



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAROK

ELC APPEAL CASE NO. 8 OF 2021

SAMSON OLOOLMAITAI.....1ST APPELLANT

NTOORIAN KORIATA.....2ND APPELLANT

STANLEY KOINET KORIATA.....3RD APPELLANT

–VERSUS–

LEO INVESTMENT LIMITED.....RESPONDENT

JUDGMENT

A. INTRODUCTION & FACTUAL BACKGROUND

1. On 26th March, 2020, the Respondent filed a reference against the Appellants in Nakuru Business Premises Rent Tribunal Case No. 60 of 2020. Contemporaneously filed with the reference was an application filed under certificate of urgency, and upon consideration, the Tribunal issued orders dated 26th March, 2020 which orders restrained the Appellants from interfering with the quiet possession and/or auctioning the Respondent's movables pending inter-partes hearing of the application.

2. The record shows that when the application came up for inter-partes hearing on 4th June, 2020, the Respondent was granted prayers (d), (e) and (f) of its application pending the hearing of the reference. Costs were also awarded to the Respondent and assessed at Kenya Shillings Fifty Thousand (Kshs. 50,000/=) as against the Appellants. Consequently, the Appellants filed a Notice of Motion application dated 30th March, 2021 wherein they sought the following orders from the Tribunal:

a) This motion be certified as urgent, and service thereof upon the Tenant be dispensed with in the first instance;

b) The order of injunction herein issued on 26th March and confirmed on 4th June, 2020 in favour of the Claimant be vacated, set aside entirety, and discharged, having become void by effluxion of time.

ALTERNATIVELY

c) The order of injunction herein issued on 26th March and confirmed on 4th June, 2020 in favour of the Claimant be vacated, set aside entirety, and discharged, having become void by effluxion of time

d) The Claimant's complaint herein be struck out for being an abuse of the court process, and/or for want of jurisdiction for the Tribunal to entertain a complaint outside the provision of the Tribunal's enabling statute;

e) Costs to be the Applicants in any event.

3. Vide the ruling of Hon. Vice Chairman Andrew Muma delivered on 14th July, 2021, the Tribunal dismissed the Appellants' application. Aggrieved by the aforesaid ruling of the Tribunal, the Appellants filed the instant appeal vide a Memorandum of Appeal dated 29th July, 2021 wherein they raised the following eleven (11) grounds of appeal:

(i) The learned vice chairman of the Tribunal erred in law and in fact when he disallowed the Appellants' Notice of Motion dated 30th March, 2021 when he was procedurally divested of jurisdiction to do so, inter alia as NO Landlord-Tenant relationship exists as between them and the 1st Respondent herein;

(ii) *The learned vice chairman of the Tribunal erred in law and in fact in holding that the Respondent had satisfied the grant of the orders of a temporary injunction and hence justified the wrongfully issued injunction order on 24th March, 2020 in favour of the Respondent;*

(iii) *ALTERNATIVELY, the learned vice chairman of the Tribunal erred in law and in fact in holding that the Respondent had met the threshold for the grant of interlocutory injunction laid down in Giella vs Cassman Brown without showing how the threshold had been so met by the Respondent;*

(iv) *That the learned vice chairman of the Tribunal erred both in law and fact in granting a temporary order of injunction in favour of the Respondent against the Appellant, restraining him from accessing their own property yet the Respondent was NOT and is NOT in possession thereof;*

(v) *The learned vice chairman erred in law and in fact in failing to appreciate that the subject property being the subject of Narok ELC Court No. 5 of 2020 the provisions of section 6 of the Civil Procedure Act barred the proceedings before him;*

(vi) *That the learned vice chairman erred in law and in fact by failing to find that the Respondent could not have acquired good interest as Tenant/Lessee to the subject suit property in Narok without the Appellants who have a subsisting lease with another entity, FURAHA AFRICA LTD in the suit property;*

(vii) *The learned vice chairman erred in law and in fact in failing to find that there was NO valid injunction before him in favour of the Respondent, even as at the date of delivery of his Ruling on July 14th 2021, having found of a fact that the injunction in place had lapsed on June 4th 2021 WITHOUT the Respondent applying to extend the same as by law envisaged;*

(viii) *The learned vice chairman erred in law and fact in finding for the Respondent;*

(ix) *From the case as a whole, as against the Appellants' elaborate submissions pointing out the frivolity of the Respondent's purported Complaint, the Learned Vice Chairman was clearly wrong in the exercise of his discretion to admit the process and dismiss the Appellants' Motion dated 30th March, 2021, in consequence of which the Appellants have been visited with injustice;*

