



**Good Choice Garage & another v Kindaruma Mall Limited & another (Environment & Land Case E033 of 2023) [2023] KEELC 22502 (KLR) (19 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22502 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E033 OF 2023  
EK WABWOTO, J  
DECEMBER 19, 2023**

**BETWEEN**

**GOOD CHOICE GARAGE ..... 1<sup>ST</sup> APPELLANT**

**SHAO GUIXIANG ..... 2<sup>ND</sup> APPELLANT**

**AND**

**KINDARUMA MALL LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**CHEN DE ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal against the orders issued on 13th October 2023 and the ruling delivered on 24th October 2023 by Hon. Gakubi Chege (panel chairperson) and Hon. Joyce Osodo (Member) - Kindaruma Mall Limited & Chen Choice Limited & Shao Guixiang)*

**JUDGMENT**

1. This is an appeal arising from the ruling and orders of the Business Premises and Rent Tribunal dated 13<sup>th</sup> October, 2023 and Ruling delivered on 24<sup>th</sup> October, 2023 in respect to Nairobi BPRT Case No. 1017 of 2023. The Appellants had moved the Tribunal vide a Preliminary Objection dated 18<sup>th</sup> October, 2023 which Preliminary Objection was premised on the following grounds:
  - (a) That there is no landlord tenant relationship between the Applicant and the Respondents.
  - (b) That this matter is subjudice MCELC No. E371 of 2023 Good Choice Garace Limited Vs. Kindaruma Mall Limited & Chen De with pending orders.
  - (c) That the subject matter in MCELC No. E371 of 2023 is Land Reference Number 1/575 Nairobi.
  - (d) Other grounds to be adduced at the hearing.



2. The Tribunal upon considering the Preliminary Objection did proceed to dismiss the same with costs and allowed the application dated 13th October, 2023 to be determined on merits. The Appellants being aggrieved by the said decision together with the orders that were issued on 13<sup>th</sup> October 2023 lodged the present appeal and filed an Amended Memorandum of Appeal dated 3<sup>rd</sup> November 2023. The Appellants raised the following grounds of Appeal:

- (a) The Honourable Vice Chair of the Business Premises Rent Tribunal (hereinafter "The Honourable Vice Chair") erred in fact by failing to consider that there were similar orders in Nairobi CMELC NO. E371 OF 2023; Good Choice Garage Limited Vs. Kindaruma Mall Limited & Chen De dated 7th September 2023 against the Respondent.
- (b) The Honorable Vice Chair thus erred in law by issuing orders in total contradiction, and with the effect of appealing, reviewing and/or setting aside the orders dated 7th September 2023 by a court of equal status.
- (c) The Honourable Vice Chair erred in fact by failing to consider the existence of NAIRO CMELC NO. E371 OF 2023; GOOD CHOICE GARAGE LIMITED VS. KINDARUMA MALL LIMITED & CHEN DE between the same parties, touching on the same subject matter, and raising the same issues.
- (d) As such, the Honourable Vice Chair erred in law by failing to consider that at the time of filing Nairobi BPRT/1017/2023, it was sub judice Nairobi CMELC NO, E371 OF 2023, and therefore a nonstarter

#### Particulars of sub judice

PARTICULARS	CMELC NO. E371 OF 2023	BPRT/E1017/2023
Parties to the Suit	Good Choice Garage Limited – Kindaruma Mall Limited & Chen De	Kindaruma Mall Limited & Che De -vs- Good Choice Garage Limited & Shao Guixiang
Date when suits were instituted	6 <sup>th</sup> September, 2023	13 <sup>th</sup> October, 2023
Subject Matter of the suits	Property known as Land Reference Number 1/575	Property known as Land Reference Number 1/575

- e. The Honourable Vice Chair erred in law by issuing a mandatory Injunction at a preliminary/ interlocutory stage and on an ex parte basis to wit the Orders issued on 13<sup>th</sup> October, 2023 were to restore status quo as of 7<sup>th</sup> September, 2023.
- f. The Honourable Vice Chair erred in fact by failing to consider the fundamental aspect that there exists no landlord tenancy relationship between the parties.
- g. From a clear implication of pleadings and evidence it is absolutely clear that the parties herein are not at all Landlord and Tenant,



