



GM Tanna & Sons Holding Limited & another v Wabuyele (Environment and Land Appeal E006 of 2022) [2023] KEELC 20764 (KLR) (17 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20764 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT AND LAND APPEAL E006 OF 2022
FO NYAGAKA, J
OCTOBER 17, 2023**

BETWEEN

GM TANNA & SONS HOLDING LIMITED 1ST APPELLANT

FG NJUGUNA T/A FEMFA AUCTIONEERS 2ND APPELLANT

AND

ANDREW BIKETI WABUYELE RESPONDENT

JUDGMENT

Introduction

1. The instant Appeal arises out of a Ruling and Order of the Business Premises and Rent Tribunal (herein referred to as the Tribunal) delivered on 4/03/2022. The main point of determination in the Ruling was that the Appellants challenged the jurisdiction of the Tribunal by way of a preliminary objection following a Reference filed by the Respondent. The Tribunal dismissed the objection and found that it had jurisdiction to hear and determine the Reference.
2. Aggrieved with the decision, the Appellants who were the Respondents in the Reference filed a Memorandum of Appeal on 31/03/2022 in the instant appeal. In precis, the Appellant avowed that the Tribunal had no jurisdiction to hear the Reference because the landlord and tenant relationship between the Appellant and the Respondent ended prior to the filing of the Reference. The Appellants contended that the orders issued by BPRM on 4/03/2022 were a nullity as the Tribunal did not have the requisite jurisdiction to issue the orders it did. Furthermore, the Appellants contended that the Tribunal erred by failing to find that it had no jurisdiction to entertain the Reference. The Appellants prayed that the Ruling of the Tribunal be set aside and Reference be dismissed with costs to the Appellants, and the costs of the appeal be borne by the Respondents.



The Submissions

3. The parties disposed of the Appeal by way of written submissions as this Court directed. In their submissions filed on 15/03/2023 the Appellants gave an outline of how the Reference was instituted by the Respondent herein. The Appellants asserted that the Respondent had, through the Reference, sought for injunctive orders to prevent the Appellants from disposing off its goods which had been distrained and carted away as a result of non-payment of rent. The Tribunal granted the said injunctive orders. Its order prompted the Appellants to file a Preliminary Objection challenging the jurisdiction of the Tribunal to hear and determine the Reference. When the Court considered the objection, it dismissed it thereby necessitating the filing of the instant appeal. The Appellants set down before this Court three issues for determination. They were whether the Tribunal had jurisdiction to hear and determine the tenant's Application and Reference, whether the orders given by the Tribunal on 4/3/2023 were a nullity and whether the Tribunal erred in law in failing to find it had no jurisdiction to entertain the Reference.
4. On the first issue, learned counsel for the Appellant submitted that the jurisdiction of the Tribunal was clearly provided for under Section 12 of the Business Premises and Rent Tribunal Act. Under the provision the Tribunal has jurisdiction to entertain a Reference only when a tenancy relationship still subsists. The Appellant asserted that, however, even before the Respondent filed the Reference, he had already moved out of and or abandoned the premises, thereby constructively terminating the tenancy agreement. He argued that in absence of such a tenancy agreement the Tribunal was divested of jurisdiction to hear and determine the Application and Reference of the Respondent. To buttress the said issue lack jurisdiction learned Counsel placed reliance on the cases of *Republic v Business Premises Rent Tribunal & Another & Ex parte Davies Motor Corporation Limited* (2013) eKLR and *Michael Gachie Mwaragu v Peter Gichuru Maina & 2 Others* (2016) eKLR.
5. On the second issue the Appellant emphasised that by virtue of the Tribunal lacking jurisdiction, it similarly did not have the locus to issue any order forthwith. Accordingly, the Reference was a nullity ab initio, including the orders issued subsequent to the filing. The Appellant relied on the case of *Phoenix of E.A. Assurance Company Limited v M. Thiga T/A Newspaper Service* (2019) eKLR. On the third issue the Appellant argued that on account of the Tribunal lacking jurisdiction, its determination was an illegality since the Tribunal misdirected itself on matters of law. The Appellant prayed that the appeal be allowed and the Reference be dismissed with costs to the Appellants.
6. The Respondent filed submissions on 16/05/2023. He asserted that what was pending determination before this Court was the issue of legality of the Tribunal's decision rendered on 4/03/2022. The Respondent asserted that indeed the Appellant re-entered the premises. However, he stated that the re-entry was pursuant to wrong provisions of the law and without requisite notice and the same ought to be determined in the present appeal. The Respondent contends that on account of the relationship of the parties herein being a controlled tenancy, the provisions of Section 4 of Cap 301 ought to have been complied with in terms of a sixty-day notice being issued to the Respondent before termination of the tenancy. The Respondent asserted that it was irrelevant that the tenant being the Respondent was not in occupation of the premises.
7. The Respondent argued further that the Appellants' purported repossession of the property belonging to the Respondent was illegal on the failure to conform with the provisions of Chapter 301 of the Laws of Kenya. To buttress this point, the Respondent placed reliance on the cases of *Narshidas & Company Limited v Nyali Air Conditioning Services Limited* (1996) eKLR and *Dolat Karim Waljee v S Rose* (1976) eKLR.



