



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

APPEAL NO. 29 OF 2019

TOTAL KENYA LIMITEDAPPELLANT

VERSUS

DRUMCON KENYA LIMITED..... RESPONDENT

JUDGMENT

(Appellant having sublet premises to the respondent for purposes of drum manufacturing; dispute having arisen and referred by the respondent to the Business Premises Rent Tribunal; Tribunal making a decision in favour of the tenant and the landlord appealing to this court; jurisdiction of the BPRT; premises being industrial premises; whether BPRT has jurisdiction over such premises; held that the BPRT has no jurisdiction over industrial premises; the proceedings and decision of the BPRT were thus null and void and set aside)

1. The relationship between the appellant and respondent is that of landlord and tenant with the appellant being the landlord. On 24 May 2007, the appellant issued to the respondent, a notice to terminate the tenancy on the reasons that the appellant wished to occupy the premises for a period of not less than one year for purposes of carrying on its business therein. The respondent contested the notice in the Business Premises Rent Tribunal (BPRT) established under the Landlord and Tenant, Shops, Hotels, and Catering Establishments Act, CAP 301, Laws of Kenya. The matter was heard by the Chairperson of the Tribunal, Honourable D. Mochache who delivered judgment on 20 April 2012. The judgment was in favour of the tenant. The landlord preferred an appeal, being Mombasa High Court Civil Appeal No. 79 of 2012. It however turned out that the proceedings appealed from were not available, and in a ruling delivered on 3 March 2015, the court (Kasango J), directed that there be a re-trial of the matter. The matter was then re-heard by the new Chairman, Hon. Mbichi Mboroki. He delivered judgment on 28 April 2017 again in favour of the tenant and issued orders restraining the landlord from interfering with the tenant's possession of the premises. Aggrieved, the landlord filed this appeal on 24 May 2017 and raises the following grounds :-

a) That the learned Chairman erred in law and in fact in finding that there was no genuine intention established by the appellant in seeking to occupy the suit/tenancy premises.

b) That the learned Chairman erred in law and in fact in failing to appreciate that the respondent had not shown or approved that the appellant had other premises to carry on its intended business.

c) That the learned Chairman erred in law and in fact in failing to acknowledge that the other premises owned by the appellant could not be used for the intended business of drum filling as required by the appellant.

d) That the learned Chairman erred in law and in fact in failing to find that the respondent had no use for the premises and was refusing to give it up in bad faith.

e) That the learned Chairman erred in law and fact by failing to appreciate that the mala fides was apparent from the respondent who did not have the financial capacity to run a business therein.

f) That the learned Chairman erred in law and in fact by failing to find that the appellant had proved all the ingredients to show that they had a genuine intention to occupy the suit premises.

g) That the learned Chairman erred in law and in fact by displaying open bias against the appellant by :-

(i) Allowing the respondent/tenant to adduce evidence after the appellant had given evidence and refusing to accord the appellant the same privilege of adducing further evidence.

(ii) Denying the appellant the right to the re-open its case.

- (iii) Failing and/or refusing to admit the appellant's further documents and having them expunged from the record.
 - (iv) Failing and/or refusing to avail to the appellant the judgment and proceedings in time to enable them lodge the appeal.
 - (v) Awarding the respondent punitive costs of Kshs. 92,000/= during trial despite the appellant's protest.
- h) That the learned Chairman erred in law and fact in dismissing the Notice filed by the appellant.

2. For the reasons above, the appellant seeks the setting aside the judgment of the Tribunal and judgment upholding its notice to terminate the tenancy.

3. I directed that the appeal be heard by way of written submissions and both Ms. Okata, learned counsel for the appellant, and Ms. Owino, learned counsel for the respondent, filed submissions. I reserved judgment for 16 June 2021. When I retired to write the judgment, it struck me that the premises is used for industrial purposes, and there was thus a question to be determined as to whether the BPRT actually had jurisdiction to determine the dispute. I asked counsel to appear before me on 11 June 2021, which they did, and I pointed this out to them. I gave them liberty of addressing me on this point. Both counsel sought time to file additional submissions on the issue of jurisdiction and they subsequently did.

4. There is certainly an issue of jurisdiction which first needs to be determined before I can even consider the merits of the case. It follows that if the BPRT did not have jurisdiction to hear the dispute, then its decision is a nullity. If I find that the decision of the BPRT is a nullity then I need not consider the merits or otherwise of the appeal. The result will be that the entire proceedings and judgment of the BPRT will have to be set aside for want of jurisdiction.

5. The dispute relates to the property LR No. 9695 located in Changamwe in Mombasa County. The whole of the land measures 11.99 acres and is registered in the name of Kenya Railways, who leased it to the appellant. The appellant in turn sub-let part of the premises, about 2 acres, to the respondent through a lease dated 21 August 1985 for a period of 5 years commencing 1 January 1985. The lease instrument is explicit that the premises is let out for purposes of the business of drum manufacturing. The appellant uses the rest of the premises for its fuel and LPG business for storage and terminating. The appellant wished to expand its business to lubricants and additives and thus needed to use what it had leased to the respondent. That is why the respondent filed the reference before the tribunal to resist the intended take over by the appellant. At the tribunal the respondent tendered evidence that it was in the business of buying, and reconditioning second hand drums from the oil industry. It had a lot of machinery underground and above ground. There was mention that their business had stalled as the Government ordered such business to be carried out in Western Kenya. The respondent thus intended to start a new line of business of blending lubricants.

6. It will be seen from the above, that for all intents and purposes, the property is an industrial premise. It was used for drum manufacturing and both parties intend to use it for blending of lubricants. So, does the BPRT have jurisdiction to hear disputes over industrial premises ?