- h. By ignoring the clear fact of complete nonexistence of a tenancy, the Honourable Vice Chair erred in law in his determination that the Tribunal has jurisdiction to determine whether a tenancy is controlled as there is no tenancy up for any such determination, and the very nonexistence of a tenancy between the parties completely ousts the jurisdiction of the Business Premises Rent Tribunal to hear and determine this matter.
    - i. The decisions of the Honourable Vice Chair are premised on wrong principles of law and the orders dated 13th October 2023 are null and void ab initio,
    - j. The Honourable Vice Chair having failed to take into account the aforesaid considerations this honorable court has jurisdiction to interfere with the orders dated 13th October 2023 and ruling dated 24<sup>th</sup> October 2021.
3. Ultimately, the Appellants sought the following orders from this Court:
  - a) That the Appeal herein be allowed and the orders dated 13<sup>th</sup> October, 2023 by the Tribunal be set aside.
  - b) Costs in favour of the Appellant.
4. The Appeal was contested and pursuant to the directions issued by this Court, it was directed that the same be canvassed through written submissions. The Appellants filed written submissions dated 25<sup>th</sup> November, 2023 while the Respondents filed written submissions dated 13<sup>th</sup> December 2023.
5. The Appellants submitted that the crux of the appeal is that the orders dated 13th October 2023 are illegal in that at the time of filing Nairobi BPRT CASE NO. 1017 OF 2023 and issuance of the said orders, there already existed another suit MCELC NO. E371 OF 2023 which was pending between the same parties, raised the exact same issues, and touched on the same subject matter. Besides that, it also had orders dated 7th September 2023 which were still in force.
6. It was submitted further that the orders dated 13th October 2023 were in direct contradiction to the orders dated 7th September 2023 thus an illegality, null and void ab initio, and the suit Nairobi BPRT case no. 1017 OF 2023 was sub judice and an abuse of court process.
7. It was further submitted that on 7th September 2023 the Appellant filed MCELC NO. E371 OF 2023 Good Choice Garage Limited Vs. Kindaruma Mall Limited & Chen De. The subject matter of the suit was property L.R. No. 1/575, and the issues were that:
  - (i) The Appellant is the registered lessee of L.R. No. 1/575. This is not in dispute;
  - (ii) The Appellant commenced developing the property but only did 30% of the desired development, and contracted the Respondent to finish the works; also not disputed;
  - (iii) Upon completion, the Respondent without the authority of the Appellant and consent of the head lessor issued licenses to persons to conduct business open the property and has been collecting rent from them. This is also not disputed.
  - (iv) The appellant thus filed MCELC 371 of 2023 seeking damages for trespass by the Respondent and mesne profits of the rent already collected from the licensees.



8. It was argued that upon filing MCELLC 371 OF 2023 the Appellants obtained the following orders against the Respondent:

“ pending inter partes hearing and determination of the application an order of temporary injunction be and is hereby issued against the Respondent restraining the Respondents or any other person acting on their behest from leasing and/or further licensing to third parties, collecting rent, or in any other manner dealing with the property LR No. 1373 (the suit premises)”

9. On 13<sup>th</sup> October 2023 while MCELLC 371 OF 2023 was still pending, the Respondents filed another suit at the BPRT against the Appellants to wit Nairobi BPRT case no 1017 Of 2013: Kindaruma Mall Limited & Chen De Vs. Good Choice Garage Limited & Shao Guixiang.

10. It was contended that besides the parties being the same, the subject matter of the suit was L.R. No. 1/575 and the claim was that:

- a) The 1<sup>st</sup> Appellant is the lessor of L.R. No. 1/575 Nairobi.
- b) The 2<sup>nd</sup> Appellant approached the 2<sup>nd</sup> Respondent to join him in the construction of a shopping mall on the suit property.
- c) The 2<sup>nd</sup> Appellant had already constructed 30% of the plan and required the 2<sup>nd</sup> Respondent's intervention to complete the mall.
- d) On or about 9<sup>th</sup> May 2022 a meeting was convened and it was agreed that the 2<sup>nd</sup> Respondent would invest Kshs 40,000,000 to complete the mall.
- e) The 2<sup>nd</sup> Respondent also claimed that the parties agreed that they would incorporate the 1<sup>st</sup> Respondent as a joint venture and transfer the lease of the 1<sup>st</sup> Appellant to the said joint venture.
- f) With the Appellant's approval the 1<sup>st</sup> Respondent sourced tenants and issued them with licenses.
- g) The Respondent's claim therefore was that it was apprehensive that it would lose the suit promises and needed the intervention of the BPRT.

