REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NUMBER 47 OF 2010

MICHAEL GACHIE MWARANGU..APPELLANT

VERSUS

PETER GICHURU MAINA..1ST RESPONDENT

ELIUD WAMAE..2ND RESPONDENT

BENJAMIN WANJOHI MACHARIA................................3RD RESPONDENT

(Appeal from the Judgment of the Honourable T. MATHEKA in Nyahururu Principal Magistrate's Court Civil Case No. 27 of 2004 delivered on 11th February 2010)Senior Resident, Nakuru delivered on 7th February 2010)

JUDGMENT

1. The appeal before the court was bought by the appellant who was the 1st Defendant in the primary suit against the three respondents. By a judgment delivered on the 11th February 2010, the trial court entered judgment against the first defendant, now the appellant for the sum of Kshs.226,810/= plus costs and interest. Being aggrieved by the said judgment, this appeal was filed. Five grounds of appeal were preferred as follows:

> **(1) That the learned trial Magistrate erred and misdirected herself in Law by holding that the court had jurisdiction to determine the issues relating to a controlled tenancy when all along the respondent's position was that this was controlled tenancy.**
>
> **(2) That the trial Magistrate erred and misdirected herself in law and fact by making contradictory findings that there was no tenancy between the appellant and the Respondents and at the same time that there existed a tenancy with the other defendants.**
>
> **(3) That the trial Magistrate erred and misdirected herself in awarding the claim for special damages which had not been strictly pleaded and proved as against the appellant.**
>
> **(4) The learned Magistrate erred and misdirected herself in failing to consider the appellant's defence that the premises were not available for leasing to the respondents and thus no valid tenancy would subsist capable of creating legal rights.**
>
> **(5) The trial Magistrate erred and misdirected herself in holding that there were no valid court orders in favour of the appellant relating to the suit premises when the same had not been challenged.**

Upon the said grounds, this court has been urged to allow the appeal and dismiss the suit in the lower court with costs.

2. A brief background of the dispute will suffice. At all material times and particularly between august 2003 and 29th January 2004, the Respondents as stated in their Further Amended Plaint filed on the 3rd March 2010, were tenants of the appellant and two others, the second and third defendants as the Administrators of the Estate of David Mwarangu Magua, deceased, who owned the premises on **L.R.No 6585/359** within Nakuru Municipality pursuant to a tenancy agreement entered between them and Mamuka Properties Limited as the landlords' agents. On 29th January 2004, the appellant evicted the respondents from the business premises where they carried on a bar, restaurant and lodging business, removed their working tools, furniture and other items and took possession and occupation of the premises. The respondents averred that no notice of termination of the tenancy was ever given to them despite having paid rent deposit and two months rent. Being faced with the problem, they filed the suit in the Chief Magistrates court at Nakuru seeking general damages for breach of contract, and special damages in the sum of Kshs.127,810/= being two months rent refund at Kshs.50,000/= Rent deposit refund at Kshs.50,000/= and Kshs.27,810/= being cost of damaged fixtures and fittings.

3. The appellant in this defence denied all the allegations, and admitted having evicted the respondents from the premises and stated that at the time they entered into the tenancy agreement, the premises were not available for leasing in view of certain court orders. The jurisdiction of the trial court was also denied.

4. The trial court is the first appellate court. It is mandated to re-evaluate the evidence tendered and draw its own findings and conclusions. It is not bound to follow the trial courts findings of fact if it appears either the court failed to take into account some material facts or left out some, or based its findings on the evidence. See **Selle -vs- Associated Motor Boats Co. Ltd & Others (1968) EA 123.**

5. The Respondents' case is as stated above. The tenancy agreement subject of the proceedings, and termed as a property management contract was executed on the 7th August 2003 by the representatives of the landlords and the tenants. It was produced as PExh 9. It was the tenants (Respondents) testimony that at the time of eviction they had paid two months rent in advance through the bank joint account of the defendants. The Payment receipt was produced as PExh 6. It was their testimony that no notice of termination of tenancy were served upon them and no refunds of the deposit and rent paid in advance for two months were refunded upon eviction.

6. The appellant's case is straight forward. He testified that the three defendants (in the lower court) are brothers, and held a Confirmed Grant of Letters of Administration for the estate of their late father, the owner of the suit premises. He stated that his two brothers evicted him from the premises, that he filed a case in the Business Premises Rent Tribunal(BPRT) and the said tribunal ordered that none of his brothers can evict any of them as they were all joint heirs, and later by another order on appeal to the High Court returned him to the business premises, sometimes in January 2004. He denied ever renting the premises to the Respondents, and denied signing the tenancy agreement and averred that it was not available for leasing as he was in occupation. He also denied having received any rent from the Respondents, nor authorised Mamuka Properties, the agents, to manage the property on his behalf. He however admitted that the Respondents were in occupation of part of the building except the space he was occupying. He also admitted having evicted the Respondents with help of the police without an eviction order and further that the business known as “Blue Star”-(Bar, Restaurant and Lodgings) was ongoing when he evicted the Respondents and took over the premises and continued to use it. He further admitted that the he did not serve the respondents with any termination of tenancy notices, apparently, because he did not know them.

