



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**MISC. CIVIL APPLICATION NO. 161 OF 2019**

**MILKAH BILLAH.....APPLICANT**

**-VERSUS-**

**FESTUS KASUKU ACHILA.....RESPONDENT**

**RULING**

By an application dated 20<sup>th</sup> September 2019, the Applicant, **MILKAH BILLAH**, sought orders to, inter alia, have her unconditionally reinstated to her business premises which is a shop located within **L.R. NO. KISUMU MUNICIPALITY/BLOCK 7/47**.

1. The Applicant had been, allegedly, evicted by the Respondent, **FESTUS KASUKU**, and his agent, **MZUNGU SAMSON TUMBO** who carries on business under the name of **SPARKNET AUCTIONEERS**.
2. The Respondent and the auctioneer are said to have evicted the Applicant on the strength of an Order which had been made by the **BUSINESS PREMISES RENT TRIBUNAL**.
3. The Applicant intends to demonstrate to this court that the Respondent and the auctioneers were in contempt of court, as they are alleged to have evicted the Applicant after they had been served with Orders for stay of execution.
4. Upon being served with the application, the Respondent filed a Preliminary Objection to the effect that the High Court lacked jurisdiction to handle the matter.
5. It was the Respondent's case that pursuant to the provisions of **Section 15** of the **Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap 301)**, it is only the Environment and Land Court that has jurisdiction to hear and determine an appeal emanating from a Judgment of the Business Premises Rent Tribunal.
6. In answer to the said submission, the Applicant pointed out that a Practice Decision had been consciously made, jointly by the Bar and the Bench, in Kisumu, to the effect that appeals from the Business Premises Rent Tribunal ought to be filed at the High Court.
7. Mr. Odeny, the learned advocate for the Applicant, drew the court's attention to the fact that there were no appeals at the Environment and Land Court, Kisumu, because of the understanding between the Bar and the Bench in this region.
8. In the light of the very serious ramifications of the "*Practice Decision*" referred to by the Applicant, the Court asked the Applicant to make available the said "*Practice Decision*".
9. In the circumstances, the Applicant asked the court to transfer the appeal to the Environment and Land Court.
10. However, Mr. Achura, the learned advocate for the Respondent, submitted that when an appeal had been filed before a court which lacked jurisdiction, that court could not give any orders in the appeal.
11. The Respondent cited the decision of the Court of Appeal in **PHOENIX OF E.A. ASSURANCE COMPANY LIMITED Vs S. M. THIGA T/A NEWSPAPER SERVICE, CIVIL APPEAL NO. 244 OF 2010**, to back his position.
12. In that case the question which arose for determination is whether or not a case which had been filed before a court which lacked jurisdiction could or could not be transferred.
13. Meanwhile, the Applicant cited the case of **EPHRAIM KARIUKI WAMBURU Vs COMMISSIONER OF LANDS ELCA NO. 1 OF 2017 (Nyeri)**. In that case the appeal was first filed in the High Court, Nairobi Registry.

14. Justice L. N. Waithaka noted thus;

***“Following the Practice Directions gazetted on 25<sup>th</sup> July, 2014 vide Gazette Notice No. 5178 by the Hon. Chief Justice on jurisdiction of courts, most of the Environment and Land matters pending before the High Court were transferred to the Environment and Land Courts in accordance with Paragraph 5 of the aforesaid directions .....*”**

15. In the light of the said practice directions, the learned Judge dismissed the application which sought the return of the appeal to the NAIROBI ELC, which had transferred the case to the NYERI ELC.

16. It is to be noted that in that case, the issue was about the geographical jurisdiction of one ELC Court, as against another ELC Court.

17. The second authority cited by the Applicant was **PROF. DANIEL N. MUGENDI Vs. KENYATTA UNIVERSITY & 3 OTHERS, CIVIL APPEAL NO. 6 OF 2012.**

18. The appeal arose out of the decision by the High Court, which had struck out the Petition for lack of jurisdiction.

19. The Petition had been clothed as a Constitutional Petition, but the learned trial Judge held that the dispute between the parties was based on Employment, and that the dispute ought therefore to have been taken to the Industrial Court.

20. When rendering their judgment, the learned Judges of Appeal made it clear that they did not discern any fault on the part of the trial judge, as they were clear that;

***“... the drafting, tenor and substance of the reference before her was essentially on breach of terms of employment.”***

21. The Court went on to hold that;

***“... this petition was essentially an employment claim that should have gone to the Industrial Court in accordance with Article 162 (2) (a) above, and the learned Judge rightly declined jurisdiction over it.”***

22. The Court of Appeal categorically stated that the Appellant had gone to the wrong court, when he lodged his petition at the High Court.

23. Nonetheless, the Court came to the conclusion that the High Court ought to have transferred the petition to the Industrial Court, instead of striking it out.

24. The Court of Appeal directed the High Court to transfer the petition to the Industrial Court. In so doing, the Court made the following observation;

***“And in order to do justice, in the event where the High Court, the Industrial Court or the Environment and Land Court come across a matter that ought to be litigated in any of the other courts, it should be prudent to have the matter transferred to that court for hearing and determination.***

***These three courts with similar/equal status should, in the spirit of harmonization, effect the necessary transfers among themselves until such time as the citizenry is well-acquainted with the appropriate forum for each kind of claim.”***

25. Meanwhile, in the case of **PHOENIX OF E.A. ASSURANCE COMPANY LTD. Vs S. M. THIGA T/A NEWSPAPER SERVICE** (Supra), the Court of Appeal expressed itself thus;

***“If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction.***

***A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself.”***

26. It is well settled that any court only has authority to hear and determine a case if the court has the requisite jurisdiction.

27. It therefore follows that when the court lacks jurisdiction, it has no power; no authority to take any steps in the case.

28. In the case of **EQUITY BANK LIMITED Vs BRUCE MUTIE MUTUKU T/A TOUR & TRAVEL, CIVIL APPEAL NO. 13 OF 2016** (at Mombas), the Court of Appeal said;

***“In numerous decided cases, Courts, including this Court have held that it would be illegal for the High Court, in exercise of its powers under Section 18 of the Civil Procedure Act to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit.***

***This is because no competent suit exists that is capable of being transferred.”***

29. This case was determined on 10<sup>th</sup> May 2019, whilst the decision in **CIVIL APPEAL NO. 6 OF 2012** was rendered on 17<sup>th</sup> May 2013.
30. I hold the view that the bench which made its decision in 2013 had taken into account the fact that the Constitution of Kenya 2010, was still fairly new, and that therefore the citizenry required time to become well- acquainted with the appropriate forum for each kind of claim.
31. I have taken note of the fact that the practice in this part of the country appears to have led the Applicant to believe that her appeal ought to be filed at the High Court.
32. However, the resolution made between the Bar and the Bench cannot, in law, confer jurisdiction.
33. Pursuant to **Section 15** of the **Landlord and Tenant (Shops, Hotels and Catering Establishments) Act**, it is the Environment and Land Court that has jurisdiction to hear and determine appeals from the Business Premises Rents Tribunal. Consequently, I find that the appeal herein has been filed before a court that lacks jurisdiction. Accordingly, this court is obliged to down its tools forthwith.
34. I cannot order that the appeal be transferred to the Environment and Land Court.
35. I therefore uphold the Preliminary Objection, and order that the appeal be and is hereby struck out, for want of jurisdiction.
36. The costs of the Preliminary Objection are awarded to the Respondent.

**FRED A. OCHIENG**

**JUDGE**

**DATED, SIGNED and DELIVERED at KISUMU This 27<sup>th</sup> day of January 2020**

**T. W. CHERERE**

**JUDGE**