



**Omar & another v Shariff (Environment & Land Case 210 of 2018)
[2023] KEELC 20101 (KLR) (26 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20101 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 210 OF 2018
NA MATHEKA, J
SEPTEMBER 26, 2023**

BETWEEN

ALI ABDALLA SHEIKH OMAR 1ST PLAINTIFF

ABDUL SWALEH ALI ALIAS ABDUL GAWA 2ND PLAINTIFF

AND

HAJI SHARIFF DEFENDANT

JUDGMENT

1. The Plaintiffs are both tenants of the Defendant on the premises situate on Plot No 53/3/VI MN Changamwe, Mainland West the respective rents payable thereon being Kshs 4,000/pm for the 1st Plaintiff and Kshs 2,000/- pm for the 2nd Plaintiff. The Plaintiffs state that the subject tenancies fall under the purview of the *Landlord & Tenant (Shops, Hotels and Catering Establishment) Act* Cap 301 insofar as there is between the parties no agreements in writing in excess of 5 years or at all. The Plaintiffs state that they were previously tenants of a third party from whom the Defendant purchased the premises. Being controlled tenancies the Plaintiffs aver that the Defendant herein purchased subject to these tenancies and any alteration of the terms thereof would be possible only in accordance with the provisions of the Landlord & Tenant Act, Section 4 thereof.
2. That the foregoing notwithstanding the Defendant within the year 2017 purported to levy distress against the Plaintiffs on the basis of purported rent arrears based on rentals other than those payable to the previous landlord. The said distress was underpinned by an ex parte order obtained irregularly from the Business Premises Rent Tribunal in BPRT 110 of 2017 against which Order there lies an application to set aside. He issued notices to increase rent in accordance with Section 4 of the *Landlord & Tenant Act*, which notices seeks to raise the rentals due to Kshs 60,000/= pm in the case of the 1st Plaintiff and Kshs 15,000/= in the case of the 2nd Plaintiff. Instructively these notices are based on erroneous starting rentals, Kshs 14,000/= pm in the 1st Plaintiff's case and Kshs 5,000/= for the 2nd



Plaintiff and have been challenged vide applications for striking out thereof in BPRT 37/2017 and BPRT 38/2017 respectively.

3. On 5th July 2018 BPRT 37/18 & 38/2017 aforesaid came up for mention in Nairobi when the order was made to the effect that the Plaintiffs pay undisputed rentals to the Defendant before end of 13th July, 2018, on pain of rent distress which sums were duly paid to the Defendant's MPesa line number 0722XXX057. The Plaintiffs paid without prejudice for the months of November, 2017 to July, 2018 notwithstanding that the arrears went only as far back as January, 2018. Notwithstanding the aforesaid payment the Defendant on 16th July 2018 in company of officers assigned by the OCS, Changamwe and with no auctioneer accompanying them and with the help of hirelings purportedly executed a distress, not within the meaning of the *Distress for Rent Act*, but an eviction where the landlord then carted off the Plaintiffs' goods without inventory to unknown destination and effectively took possession of the premises. The Plaintiffs will aver that the aforesaid actions of the Defendant are unlawful and do not amount to distress for rent within the meaning of the *Distress for Rent Act*. The Plaintiff prays for judgment against the Defendants jointly and/or severally for;
 - i. A declaration that the dispossession of the Plaintiff of the suit premises by the Defendants is unlawful, null and void as contravening the Provisions of the *Landlord & Tenant (Shops, Hotels and Catering Establishments) Act*.
 - ii. An Order directing the Defendants by themselves or anybody claiming under them to forthwith restore the Plaintiff into the suit premises together with all goods removed therefrom on 16.7.18.
 - iii. An Order restraining the Defendant his agents, servants or anybody claiming under him from letting out or otherwise parting with possession of the suit premises to any third party.
 - iv. Damages for unlawful eviction and trespass
 - v. Costs and interest
 - vi. Any other or further reliefs that this Honourable Court deems fit to grant.
4. The Defendant denies that the Plaintiffs are his tenants currently occupying the premises erected or built on Plot No 53/3/VI MN Changamwe, Mainland West. The Defendant states that the order for levy of distress for rent was regularly obtained from the Business Premises Rent Tribunal Case No 110 of 2017 after the Plaintiffs refused to pay rent as and when they became due. The Defendant states that on 5th July 2018 when BPRT Nos 37 of 2018 and No 38 of BPRT Chairman Hon. Mbichi Mboroki ordered the Plaintiffs to pay the rent arrears from November 2017 to June 2017 before 13th July 2018 in default of which the Defendant was at liberty to be evict them from the premises. The Defendant states that the Plaintiffs did not pay the rent arrears as ordered by the BPRT Chairman by 13th July 2018 hence the Defendant was left with no option but to remove the Plaintiffs' goods from the premises as ordered by the Tribunal. The Defendant states that the dispute herein is still active before the Business Rent Tribunal. The Plaintiffs filed reference numbers 37 of 2017 which came up for hearing on 3rd November 2018 and reference Nos. 110 of 2017 of which came up for hearing on 29th October 2018 after the filing of the suit herein. The Defendant states that this Honourable Court lacks jurisdiction to hear and determine this matter by dint of Section 15 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* Cap. 301 and that the matter herein is Res judicata.