7. Upon the backdrop of the above evidence, the trial court made its findings that the appellant did not follow due process in the eviction of the respondents and took the law into his hands, that the eviction was unlawful and proceeded to assess damages, for loss of business at Kshs.1,100/= for 90 days at Kshs.99,000/= and compensation for failure to give a three months notice of intention to terminate the tenancy, making a total of Kshs.226,810/=.

8. The first ground of appeal deals with jurisdiction. Though the appellant had denied the trial court's jurisdiction in its defence, he did not pursue the same at the commencement of the hearing of the suit at the trial court hence an assumption that he had submitted himself to the court's jurisdiction. A court cannot abrogate itself with jurisdiction save as given by either the constitution or by legislation. Any proceedings taken by a court without the necessary jurisdiction is a nullity.

In the **"Lillian S" Case Owners of Motor Vessels "Lilian S" - vs- Caltex Oil (K) Ltd (1989 KLR,** it is established that jurisdiction flows from the law, and no court can arrogate its jurisdiction save as donated by the constitution, legislation or statutes.

9. The appellant in support of this ground of appeal submitted that since the claim in the lower court was based upon a tenancy agreement and governed by the provisions of the **Landlord and Tenant (Shops Hotels and Catering) Establishments Act Chapter 301,** the appropriate court would have been the Business Premises Rent Tribunal. He submitted that the injunctive orders sought in the trial court by the respondents could not be granted by the business tribunal and suggested that it was only the High Court that could have given such relief and that the trial court had no jurisdiction in matters of controlled tenancy. He offered no explanation why issue of jurisdiction was not raised at the first instance in the trial court.

10. The Respondents agreed with the appellant that the tenancy was indeed subject to the provisions of Chapter 301 as long as it existed, and relying on several decisions, stated that once a tenant is unlawfully evicted he cannot go to the BPRT as the tribunal would have no jurisdiction to issue an injunction or a similar remedy. See **Muundia -vs- Lolchoki (1976) KLR and Narshidas & co LTD -vs- Nyali Air Conditioning And Refrigerations Services Ltd.**

11. The jurisdiction of the Business Premises Rent Tribunal is governed by the **Landlord and Tenant Shops Hotels and Catering Establishments Act Cap 301.** The preamble to the Act states that:

> ***"It is an Act of Parliament to make provisions with respect to certain premises for the protection of tenants of such premises form eviction or from exploitation and for matters connected therewith and incidental thereto."***

The tenancy must be controlled, may be reduced into writing and must not be for more than five years period. **Section 4 of the Act** states that no controlled tenancy shall be terminated or altered otherwise than in accordance of the provisions of the Act. Section 4(2) provided for a notice period as may be agreed by the parties or not less than two months. As such the tenancy between the parties in this matter was a controlled tenancy upto the 29th January 2004 when the respondents were evicted by the appellant.

Citing **Narshidas & Co. Ltd (Supra),** a tenant faced with an illegal threat of forcible eviction cannot go to the BPRT for an injunction order against the landlord. The tribunal has no jurisdiction. His remedy lies in the civil courts, either the Chief Magistrates Court or the High Court, for a remedy for breach of contract or trespass. Once a tenant is evicted, the BPRT ceases to have jurisdiction on subsequent actions as a Landlord-Tenant relationship ceases to exist. See also **Muudia -vs- Lolchoki (1976) KLR 284**.

The BPRT has no jurisdiction to grant injunctive orders or enforce its own orders -see **Ruling of Odunga, J, in Hccc No. 56 of 2004, John Onyango -vs. Salama Corner Ltd.** That being the case, it is this courts finding that the trial court had the necessary jurisdiction to hear and determine the case as the monetary value was within its mandate.

For those reasons, Ground Number 1 of the appeal is without merit.

