REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 110 OF 2013

VICKY MONGI..APPEALLANT

VERSUS

ESTHER NGUNA CHANDA

JOHNSTONE K. MULI t/a KITHEMU AUCTIONEERS................RESPONDENTS

J U D G M E N T

1. In this appeal, the appellant Vicky Mongi has challenged the judgment and decision of the trial court dated 25/7/2013 by which the said court dismissed the Appellant application seeking a temporary injunction with costs on the basis that the court lacked jurisdiction. In coming to that decision the court delivered itself as follows:-

> **"I wish to pick out one portion that has the effect of**
>
> **bringing the dispute to its context and thereby bring a closure to the dispute. The Defendant's counsel has drawn my intention to the provisions of the Constitution Article 162 and the Environment and Land Court Act No. 19 of 2011 at Section 13.**
>
> **From the working of Section 13(2) (a) of the Act, it is clear that disputes concerning 'rent' are to be resolved in the Environment and Land Court. That provision is straight forward and there is no ambiguity. Consequently, I do find that I lack jurisdiction to entertain the notice of motion dated 31st October, 2012.**
>
> **Accordingly, I do order the said application dismissed for want of jurisdiction. I award the costs of the application to the Defendants.**
>
> **R. ODENYO – SPM".**

2. That decision provoked the current appeal in which the Appellant has raised 4 grounds of Appeal. All the four grounds identify four distinct grounds upon which the appellant fault the trial court for what it considers as the fact of error. All in all the grounds all assert the point that the trial court abdicated duty and forsook jurisdiction and in so doing did not appreciate the law then applicable but mis-apprehended the submissions and the law.

3. The only question the court has to determine is whether or not the trial court was clothed with jurisdiction in the matter.

Submissions by the parties

4. Both sides filed well-argued written submissions and attended court to highlight the same. The appellant's submissions are dated 5th October 2016 and filed on the 6th October 2016 while the respondent did filed the submission dated 7th October 2016 on the same day.

5. In his submissions the appellant takes the view that the provisions of Article 165 and section 13 Environment and Land Act notwithstanding there were inaugural practice directions issued by the Chief Justice dated 9/2/2012 and amended on 20/9/2012 and again on 9/11/2012. To the appellant, the practice directions reserved upon the Magistrates' Court jurisdiction to entertain land related case falling within the pecuniary jurisdiction of the court.

6. Beyond whether or not the court was possessed of requisite jurisdiction the appellant also contended that the trial court had a duty to consider the merits of the case while noting that the question whether or not the rent was controlled or standard was a matter of law and that even if only the tribunal was the right forum, there is no jurisdiction in the tribunal to grant an injunction and that even distress could not be undertaken and leview without leave of the tribunal under section 16 of Cap 296.

7. For those reasons the Appellant took the position that the trial court ran into error when it struck out the suit for lack of jurisdiction and declined to determine the application for an injunction.

8. For the Respondent, the position was taken that the trial court was perfectly within its right to determine the matter the way it did because jurisdiction is everything and once the court found, as it did, that in lacked jurisdiction it had no otherwise but to down its tools. The respondent cited to court the now well established principles in the area as laid down by the court of appeal in ***OWNERS OF MOTOR VESSEL LILIAN 'S' VS TOTAL KENYA LTD [1989] KLR 1*** to the effect that jurisdiction is everything for a court of law.

9. Mrs. Umara Advocate further relied on the decision of in ***Chairman Rent Restriction Tribunal and Another*** *Exparte* ***Machugu & 3 Others [2013] eKLR*** for the proposition that the Jurisdiction of the Rent Restriction Tribunal is limited to cover only those premises whose standard rents or assessed rent is Kshs.2500 and below. The advocate equally cited to court the provisions of Article 162(2)(b) of the Constitution, Section 13 of the Environment and Land Court Act, the practice directions by the Chief Justice given pursuant to Gazette Notice No. 16268 and the decision in ***Kibwana Ali Karisa & Another vs Said Hamisi Mohamed & 3 Others [2015] eKLR*** all to stress the point that the trial court had no jurisdiction to entertain the matter further then strike it out.

Analysis and determination

10. The dispute before the lower court was whether or not the Respondent was entitled to increase the rent payable from Kshs.14,000 to Kshs.20,000/=.

11. In the plaint, it was unequivocally pleaded that the plaintiff was at all material times, since 2005, a tenant paying a monthly rent of Kshs.14,000/=. The Appellant contended that the intended increment to Kshs.20,000/= could not be effected without the sanction of the Rent Restriction Act under provisions of the Rent Restriction Tribunal because in his contention there had never been assessment of rent hence the rents were restricted. It was contended further that the ensuing distress was unlawful under Cap 296.

12. The Defendant did file a defence in which the rent payable before increment was admitted to have been Kshs.14,000.00 but the defendant denied that the increment was unlawful or that the tenancy was a restricted one and governed by the Rent Restriction Act. In addition it was pleaded that there had been rent arrears of Kshs.30000/= for which distress for rent was lawfully initiated.

