



Ibrahim v Kakamega District Cooperative Union Limited & another (Civil Case E009 of 2021) [2022] KEHC 14185 (KLR) (21 October 2022) (Ruling)

Neutral citation: [2022] KEHC 14185 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL CASE E009 OF 2021
WM MUSYOKA, J
OCTOBER 21, 2022**

BETWEEN

MOHAMMED IBRAHIM PLAINTIFF

AND

KAKAMEGA DISTRICT COOPERATIVE UNION LIMITED .. 1ST DEFENDANT

PAVEMENT AUCTIONEERS 2ND DEFENDANT

RULING

1. The application for determination is the motion, dated January 28, 2022, in which the plaintiff seeks the setting aside review and variation of orders that were made herein on November 24, 2021. The grounds are said to be that the dispute related to a contract between a landlord and tenant, that the court had struck out the suit on 24th November citing lack of jurisdiction on account of articles 162(2) and 165(5) of the *Constitution*, there was error on the face of the record as the dispute in question was not covered under article 162 of the *Constitution*, section 13 of the *Environment and Land Court Act*, No 19 of 2011, Laws of Kenya, and section 150 of the *Land Act*, No 6 of 2012, Laws of Kenya, the High Court has unlimited original civil and criminal jurisdiction under article 165(3) over such matters as collection of rents and dues, and the dispute is over unlawful break-in and eviction.
2. The affidavit sworn in support of the application, by Mohammed Ibrahim, on January 28, 2022, merely regurgitates, almost word for word the grounds set out on the face of the motion, dated January 28, 2022.
3. The impugned order was made on the basis of an application, dated November 22, 2021, where the plaintiff sought stay of proceedings in Kakamega CMC Misc No E046 of 2021, between the him and the 2nd defendant, pending hearing and determination of this suit. The factual basis, set out in that application, was that the plaintiff was in a tenancy agreement with the 1st defendant since 1977, with respect to a space on premises owned by the 1st defendant, erected on Kakamega Municipality/Block



- 1/182, from where he operated a butchery. He was in quiet possession until October 9, 2021, when the defendants purported to distrain for rent arrears, despite pendency of a rent dispute before the Kakamega Business Premises Tribunal, in case No 88 of 2021. He asserted that he was not in rent arrears, and the distress action was a design to evict him from the premises. He avers that the action has resulted in an unlawful eviction.
4. The said application, dated November 22, 2021, was placed before me on November 24, 2021, and, in a short ruling, I declared that I had no jurisdiction over the dispute, and proceeded to strike out the suit. The said ruling was in the following terms:
- “1. The suit herein is a tenancy dispute, where tenancy refers to the relationship between the owner of land/premises, where he allows the second party to occupy and use land.
 2. The dispute is around the right to use and occupy/possess premises/land, consequently it falls under article 162(2) of the Constitution, and it ought to be placed before the Environment and Land Court.
 3. Article 165(5) of the Constitution is clear that the High Court has no jurisdiction over any matter which falls under article 162(2) of the Constitution, like this one.
 4. As suit filed before a court without jurisdiction is incompetent, and by dint of the decision of the Court of Appeal in Phoenix of EA Assurance Company Ltd v SM Thiga t/a Newspaper Service [2019] eKLR, the High Court would have no jurisdiction to order its transfer to the court with jurisdiction.
 5. Consequently, I have no option but to strike it out. It is so ordered.”
5. Directions were given on February 22, 2022, for the application dated January 28, 2022 to be canvassed by way of written submissions. The plaintiff filed written submissions, dated April 22, 2022. It is submitted that “the main issue in the case is the illegal and or unlawful break-in and gain-in entry orders which the 1st respondent used to illegally and unlawfully evict the applicant alleging distress for rent ...” It is further submitted that the High Court has unlimited original jurisdiction in civil matters, by virtue of article (3) of the Constitution, and Cooperative Bank of Kenya Limited v Patrick Kang’ethe Njuguna & 5 others [2017] eKLR (Visram, Karanja & Koome, JJA), is cited, for the proposition that the High Court had jurisdiction to deal with disputes over contracts to or over land turning on charges, mortgages and collection of dues and rents. It is submitted that a contractual relationship existed between the parties, which then brought the matter within the jurisdiction of the High Court.
6. My understanding of Cooperative Bank of Kenya Limited v Patrick Kang’ethe Njuguna & 5 others [2017] eKLR (Visram, Karanja & Koome, JJA) is that where the dispute between the parties turns exclusively on title to and user and occupation of land, the Environment and Land Court would have jurisdiction, by virtue of article 162(2) of the Constitution and section 13 of the Environment and Land Court Act. It interpreted section 13 as conferring jurisdiction on the Environment and Land Court with respects to contracts over private land and instruments granting any enforceable interests in land, but pointed out that such would not include mortgages, charges and collection of dues and rents, which would remain within the jurisdiction of the High Court, as such would turn around accounting questions.
7. The plaintiff appears to understand Cooperative Bank of Kenya Limited v Patrick Kang’ethe Njuguna & 5 others [2017] eKLR (Visram, Karanja & Koome, JJA) to mean that where there is a contractual



