



REPUBLIC OF KENYA



**KENYA LAW**  
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**Concept Holdings Limited t/a Dashcam Center and Pun Grub v Azalea Holdings Limited  
(Civil Appeal 31 of 2019) [2023] KEELC 19302 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19302 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
CIVIL APPEAL 31 OF 2019**

**MD MWANGI, J  
JULY 27, 2023**

**BETWEEN**

**CONCEPT HOLDINGS LIMITED T/A DASHCAM CENTER AND PUN  
GRUB ..... APPELLANT**

**AND**

**AZALEA HOLDINGS LIMITED ..... RESPONDENT**

**JUDGMENT**

**Background**

1. On 6th September, 2018, the Appellant filed a reference against the Respondent in the Business Premises Rent Tribunal Case No. 716 of 2018. Contemporaneously filed with the reference was an application filed under certificate of urgency, seeking an injunction restraining the landlord from unlawfully levying distress and interfering and/or harassing, intimidating and or evicting or closing down all that space known as Unit No. A2.15 (2) in the premises situate on LR No.1159/466 Nairobi. Upon consideration, the Tribunal issued orders dated 10th September, 2018 which orders restrained the Respondent from interfering with the quiet possession and/or lawful enjoyment of the premises pending inter-partes hearing of the application.
2. In response to the reference, the Respondent filed a Replying Affidavit deponed by Kobus Weyers, its General Manager, sworn on the 19th October, 2018. The deponent averred that the relationship between the parties was guided by the Lease Agreement for a term of six (6) years with effect from 1st December, 2016. The said Lease Agreement had no provision for early determination. He deposed that the Tribunal therefore lacked jurisdiction to try the matter in view of the existence of a Lease Agreement for a period of 6 years which nullifies the proceedings therein. The deponent further contended that the Appellant was in rent arrears and hence the levying of distress for rent was just and proper.
3. The Tribunal delivered its ruling on the 12th April, 2019 in which the Honourable Chair held that the Applicant/Tenant had not disclosed to the Tribunal the existence of the Lease Agreement. Further



that the Applicant/Tenant had exhibited a 2 pages lease agreement which did not disclose the period of the lease contrary to Section 13 of Cap 301. The Court further held that the Lease Agreement executed by parties on the 1st December, 2016 does not contain a Termination Clause other than breach within 5 years from commencement of the lease.

4. The court further held that the Preliminary Objection raised by the Landlord raised an issue of pure law based on an admitted document. That the Preliminary Objection met the threshold set out in the Mukisa Biscuit Case (1969) EA 696. The Tribunal was therefore satisfied that it lacked the jurisdiction to hear and determine the reference. Consequently, the Reference and the application were struck out.
5. The Appellant being aggrieved by the BPRT ruling delivered on the 12th April, 2019 has preferred this appeal seeking to have the decision of the Tribunal varied and /or altered and be set aside and the court to reinstate the complaint and that the Respondent be compelled to pay costs of the Appeal. The Appellant raised the following grounds of Appeal:
  - a. The Learned Chairman erred in law and in fact in finding that the objection raised by the Landlord was on a point of law rather than an issue of fact.
  - b. The Learned Chairman erred in law and in fact in not considering the submissions of the appellant hence arriving at the wrong decision.
  - c. The Learned Chairman erred in law in not taking into account the evidence which was placed before the court hence arriving at the wrong decision.
  - d. The Learned Chairman erred in law in finding that the tenant was in arrears of rent which issue was not before him.
  - e. The Learned Chairman erred in law and in fact in relying heavily on the submissions of the Landlord to arrive at the ruling rather than the submissions which were before the court.

#### **Directions on submissions**

6. Counsel consented to canvass the appeal by way of written submissions which were duly filed by both sides. The Appellant's submissions are dated 21st October, 2022 whereas the Respondent's submissions are dated 11th May, 2023 initially filed on 5th May, 2023 with an erroneous heading.

#### **Appellant's Submissions**

7. In its submissions, the Appellant cites the provisions of Article 159(2) (d) of *the Constitution*. It submits that the striking out its Reference before the Tribunal denied it a chance to a fair hearing. Based on the Mukisa Biscuit Manufacturing Company Limited Case, a preliminary objection can only be argued primarily on issues of law. That the objections as raised in the Respondents Replying Affidavit touches on facts which needed to be interrogated before the court could make a finding.
8. The Appellant further stated that the issue of rent arrears as argued by the Landlord/Respondent could not constitute a point of law. It was a point of fact that could only be determined if parties were accorded an opportunity to be heard and a determination made on the merits of the case.
9. That the Learned Chairman therefore erred in finding that the Landlord's Replying Affidavit raised a point of law and proceeded to strike-out the Reference. Counsel urges the Court to allow the appeal and grant the prayers sought.