(x) *ALTERNATIVELY, the learned vice chairman erred both in law and fact in failing to consider the Appellants' submissions tendered in court; and*

(xi) *The learned vice chairman erred in law in any event, in declining to order that the Respondent deposits with the court some form of security, and/or an undertaking as to damages accruing to the Appellants in consequence of the injunction so issued to the Respondent.*

4. The Appellants are therefore seeking the following prayers in their appeal:

a) *An order do issue allowing the appeal herein and to forthwith vacate and entirely set aside the order of injunction issued on 24th March, 2020 and extended on 4th June, 2020 by the Hon. Chairman of the Business Premises Rent Tribunal in in favour of the Respondent in Nakuru BPRT 60 of 2020, and in lieu thereof substitute the same with an order allowing the Appellant's Notice of Motion dated 30th March, 2021 entirely, and striking out the Complaint against the Appellants of even date filed before the Business Premises Tribunal; and*

b) *The Respondent do bear the cost of the application before the subordinate court in Nakuru Business Premises Tribunal Complaint No. 60 of 2020 and of this appeal.*

B. DIRECTIONS ON SUBMISSIONS:

5. On 26th October, 2021, parties agreed to canvass the appeal by way of written submissions. The Appellants filed their written submissions on 2nd November, 2021, while the Respondent filed its own on 3rd November, 2021.

The Appellants' Submissions

6. In their submissions, the Appellants contended that the BPRT had no jurisdiction to entertain the case before it since there was no tenancy relationship between the Appellants and the Respondent, hence, they submitted that the BPRT was divested of jurisdiction to issue injunction orders of 26th March, 2020. The Appellants insisted through their submissions that they did not have a tenancy agreement with the Respondent, thus, they urged that the BPRT had no jurisdiction in the matter.

7. Further, the Appellants also submitted that the BPRT had no jurisdiction to extend lapsed ex parte injunction orders. It was the Appellants' contention that after the lapse of fourteen days, the temporary injunctive orders issued on 26th March, 2020 had lapsed, hence, the BPRT had no jurisdiction to extend lapsed injunctive orders.

8. The Appellants also accused the BPRT of wrongfully exercising its discretion and thus urged that this court is entitled to set aside the BPRT orders. It was also urged by the Appellants that the BPRT erred in failing to order the Respondent deposit some form of security as a condition for the grant of the injunctive orders. To the Appellants, there is no open ended carte blanche injunction order under Order 40 of the Civil Procedure Rules, 2010.

9. The Appellants therefore prayed that their appeal be allowed. Reliance was placed on the case of *Owners of the Motor Vehicle M.V. Lillian vs Caltex Oil (Kenya) Limited (1989) KLR 1, Kimani Wanyoike vs Electoral Commission Civil Appeal No 213 of 1995 (UR), S.N. T/A Baby Steps Kindergarten vs Hasham Lalji Properties & Another [2008]eKLR, Italframe Ltd vs Mediterranean Shipping Co. Ltd (1986) KLR 54; 1986-1989 EA 174, Narshidas & Company Limited vs Nyali Air Conditioning and Refrigeration Services Limited Civil Appeal No 205 of 1995, Rift Valley Sports Club vs Patrick James Ocholla [2005]eKLR, Republic vs Business Premises Rent Tribunal and Others ex Parte Karasha [1979] KLR 147, Re Hebatulla Properties Ltd [1979] KLR 96, Republic vs Business Premises Rent Tribunal ex parte Davies Motor Corporation Limited [2013]eKLR, Geoffrey M. Asanyo & 3 Others vs Attorney General [2020]eKLR, Director of Public Prosecutions vs Justus Mwendwa Kangethe & 2 Others [2016]eKLR, Thiba Min. Hydro Co. Ltd vs Josphat Karu Ndwiga [2013]eKLR, Samuel Oduor Okeyo vs Postal Corporation of Kenya Staff Pension Scheme [2017]eKLR, Kenya Airports Authority vs Mitu-Bell Welfare Society & 2 Others [2016]eKLR, Ngome vs Plantex Company Ltd [1984]eKLR, Joseph Hinga Gati vs Barclays Bank (K) Ltd [2001]eKLR, Chatur Radio Services vs Phonogram Ltd [1994]eKLR and the case of *Jasbir Singh Rai & 3 Others vs Torlochan Singh Rai & 4 Others [2013]eKLR.**

The Respondent's Submissions

10. On jurisdiction, the Respondent submitted that the BPRT is clothed with the appropriate jurisdiction to entertain the matter contending that there is a binding oral tenancy agreement between the Appellants and the Respondents. According to the Respondent, there is no requirement for the tenancy agreement to be in writing.