relationship between parties over land, then the Environment and Land Court would not have jurisdiction, and the High Court would have jurisdiction in such case. That is not what *Cooperative Bank of Kenya Limited v Patrick Kang'ethe Njuguna & 5 others* [2017] eKLR (Visram, Karanja & Koome, JJA) is about. The Court of Appeal states, in that decision, that the Environment and Land Court has jurisdiction, by virtue of section 13(2)(d) of the *Environment and Land Court Act*, over disputes turning on contracts, choses in action and other instruments granting any enforceable interests in land. In the opinion of the Court of Appeal, which binds me, although I do not agree with it, that does not cover contracts in the nature of mortgages and charges, and questions around collection of dues and rents, and disputes around those areas ought to be placed before the High Court. It was said that such disputes tend to turn around accounts, which is really not a matter of the use or occupation of land.

8. So, what is the nature of the dispute between the parties hereto? Is just taking of accounts as between them, to assess what the tenant owes the landlord, in respect of which *Cooperative Bank of Kenya Limited v Patrick Kang'ethe Njuguna & 5 others* [2017] eKLR (Visram, Karanja & Koome, JJA) says the High Court has jurisdiction, or is it more substantial, dealing with issues around use and occupation of premises, in respect of which, according to *Cooperative Bank of Kenya Limited v Patrick Kang'ethe Njuguna & 5 others* [2017] eKLR (Visram, Karanja & Koome, JJA), the High Court would have no jurisdiction, but the Environment and Land Court would?
9. The prayers sought in the plaint herein state as follows:
 - i. a declaration that the distress aforesaid is and or was illegally exercised by the defendants who used the same to evict the plaintiff
 - ii. that the plaintiff be reinstated as the tenant in the business premises situated in the building known as Ushirika House erected on land parcel No Kakamega Municipality/Block 1/182.
 - iii. An order that the distrained goods be returned/ restored forthwith.
 - iv. Damages for unlawful distress and eviction loss of profits/business.
 - v. Punitive damages
 - vi ...”
10. No lease or tenancy agreement was attached by the plaintiff to his papers, and since the defendants had not appeared they had not filed any papers. What I understand the plaintiff to say is that he and the 1st defendant were in a tenancy arrangement, wherein he was given space in premises belonging to the 1st defendant from where he ran a business, and for which he paid a rental. Whether reduced into writing or not, what is clear is that there was a tenancy contract between them, supported by consideration, the rent paid for the space. What was the contract for? For occupation and use of a space within the premises which stood on Kakamega Municipality/Block 1/182. The said premises were erected on or was a fixture on Kakamega Municipality/Block 1/182, thereby making it part of Kakamega Municipality/Block 1/182. The contract, therefore, was for occupation and use of land, being Kakamega Municipality/Block 1/182. The rent payable was the consideration for the said occupation and use of the land, Kakamega Municipality/Block 1/182. For all practical purposes, therefore, the plaintiff was occupying and using land, being Kakamega Municipality/Block 1/182. A dispute around the use and occupation of Kakamega Municipality/Block 1/182 by the plaintiff was one that fell squarely within article 162(2) of the *Constitution* and section 13(2)(b) of the *Environment*



and Land Court Act, meaning that the High Court would have no jurisdiction over such dispute, by dint of article 165(5) of the Constitution.

