

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL APPEAL NO. 93 OF 2015

GEKARA OGETA.....APPELLANT

=VRS=

NELSON NYAUMA NDUBI.....RESPONDENT

{Being an Appeal from the Ruling of Hon. N. Njagi– PM dated and delivered on the 15th day of June 2015 in the original Nyamira Principal Magistrate’s Court Civil Case No. 126 of 2004}

JUDGEMENT

This is an appeal against a ruling in which the trial magistrate dismissed the appellant’s suit on the ground that the court did not have jurisdiction as the dispute should have been taken to the Business Premises Rent Tribunal.

The appellant had sued the respondent for rent arrears in the sum of Kshs. 166,000/=, eviction and delivery up of the possession of the suit premises, mesne profits and/or damages for holding over the suit premises, costs and interest. This was as per an amended plaint dated 25th February 2005.

The thrust of the appeal is that the argument that the court did not have jurisdiction was devoid of merit as the tenancy, which admittedly was a controlled tenancy had by consent of the parties terminated on 11th March 2009. That therefore the landlord – tenant relationship no longer existed. Counsel relied on the case of **Republic Vs. Chairman, Business Premises Rent Tribunal Exparte Velji Premchand Shah [2012] eKLR**. He urged this court to allow the appeal by setting aside the ruling of the learned magistrate and substituting it with an order dismissing the preliminary objection with the costs here and the court below.

That was opposed by Counsel for the respondent who reiterated his objection and submitted that the proper forum for the dispute was the Business Premises Rent Tribunal and that the court did not have jurisdiction.

I have considered the rival submissions carefully but an appeal being in the nature of a retrial, I have reconsidered the arguments in the lower court record so as to arrive at my own conclusion.

I have come to the conclusion that the trial Magistrate who dismissed the suit misdirected himself and therefore made a decision not based on the law. It will be noted that on 31st March 2010 similar arguments were raised before another Magistrate – L. Komingoi – SRM, as she then was, who dismissed the preliminary objection and gave the parties a right to appeal within 28 days. It was therefore an error on the part of the succeeding Magistrate N. Njagi – SPM, the Magistrate who dismissed the suit on 15th June 2015, to entertain a similar objection. That amounted to sitting on appeal over the decision of another Magistrate. He did not have jurisdiction to do so. Moreover, and more importantly it was evident that the landlord and tenant relationship no longer existed between the parties firstly because the notice admittedly received by the respondent took effect immediately or once he decided not to file a reference – **see Section 10 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, cap 301 Laws of Kenya**. Secondly, the parties had during the pendency of the suit and long before the preliminary objection was raised also “terminated” the tenancy by a consent dated 9th March 2009. I put the word “terminated” in quotes in relation to the consent because the tenancy had long been terminated by operation of the law – **Section 10 (Suppra)**. The Tribunal no longer had jurisdiction.

It is my finding therefore that this appeal has merit. The order dismissing the appellant’s suit is accordingly set aside and the suit is remitted back to the lower court for retrial by a Magistrate other than N. Njagi. The appellant will have the costs of this appeal but those of the lower court shall abide the trial. It is so ordered.

Signed, dated and delivered in Nyamira this 28th day of March 2019.

E. N. MAINA

JUDGE