11. Further, on the issue of jurisdiction, the Appellant submitted that this court had already made a determination on the issue by referring the case to the BPRT. On whether the injunction orders issued by the BPRT had lapsed by the time of its confirmation, the Respondent urged that the delay in serving the orders was occasioned by the restriction of movement by the government to contain the spread of Covid19 hence, it was impractical to serve the orders within time.

12. Ultimately, the Respondent urged the court to find the appeal devoid of merit and to dismiss the same with costs. To buttress its submission, the Respondent relied on the case of *Re Hebatulla Properties Ltd [1979] KLR 96, Mercy Munee Kingoo & Another vs Safaricom Limited & Another [2016]eKLR, John Mugo Ngunga Margaret M. Murangi [2014]eKLR* and the case of *Wanjala Mining Company Limited vs National Land Commission & 3 Others [2017]eKLR.*

C. ISSUES FOR DETERMINATION

13. Upon consideration of the materials presented in respect of the Appeal herein, the court is of the opinion that the following are the issues for determination:

i) *Whether the BPRT had jurisdiction in the case before it;*

ii) *Whether the injunction orders issued by the BPRT on 26th March, 2020 had lapsed by the time of their extension on 4th June, 2020; and*

iii) *Whether the BPRT erred in dismissing the Appellants' Notice of Motion application dated 30th March, 2020.*

Duty of the Court

14. As a first appellate court, this court's role is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make its own conclusions about it. This duty was well stated in *Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA 123* in the following terms:

"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hamed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).

15. From the above case, the appropriate standard of review to be established can be stated in three complementary principles:

a) *That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;*

b) *That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and*

c) *That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.*

D. ANALYSIS OF THE ISSUES

(I) WHETHER THE BPRT HAD JURISDICTION IN THE CASE BEFORE IT;

16. At the heart of the BPRT's ruling, an issue of the jurisdiction of the Tribunal was raised by the Appellants with the Tribunal finding that it had the requisite jurisdiction to entertain the case. The question of jurisdiction being a preliminary point is germane as the same sets the stage for the case in so far as determining the competence of the court or tribunal to make a determination on a dispute. The *locus classicus* on jurisdiction is the celebrated case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1* where Justice Nyarangi of the Court of Appeal held as follows

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

17. Addressing the issue in its impugned ruling, the BPRT had the following to say:

The court in Narok ELC No 55 of 2018, suit brought by the Tenants herein decided on the issue of jurisdiction and stated:

"I have considered the Plaintiff and the Application and I find that the Plaintiff applicant suit is entirely premised on a tenant landlord relationship between the applicant and the Respondent, if the suit or the application relates to the unpaid rents or on compensation or costs incurred, the operating statute which this relationship is premised is the Landlord Tenant (Shops, Hotel and Catering Establishment) Act and by extension therefore the provisions of section 6 of the Act directs the jurisdiction of this court to hear and determine the dispute herein"

In view of the foregoing, I respectfully find that the issue of jurisdiction was well determined by the Superior Court and the doctrine of res judicata and doctrine of estoppel applies.

18. In determining that it had jurisdiction to entertain the case before it, it is apparent that the BPRT relied on the decision of this court in *Leo Investment Limited v/a Mara Concord Game Lodge vs Samson Ololmaitai & Another [2020]eKLR* wherein the Respondent had filed suit against the Appellants in this case. The Appellants in response, filed a Notice of Preliminary Objection contending that the dispute therein involved a Landlord and Tenant relationship, and that as such, the Respondent ought to have filed a reference before the BPRT.

19. This court, in its ruling delivered on 13th March, 2020, agreed with the Appellants thereby striking out the Respondent's suit while holding that the Respondent ought to have filed a reference before the BPRT. The Respondent then proceeded and filed Nakuru Business Premises Rent Tribunal Case No. 60 of 2020. It is the ruling of the BPRT in that case that is the subject of the present appeal.

20. From the foregoing chronological narration of the background of this case, there is no doubt that the issue of jurisdiction raised by the Appellants challenging the powers of the BPRT has already had its day before this court. I find that the issue of jurisdiction raised by the Appellants herein is not novel at all having been conclusively canvassed before this court in the above cited case of *Leo Investment Limited v/a Mara Concord Game Lodge vs Samson Ololmaitai & Another [2020]eKLR*. Accordingly, I find no reason to depart from the finding of this court in the above cited case. The upshot of the foregoing is that the court finds that the BPRT had the requisite jurisdiction to entertain the case before it.