5. This court has considered the evidence and submissions therein. The Respondents has raised a preliminary issue that this matter is Res judicata and that this Honourable Court lacks jurisdiction to hear and determine. Section 7 of the [Civil Procedure Act](#) on Res judicata, reads as follows:

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

6. The provision is on the fundamental doctrine that there should be an end of litigation. The doctrine of Res judicata may be pleaded by way of estoppel so that where a judgment has been given future and further proceedings are estoppel. The rationale for the doctrine of Res judicata exists to protect public interest so that a party should not endlessly be dragged into litigation over the same issue or subject matter that has otherwise been conclusively determined by a court of competent jurisdiction.

7. Res judicata is normally pleaded as a defence to a suit or cause of action that the legal rights and obligations of the parties have been decided by an earlier judgment, which may have determined the questions of law as well as of fact between the parties. In other words, Res judicata will successfully be raised as a defence if the issue(s) in dispute in the previous litigation or suit were between the same parties as those in the current suit; the issues were directly or substantially in issue in the previous suit as in the current suit and they were conclusively determined by a court of competent jurisdiction. In that respect, the Court of Appeal held in [The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others](#), (2017) eKLR, that.

“The rule or doctrine of Res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of Res judicata thus rest in the public interest for swift, sure and certain justice.”

8. Expounding further on the essence of the doctrine this Court in [John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others](#) (2015) eKLR pronounced itself as follows;

“The rationale behind Res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res-judicata ensures the economic use of court’s limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without Res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably.”



9. The test for determining the application of the doctrine of res-judicata in any given case is spelt out under Section 7 of the *Civil Procedure Act*. In *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* (*supra*), the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:
- “(a) The suit or issue was directly and substantially in issue in the former suit.
 - (b) That former suit was between the same parties or parties under whom they or any of them claim.
 - (c) Those parties were litigating under the same title.
 - (d) The issue was heard and finally determined in the former suit.
 - (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”
10. I have perused the court record and find that that on 5th July 2018 was when BPRT Nos. 37 of 2018 and No 38 of BPRT Chairman Hon. Mbichi Mboroki ordered the Plaintiffs to pay the rent arrears from November 2017 to June 2017 before 13th July 2018 in default of which the Defendant was at liberty to be evict them from the premises. It is not disputed that these cases exist at the BPRT. The Plaintiffs maintain that they paid the rent without prejudice for the months of November, 2017 to July, 2018 notwithstanding that the arrears went only as far back as January, 2018. That the Defendant on 16th July 2018 in company of officers assigned by the OCS, Changamwe and with no auctioneer accompanying them and with the help of hirelings purportedly executed a distress, not within the meaning of the *Distress for Rent Act*, but an eviction where the landlord then carted off the Plaintiffs' goods without inventory to unknown destination and effectively took possession of the premises and they are challenging the same.
11. 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”.

12. Provisions of Section 15 *Landlord and Tenant (Shops, Hotels and Catering Establishment) Act*, chapter 301 laws of Kenya, which provides as hereunder;

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.

13. From the foregoing provision, it is apparent that a right of appeal only avails to a party to a reference and who is aggrieved by any determination or order of the tribunal made therein. For clarity, the determination or order, which attracts a right of appeal must be one made in the reference and not otherwise.

14. Even though, the only court with unlimited original jurisdiction over disputes reserved for the Business Premises Rent Tribunal is the Environment and Land Court. That unlimited original jurisdiction is granted by Section 13 of the *Environment and Land Court Act*. Even then, that unlimited original jurisdiction is invoked only when it is demonstrated that the Tribunal is not properly constituted or quorated. One cannot in my view file parallel matters in the Tribunal and this court unless it is by way of an appeal.

15. From the foregoing I find that the matter is the same and involves the same parties and meets the bar of Res judicata. Having found so there would be no need to go into the issue of evidence. Furthermore, the Plaintiffs filed reference numbers 37 of 2017 which came up for hearing on 3rd November 2018 and reference Nos. 110 of 2017 on the same matter of which came up for hearing on 29th October 2018 after the filing of the suit herein. I therefore strike out this suit for being Res judicata with costs.

16. It is so ordered.



DELIVERED, DATED AND SIGNED AT MOMBASA THIS 26TH DAY OF SEPTEMBER 2023.

N.A. MATHEKA

JUDGE