8. The Respondent urged that it was improper for the Appellants to evict the Respondent on the basis of ex-parte orders obtained on 28/9/2021 in Kitale Miscellaneous Application No. 40 of 2021 since the Respondent was not afforded an opportunity to defend himself in the suit and he was never served with the Application for distress for rent. The failure breached both substantive and procedural law. To this end, the Respondent asserted that the Chair of the Tribunal correctly faulted the procedure of termination of the Respondent's tenancy since it was done only as a ploy to avoid compliance with the mandatory provisions of Chapter 301 Laws of Kenya. Furthermore, the Respondent contended that the Tribunal's findings were valid as controlled tenancy could not be terminated pursuant to an order obtained in pursuance of the *Distress for Rent Act*, and that it ought to have complied with the provisions of Section 4 of the *Landlord and Tenants (Shops, hotels and Catering) Act*.
9. The Respondent asserted that the argument that Tribunal lacked jurisdiction on account of the fact that tenant had already moved out pursuant to the distress for rent were not true because the Respondent did not move out voluntarily. Thus, the orders granted to evict the Respondent were issued illegally thereby circumventing the provisions of Chapter 301.

Analysis and Disposition

10. This Court has considered the Memorandum of Appeal, the relevant substantive and procedural law, and the rival submissions filed by the parties in this matter. I have carefully, cautiously and deeply reflected on the issue. It is not in dispute that the Appeal emanates from the Orders of the Tribunal issued on 4/03/2022. They relate to whether or not the Tribunal had the jurisdiction to entertain the Reference owing to the fact that the 1st Appellant re-entered the premises. In the matter at hand, the pivotal considerations revolve around three key determinations. Firstly, the primary issue is whether the Appellant re-entered the premises in question, and if it did, whether it effectively terminated the existing landlord-tenant relationship. Second, whether the Respondent who claimed to be the tenant was indeed dispossessed of the premises in question. Lastly, in light of the first and second findings, whether the Tribunal possessed the requisite jurisdiction to entertain and adjudicate upon the Reference filed and the subsequent issuance of the orders.
11. In the instant case, the Appellant stated that the decision made by the Tribunal should be set aside as it was made without jurisdiction. The Respondent on the other hand argued that the Tribunal was clothed with the jurisdiction to make the decision and issue the said orders. The preamble of the *Landlord and Tenant (Shops, Hotel and Catering Establishments) Act* which provides that is;

“ An Act of Parliament to make provision with respect to certain premises for the protection of tenants of such premises from eviction or from exploitation and for matters connected therewith and incidental thereto.”
12. Additionally, under Section 12 of the Act, the Tribunal has power, inter alia, to determine whether or not any tenancy is a controlled tenancy; and 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. From the Section 12 (1) (e) of the Act, in regard to possession or otherwise of tenancy premises, the reliefs the Tribunal can give are recovery of possession but this Court is of the opinion that the relief is only available to the landlord and not a tenant who has been evicted or removed from the tenancy premises. This is because the phrase “recovery of possession” is used conjunctively with the other phrase “payment of arrears of rent and mesne profits” which phrase imports a right which is only due to a landlord in tenancy agreements. Again, the provision reads that such order of the Tribunal can be made against any person irrespective of whether or not he is a tenant.



The provision is to the effect that the Tribunal can “...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” (emphasis mine). My reading of the Act finds that under Section 12, and indeed any other provision, the Tribunal does not have any power to grant an injunction. Thus, the prayer that the Respondent sought at the interim stage was granted was outside of the jurisdiction of the Tribunal hence unlawful.