(II) WHETHER THE INJUNCTION ORDERS ISSUED BY THE BPRT ON 26TH MARCH, 2020 HAD LAPSED BY THE TIME OF THEIR EXTENSION ON 4TH JUNE, 2020:

21. The other aspect of the BPRT ruling which the Appellants took issue with was grounded on the argument that the BPRT had no jurisdiction to extend lapsed ex parte injunction orders. It was the Appellants' contention that after the lapse of fourteen days, the temporary injunctive orders issued on 26th March, 2020 had lapsed, hence, the BPRT had no jurisdiction to extend lapsed injunctive orders.

22. On this issue, the BPRT in its ruling observed as follows:

"Turning back to the issue of whether this Tribunal should extend or pronounce the termination of the injunctive orders by effluxion of time, I find that statutory time had not elapsed since the grant of the said orders by the time the Landlord moved this Tribunal, which time is 12 months, the orders having been substantively confirmed on 4th June 2020 these were new orders prayed for and granted being prayers d, e and f different from the ones of 26th March 2020 which the landlord relies upon. It appears the

landlord's application is therefore premature to the extent that the effective date applicable for the expiry of the said orders is 5th June 2021. Which time the matter was effectively before myself for submissions on the landlords' application.

In addition I confirm that the orders were issued at the time when there was a Nationwide cessation of movement of the people due to the novel Corona virus pandemic. Further, the Amendment to allow service through Telephones in the Civil Procedure Rules were not in place and the advocates had in deed not included as essential service providers.

While I agree that in deed the Landlord deponent to the effect that the same orders were served to them beyond the limitation of the statutory provisions, I see and recognize the efforts by the tenants seeing the presence of lockdown as at that time."

23. Examining the Appellants' argument, they seem to suggest that the injunctive orders issued on 26th March, 2020 and later on confirmed on 4th June, 2020 had already lapsed, hence, the same were not available for extension by the Tribunal. However, it is apparent from the record that on 4th June, 2020, the Tribunal granted prayers (d), (e) and (f) of the Respondent's application pending the hearing of the reference filed by the Respondent. On lapse/ expiry of the injunctive orders by the Tribunal, Order 40 Rule 6 provides that:

Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.

24. From the foregoing, it is clear that the BPRT was right in holding that the Appellants' application on this limb was premature given that the injunctive orders were made on 4th June, 2020. Accordingly I agree with the Tribunal that by dint of Order 40 Rule 6, twelve (12) months had not lapsed, hence, the injunctive orders had not expired/ lapsed as alleged by the Appellants.

(III) WHETHER THE BPRT ERRED IN DISMISSING THE APPELLANTS' NOTICE OF MOTION APPLICATION DATED 30TH MARCH, 2020:

25. It is trite law that the power of a court or tribunal to set aside, vary or discharge injunctive orders is a discretionary power and like all discretionary power, it must be exercised judiciously and not capriciously. While addressing the powers of the court under Order 40 Rule 7, the High in JSL v JKL [2020]eKLR had the following to say:

“The provision primarily grants the Court discretion to discharge or vary or even set aside an injunction order if the ends of justice so demand, or if the injunction does not serve the ends of justice it was intended to serve when it was issued.

In Mobile Kitale Service Station v. Mobil Oil Kenya Ltd & Another (2004) eKLR, Warsame J held inter-alia;

“...an interlocutory injunction is given on the court's understanding that the defendant is trampling on the rights of the plaintiff. An interlocutory injunction, being an equitable remedy, would be taken away (discharged) where it is shown that the person's conduct with respect to matters pertinent to the suit does not meet the approval of the court which granted the orders which is the subject matter. The orders of injunction cannot be used to intimidate and oppress another party. It is a weapon only meant for a specific purpose- to shield a party against violation of the legal rights a person is seeking.”

26. In this appeal, there is no evidence by the Appellants on how exactly the BPRT wrongly exercised its discretion in dismissing its application. The court having carefully gone through the evidence on record as well as the submissions by the parties, I am satisfied that the BPRT correctly exercised its discretionary powers, thus, this court finds no reason to disturb the findings made by the BPRT.

E. DISPOSITION:

27. The upshot of the foregoing is that I find no merit in the Appellants' appeal. Accordingly, I dismiss the same with costs to the Respondent.

SIGNED, DATED AND DELIVERED AT NAROK VIA EMAIL THIS 31ST DAY OF JANUARY, 2022.

MBOGO C.G,

JUDGE

IN THE PRESENCE OF:

CA:TIMOTHY CHUMA