REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 28 OF 2007

ALBERT KARIUKI MUNDIA.....APPELLANT

-VERSUS-

JOHN KIBOI WAMBUGU.....RESPONDENT

(Appeal from original judgment and decree in Nyeri Chief Magistrates Court Civil Case No. 102 of 2001 (Hon. Elizabeth J. Osoro, Senior Resident Magistrate) dated 3 May 2007)

JUDGMENT

Until December 1999, the appellant was the respondent's tenant for 18 years in rental premises described as plot number 23B at Mweiga Township, in Nyeri County. He vacated the premises at around that time apparently after a simmering disagreement between them over the respondent's bid to have him vacate. According to the respondent, at the time of his departure, the appellant was not only in arrears of four months' rent but he also owed him the money he had spent to have him vacate the premises; he also owed him the expenses that he subsequently incurred in repairing the premises after the appellant vacated.

Accordingly, by a plaint dated 14 March 2001 and filed in the magistrates' court on the following date, the respondent sued the appellant for the alleged rent arrears amounting to Kshs. 12,000/= equivalent to four months' rent, Kshs. 30,091/= as repair costs and Kshs. 5,350/= being the advocates' costs he incurred to have the appellant vacate his premises.

The appellant disputed the respondent's claim and filed his statement of defence accordingly. He admitted, however, that he had been the respondent's tenant but that he had vacated after the conclusion of a rent tribunal case apparently between him and the respondent. He denied owing any rent arrears or that the respondent incurred any expenses to have him vacate the premises.

After taking evidence, the learned magistrate found for the respondent and upheld his claim for Kshs. 30,133/= being the compensation of the amount incurred on the repair of the premises; she, however, dismissed his claim on rent arrears and the alleged expenses of the amount spent on eviction of the appellant.

The appellant was dissatisfied with this judgment and for this reason he has filed the present appeal; in the memorandum of appeal dated 4 May 2007, his grounds against the decision of the learned trial magistrate have been framed as follows:

> ***1. The learned senior resident magistrate erred in law and fact in holding that the plaintiff was entitled to repair costs of Kshs. 30,091/= when there was no evidence to this effect. A miscarriage of justice was thereby occasioned.***
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> ***2. In so far as no valuation of the premises was carried out immediately the defendant vacated the premises and no valuation report was carried out to show what needed to be repaired and no valuer, mason or carpenter was called to give evidence on the repairs they carried out, the learned magistrate erred in holding that Kshs. 30,091/= was expended in carrying out repairs on the premises. A miscarriage of justice was thereby occasioned.***
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> ***3. The learned senior resident magistrate erred in law and fact in not finding and holding that the claim of Kshs.30,091/= being the sum allegedly spent on repairs is a special claim which in law must not only be specifically pleaded but must also be specifically proved and that the plaintiff had not only failed to give particulars of the same but also the evidence on record does not prove the same. A miscarriage of justice was thereby occasioned.***
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> ***4. The learned senior resident magistrate erred in law and fact in not finding and holding that under section 3 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act cap 301 Laws of Kenya and the schedule(Terms and conditions to be implied in the tenancies) term (v) thereof, all repairs to roofs, main walls, main drains and structure is the responsibility of the lessor and the defendant therefore was not liable. A miscarriage of justice was thereby occasioned.***
>
> ***5. The learned senior resident magistrate erred in law and fact in not holding that in so far as there was Nyeri Business***

Premises Rent Tribunal number 16 of 1999 between the parties herein relating to the same tenancy, any issues concerning vacant possession and repairs ought to have been concluded in that suit under section 12 1(e),(k) and (9)of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act cap 301 Laws of Kenya. A miscarriage of justice was thereby occasioned.

6. The learned Senior Resident Magistrate erred in law and fact in not finding and holding that the receipts and vouchers produced in evidence were not admissible in evidence as they were not produced by the maker, did not bear the name of the plaintiff and do not show what they were for. A miscarriage of justice was thereby occasioned.

In his evidence at the trial, the respondent testified that the appellant used to be his tenant at his premises known as plot No. 23 Mweiga. He paid a monthly rent of Kshs. 3,000/= and as at the time he vacated, he hadn't paid rent for the preceding four months which I understand to have been the months of September, October, November and December of the year 1999. As a matter of fact, he left without handing over the premises to the respondent and that it is only after a demand notice requiring him to pay the rent arrears that appellant reappeared on 2 March 2000 and handed over possession of the premises back to the respondent. It is on this date that the appellant is said to have undertaken to pay him a total sum of Kshs. 17, 350/= made up of the rent arrears, the costs in a tribunal case and the advocate's fees. But he incurred further costs in repairs bringing the total amount due to Kshs. 47, 441/=. He further made reference to a tribunal case No. 16 of 1999 in which he was a party; apparently, it is the costs incurred in this case that he was also demanding from the appellant; during his cross-examination, he admitted that the tribunal never ordered any one to pay costs.

Peter Ndirangu Ngunjiri was one of the respondent's witnesses who, in his testimony, confirmed that on 2 March 2000, the appellant agreed to pay the sum of Kshs. 17,350/= as rent arrears, costs for repairs and advocates' costs. Also present in the meeting when the appellant is alleged to have agreed to make this payment was David Wambugu Kabue. He testified that both the appellant and the respondent assessed the damages to the premises and ultimately, the costs for the necessary repairs were mutually agreed upon. Unlike the respondent and his witness, Peter Ndirangu Ngunjiri, he stated that the appellant was still in possession of the premises as at 2 March 2000 when the parties met and agreed on the payments. Another of the respondent's witness was Joseph Kamande Wainaina who testified that he not only witnessed the appellant and the respondent sign their agreement but that he also supervised the repair works.

On his part the appellant admitted that he had been the respondent's tenant in the respondent's premises where operated a general shop for eighteen years. He testified that he had paid what the respondent demanded as arrears as at the time he filed his suit. He further testified that the respondent had made a reference at the Business Premises Rent Tribunal seeking that he vacates the premises as a result of which he vacated on 31 December 1999. He denied having damaged the respondent's premises and further denied that he was party to any agreement to compensate the respondent for any expenses he allegedly incurred towards repairs of his premises. During cross-examination, he admitted that he was in fact the one who had filed a reference at the tribunal after the respondent issued him with a notice to vacate the premises. He withdrew the reference after he vacated the premises. He urged the court to find that there was no cause of action against him and that the respondent's suit should be dismissed.

It is apparent from this evidence that the appellant's tenancy was 'controlled' as understood under section 2 of the **Landlord and Tenant (Shops, Hotels and Catering Establishments) Act**; that section reads as follows:

"controlled tenancy" means a tenancy of a shop, hotel or catering establishment—

(a) which has not been reduced into writing; or

(b) which has been reduced into writing and which—

(i) is for a period not exceeding five years; or

(ii) contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or

(iii) relates to premises of a class specified under subsection (2) of this section:

Provided that no tenancy to which the Government, the Community or a local authority is a party, whether as landlord or as tenant, shall be a controlled tenancy;

There was no evidence, and neither was it ever suggested by either of the parties, that the tenancy between them had been reduced into writing. And even if such written agreement existed, there was no evidence that the tenancy was for a period exceeding five years or, in it, was a provision on termination of the tenancy after five years from the date of commencement; neither was there evidence that the leased premises fell outside the category of premises specified in subsection (2) of section 2 of the Act.

What's more, parties were in agreement that premises were let out for purposes of general supplies; to be specific, they both spoke of a shop from which the appellant operated a retail trade. The premises, in my humble view, fit the description of a 'shop', which is one kind of the premises to which the Act applies; in section 2 of the Act it is defined as follows:

"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; (See section 2 of the Act)

Now, the next question that logically emerges is this; if the tenancy was controlled, was the magistrates' court seized of jurisdiction to entertain any dispute arising out of this tenancy?

Section 11 of the Act establishes a tribunal whose mandate includes, *inter alia,* making orders for the payment of arrears of rent and mesne profits, from any person, irrespective of whether he is a tenant so long as he was in occupation of the premises comprised in a controlled tenancy at the material time; this is provided for in **section 12 (1) (e)** which reads as follows:

