



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT NAIROBI**

**CIVIL APPEAL NO. 85 OF 2016**

**BOARD OF TRUSTEES KIAMBU INSTITUTE OF SCIENCE  
& TECHNOLOGY.....APPELLANT**

**-VERSUS-**

**NICHOLAS KINYUA & 50 OTHERS.....RESPONDENTS**

**JUDGMENT**

**INTRODUCTION**

1. On or about the 26<sup>th</sup> June 2014, the Respondents herein filed and/or lodged a suit before the Rent Restriction Tribunal, whereby same sought various Reliefs against the Appellant herein.
2. Simultaneously with the filing of the suit, the Respondents also filed an Application for Interim protection in the nature of temporary injunction, essentially to bar and/or prohibit the Appellant herein from raising and/or increasing the monthly rents, over and in respect of the premises belonging to the Appellant Institution.
3. Following the filing of the Application, the Tribunal proceeded to and entertained same and thereafter granted orders of Injunction/status quo, preserving the status of the Respondents as lawful tenants in the premises belonging to the Appellant herein.
4. Other than the Application for Interim protection, the Respondents herein also filed an Application for assessment of the Standard Rents as pertains to the premises belonging to the Appellant Institution and in respect of which, the Respondents sought to have the Monthly rents payable to be standardized.
5. Following the filing of the Application for assessment of Rents, the Tribunal ordered and/or directed that the Rents in respect of the suit premises be assessed and in this regard, the Tribunal's valuer was mandated to and indeed carried out valuation in respect of the suit premises.
6. It is worthy to note, that upon the valuation being carried out and/or undertaken, the Tribunal's valuer filed and/or lodged a Report relating to the assessed rents. However, the Parties herein, felt aggrieved and/or dissatisfied with the assessed Rents and thereby sought leave of the tribunal to undertake own and/ or Independent valuation and file the Resultant Reports.
7. Pursuant to the request by and/or on behalf of the parties, whereby same sought to file independent valuation report, the Tribunal proceeded to and granted such orders on the 16<sup>th</sup> January 2016.
8. Subsequently, both the Appellants and the Respondents filed valuation Reports, in line with the valuation carried out and/or undertaken by their own Independent valuers.
9. Suffice it to say, that upon the filing of the two independent valuation Reports, the Tribunal was possessed and/or seized of three separate and distinct valuation reports, inclusive of the one that was filed by the Tribunal's own valuer.
10. On the basis of the valuation reports, which were availed and/or presented to the Tribunal, the Tribunal, without conducting any proceedings and without subjecting the valuation reports to any interrogation vide cross examination or otherwise, proceeded to and thereafter set down the matter for Ruling, which was to be delivered on Notice.

11. From the record, it is evident that the Ruling was ultimately delivered on the 21<sup>st</sup> September 2016, whereupon the Tribunal made the following decision;

**‘the Tribunal having taken all the above factors into considerations could not agree more with the tenants position that the premises are institutional with teachers and non-teaching staff being the occupants and cannot therefore be subjected to open market rates as proposed by the two valuation reports.’**

**Accordingly, the tribunal finds no justification to interfere with current letting rates”**

12. Based on the foregoing Decision by and/or on behalf of the tribunal, the Appellant herein felt aggrieved and has therefore filed a Memorandum of appeal, whereby same has itemized Ten (10) grounds of Appeal as hereunder;

I. The Honourable chairman erred in law by determining a matter which felt outside the scope of his jurisdiction.

II. The Honourable chairman erred in fact and in law by failing to give the Appellants valuation report and advocates submissions serious considerations and dismissed them of hand without giving them their due weight.

III. The Honourable chairman erred in fact and law by disregarding the Independent assessment of rents by the tribunals own valuer after inspection of the houses on the 10<sup>th</sup> June 2014.

IV. The Honourable Chairman erred in fact and in law by taking into account the conclusion by the Respondents valuer that the houses were not available to potential tenants in the open market.

V. The Honourable chairman erred in fact and law by disregarding the fact that the Respondents are not the Appellants employees.

VI. The Honourable chairman erred in fact and law by disregarding the Appellants contention than like other institutions, the Appellant is not fully funded by the government and the houses were at the time the only source of income for the appellants by which it supported the appellants board of governance.

VII. The Honourable chairman erred in fact and in law by failing to consider the Appellants valuation of the premises based on open market rental values.

VIII. The Honourable chairman erred in fact and in law by failing to consider the characteristics, the conditions, amenities, competitive locations and maintenance of the houses which are the subject matter herein.

IX. The Honourable chairman erred in fact and in law by holding that he found no jurisdiction to inter-fear with the current letting rates thereby over looking the tenancy agreement entered into on the 1<sup>st</sup> July 2011, in which both parties agreed to have the houses valued for the determination of rents after expiry of the tenancy agreement of three years.

X. The Honourable chairman erred in fact and in law by overlooking the fact that the Appellant had subsidies the rent for the Appellants from the 1<sup>st</sup> July 2011 and for three (3) years had the right to discontinue the subsidies after the expirers of the tenancy agreement

#### **SUBMISSIONS:**

13. The Appeal herein came up for hearing on the 28<sup>th</sup> September 2021, and on which date the Advocates for the respective Parties proposed to have the Appeal canvased by way of written submissions. Consequently, the court agreed with counsel and directed that the Parties do file and exchange their written submissions.

14. Pursuant to the directives by the court, the Appellant herein filed her written submissions on the 23<sup>rd</sup> November 2021, whereas the Respondents filed their submissions on the 9<sup>th</sup> December 2021. For coherence the two sets of submissions are on record and same shall receive due attention and consideration.

15. In brief, the Appellants herein have raised three (3) pertinent issues, first of which is that the tribunal was not seized of the requisite jurisdiction to entertain and/or adjudicate upon the dispute that was placed before her.