11. It was further contended that upon filing the said BPRT case no. 1017 OF 2023 the Respondents filed an application dated 13<sup>th</sup> October 2023 under certificate of urgency and acquired the following orders:

- a) "The status quo preceding the order dated 7<sup>th</sup> September 2023 to be restored/maintained pending hearing of the application inter partes"
- b) A temporary injunction be and is hereby issued restraining and barring the Respondents, their agents and or permitted assigns from interfering with the Applicant and their tenant's enjoyment and quiet possession of the suit premises pending hearing and determination of the application inter-partes on 6th November 2023"
- c) The Nairobi Regional Police Commander to enforce and ensure compliance with the above orders pending hearing and determination of the application inter-partes.

12. The Appellants argued that from the above two suits i.e. MCELLC 371/2023 & BPRT 1017/2023 it was evident that; the suits are between the exact same parties, they both touch on the same subject matter being L.R. No. 1/575, they both bear the same facts, BPRT 1017/2023 was filed on 13th October



2023 after the filing of MCELC 371/2023 to wit on 7th September 2023, At the time of filing BPRT 1017/2023, MCELC 371/2023 was still pending and the orders in it dated 7th September 2023 still in force and that the orders issued in BPRT 1017/2023 were in direct contradiction to the already pre-existing orders in MCELC 371/2023, a court of equal status and as a matter of fact, the orders were to effect the undoing of the orders dated 7th September 2023 as they ordered the restoration of status quo preceding the orders dated 7th September 2023.

13. It was further submitted that MCELC 371 of 2023 and BPRT 1017 of 2023 are identical and similar and relying on the case of Ephraim Miano Thenaini -vs- Nancy Wanjiru Wangai & 2 others [2022] eKLR, the Court was urged to allow the appeal by dismissing BPRT 1017 of 2023 for being an abuse of the Court process.
14. It was also submitted that there was no evidence of any Land Lord Tenant relationship between the parties and that the Tribunal lacked jurisdiction to entertain the matter.
15. It was further submitted that the 1<sup>st</sup> Respondent was not in control nor in possession or occupation of the suit premises. The Court was urged to allow the appeal.
16. The Respondents submitted on the following three issues; Whether the Tribunal had jurisdiction to hear and determine the matter, whether the Tribunal erred in issuing the orders dated 13<sup>th</sup> October 2023 and whether the appeal should be allowed.
17. On jurisdiction, it was submitted that there was no written agreement between the 1<sup>st</sup> Appellant and the 1<sup>st</sup> Respondent and that the 1<sup>st</sup> Appellant delivered possession to the 1<sup>st</sup> Respondent who took over payment of rent, issuing licenses to the tenants and payment of rent to the head lessor. Counsel submitted that the Tribunal had jurisdiction and reliance was made to Section 2 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* Cap 301 and the Court of Appeal case of WJ Blakeman Ltd vs Associated Hotel Management Services Ltd [1985] eKLR.
18. It was also submitted that the learned magistrate in respect to MCELC E371 of 2023 was right and just in exercising his judicial authority as he did and that the court should uphold the orders issued therein.
19. The Respondents also submitted that the Appellants are guilty of non-disclosure based on the fact that they did not disclose the ruling dated 18<sup>th</sup> October 2023. The court was urged to dismiss the appeal and reliance was made to the cases of Bahadurali Ebrahim Shamji vs Al Noor Jamal & 2 Others Civil Appeal No. 210 of 1997, Halima Haji Sarah vs Mutiple Haurlies (E.A) Limited & Another [2022] and Kayla Soi Farmers Cooperative Society vs Paul Kirui & Another [2013] eKLR.
20. I have considered the grounds raised in the appeal. I have also considered the submissions filed by the parties. In determining the issues raised in the appeal, this Court is cognizant of its duty on a first appeal as set out in the Case of Selle & Another -vs- Associated Motor Boat Company Limited & others [1968] EA 123 cited with approval in China Zhongxing Construction Co. Ltd -vs- Ann Akuru Sophia [2020] eKLR. The following are the key issues for determination which can dispose the appeal:
  - i) Whether the appeal herein in merited.
  - ii) What are the appropriate reliefs to issue.
21. I will now proceed to analyze the two issues sequentially.
22. In the instant appeal, the Appellant argued that the Tribunal did not have jurisdiction for the reasons that the Tribunal erred in law by failing to consider that that at the time of filing Nairobi BPRT/ E1017/2023, it was sub judice Nairobi MCELC 371 of 2023 and therefore a nonstarter. It was also argued that the Tribunal erred in determining that the Tribunal had jurisdiction yet there was no



tenancy for such determination and the very non-existence of a tenancy between the parties completely ousts the jurisdiction of the Tribunal.