> ***12. Powers of Tribunals***
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> ***(1) A Tribunal shall, in relation to its area of jurisdiction have power to do all things which it is required or empowered to do by or under the provisions of this Act, and in addition to and without prejudice to the generality of the foregoing shall have power—***
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> ***(a) …***
>
> ***(b) …***
>
> ***(c) …***
>
> ***(d) …***
>
> ***(e) to make orders, upon such terms and conditions as it thinks fit, for the recovery of possession and for the payment of arrears of rent and mesne profits, which orders may be applicable to any person, whether or not he is a tenant, being at any material time in occupation of the premises comprised in a controlled tenancy;***
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> ***(f) …***
>
> ***(g) where the landlord fails to carry out any repairs for which he is liable—***
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> ***(i) to have the required repairs carried out at the cost of the landlord and, if the landlord fails to pay the cost of such repairs, to recover the cost thereof by requiring the tenant to pay rent to the Tribunal for such period as may be required to defray the cost of such repairs, and so that the receipt of the Tribunal shall be a good discharge for any rent so paid;***
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> ***(ii) to authorize the tenant to carry out the required repairs, and to deduct the cost of such repairs from the rent payable to the landlord;***
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> ***(h) to permit the levy of distress for rent***
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> ***(i)…***
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> ***(j)…***
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> ***(k) to award costs in respect of references made to it, which costs may be exemplary costs where the Tribunal is satisfied that a reference to it is frivolous or vexatious;***
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> ***(l) …***
>
> ***(m) …***
>
> ***(n)…***

The essence of this provision is that all those questions which the respondent raised in the magistrates' court on whether he was entitled to any compensation for expenses incurred in repair of his premises or whether they are the sort of repairs he was under obligation to undertake himself without any cost to the tenant; whether he was entitled to any costs of a reference to which he was a party in the rent tribunal; or, whether there was any rent arrears due to him, are all questions that could and ought to have been determined by the tribunal established under section 11 of the Act. The magistrates' court was not the proper forum for their determination.

In fact, apart from registration, in the magistrates' court, of a determination or an order issued by a tribunal in accordance with section 14(1) of the Act for its adoption and enforcement as a decree of that court, the magistrates' court does not have any other role in matters relating to controlled tenancy under the **Landlord and Tenant (Shops, Hotels and Catering Establishments) Act**. And, perhaps for avoidance of doubt of its limited role, section 15 is clear that any party aggrieved by a decision of a tribunal can only appeal to the High Court and not to the magistrates' court; this section reads as follows:

> ***(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 High Court:***
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> ***Provided that the High 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.***

In the final analysis, the answer to the question whether the magistrates' court had jurisdiction to entertain the suit before it and out of which this appeal arises is emphatically in the negative. Jurisdiction, it has been said, is everything and without it the court should down its tools.

In **the Owners of the Motor Vessel "Lillian S" versus Caltex Oil (Kenya) Ltd (1989) KLR 1** the judges of appeal had this to say on this question (at page 14 of the judgment):

> ***I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of the proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.***

In the absence of jurisdiction, the magistrates' court did not have the requisite authority to entertain the dispute before it and for this reason its decision did not amount to anything.

It does not really matter that the appellant admitted the jurisdiction of the court for, where jurisdiction does not exist, it cannot be conferred by consent of the parties. In **the Owners of the Motor Vessel "Lillian S"** (supra) the Court demonstrated how jurisdiction is acquired and, in this regard, it made reference to ***'Words and Phrases Legally Defined, Volume 3'*** at page 113 where it is stated:

> ***By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented before it in a formal way for its decision. The limits of this authority are imposed by statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means.***

It is not suggested that parties can confer jurisdiction where none exists.

If I have to add anything, I would remind the respondent that it is settled that whenever an Act expressly prescribes a certain procedure, that procedure must be followed. See **Methodist Church Kenya Trustees & Another versus Rev. Jeremiah Muku & Another (2012) eKLR.** It follows that if the **Landlord and Tenant (Shops, Hotels and Catering Establishments) Act** expressly provides that resolution of disputes arising out of controlled tenancies falls within the jurisdiction of a tribunal established for that purpose, there is no reason why a dispute of that category of disputes should be lodged in and entertained by the magistrates' court.

For all I have said, I am inclined to come to the conclusion that the proceedings in the magistrates' court together with the purported decision amounted to nothing more than a nullity. There was no valid decision out of which an appeal could be lodged. I will therefore allow the appeal not necessarily because of any of the grounds raised by the appellant but on the ground of lack of jurisdiction which, in my humble view, ought to have been determined *in limine* and which I cannot close my eyes to even at this appellate stage.

For avoidance of doubt, I will substitute the learned magistrate's order with the order that the respondent's suit in the magistrates' court is struck out. Parties will bear their respective costs both in that court and in this honourable Court. Orders accordingly.

Signed, dated and delivered in open court this 29th day of November 2019.

Ngaah Jairus

JUDGE