13. It is of utmost significance to underscore that the presence of a bona fide landlord-tenant relationship serves as a fundamental prerequisite for the Tribunal to exercise its jurisdiction and authority over any matters filed before it. Consequently, in the instant case, for the court to determine whether the Tribunal was seized with power to determine the Reference and the Orders it granted, it is important to consider the reliefs that the Respondent sought before the Tribunal. This Court shall do so shortly, after underscoring meaning and import of jurisdiction.
14. On the issue of jurisdiction, it is noteworthy that neither a Court nor a Tribunal can arrogate itself jurisdiction exceeding that which is conferred upon it by law or legislation. The jurisdiction of a Court or Tribunal is not a mere technicality but that which goes to the root or heart of the matter. In the case of *Samuel Kamau Macharia & Another -v- Kenya Commercial Bank Ltd & 2 Others* (2012) eKLR it was held that: -

“A court’s jurisdiction flows from either the constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by the law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings.”

15. The jurisdiction of the Tribunal was aptly discussed in the case of *Republic v Business Premises Rent Tribunal & Another Ex- Parte Albert Kigera Karume* [2015] eKLR cited with approval the case of *Re Hebtulla Properties Ltd.* [1979] KLR 96; [1976-80] 1 KLR 1195 where the Court dealt with the provisions of Section 12 of Chapter 301 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”.

16. In the instant case, and from the pleadings of both parties by way of Reference before the Tribunal, it was not disputed that before the alleged termination, there existed an oral tenancy agreement between the parties herein. Thus, whereas the Respondent sought one of the reliefs as a declaration that the relation between him and the Appellant herein was a controlled tenancy, it was not an issue before the Tribunal at the time since, as discussed below, the relationship ceased to exist when the Respondent herein was evicted.
17. Turning to the issue of existence of a tenancy at the time of making the Reference, the question is whether upon eviction of the Respondent, a tenancy relationship still existed between him and the Appellant herein. It was also not disputed that the Appellant re-entered and repossessed the suit premises from the Respondent and distressed the goods belonging to the Respondent. That is why among the grounds the Respondent moved the Tribunal were, “iv. Illegal re-entry and repossession of the demised premises on 6th Floor, Amigo Plaza. v. Illegal eviction from the demised premises ...” As a result of that he prayed for “an order of reinstatement into and repossession of the premises,” among others. The Appellant justified its action of eviction of the Respondent by maintaining that he had abandoned the premises, was in rental arrears and it was only after obtaining break-in orders that the Appellants gained access to the suit premises.
18. It is my considered view that the central question pertains to whether the Tribunal acted within its jurisdiction. A keen evaluation of the pleadings and evidence before the Tribunal led to the Court to find that through the auctioneers the Appellants effectively evicted the Respondent from the premises located on the 6th floor of Amigo Plaza, re-entered and repossessed them. This significant development occurred prior to the issuance of the orders the Tribunal gave which gave rise into the instant appeal. Notably, the Respondent explicitly stated, during the course of filing and prosecuting the Reference, the Appellant had already re-entered and repossessed the aforementioned premises. This means that the Appellants essentially terminated the tenancy before the orders hence there was no longer a tenancy relationship that could be preserved by the Tribunal, as defined in Section 2 of the Act.
19. Consequently, the Tribunal acted without jurisdiction in this case. The Respondent argued that the Appellants took advantage of the orders of the Court in Kitale Miscellaneous Application No. 40 of 2021 to effect the eviction and repossession of the then demised premises. He argued that it was illegal for them to do so hence the Tribunal had jurisdiction to handle the Reference. This Court is of the view that since the tenancy had been terminated, if he was of the opinion that the landlords had breached the tenancy by evicting him and re-entering the premises, the appropriate legal avenue for addressing his grievances was the Court for appropriate redress. In view of the foregoing, this Court finds that there was no landlord-tenant relationship when the Tribunal issued the Ruling and subsequent orders of 4/03/2022. Consequently, there is nothing that clothed the tribunal with jurisdiction, and its actions were ultra vires.
20. The upshot of this finding is that the Appellants appeal succeeds. It is allowed as follows:
 - a. The Ruling of the Business Premises Rent Tribunal Nairobi Case No. E699 of 2021 Andrew Biketi Wabuyele v G.H Tanna & Sons Holding Limited & F.C Njuguna T/A Femfa Auctioneers together with the Tribunal Orders of 4/3/2022 made by the Chairman, Business Premises Rent Tribunal, Nairobi be and is hereby set aside.



- b. The Respondent's Reference in the Business Premises Rent Tribunal Nairobi BPRT Case No. E699 of 2021 Andrew Biketi Wabuye v G.H Tanna & Sons Holding Limited & F.C Njuguna T/A Femfa Auctioneers is dismissed.
- c. The cost of this Appeal shall be borne by Respondent.

21. Orders accordingly.

**JUDGMENT DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS
17TH DAY OF OCTOBER, 2023.**

HON. DR. IURFRED NYAGAKA

JUDGE, ELC KITALE.