23. The Appellant submitted that from the above two suits i.e. MCELC 371/2023 & BPRT 1017/2023 it was clear that; the suits are between the exact same parties, they both touch on the same subject matter being L.R. No. 1/575, they both bear the same facts, BPRT 1017/2023 was filed on 13th October 2023 after the filing of MCELC371/2023 to wit on 7th September 2023, At the time of filing BPRT 1017/2023, MCELC 371/2023 was still pending and the orders in it dated 7th September 2023 still in force, the orders issued in BPRT 1017/2023 were in direct contradiction to the already pre-existing orders in MCELC 371/2023, a court of equal status and the orders were to effect the undoing of the orders dated 7th September 2023 as they ordered the restoration of status quo preceding the orders dated 7th September 2023.
24. It was also submitted that the 1<sup>st</sup> Respondent was neither in possession or control of the premises and further that there was no evidence that there existed any landlord and tenant relationship.
25. The said position was contested by the Respondents who argued that Appellants contention was frivolous and baseless since the exparte orders had been set aside.
26. The sub judice principle is captured in Section 6 of the *Civil Procedure Act*, which stipulates as follows: -

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title.”
27. In the instant case, the evidence on record clearly shows that BPRT 1017/2023 was filed on 13<sup>th</sup> October, 2023 after the filing of MCELC 371/2023 on 7<sup>th</sup> September, 2023. At the time of filing BPRT 1017/2023, MCELC 371/2023 was still pending and the orders in it dated 7<sup>th</sup> September, 2023 still in force. The Tribunal therefore had no business entertaining the matter.
28. The actions of the Respondents in instituting a separate case at the Tribunal after being aware of MECEL E371 of 2023 had been earlier filed and was still pending amounted to an abuse of the court process. The practice of filing new and separate cases despite the existence of a similar case relating to the same subject matter amounts to an abuse of the court process. Courts usually frown on this practice since it leads to unnecessary backlog of cases and a waste of the precious judicial time.
29. The court has also considered the Respondents argument and contention that the Ruling delivered by the Learned Magistrate on 18<sup>th</sup> October 2023 led to the striking out of the suit, however the court is of the view that the same does not alter the position that the orders issued by the Tribunal in respect to BPRT case no. 1017 OF 2023 on 13<sup>th</sup> October 2023 were issued when the said suit MCELC no. E371 OF 2023 was still pending.
30. Section 13 (5) of the *Environment and Land Court Act*, 2011 sets out the jurisdiction of this court which includes its supervisory mandate over the subordinate courts and local tribunals.
31. In view of the foregoing, it is the finding of this court that the Tribunal erred in issuing orders on 13<sup>th</sup> October 2023 by failing to consider the existence of Nairobi CMCELC NO. E371 OF 2023 which had already been instituted and was pending as at that time and for the foregoing reasons the Appeal herein is merited. Having found as such, I need not pronounce myself on the other grounds raised in respect to the Appeal.
32. Consequently, the appeal succeeds and the following orders are granted: -



- a) The orders dated 13<sup>th</sup> October, 2023 and Ruling dated 24<sup>th</sup> October, 2023 by the Business Premises Rent Tribunal are hereby set aside and substituted with an order striking out the application dated 13<sup>th</sup> October, 2023 before the Business Premises Rent Tribunal with no orders as to costs.
- b) Parties to bear respective costs of the appeal.

It is so ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19<sup>TH</sup> DAY OF DECEMBER, 2023.**

**E. K. WABWOTO**

**JUDGE**

**In the presence of:**

Mr. Gitau and Mr. Etemesi for the Appellants.

Mr. Munyororo for the Respondents.

Court Assistant; Caroline Nafuna.

