



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mambao v Sulum (Environment and Land Appeal 13 of 2022)  
[2023] KEELC 20401 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20401 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND APPEAL 13 OF 2022  
LL NAIKUNI, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**JOSHUA KALUNGE MAMBAO ..... APPELLANT**

**AND**

**SWALEH ABDUN SULUM ..... RESPONDENT**

**JUDGMENT**

**I. Preliminaries**

1. This Judgment emanates from an appeal lodged before this Honourable Court by the Appellant/ Tenant – “Joshua Kalunge Mambao” – through a filed Memorandum of Appeal dated 6<sup>th</sup> April, 2022 and filed on 7<sup>th</sup> April, 2022 and a 57 pages Record of Appeal dated 6<sup>th</sup> April, 2022 and filed on 7<sup>th</sup> April, 2022. It is against the Respondent/Landlord and being aggrieved by the decision of the Chairman of the Business Premises and Rent Tribunal (Hereinafter referred to as “The BPRT”) Honourable Cyprian Mugambi Nguthari delivered in BPRT Case No. 160 of 2020 on 15<sup>th</sup> March, 2022.
2. On 2<sup>nd</sup> March, 2023, upon service of the Record of Appeal onto the Respondent and the same being admitted directions on the Appeal under the Provisions of Section 79 B and G of the *Civil Procedure Act* Cap 21 and Order 42, Rules 11, 13, 16 and 18 of the Civil Procedure Rules 2010. By consensus, the parties agreed that the appeal be disposed off by way of written submissions accordingly. By 2<sup>nd</sup> May, 2023, the Appellant had already complied and hence the appeal is to be determined on its merit.

**II. The Appellant’s Case**

3. From the filed pleadings the Appellant filed the appeal under the following grounds:-
  - a. That the Learned Chairman erred in Law and Fact by failing to appreciate that the Notice dated 2<sup>nd</sup> March, 2020 offended the provisions of Section 9 (3) (b) of Cap 301 and the same was null and void.



- b. That the Learned Chairman erred in Law and in fact in failing to appreciate that the Notice dated 2<sup>nd</sup> March, 202 could not take retrospective effect since leave to issue the same had not yet been granted by the Tribunal.
  - c. That the Learned Chairman erred in law and in fact by failing to appreciate that the Notice dated 2<sup>nd</sup> March, 2020 was objected to by a letter dated 6<sup>th</sup> March, 2020.
  - d. That the Learned Chairman erred in law by purporting to sit on appeal against the decisions in BPRT No. 8 of 2020 and giving his view on what the Chairman could or would not have decided.
  - e. That the Learned Chairman erred in sitting on Appeal in Tribunal Case No. 8 of 2020 and held that a complaint could not arise from a Notice.
  - f. That the Learned Chairman contradicted himself in that while appreciating tribunal case No. 8 of 2020 was based on two termination Notices held that there was no determination as envisaged in Section 9(3) of the Act and a complaint cannot arise from a Notice.
  - g. That the Learned Chairman erred in ordering for eviction of the Appellant/Tenant considering all the circumstances of the case.
  - h. That the Learned Chairman erred in law and in fact by not considering the Tenant's replying affidavit and submissions the Appellant prayed for.
  - i. The Ruling of the Chairman be set aside and be substituted with an order that the Landlord Notice of 2<sup>nd</sup> March, 2020 was of no effect, null and void.
  - j. Costs of this Appeal be to the Appellant/Tenant.
4. Basically, the main issue of contention here is that on 2<sup>nd</sup> March, 2020, the Respondent, Landlord, gave a notice to terminate the Appellants/Tenant tenancy onto the Plot No. Mombasa/Block/XVI/116 whereby the Appellant run or operated a business of a hotel. He had been a tenant of the Respondent for over Thirty (3) years. The reason for the termination of the tenancy was that Respondent/Landlord wishes to occupy the premises himself. Ideally the notice for the termination was opposed by the tenant on grounds that the Landlord could not issue a fresh notice before the expiry of 12 months after determination on a previous notice. Further the Landlord had alternative premises in the same building which he could occupy and that the previous reference No. 8 of 2020 had given the Landlord liberty to issue fresh notice on 5<sup>th</sup> March, 2020 yet the Landlord had already issued the Notice on 2<sup>nd</sup> March, 2020.
5. However, despite of the above, on 15<sup>th</sup> March, 2022, the Chairman of the Tribunal issued the following orders in Tribunal Case No. 160 of 2020 (Mombasa) :-
- a. That Notice to terminate took effect on 3<sup>rd</sup> June, 2020 and the Tenant is therefore ordered to handover vacant possession of the suit at the expiry of Ninety (90) days from the date hereof and
  - b. The reference by the Landlord succeeds with costs.