## Respondent's Submissions

10. The Respondent submitted on each of the grounds in the Appellant's Memorandum of Appeal.
11. On Ground 1, the Respondent stated that the jurisdiction of the Tribunal is established by the Landlord and Tenant (Shops, Hotels and Catering Establishments) Cap 301 Laws of Kenya and it is limited to controlled tenancies. The Act defines a controlled tenancy as a tenancy of a shop, hotel or catering establishment which has not been reduced into writing or if it has, then it does not exceed 5 years or contains provision for termination, otherwise than for breach of covenant, within 5 years from the commencement thereof. The objection raised by the Respondent before the Tribunal being on the jurisdiction of the court was a pure point of law.
12. On grounds Number 2 and 5 of the Memorandum of Appeal where the Tribunal is faulted for failing to consider the submissions by the Appellant to the objection, Counsel restates the Tribunal's Ruling in which it was noted that the court had considered submissions filed by parties.
13. Finally, on the 3rd and 4th grounds, it is the Respondent's submission that the Tribunal did not err in holding that the costs of the suit were recoverable together with rent arrears. This is so since the Tribunal perused Paragraph 1.1.27 and 1.1.28 of the Lease Agreement before allowing the Respondent to recover costs of the suit by way of distress for rent alongside rent arrears.
14. It is the Respondent's submission that the appeal therefore lacks merit and should therefore be dismissed with costs.

## Issues for determination

15. This being a first appeal; the court reminds itself of its primary duty as a first appellate court, to re-evaluate, re-analyse and re-assess the evidence and the law applicable before determining whether the conclusions reached by the Learned Magistrate are to stand or not and give reasons either way. (See *Selle & Another –vs- Associated Motor Boat Co. Ltd & others* (1968) E.A. 123, *Gitobu Imanyara & 2 others –vs- Attorney General* (2016) eKLR, *Abok James Odera t/a A. J. Odera & Associates –vs- John Patrick Machira t/a Machira & Co. Advocates* (2013) eKLR).
16. Upon consideration of the grounds of appeal, the submissions filed by the parties and the impugned ruling of the Tribunal, the court is of the opinion that the Appellant's grounds of appeal boils down to only one issue for determination being whether the Objection raised by the Respondent was a pure point of law; consequently, whether the Tribunal erred in upholding the Objection and striking out the Appellant's complaint before it.

## Analysis and Determination

17. Jurisdiction is what gives courts and other adjudicatory bodies the mandate to determine disputes presented before them. Without jurisdiction, they labour in vain. In *Samuel Kamau Macharia & Another v Kenya commercial Bank & 2 Others*, [2012] eKLR, the Supreme Court stated thus 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. We agree with counsel for the first and second respondents in his submission that 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.”

18. Prior to the above pronouncement by the Supreme Court of Kenya, the Court of Appeal [Nyarangi JA] stated the following on jurisdiction in *Owners of Motor Vessel Lillian “S” v Caltex Oil (Kenya) Limited*:

“Jurisdiction is everything. Without it, a court has no power to take one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending the 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.”

19. At the heart of the BPRT’s ruling, is an issue of the jurisdiction of the Tribunal which was raised by the Respondent in its Replying Affidavit. The Respondent argued that the Tribunal lacked the jurisdiction to entertain the Reference and the application as the relationship between the parties was guided by the Lease Agreement for a term of six (6) years with effect from 1st December, 2016. The Lease Agreement had no provision for early determination. The Tribunal therefore lacked jurisdiction to try the matter in view of the existence of a Lease Agreement.

20. The Tribunal in its ruling held that the Lease Agreement executed by parties on the 1st December, 2016 ousted its jurisdiction. The Agreement was for a term of 6 years and it did not contain a Termination Clause other than breach within 5 years from commencement of the lease. Based on the admitted document, the court found that the Respondent had raised an issue on a pure point of law.

21. The Appellant on the other hand contends that the objection raised by the Landlord was not a point of law rather was an issue of fact while a preliminary objection can only be argued primarily on issues of law. The objections as raised in the Respondent’s Replying Affidavit touched on facts which needed to be interrogated before the court could make a finding on merit.

22. A court of law cannot validly take any step without jurisdiction. The moment a party in a suit successfully challenges the jurisdiction of the court, the said court must down its tools. A Preliminary Objection, as stated in the case of *Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd (1969) E.A 696*,

“..... consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit”

23. In the same case, Sir Charles Newbold said:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion”.

24. The issue as to whether or not the Tribunal had jurisdiction was therefore germane as it sets the stage for the case in so far as determining the competence of the court or tribunal to make a determination.

25. 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 provision 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” (emphasis mine). The ‘certain premises’ are the controlled tenancies.