13. In addition the defendant pleaded that there had been filed a previous suit, HCC No. 54 of 2011 between the same parties and concerning the same set of facts hence the suit was in contravention of section 6 Civil Procedure Act. The defendant then specifically denied the jurisdiction of the court.

14. My reading of the Record of Appeal does not reveal that the plaintiff ever filed any Reply to the statement of defence to traverse the pleadings by the defendant. Consequently when the matter came before the trial court, the jurisdiction of the court had been contested and brought into issue and it was perfectly in order that the trial court dealt with that hurdle before engaging in any other or further task. That is what it did. However, the question is whether or not court was right in its determination.

15. Depending on what this court finds on the correctness of the finding that the court lacked jurisdiction, the next question would be whether or not the suit flouted section 6 of the Civil Procedure Act and if it did not, then this court as a first appellate court would need to consider whether a case for a temporary injunction was merited.

Did the Court have the jurisdiction to hear and determine the suit?

16. My understanding of the provisions of Article 162(2) b is that it created the Environment and Land Court as a specialized court to handle, in the words of the constitution, Environment and the use and occupation of, and title to land.

17. The suit that was filed before the trial court was a dispute whether or not the Respondent, as the landlord to the Appellant, was entitled to increase rent from 14,000/= to 20,000/=. In my understanding, the Appellant was already in occupation of the premises as a tenant, he was not seeking to be given any right to use or occupy the premises neither was he seeking to challenge or be granted title to the same. Even the landlord was not seeking to evict or terminate the tenancy. Infact there was no dispute whether or not there existed a tenant/landlord relationship. The dispute was whether the premises, in the view of the Appellant having not been subjected to assessment for standard rent, were amenable to have the rent increased without recourse to the Rent Restriction Tribunal.

18. That to me was not the type of dispute that fell for determination of the Environment and Land Court. In truth, it was a clear contractual dispute questioning the right of the Respondent to increase rent. I do find based on the pleadings, the prayers sought by the plaintiff and the practice directions given by the Chief Justice, direction no. 7, contained in Gazette Notice No. 16268 of 9/11/2012 specifically directed the magistrates courts to continue hearing even cases preserved for the Environment and Land Court provided the same fell within the pecuniary jurisdiction of the lower magistrates court.

19. But in any event, the dispute was not on occupation but on the right of the Respondent to vary a term of an existing contract. That to me more none in the realm of the law of contract rather than the use, occupation of and title to land. It is note worthy, that the Respondent was not seeking to evict but rather to recover what it considered the accrued arrears of rent.

20. In the case of ***Kinyua Koech Ltd & 2 Others vs Nairobi Homes (Mombasa) Ltd & 11 Others [2015] eKLR*** the Court of Appeal had this to say of the jurisdiction of the Environment and Land Court:-

> **"The issue as posed by the appellant before the High Court was based on the admission that the suit premises is still in the name of the deceased and was therefore essentially a matter of who between the co-administrators and the beneficiaries may make decision on its management and whether the (majority) beneficiaries may make such decisions. <u>This has more to do with the law of contract and law of succession then with the title to the suit premises, or an enforceable interest in land as would bring it squarely within the jurisdiction of the Environment and Land Court".</u>**

21. As in the situation in the matter presenting itself before the court of appeal, this matter was more to do with the decision to increase rent and whether there was therefore accrued rent arrears rather than a claim to use, occupying the land or the title thereto. It was perfectly within the jurisdiction of the trial court, even in the absence of the practice directions, and therefore the trial court ran into error when it found that it lacked jurisdiction.

22. I am however not in agreement with the Appellant that the premises were subject to the provisions

and control of Cap 296. This is because the Appellant having took up the premises and agreed to pay the monthly rent of Kshs.14,000/= and having paid such rent for a period in excess of 7 years would not be in law be permitted to assert afresh that the rents had not been assessed to have been beyond the statutory limit of Kshs.2,500/= as to place it under the Rent Restriction Tribunal. I think the principle of waiver would stand on his way and dictate to it that he was estopped by conduct from asserting such right.

23. In ***Sitasteel Rolling Mills Ltd vs Jubilee Insurance Co. Ltd [2007] eKLR*** in court said:-

> **"A waiver may arise where a person has pursued such a course of conduct as to evidence an intention than to waive his right or where his conduct is inconsistent with any other intention then to waive it. It may be inferred from conduct or acts putting one off one's guard and leading one to believe that the other has waived his right".**

24. In this matter by paying the rent by paying the rent outside the Rent Restriction Tribunal's Jurisdiction, the Appellant can only be inferred to have led the Respondent to believe that he would not insist on the rent being assessed afresh.

25. This appeal therefore succeeds and is allowed with costs. It is ordered that the file be remitted to the trial court for it to be heard and determined on the merits.

Dated and delivered at **Mombasa** this **23rd** day of **June 2017**.

HON. P.J.O. OTIENO

JUDGE