11. Articles 162(2) and 165(5) of the Constitution, and section 13(2)(b) of the Environment and Land Court Act state as follows:

“162 (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to —

- (a) ...
- (b) the environment and the use and occupation of, and title to, land.”

“165 (5) The High Court shall not have jurisdiction in respect of matters —

- (a) ...
- (b) falling within the jurisdiction of the courts contemplated in article 162 (2)”

“3(2) In exercise of its jurisdiction under article 162(2)(b) of the Constitution, the court shall have power to hear and determine disputes –

- (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interest in land.”

12. The dispute revolves around two issues, one, distress for rent, and two, eviction, in the guise of distraining for rent, in respect of which the plaintiff is seeking reinstatement. Eviction from land dispossesses the tenant of the land, and thereby interfering with his right to the occupation and use of the same. It is a fundamental breach, if done wrongly and unlawfully, of the tenancy contract. Use and occupation is at the core of a tenancy, and, therefore, a dispute about eviction or dispossession would be outside the jurisdiction of the High Court, for it would be about the right to occupy and use land. Questions about the legality of exercise of the right to distrain for rent are not merely about accounting, facts and figures, with regard to who owes what, for it goes to the core of the tenancy contract, for the right to occupy and use premises is premised on the payment of rent. When rent is not paid, a fundamental tenet of the tenancy contract is breached, and the right to occupy and use is compromised, for rent is the central plank upon which the occupancy and user is premised. A dispute over rent is about the right to occupy and use premises, for where the tenant ceases to pay rent the tenancy should be at an end. Distress for rent is about enforcement of the tenancy contract, and not just about accounts. Looking at the prayers in the plaint, the dispute was not about accounts on the rent due, but rather on whether the plaintiff was faithful to the tenancy contract. As that went beyond mere accounting, and touched on the occupation and use of land, the High Court has no jurisdiction. These provisions should be read more broadly, and, with respect, Cooperative Bank of Kenya Limited v Patrick Kang'ethe Njuguna & 5 others [2017] eKLR (Visram, Karanja & Koome, JJA) takes a rather too narrow position with regard to that, for I am of the persuasion that a dispute on rent, even if limited to just the taking of accounts, has something to do with occupation and use of land or premises, for it is that disputed rent that enables the tenant to be in occupation and to use the land or premises.

13. In any event, from the facts pleaded by plaintiff it appears that the nature of the tenancy between the parties is a controlled one, within the meaning of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, cap 301, Laws of Kenya, and the issues raised in the instant cause ought



to have been placed before the tribunal established under that statute, which is dedicated to issues around controlled tenancies, disputes about rent for such tenancies and their termination. Indeed, the pleadings disclose that there are pending proceedings before the tribunal envisaged by that law, being Kakamega Business Premises Rent Tribunal cases numbers 88 of 2020 and E34 of 2021, which turn on rent. The issues relating to recovery of rent and termination of the controlled tenancy are issues for determination before the said tribunal, and the instant dispute ought to have been launched there.

14. It was submitted that the High Court has jurisdiction, by virtue of article 165(3) of the Constitution, for it has unlimited original civil and criminal jurisdiction. However, article 165(3) ought to be read together with other articles of the Constitution, and in particular, for the purpose of this ruling, article 165(5), which states that the High Court shall not exercise jurisdiction in cases which are subject to article 162(2) of the Constitution, yet such cases or disputes are of a civil nature. So, there are exceptions to the general rule stated in article 165(3), the jurisdiction of the High Court is not as limitless as suggested by that article.
15. In the end, I am not persuaded that there was any error in the making of the orders of November 24, 2021, to warrant their review or variation or setting aside. That said, the application dated January 28, 2022 is without merit, and I hereby dismiss the same.

DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAKMEGA THIS 21ST DAY OF OCTOBER 2022

WM MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Mr. Evans O. Getanda, instructed by Onsando Getanda & Company, Advocates for the plaintiff.