Hence, it's the above decision that is the pith and substance of this appeal being aggrieved by it.



### III. The Submissions

6. As indicated by the time of writing this judgment on the Appellant had filed served its submissions. Thus, the Honourable Court will just proceed on delivering the judgment based on the filed pleadings and on its own merit accordingly.

#### A. The written submissions by the Appellant/Tenant

7. On 23<sup>rd</sup> March, 2023, the Learned Counsel for the Appellant Counsel for the Appellant, the Law firm of Messrs. B.W. Kenzi and Company Advocate filed their written submissions dated 21<sup>st</sup> March, 2023. Mr B.W. Kenzi Advocate commenced the filed submissions by providing the Honourable Court with a detailed background of the case from the time the Landlord issued the termination notice dated 2<sup>nd</sup> March, 2020 to cause the termination of the tenancy by the Appellant/Tenant from the suit premises which he had been operating a hospitality business in form of a hotel for a period of over thirty (30) years on the ground that the Landlord wanted to occupy it himself yet he had other alternative premises within the said premises and that there had been yet another notice which had not been determined. The Learned Counsel indicated although the Appellant filed an application challenging the said notice of 2<sup>nd</sup> March, 2020 by the Tenant, the Chairman of BPRT on 15<sup>th</sup> March, 2022 disregarded the application by dismissing it and that was the basis for this eight (8) grounds appeal whatsoever.
8. In a nutshell, the Learned Counsel submitted as follows:-
  - a. The Provisions of Section 9 of the Landlord (Shops, Hotels and Catering, Establishment) Act Cap 301 sub-section 3 (b) held that: -

“Where a Tribunal has made a determination upon a reference, no further tenancy notice shall be given in respect of the premises concerned, which is based on any of the matters affected by the determination.

- i. In the case of an assessment of rent, until after the expiration of two (2) years, or
- ii. In any other case, until after the expiration of twelve months, after the date of the determination, unless the Tribunal at the time of the determination specifies some shorter period”

According to the Learned Counsel there existed a Reference No. 8 of 2020 when the Landlord issued the Notice of 2<sup>nd</sup> March, 2020. The reference No. 8 of 2020 was pursuant to two notices issued by the Respondent dated 5<sup>th</sup> September, 2019 and 12<sup>th</sup> September, 2019 which were pending in court. The tenant applied before court and on 5<sup>th</sup> March 2020 got orders in his favour restraining the Landlord from evicting the tenant. before, these orders were effected the Landlord had issued the notice of 2<sup>nd</sup> March, 2020 three (3) days prior to the determination of the court. He argued that the Chairman of BPRT in holding that the order of 5<sup>th</sup> March, 2020 on BPRT No. 8 of 2020 was not a determination on a Reference was a misapprehension of the law and his decision should be set aside.

- b. The Learned Counsel argued that in BPRT No. 8 of 2020 the Chairman on 5<sup>th</sup> March, 2020 gave the Respondent/Landlord leave to issue a fresh notice to wit: - The Landlord is at liberty to serve the Tenant with a fresh notice in the prescribed forms if he wishes to terminate the



tenancy”). But on the contrary the Landlord issued a Notice on 2<sup>nd</sup> March, 2020. He could only issue a fresh Notice after leave but he did before the expiration of the three (3) days.

- c. The Learned Counsel emphatically opined that the Notice of 2<sup>nd</sup> March, 2020 was objected to through a letter dated 6<sup>th</sup> March, 2020 on grounds that the notice was defective and therefore null and void and that there were (2) adjacent shop which he could let out to tenants. Further it had offended the provisions of Section 4(2) of Cap 301 of which the Notice required a notification in writing within one months of objection to the notice. But the Landlord failed to comply with this provisions whatsoever.
- d. The Learned Counsel’s contention was that the Learned Chairman erred in law by siting on an appeal against the decision of BPRT No. 8 of 2020 and giving his view on what the Chairman could or would not have decided.
- e. The Learned Counsel argued that the Learned Chairman erred in sitting on Appeal in Tribunal Case No. 8 of 2020 and held that a complainant could not arise from a Notice.
- f. Finally, the Learned Counsel submitted that the Learned Chairman contradicted himself in that while appreciating Tribunal Case No. 8 of 2020 was based on two termination Notices, held that there was no determination as envisaged in Section 9 (3) of the Act and that a complaint could not arise from a Notice. Based on the provisions of Section 12 (4) of the Act, a complaint could arise out of a Notice and hence submitted that the chairman was wrong to state that what was before The Tribunal in BPRT No. 8 of 2020 was a complaint and not a Reference. He held that the Learned Chairman erred in ordering for eviction of the Appellant/Tenant considering all the circumstances of the case. He thus prayed for the appeal to be allowed accordingly.