7. The BPRT is a creature of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301, Laws of Kenya. The preamble to the statute provides that it is "An Act of Parliament to make provision with respect to certain premises for the protection of tenants of such premises from eviction or from exploitation and for matters connected therewith and incidental thereto" (emphasis mine).

8. Under Section 2, "controlled tenancy" means a tenancy of a shop, hotel or catering establishment let out under certain conditions. Shop means premises occupied wholly or mainly for the purposes of a retail or wholesale trade or business or for the purpose of rendering services for money or money's worth.

"Hotel", means any premises in which accommodation or accommodation and meals are supplied or are available for supply to five or more adult persons in exchange for money or other valuable consideration. "catering establishment" means any premises on which is carried out the business of supplying food or drink for consumption on such premises, by persons other than those who reside and are boarded on such premises.

9. The tribunal would only have had jurisdiction if the premises was a shop, a hotel or a catering establishment.

10. In her submissions, Ms. Okata, learned counsel for the appellant, submitted that "this matter would squarely fall under the ambit and meaning of a shop under the Act" hence there was jurisdiction. She referred me to the case of *David Cullen vs Amuel Kiptalai & 2 Others, Eldoret ELC No. 13 of 2020*, where the court cited with approval a dictum in the case of *John Onyanza Zurwe vs Oreti Atinde, Civil Appeal No. 217 of 2003*, where the following passage from Halsbury's Laws of England 4th Edition Vol. 12 was adopted :-

"where the intention of the parties has been reduced to writing it is, in general not permissible to adduce extrinsic evidence, whether oral or contained in writings such as instructions, drafts, articles, conditions of sale or preliminary agreements either to show that intention or to contradict vary, or add to the terms of the document." Counsel submitted that the lease of the premises was for drum manufacturing, which definition, as read as a whole in the Act, includes rendering services for money or money's worth. She submitted that the meaning of shop in the Act is not limiting and encompasses the word "business" in a generalised term, meaning any business, and further the said business would be for the purposes of rendering services for money or money's worth. She submitted that the drum business was for profit and for money's worth and not for leisure or hobby. She submitted that the Act does not differentiate businesses that are industrial or industrialized and those that are merely retail. She submitted that the Act does not limit the kind of trade a tenant would need to be engaged in so as to fall under the ambit of the Act. Counsel referred me to the case of *Nairobi A-One Auto Services Limited vs Jayantilal O. Kantaria, ELC No. 578 of 2014*, where it was held that a garage business would fall under the Act and thus the tribunal had jurisdiction. She also referred me to the case of *Republic vs The Chairman Business Premises Rent Tribunal & Another ex parte Dr. Daniel Wanjohi Kabithe and Lydia Wangui Kabithe (2019)*

eKLR where the dispute related to a school.

11. On the other hand Ms. Owino, learned counsel for the respondent, submitted that the tribunal and by extension this court has no jurisdiction to entertain the appeal as the lease had expired. I don't think she addressed herself on the issue of jurisdiction in relation to industrial premises.

12. I am not persuaded by Ms. Okata's submissions that the premises in issue is a shop. Her reference to the case of *Republic vs The Chairman, Business Premises Rent Tribunal & Another* does not help her. First, that case was a dispute over premises leased out for use as a school. That is not what we have here. Ms. Okata referred me to the court's definition of "shop" which the court (Eboso J) was of opinion that it needs to fit into three criteria, being (i) the premises should be occupied wholly or mainly for retail trade or business; (ii) the premises should be occupied wholly or mainly for wholesale trade or business; (iii) the premises should be occupied wholly or mainly for rendering of services for money or money's worth. I have no issue with this breakdown of what would constitute a shop. But the premises here cannot fall under (i) above for it is not occupied for retail trade; neither can it fall under (ii) for it is not occupied for wholesale trade; and neither can it fall under (iii) for it is not used for purposes of rendering a service. In fact, there is no evidence of any service being rendered in the business. This case is also distinguishable from that of *A-One Auto Services Limited vs Jayantilal O. Kantaria*, for the issue there was a garage, which the court thought it to be a service.

13. The situation before me is not very far off from what arose in the case of *Panesar vs Balbir (1972) EA 208*. The dispute in that case related to premises used for the purpose of manufacturing furniture. It was held that the premises could not fall under the definition of shop in Cap 301. The Court of Appeal had this to say :-

"There is something termed a lease for manufacturing purposes (S. 106 of the Transfer of Property Act of India) and the lease here was such a lease. The long title to the Act refers only to shops, hotels and catering establishments, not to factories or premises for manufacturing goods."

Mustafa J.A who wrote the unanimous decision further stated as follows:-

"I am also of the view that "Premises occupied ... for the purposes of rendering services for money or money's worth," would be applicable to offices like those of advocates, accountants, manufacturer's representatives, barbers and so forth, and cannot apply to a factory or the suit premises."

14. I am in full agreement with the above. Premises used for manufacturing goods do not fall within the ambit of premises falling under Cap 301. As I had earlier mentioned, the premise herein was let out for purposes of drum manufacturing. This is an industrial purpose property. It is neither a shop, hotel, nor a catering establishment.

15. I therefore find that the BPRT had no jurisdiction to entertain the dispute. Its proceedings and decision are a nullity and must be set aside. I do hereby set the same aside. The parties must proceed as if no dispute was ever determined by the tribunal.

16. The only issue left is costs. It was incumbent on both parties to confirm that the BPRT had jurisdiction before litigating in that forum. None did. Let each party bear his/her own costs.

17. Judgment accordingly.

DATED AND DELIVERED THIS 26TH DAY OF JANUARY 2022.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA