



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 21 OF 2021

VERONICA NYAMOITA MAKORIAPPELLANT

VERSUS

ZABLON MOGAKA1ST RESPONDENT

JOSEPHAT NYACHOTI T/A

MINMAX AUCTIONEERS2ND RESPONDENT

RULING

1. The appellant filed an application dated 16th March 2021 seeking among other things, a stay of the trial court's orders pending the hearing and determination of the appeal; reinstatement of the appellant back into her business premises as she was before she was evicted and a return of the properties seized by the 2nd respondent during eviction. Before the appellant's learned counsel, Mr. Okemwa could argue that application, the respondents' counsel Mr. Oguttu raised a preliminary objection contesting the jurisdiction of this court to hear and determine the application and the appeal.

2. He set out the following grounds in his Notice of preliminary objection dated 23rd March 2021;

1) The subject Appeal emanates and/or arises from the proceedings and decision of the Business Premises Rent Tribunal and hence the Court seized and/or possessed of jurisdiction is the Environment and Land Court and not otherwise. Consequently, the Honourable Court herein is devoid and/or bereft of jurisdiction to entertain and/or adjudicate on the subject appeal and application;

2) At any rate, the appeal and the Notice of Motion application filed do not disclose any reasonable cause of action, whatsoever and/or howsoever;

3) Besides, the appellant/applicant herein is non-suited;

4) In the premises, the instant appeal and Notice of Motion application attached to it therefore constitute and/or amount to an abuse of the due process of the court.

3. The preliminary objection was canvassed orally before this court. Mr. Oguttu, for the respondent argued that the central issue for determination before the tribunal was on the occupation and use of the premises which formed part of the immovable property belonging to the 1st respondent. Therefore, what was now before this court related to the use of the premises which was an issue under the jurisdiction of the Environment and Land Court and not the conventional High Court. Counsel further submitted that the decision of the Tribunal related to a contract concerning land between the applicant and the respondent. He argued that in as much as the matter also touched on rent, the issues fell within the mandate of the Environment and Land Court as provided under **section 13 (7)** of the **Environmental and Land Court Act** as read with **section 26** of the said Act.

4. For his part, Mr. Okemwa submitted that the appeal was against the decision of the Business Premises Tribunal which had been adopted by the lower court. Counsel submitted that this court had jurisdiction to hear appeals from the lower court and since the dispute was commercial in nature, the appellant was rightfully before this court.

5. In brief rejoinder to the submissions by fellow counsel, Mr. Oguttu, submitted that the right forum to address the issue of service of the Notice was before the Tribunal according to section 12 of CAP 301. Counsel argued that although the irregularity of the orders could be a valid issue for determination, this court was first required to determine whether it had jurisdiction to deal with the matter as held in the renowned case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR*.

6. In the case of “**Lillian S**” (*supra*) Nyarangi JA expressed himself thus on the issue of jurisdiction;

I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

7. The appellant instituted this appeal vide a Memorandum of Appeal dated 15th March 2021 contesting the ruling and order of the Business Premises Rent Tribunal sitting at Kisii in Reference Number 29 of 2021 and adopted by the Hon. E. Obina (P.M.) Magistrate, Miscellaneous Civil Application No. 53 of 2021. The grounds of appeal set out in the Memorandum of Appeal are that;

- 1) The learned Hon. Chairman Muma, erred in law and in fact by failing to determine whether the appellant herein was given Notice of the said eviction;
- 2) The learned Hon. Chairman Muma, erred in law and in fact by failing to consider if Notice to evict was proper and served upon the appellant;
- 3) The learned Hon. Chairman Muma erred in law and in fact by failing to consider that no Notice was served;
- 4) The learned Hon. Chairman Muma erred in law and in fact by not taking into consideration that the appellant had paid all the rents in advance and that the landlord held rent deposit
- 5) The learned Hon. Chairman Muma erred in law and in fact by giving a hearing to the appellant before issuing such orders.

8. The appellant sought that the orders of the Chairman of Business Premises Rent Tribunal in Reference 29 of 2021 be set aside and quashed; the order of Hon. E. Obina adopting the order of the Chairman of Business Premises Rent Tribunal be substituted with an order dismissing Reference 29 of 2021; the appellant be reinstated back into her business premises as she was before the eviction orders and she be awarded costs of the appeal.

9. From the Memorandum of Appeal, it is clear that the appeal before this court relates to the decision of the Chairman of the Business Premises Rent Tribunal to evict the appellant from her business premises. The appellant contends that she was not served with a Notice to Terminate Tenancy and also claims that the Chairman of the Business Premises Rent Tribunal did not take into consideration the fact that she had paid all the rents in advance prior to her eviction.

10. The Business Premises Rent Tribunal derives its mandate from the **Landlord and Tenant (Shops, Hotels and Catering Establishments) Act** CAP 301. **Section 15** of the **Act** provides the manner in which appeals from the Tribunal should be instituted. It states;

15. Appeal to court

(1) Any party to a reference aggrieved by any determination or order of a Tribunal made therein may, within thirty days after the date of such determination or order, appeal to the Environment and Land Court:

Provided that the Environment and Land Court may, where it is satisfied that there is sufficient reason for so doing, extend the said period of thirty days upon such conditions, if any, as it may think fit.

(2) In hearing appeals under subsection (1) of this section the Court shall have all the powers conferred on a Tribunal by or under this Act, in addition to any other powers conferred on it by or under any written law.

(3) Deleted by Act No. 2 of 1970, s. 13.

(4) The procedure in and relating to appeals in civil matters from subordinate courts to the Environment and Land Court shall govern appeals under this Act:

Provided that the decision of the Environment and Land Court on any appeal under this Act shall be final and shall not be subject to further appeal. [Emphasis added]

11. The Supreme Court was categorical in the case of **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & others [2012] eKLR** that a court’s jurisdiction flows from the Constitution, legislation or both. The Apex court further held that a court cannot arrogate to itself jurisdiction exceeding that conferred upon it by law. Section 15 above is categorical that appeals arising from the determination of the Tribunal are instituted before the Environment and Land Court. Clearly then, this court lacks jurisdiction to hear and determine the issues raised by the appellant in the matter.

12. Consequently, the preliminary objection raised by the respondent is merited. The appeal dated 15th March 2021 and the application dated 16th March 2021 are hereby dismissed with costs to the respondents.

Dated, Signed and Delivered at KISII this 24th day of June 2021.

R.E. OUGO

JUDGE

In the presence of:

Mr. Okemwa For the Appellant

M/s Ochwal For the Respondent

Ms Rael Court Assistant