12. The second issue to determine is whether special damages awarded to the Respondents were strictly pleaded and proved. I have highlighted that in the Further Amended Plaint filed on the 3rd March 2010 a claim for Kshs.127, 810/= was made, and particulars given. Evidence was adduced that Kshs.50,000/= was paid as Rent deposit, Kshs.50,000/= paid in advance as two months rent and Kshs.27,810/= was paid being cost of damaged fixtures and fittings. Relevant payment receipts were produced as exhibits. The

only issue that the appellant has is that the said money was not paid to him, but to his co-administrators. The Property agents **Mamuka Valuers Ltd** issued payment receipts on behalf of the administrators, including the appellant. It is the unlawful acts of the appellant that resulted in the loss suffered by the Respondents. The co-administrators of the estate are not parties to this appeal. The appellant admitted committing the unlawful acts – personally. The trial court was right when it made a finding that the co-administrators had nothing to do with the respondent's unlawful eviction of the Respondents. On those findings of fact, the court finds no reason to upset the trial courts finding that the special damages were strictly pleaded and proved and payable by the appellant as a result of his unlawful acts, and his occupation of the suit premises alone.

13. A sum of Kshs.99,000/= was awarded to the respondents as damages for loss of business at Kshs.1,100/= for 90 days. In awarding the same, the trial Magistrate reasoned that the tenancy agreement was terminable by either party giving the other 90 days notice, and since such notice was not given, then the 90 days loss of business was reasonable. What then was a days income (profit)?

14. An audit report (PExh 8) was produced by PW2, James Kituku an accountant practicing in the name of Gathuthi & Company Auditors and Accountants. He testified that using purchases records, expenses records, monthly bills and Petty cash vouchers furnished by the respondents, he came up with a profit and loss account for the relevant period, 3rd October 2003 to 29th January 2004 for the respondents business – "Blue Star." He stated that the said business was making a profit of Kshs.1,100/= on average per day. He however did not provide or produce the records from which he extracted the information to come up with the profit stated. The trial court was satisfied that the audit report represented a true picture of the earnings of the business, and accepted the figure stated, on reasons that the report was not objected to.

15. The Appellant submits that as supporting documents were not produced to support the audit report, the court ought not have accepted the said report as having not been strictly proved. On this, the respondents submission was that the appellant having admitted that the respondents business was ongoing when he evicted them from the premises, and that it is the same business that was audited and a report prepared, that it is no issue whether the supporting documents were produced. He relied on the holding in **Kimathi Mbuvi t/a Kimatu/Mbuvi & Brothers -vs- Augustine Munyao Kioko (2006) KLR and Wambua -vs- Patel (1980) KLR** where the respective courts stated that proof of a persons earnings by production of documents is not the only way as it would cause a lot of injustice to many Kenyans who are illiterate and unable to keep records yet they earn their livelihood in various ways. The Judges rejected any contention that only documentary evidence can prove earnings. This court fully associates itself with the above pronouncements, and agree with the trial courts findings that the audited report produced was sufficient to prove an average earnings per day by the respondents. It was stated in evidence, and admitted by the appellant that the respondents were doing business of a bar, restaurant, and lodgings. The sum of Kshs.1,100/= per day in terms of profits cannot be said to be far fetched. The Audit Report in support was admitted as evidence without objection by the Appellant.

16. When a party decides to take the law into his own hands knowingly and willingly, he should be able to bear the consequences of his actions. As observed by the trial Magistrate on Page 13-21 of her judgment,

> ***"The 1st defendant concedes that he went and obtained police assistance to evict the persons who were in that premises. He had no court order. Even if the first defendant intended to evict the second and third defendants from the premises as his co-owners, he would still have required to follow due process. In this case, he took the law into his own hands and proceeded to evict the plaintiffs. The eviction he carried out was unlawful and he cannot be allowed to continue flouting the law."***

In my view, that was a very reasoned finding by the trial court. Choices have consequence and the appellant shall bear the consequences, by having to pay the damages as awarded against him by the trial court. This court finds no plausible reasons to overturn such decision.

17. The trial court was faulted for not considering the appellants defence. This court has gone into depth

of analysing and re-evaluating the appellants evidence and his pleadings.

The appellant and his two co-administrators were sued jointly and severally. The tortious actions of eviction were committed by the **appellant alone**. A tenancy agreement may or may not be reduced into writing. The appellant admitted the presence of the respondents in the premises as tenants and businessmen. He needed not have executed the agreement as an oral agreement of a controlled tenancy is good agreement. At the time of signing the tenancy agreement, the appellant was not in possession of the premises. The premises were therefore available for leasing out, and the respondents, upon executing the tenancy agreement because legal tenants of the appellant and the Respondents jointly. If the premises were not available for leasing as the appellant would wish the court to believe, he would have terminated the respondents tenancy and occupation soon after they took possession and occupation. He condoned the tenancy from August 2003 upto 29th January 2004. I am satisfied that the trial Magistrate took into account and considered the appellants defence. This ground fails too.

For the above reasons the appellants appeal, in its entirety, lacks merit and is dismissed with costs to the respondents.

Dated, signed and delivered in open court this 24th day of March 2016.

JANET MULWA

JUDGE