26. Under Section 2 of the Act, “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.
27. The BPRT’s jurisdiction was aptly discussed in *Republic v Business Premises Rent Tribunal & Another, Ex- Parte Albert Kigera Karume* [2015] eKLR which cited with approval the case of *Re Hebtulla Properties Ltd.* [1979] KLR 96; [1976-80] 1 KLR 1195 where the Court stated as follows:
- “The tribunal is a creature of statute and derives its powers from the statute that creates it. Its jurisdiction being limited by statute it can only do those things, which the statute has empowered it to do since its powers are expressed and cannot be implied.... .... The powers of the tribunal are contained in section 12(1) of the Act and anything not spelled out to be done by the tribunal is outside its area of jurisdiction. It has no jurisdiction except for the additional matters listed under section 12(1)(a) to (n). The Act was passed so as to protect tenants of certain premises from eviction and exploitation by the landlords and with that in mind the area of jurisdiction of the tribunal is to hear and determine references made to it under section 6 of the Act. Section 9 of the Act does not give any powers to the tribunal, but merely states what the tribunal may do within its area of jurisdiction..... It would be erroneous to think that section 12(4) confers on the tribunal any extra jurisdiction to that given by and under the Act elsewhere. For example, it is not within the tribunal’s jurisdiction to deal with criminal acts committed in relation to any tenancy nor is it within its jurisdiction to entertain an action for damages for trespass. These are matters for the courts and the tribunal cannot by way of a complaint to it by the landlord or tenant purport to deal with such matters. Section 12(4) of the Act must be read together with the rest of the Act and, when this is done it becomes apparent that the complaint must be about a matter the tribunal has jurisdiction to deal with under the Act and that is why the complaint has to relate to a controlled tenancy.... The Act uses the words “any complaint” and the only qualification is that it must be “relating to a controlled tenancy”.
28. The question that was before the Tribunal then was whether the relationship between the Appellant and the Respondent was a controlled tenancy? What is the meaning of a controlled tenancy as per the Act? Section 2(1) (a) of the Act defines a controlled tenancy as one:
- a. Which has not been reduced into writing; or
  - b. Which has been reduced to writing and which-is for a period not exceeding five years; or contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or relates to premises of a class specified under subsection (2) of this section.
29. It is not in dispute that the Lease Agreement executed by the parties was in writing for a period of 6 years and it does not contain a Termination Clause other than breach within 5 years from commencement of the lease. It is therefore evident that the tenancy between the parties herein was not a controlled tenancy.
30. A Preliminary Objection, as held by Sir Charles Newbold, raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. The Appellant did not dispute executing the Agreement which was attached to the Respondent’s replying affidavit. Black’ Law Dictionary, 11<sup>th</sup> Edition defines a pleading as a formal document ‘in which a party to a legal



proceedings sets forth or responds to allegations, claims, denials or defenses'. The Replying Affidavit filed by the Respondent before the Tribunal was for all intents and purposes a pleading.

31. An issue of jurisdiction can be raised by the court suo moto based on pleadings filed before it. In *Anaclet Kalia Musau –vs- Attorney General & 2 Others* [2020] eKLR, Civil Appeal 111 of 2017, the Court of Appeal in determining a jurisdictional issue which was never raised by the parties to the suit stated as follows:

“..... A jurisdictional issue is fundamental and can even be raised by the court suo moto as was persuasively and aptly stated by Odunga J in *Political Parties Dispute Tribunal & another vs Musalia Mudavadi & 6 others Ex Parte Petronila Were* [2014] eKLR. The learned Judge drawing from the Court of Appeal precedent in *Owners and Masters of The Motor Vessel “Joey” vs. Owners and Masters of The Motor Tugs “Barbara” and “Steve B”* [2008] 1 EA 367 stated thus:

“What I understand the Court to have been saying is that it is not mandatory that an issue of jurisdiction must be raised by the parties. The Court on its own motion can take up the issue and make a determination thereon without the same being pleaded...” (Emphasis supplied)

32. The totality of the foregoing is that the issue of jurisdiction raised before the Tribunal was a pure point of law which arose by clear implication out of the pleadings and the Tribunal was justified to consider it and determine it as it did. I find no error in the Tribunal’s decision and action of determining the preliminary objection by the Respondent to its jurisdiction. Consequently, this appeal is devoid of any merit. The appeal is hereby dismissed in its entirety with costs to the Respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27<sup>TH</sup> DAY OF JULY 2023.**

**M.D. MWANGI**

**JUDGE**

In the virtual presence of:

Mr. Omwenga Jackson for the Appellant.

Mr. Ngugi holding brief for Njuguna for the Respondent.

Court Assistant – Yvette.

**M.D. MWANGI**

**JUDGE**

