



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAJIADO**

**CIVIL MISC. APPLICATION NO. 32 OF 2018**

**NANCY WANYONYI.....APPLICANT**

**-VERSUS-**

**LEMAYAN LANTEI.....RESPONDENT**

**RULING**

The applicant filed a notice of motion pursuant to sections 1A, 1B, 3, 3A of the Civil Procedure Act, order 51 rule of the Civil Procedure Rules, section 5 of the Judicial Act, Sections 3, 4, 5 of the Contempt of Court Act No. 46 of 2016, Article 159 of the Constitution and all other enabling processes of the law seeking the following orders:

- (1) THAT pending the hearing and determination of this application, the honourable court does and hereby issues notice to show cause on why an order directing the respondent to Deposit with court a total sum of Ksh. 122,500/= being the decretal amount as ordered by the rent tribunal and in default of which the Respondent should not be committed to Civil jail for contempt of court orders.*
- (2) THAT pending the inter partes hearing and final determination of the application, the honourable court does and hereby grants an order directing the Respondent to pay the costs of this suit.*
- (3) THAT the honourable court be pleased to give any other directions and/or relief as it may deem just and fit to grant in the circumstances.*

The facts of the application are straight forward and lifted from the supporting affidavit. The applicant and the respondent entered into a tenancy agreement in respect to Bensawa Estate Shop Number 4 – Kitengela on 2/1/2013.

On 26/7/2013 the respondent served the applicant with a notice to vacate the premises. Being aggrieved by the notice and eviction the applicant filed a reference with the Business Premises Rent Tribunal seeking a refund for the deposit withheld by the respondent. In his judgement the chairman of the BPRT granted the applicant an order for a refund of Ksh. 115, 500 being rent deposit and costs assessed at Ksh. 7,000. It is the enforcement of orders that the respondent has disobeyed to warrant an application for a writ to comply or sanctions for non-compliance.

In reply to the application the respondent filed a notice of preliminary objection on grounds that this court has no jurisdiction to determine the said application.

**Analysis**

It is settled law that jurisdiction of a court can be raised at any stage of the proceedings. It is also correct to state that the court on its own motion can determine the issue of jurisdiction by so taking cognizance of the matter down tools not to entertain the claim.

After hearing the arguments by both counsels the central issue to determine this application is whether this court has the jurisdiction.

The broad statement of the doctrine of lack on jurisdiction can be traced way back to Freeman in his Legal Text on Judgements 5<sup>th</sup> Edition 1925 where he observed as follows:

***“if a court has no jurisdiction of the subject of an action, a judgement rendered therein does not bind the parties, nor can it thereafter be made the foundation of any right. It is a mere nullity without life or vigour. The uniformity appearing upon its face, its validity can be assailed on appeal or by motion to set it aside in the court which rendered it, or by objection to it with an effort is made to use it as evidence in any other proceeding to establish a right.”***

The respondent through the preliminary objection maintains that this court does not have subject matter jurisdiction to consider the motion and grant orders.

In expounding the law, the **Supreme Court in the case of Samwel Kamau Macharia & another v Kenya Commercial Bank & 2 others Misc. Application No. 2 of 2011, 2012 eKLR**. Considered the issue and held as follows:

*“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 to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondent 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...where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.”*

Further, Parliament enacted an Act referenced as Environment and Land Court No. 19 of 2011. The Act under section 13(2) lays down the jurisdiction of the court to hear and determine disputes arising from:

- “(a) Relating to Environment Planning and Protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural of land;*
- (b) Relating to compulsory acquisition of land;*
- (c) Relating to and administration and management;*
- (d) Relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and*
- (e) Any other dispute relating to environment and land.”*

The landlord and tenant (shops, Hotels and Catering Establishments Act Cap 301) establishes the Business Premises Rent Tribunal under Section 12 to determine the following dispute involve:

- (a) To determine whether or not any tenancy is a controlled tenancy;*
- (b) To determine or vary the rent to be payable in respect of any controlled tenancy, having regard to all the circumstances thereof;*
- (c) To apportion the payment of rent payable under a controlled tenancy among tenants sharing the occupation of the premises comprised in the controlled tenancy;*
- (d) Where the rent chargeable in respect of any controlled tenancy includes a payment by way of service charge, to fix the amount of such service charge;*
- (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;*
- (f) For the purpose of enabling additional buildings to be erected, to make orders permitting landlords to excise vacant land out of premises of which, but for the provisions of this Act, the landlord could have recovered possession;*
- (g) .....*
- (h) .....*
- (i) .....*
- (j) .....*
- (k) .....*

The respondent’s position is that the appeals arising from the decisions of the Chairman of the Tribunal are appealable to the ELC under section 15 of the Act.

From the above extracts it can be reaffirmed that jurisdiction of the subject matter or cause of action is a matter of Law and cannot be conferred or consented by the parties or acquiesced by the court itself.

I have considered the submissions on the preliminary objection by the Respondent. It is trite that the dispute and order emanating from the Business Premises Rent Tribunal to a large extent is specifically to be determined by the ELC and not High court. I consider it perfectly appropriate to down tools for the very reasons that the subject matter jurisdiction of this court is ousted by the statute.

In the premises I find merit in the preliminary objection and do decline to proceed further with the application on the merits.

**Dated, Signed and Delivered in open court at Kajiado this 26<sup>th</sup> of November 2018.**

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**R. NYAKUNDI**

**JUDGE**

**Representation**

Mr. Muoka for the Applicant – Present

Mr. Maina for the Respondent - Present