a term of 10 years the commencement date being 1/1/2011.
10. Under Section 12 (1) (a) the BPRT has power to determine whether or not any tenancy is a controlled tenancy falling within its jurisdiction.



11. Section 2 (1) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, Cap 301, Laws of Kenya defines a controlled tenancy in the following terms:

"controlled tenancy" means a tenancy of a shop, hotel or catering establishment—

- (a) which has not been reduced into writing; or
- (b) which has been reduced into writing and which —
 - (i) is for a period not exceeding five years; or
 - (ii) contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or
 - (iii) relates to premises of a class specified under subsection (2) of this section:

Provided that no tenancy to which the Government, the Community or a local authority is a party, whether as landlord or as tenant, shall be a controlled tenancy;"

12. For our purposes, the relevant part of that provision is Section 2 (1)(b)(ii). In a nutshell it is a tenancy of a shop, hotel or catering establishment which has not been reduced into writing; or which has been reduced into writing and which is for a period not exceeding five years; or contains a provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or which relates to premises of a class specified under subsection (2) of this section. Section 2 (1)(b) (ii) of the Act stipulates that if a tenancy agreement has provision for termination, otherwise than for breach of covenant, within 5 years from the commencement of the term, it is a controlled tenancy. In other words, if such a tenancy has provision for termination, which can be invoked at any time during the term, it is a controlled tenancy. Consequently, a lease for 10 years reduced in writing and without a termination clause would be found to fall outside the jurisdiction of the BPRT
13. The lease was reduced into writing and for 10 years, above the ceiling of 5 years and there is no termination clause that would bring the lease under the jurisdiction of the BPRT. The parties have no right to terminate the lease and are bound by the same for the full term.
14. The lease was actually amended before its expiry date. There is in existence a second lease contained in the Further Reply to the Replying Affidavit of the Appellant/Tenant sworn on 10/2/2022. The same was superimposed on the earlier lease to commence on 1/7/2015 for a period of 15 years, up to 31/12/2030. Although the same is undated, both parties appended their signatures on it. The Landlord never disowned it. The Tribunal was silent on this and went ahead to decide the 2 References. It is during the pendency of this Tenancy Agreement that the References were filed. Again, the same is for a period of over 5 years, reduced into writing and without a termination clause.
15. Had there been no second Tenancy, this tenancy would have reverted to a protected Tenancy as soon as the first one came to an end and the Landlord continued receiving Rent.
16. It is therefore clear that the lease dated 1/12/2010 and the latter one that is undated do not conform to the requirements of Section 2 (1) (b) (ii) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, Chapter 301 as there are no termination clauses as envisaged by the provisions of the said Section.
17. The question then would be, did the parties herein execute the Tenancy agreements for over five years or is the Tenant occupying the premises on the basis of an unwritten agreement on the premises? Both



parties are in agreement that the dispute arises out of an existing Landlord and Tenant relationship between the Appellant and the Respondent and reduced into writing both agreements being for a cumulative period of 20 years.

18. The case of *Joseph Tomino Cheserem v Sammy Kipketer Cheruiyot* decided that the fact that the tenancy between the parties were for endless term removed the tenancy from the ambit of a controlled tenancy.
19. There is certainly an issue of jurisdiction which first needed to be determined before the Tribunal could consider the merits of the References. It follows that if the BPRT did not have jurisdiction to hear the dispute, then its Decision is a nullity. If the Decision of the BPRT is a nullity, then I need not consider the merits or otherwise of the Appeal. The result will be that the entire proceedings and judgment of the BPRT will have to be set aside for want of jurisdiction.
20. In conclusion therefore, I am of the view that the tenancy between the Tenant and the Landlord was not a controlled tenancy in view of the fact that the tenancy was reduced into writing, for a period of more than 5 years and did not provide for the termination of the tenancy. I therefore find that the BPRT had no jurisdiction to entertain the dispute. Its proceedings and decision are a nullity and must be set aside. Accordingly, I do hereby set the same aside. The parties must proceed as if no dispute was ever determined by the Tribunal.
21. Having found that the BPRT had no jurisdiction to hear and determine the matter all the issues raised in the Memorandum of Appeal do not fall for determination.
22. I wish to lament that Counsel in this case have wasted Court's time by not addressing the issue of jurisdiction. Counsel should guide the Court or Tribunal to stick to its lane and not go beyond. It is painful that if the Respondent's claims are genuine, it has taken him all this time without the matter being finalised. But Jurisdiction is everything and as was held in the Supreme Court in *Samuel Kamau Macharia & Another v Kenya Commercial Bank & 2 Others*, [2012] eKLR, at paragraph 68:

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 upon it by law. the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings."

23. Although costs follow the event I will order that each party in this Suit pays his costs.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 11TH DAY OF MAY, 2023

MUGO KAMAU

JUDGE

In the Presence of: -

Sibota - Court Assistant

Mr. Wesonga for the Appellant

N/A for the Defendants

