REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 166 OF 2011

FAIRMONT MT. KENYA SAFARI CLUB……APPELLANT

VERSUS

JENNIFER WAMBUI NYAKINYUA…….....RESPONDENT

RULING

The appeal herein arose out of a ruling delivered by the chairperson of the Business Premises Rent Tribunal in Nyeri Tribunal Case No. 99 of 2011 in which the respondent was indicated to be the applicant/tenant while the appellant was the respondent/landlord.

I must hasten to mention that I was to deliver a judgment on this appeal but for reasons I have stated and which will become clear in due course I opted to deliver this ruling in which I have given specific directions on the proper forum for determination of this appeal.

Coming back to the ruling, the subject of the appeal herein, it was held in that ruling that a tenancy relationship did exist between the appellant and the respondent and therefore if it was to be terminated or the terms thereof altered, such termination or alteration of the terms of the tenancy must be in a prescribed form and to the extent that they were not, the landlord contravened **section 4(2) of the Landlord and Tenants (Hotels and Catering Establishments Act) Cap 301**. In summary, that was the gist of the Tribunal's decision by which the appellant is aggrieved.

The appeal against this ruling was filed in this court on 8th November, 2011 though the record of appeal was filed a day later. The record shows that on 8th July, 2014, Mr Mugambi for the appellant informed the court he wanted the appeal to be determined on the basis of written submissions. Apparently, Mr Mwangi for the respondent agreed with him and informed the court that in fact the submissions had already been filed and all he was seeking was a date for judgment. The court did not give any directions on how the appeal was to be heard but instead directed that it be mentioned on 6th October, 2014 so that it could be appraised of the status of the suit premises.

It would appear that none of the parties appeared in court on 6th October, 2014 and therefore the court stood over the appeal generally.

Subsequently, the appellant took a mention dated and when the appeal was mentioned before me for the first time on 17th February, 2015, Mr Cheruiyot for the appellant informed the court that both parties had filed written submissions and he wanted a date for judgment. I obliged and gave counsel a date for judgment after confirming that both parties had filed their written submissions.

When I retreated to write the judgment, I noted that although parties had proceeded on the understanding

that the appeal shall be disposed of by way of written submissions and had infact filed their respective submissions, no specific directions had been given by this court to that effect.

I would have been prepared to overlook this procedural omission and write the judgment since both parties were at consensus from the very beginning that the appeal would be determined by way of their written and filed submissions and in any event such omission wouldn't have prejudiced any of them; however, I have also noted that the dispute between the parties falls outside the jurisdiction of this court and, in my humble view, without this essential authority any judgment I write purporting to determine this appeal would be of no consequence and of little value to the parties, in any event.

Perhaps I should clarify here why I hold the view that this court does not have the jurisdiction to determine this appeal.

The jurisdiction of this court is conferred by the Constitution under **article 165(3)** thereof; in **article 165(5) (b)** the same Constitution is clear that this Court shall not have jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated in **article 162 (2).** The Environment and Land Court is one of those courts contemplated in **article 162 (2) and** under **article 162 (3)** the jurisdiction of this particular court is defined, statutorily, by parliament.

The Act through which parliament has defined the jurisdiction of the Environment and Land Court is the **Environment and Land Court Act, 2011** which came into force on 30th August, 2011. **Section 13(1)** of the Act states that the Court shall have ***original and appellate jurisdiction*** to hear and determine all disputes in accordance with **article 162(2)(b)** of the **Constitution**; **section 13(2)** of the **Act** is more specific as to the nature of these disputes. For instance, **section 13(2) (a)** says that the court shall hear and determine disputes including disputes:-

> ***"(a) relating to environmental planning and protection, trade, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources."(Underlining mine).***

I reckon that a dispute such as the one filed by the respondent against the appellant in the Business Premises Rent Tribunal on whether there was a tenancy relationship between them or whether any sort of lease existed between the parties would fall under the category of disputes relating to land tenure; only the Environment and Land Court has the mandate to resolve such a dispute in exercise of its appellate jurisdiction as conferred by **section 13(1)** of the Act.

For avoidance of doubt **section 13(4)** of the **Environment and Land Act** clarifies that appeals from disputes which fall within jurisdiction of the Environment and Land Court shall be determined by that court. It states:-

> ***"(4) In addition to matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over decisions of subordinate court or local tribunals in respect of matters falling within the jurisdiction of the Court."***

In my humble view, the dispute between the appellant and the respondent is one such dispute over which the Environment and Land Court is statutorily mandated to exercise the appellate jurisdiction.

This legal position on the statutory jurisdiction of the Environment and Land Court has been followed by the **Practice Directions** issued on 25th July, 2014 (and published in Gazette Notice No. 5178) by the Chief Justice on, amongst other issues, the jurisdiction of the Environment and Land Court. On this particular issue, and as far as the dispute between the parties herein is concerned, the directions are clear that:-

> ***"9. All cases under the Landlord and Tenants (shops, Hotels & Catering Establishments) Act Cap 301 Laws of Kenya shall continue to be filed in and determined by the Business Premises Tribunal."***

Practice Direction No. 13 is clear as to where appeals arising from tribunals such as the Business Premises Tribunal are to be filed; that Direction provides as follows:-

> ***"13. Appeals from the Magistrates Courts and Tribunals in the forgoing paragraphs 6 to 13 shall lie in the Environment and land Court pursuant to Section 13(4) of the Environment and Land Court Act."***

I am conscious that the Practice Directions were published long after this appeal had been filed; however, these Directions, particularly those relating to the jurisdiction of the Environment and Land Court are nothing more than a substantiation or elaboration of the law on this issue. It cannot be urged for instance, that the position in law would have been any different were it not for these Practice Directions.

It has been noted that the appellant's appeal was filed on 8th November, 2011 at least two months after the Environment and Land Court Act, 2011 came into force; it follows that the proper forum for it to have been filed and determined was the Environment and Land Court. In the words of **article 165 (5) (b)** of the Constitution this appeal is the kind of matter which has been expressly excluded from the jurisdiction of this Court and by the same token reserved for exclusive jurisdiction of the Environment and Land Court under **article 162(2)** of the **Constitution.**

The Constitutional and statutory provisions I have alluded to bind me therefore to have this appeal transferred to the Environment and Land Court for disposal.

I must mention here as I conclude that had this issue of jurisdiction been brought to my attention when this matter was mentioned before me for the first and the only time on 17th February, 2015, I would have transferred the appeal to the appropriate court for disposal straight away; however, as noted, Mr Cheruiyot for the appellant only wanted a date for judgment which I gave on the mistaken belief that the submissions filed were filed on the basis of an appeal that was properly before this court.

Ordinarily, any issue relating to whether a court has jurisdiction to determine any matter before it should always be taken at the earliest opportunity possible but as it has turned out in the instant appeal, none of the parties took up this issue and regrettably so. It could be that the parties cared less about the extent of jurisdiction of this Court or even agreed between themselves that this court could hear and determine the appeal but it is trite that jurisdiction cannot be conferred by consent of the parties where none exists; it can only be conferred by law and in this particular instance the Constitution or the statute. It is for this reason that I, on my part, could not sidestep this essential requirement and purport to write and deliver a judgment on this appeal. I would, instead, direct that this appeal be transferred to the Environment and Land Court for hearing and disposal; the manner in which it will be heard and disposed of, is of course, subject to the directions of that court. It is so ordered.

Dated, signed and delivered in open court this 15th January, 2015

Ngaah Jairus

JUDGE