## VI. Analysis and Determination

9. I have carefully analysed and considered all the filed pleadings in this Appeal being mainly the Memorandum of Appeal dated 6<sup>th</sup> April, 2022, the 57 Record of Appeal dated even date the written submissions by the Appellant, the appropriate provisions of *the Constitution* of Kenya 2010 and statutes.
10. In order to arrive at an informed, fair, equitable and reasonable decision herein the Honourable court in this Appeal has framed the following three (3) fundamental issues to be determined by the Court. These are: -
  - a. Whether the filed Appeal by the Appellant through the Memorandum of Appeal dated 6<sup>th</sup> April, 2022, being aggrieved against the decision of the BPRT No. 160 of 2020 delivered on 15<sup>th</sup> March, 2022 has any merit or not?
  - b. Whether the parties herein are entitled to the relief sought from the filed Appeal.
  - c. Who will bear the costs of Appeal?

### **Whether the filed Appeal by the Appellant through the Memorandum of Appeal dated 6<sup>th</sup> April, 2022, being aggrieved against the decision of the BPRT No. 160 of 2020 delivered on 15<sup>th</sup> March, 2022 has any merit or not?**

11. Before embarking on the issues for analysis under this sub-heading as indicated earlier in the Judgement the Honorable Court in a preamble form the court makes two assertions. First on the re - evaluation



and analysis of the evidence from trial court and secondly the brief facts of this case. To begin with, while dealing with all appeals emanating from the decision by the trial Courts, as a first appellate Court it is guided and informed by the principles summarized in myriad of decisions in particular that of: - “Selle & Another – Versus- Associated Motor Boat Co. Limited & Others (1968) E.A. 2123” at Page 126 as:-

“Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make allowance in that respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence of if the impression on the demeanor of a witness is inconsistent with the evidence in the case generally.”

12. Similarly, in the case of “Peter –Versus - Sunday Post Limited 1958 E.A. 424” Sir Kenneth O’Connor P. rendered the applicable principles as follows:-

“It is a strong thing for an appellate court to differ from the finding on a question of facts, of the judge who tried the case and who had the advantage of seeing and hearing the witnesses. An appellate court has indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a Jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion....”

13. From the instant case, its not in dispute that between the Respondent/Landlord and Appellant/ Tenant there existed a Landlord – Tenant relationship and which was guided by a Tenancy Agreement terms and conditions stipulated thereof under the Provisions of Landlord (Hotels, Shops establishment) Act Cap 301 for the operation of a hotel. This had subsisted for over 30 years. It so happened that the Landlord wished to have the tenancy terminated which caused the Tenant to institute a Reference before BPRT No. 8 of 2020 and whereby on 5<sup>th</sup> March 2020 he was granted orders to his favour and which restrained the Landlord from evicting the tenant from the business premises. However, before the determination of the above orders the Landlord, issued a Notice dated 2<sup>nd</sup> March, 2020, three days prior to the determination of the court. It was based on this that the Tenant filed an application before the Chairman challenging the said notice of 2<sup>nd</sup> March, 2020. However, on 15<sup>th</sup> March, 2022 the Chairman held that the Notice to terminate took effect on 3<sup>rd</sup> June, 2020 and the tenant was therefore ordered to hand over vacant possession of the suit at the expiry of ninety (90) days from the date thereof and costs. That is adequate on the brief facts.
14. Now turning to the issues under this sub-heading from the surrounding facts of this case, there existed a Reference No. 8 of 2020 when the Landlord issued the Notice of 2<sup>nd</sup> March, 2020. The Reference No. 8 of 2020 was pursuant to the two (2) Notices issued by the Respondent dated 5<sup>th</sup> September, 2019 and 12<sup>th</sup> September, 2019 while the notices were pending in court the Landlord proceeded to court to have evict the Tenant from the suit premises, but the tenant successfully applied to the Tribunal for restraining orders. On 5<sup>th</sup> March, 2020. However, before the expiration and determination of this orders on 2<sup>nd</sup> March, 2020 the Landlord issued yet another notice three (3) days prior to the determination of the court.
15. Its my view and fully concur with the Learned Counsel for the Appellant, the Respondent by issuing of all these notices and in particular the one of 2<sup>nd</sup> March, 2020 to have the tenancy of the tenant



terminated is contrary to the provisions of Section 9 (3) (a) and (b) of the Act Cap 2013. I have noted that the chairman at Page 11 line No. 2 says as follows: -

“The notices which were sought to be challenged by the tenant in BPRT No. 8 of 2020 are the ones issued on 12<sup>th</sup> September, 2019. The Tenant opposed the said Notice by a Reference to the Tribunal under Section 12 (4) Cap 301.”

Clearly, the chairman acknowledges BPRT No. 8 of 2020 was a reference against the Notices of 12<sup>th</sup> September, 2019 and 5<sup>th</sup> September, 2019 respectively.

All said and done, according to the Provisions of Section 4 (1) and (2) of the Act provides: -

“A Landlord who wishes to terminate a controlled tenancy or to the alter to the detriment of the tenant any terms or conditions in or right o service enjoyed by the tenant under such a tenancy shall give a notice in that behalf to the tenant in the prescribed form.”

The Prescribed form requires a notification in writing within one months of objection to the Notice. From the facts given herein this requirement was not fulfilled and hence making the notice of 2<sup>nd</sup> March, 2020 illegal, irregular and null and void. Based on these grounds I hold that the Appeal has merit and hence succeeds.

#### **Whether the parties herein are entitled to the relief sought from the filed Appeal.**

16. Under this sub-heading, it’s clear that there already existed a Reference No. 8 of 2020 where the Chairman on 5<sup>th</sup> March, 2020 gave the respondent leave to issue a fresh notice. He stated
  - a. That the Tenant application dated 13<sup>th</sup> January, 2020 is allowed in terms of prayer 3 of the Notice of Motion that is to say: -
    - i. The Landlord is restrained from evicting the tenant from the business premises on Plot No. MSA/BLOCK/XVI/116.
  - b. That the Tenant shall deposit rent in this Tribunal if the Landlord does not accept the same within thirty (30) days from the date of this Ruling.
  - c. That the Landlord shall pay costs assessed at Kshs. 50,000/=
  - d. That the Tenant shall deduct the costs from the rent due to the Landlord.
  - e. That the Landlord is at liberty to serve the Tenant with a Notice in the prescribed form if he wishes to terminate the tenancy.

From the above very graphic and clear findings two (2) things come to fore.

Firstly, from the records I have not come across any steps taken by the Landlord in form of an appeal setting aside or review or variation of the said orders. Thus the parties are bound by the said orders which typical and/ expected of such ordinary court orders.

Secondly, I find the orders or directions by the Chairman on 15<sup>th</sup> March, 2022 to wit: -

- a. That Notice to terminate took effect on 3<sup>rd</sup> June, 2020 and the tenant is therefore ordered to handover vacant possession of the suit at the expiry of ninety (90) days from the date hereof and the reference by the Landlord succeeds with costs rather misleading, misplaced and misconceived in law. I am compelled to concur with the Learned Counsel for the Appellant. It appears the Chairman of the BPRT on asserting this position he was sitting on Appeal in



Tribunal Case No. 8 of 2020 and in giving his views on what the Chairman could or would not have decided by holding that a complaint could not arise from a Notice. He held that what before him was a complaint and not a reference. There are all red herring and a case of splitting hairs.

For these reasons therefore I hold that the Appellant has a strong and meritorious appeal and which certainly must succeed.

#### **Who will bear the costs of Appeal?**

17. Its now trite law that issues of costs are at the discretion of the court. Costs are the awards granted to a party upon conclusion of any legal action and proceedings in any litigation. The Provisions of Section 27(1) of the *Civil Procedure Act* Cap 21 holds that costs follow the event. By event it means the outcome and/or results of legal action and proceedings.
18. In the instant case the Appellant has been successful in prosecuting the appeal herein against the Respondent. Thus, the Appellant is entitled to the costs of the Appeal accordingly.

#### **V. Conclusion and findings**

19. Having conducted such an elaborate analysis of the framed issues herein the court finds that the Appeal filed by the Appellant is successful on the preponderance of probabilities. For avoidance of doubts I proceed to order as follows specifically.
  - a. That The Appeal by the Appellant through the filed Memorandum of Appeal dated 6<sup>th</sup> April, 2022 has merit and hence be and is hereby successful.
  - b. That the Ruling of the Chairman of BPRT delivered on 15<sup>th</sup> March 2022 be and is hereby set aside.
  - c. That an order that the Landlord Notice of 2<sup>nd</sup> March, 2020 was of no effect, irregular and illegal and hence null and void.
  - d. That the costs of the Appeal be and is hereby granted to the Appellant/Tenant.

It is so ordered accordingly

**JUDGEMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS .....28<sup>TH</sup> .....DAY OF.....SEPTEMBER.. .....2023**

**HON. JUSTICE MR. L. L. NAIKUNI**

**ENVIRONMENT & LAND COURT AT**

**MOMBASA**

**Judgement delivered in the presence of:-**

- a. M/s. Yumnah, the Court Assistant.
- b. M/s. Wambua Advocate holding brief for Mr. B.W Kenzi Advocate for the Appellant.
- c. No appearance for the Respondent.