16. The crux of the Appellants submissions is that the houses, whose rents were the subject of dispute and therefore determination were Institutional houses and hence the tribunal could not deal with same, to the extent that such houses are exempted.

17. Secondly, the Appellant has also argued that following the lodgment of the suit before the tribunal, the tribunal appointed and/or authorized her own valuer to undertake assessment of rents over and in respect of the suit premises.

18. It was the Appellant’s contention, that pursuant to the mandate, the tribunals own Valuer carried out and/or undertook the requisite valuation and thereafter filed a Report, which indicated that the requisite rents were between Kenya shillings Four Thousand to Eighteen Thousand (Kshs.4, 000/= to Kes.18, 000/= ) only, respectively.

19. Owing to the foregoing, the Appellant's counsel contended that to the extent that the tribunal had appointed own valuer, same (Tribunal) could not thereafter proceed to and ignore the valuation Report filed by the said valuer.

20. Thirdly, the Appellant has also argued that even though the jurisdiction issue was neither raised nor ventilated before the tribunal, same is a critical issue of law and therefore it can be raised and canvassed for the first time during an Appeal.

21. Suffice it to say, the Appellant contended that the Doctrine of Estoppel cannot be raised to defeat an issue of law and in this case, the question of jurisdiction. Consequently, Counsel submitted that same was within the Law to ventilate the Jurisdictional Question before the Honourable Court.

22. In the premises, the Appellant has implored the court to set aside and/or quash the ruling of the tribunal in its entirety and therefore dismiss the Respondents case before the tribunal.

23. On their part, the Respondents herein have supported the Ruling and Decision of the tribunal and have further averred that the Tribunal was seized of the requisite jurisdiction to entertain and adjudicate upon the subject dispute.

24. It is the Respondents' contention that the dispute which was before the tribunal touched on and/or concerned assessment of Standard rents and hence the subject matter fell squarely within the purview of Section 5 of the Rent Restriction Act, Chapter 296.

25. Secondly, the Respondents' also contended that even though the tribunal was confronted with three separate valuation Reports, the tribunal was at liberty to exercise discretion and thereby chose which of the three reports to adopt, rely on and/or apply.

26. In the premises, the Respondents submitted that the tribunal was therefore within her right to chose and rely on the valuation report filed by the tenants valuer. For clarity, the Respondents contended that the adoption of and reliance on the Tenants Valuation Report, was therefore an Exercise of Discretion.

27. Thirdly, it was the Respondents submissions that during the entire proceedings before the tribunal, the Appellant herein did not raise the issue of jurisdiction. In fact, the Respondents contended that the Appellant participated in the entire proceedings, without any protest and/or reservation.

28. In view of the foregoing, the Respondents have therefore sought for the Dismissal of the Appeal.

#### **ISSUES FOR DETERMINATION:**

29. Having reviewed the Grounds of Appeal, as well as the written submissions filed and exchanged by the parties and having similarly taken cognizance of the proceedings that were conducted before the Tribunal, the following issues are germane for determination;

**I. Whether the subject Appeal is competent in line with the provisions of Section 8(2) of the Rent Restriction Act, as read together with the provisions of Rule 2 of the Rent Restriction (Appeals) Rules.**

**II. Whether the suit premises were exempted and thus fell outside the jurisdiction of the tribunal.**

**III. Whether the Tribunal acted in accordance with the law in disregarding the valuation report filed by own valuer and in lieu thereof, adopting the one filed by the Respondents.**

#### **ANALYSIS AND DETERMINATION**

##### **ISSUE NUMBER 1**

**Whether the subject Appeal is competent in line with the provisions of Section 8(2) of the Rent Restriction Act, as read together with the provisions of Rule 2 of the Rent Restriction (Appeals) Rules.**

30. The subject dispute was commenced and/or otherwise prosecuted pursuant to the provisions of the Rent Restriction Act, Chapter 296, Laws of Kenya.

31. To the extent that the subject matter was so prosecuted, it is therefore important to observe that the right of appeal, if any, that avails to the parties, must be provided for and stipulated under the subject Act and not otherwise.

32. True to the point, the provisions of **Section 8 (2) of the Rent Restriction Act**, herein provides a Right of Appeal to any party, who is aggrieved and/or dissatisfied with the ruling and/or decision of the tribunal. For clarity, the said Section provides as hereunder;

#### **8. Appeals;**

**(1) Except as provided by subsection (2), every decision, determination and order of the tribunal under the provisions of this Act shall be final and conclusive, and no appeal shall lie therefrom to any court.**

**(2) An appeal shall lie to the Environment and Land Court from any such decision, determination or order in the following cases—**

**a. in the case of an order under subsection (5) of section 6;**

**b. or (b) on any point of law; or**

**c. (c) in the case of premises whereof the standard rent exceeds one thousand shillings a month, on any point of mixed fact and law,**

33. Other than the foregoing provisions, it is also important to take cognizance of the provisions of the Rent Restriction (Appeals) Rules, which provides as hereunder;

**The Rent Restrictions (Appeal) Rules:**

Rule 2 –

An appeal brought under Section 8 (2) of the Act shall be filed for a period of 15 days from the date of the determination, or order appealed against, excluding from that period any time which the tribunal may certify has having been requisite for the preparation and delivery to the appellants a copy of the decision, determination or order.

Provided that the Appellate court may admit the appeal out of time if it is satisfied that the appellant has good and sufficient cause for not filing the appeal in time.

34. From the provisions of Section 8(2), it is evident that an appeal lies against the ruling, order and/or decision of the tribunal and such an appeal shall be heard and determined by the Environment and land court.

35. On the other hand, it is also important to note, that though the provisions of Section 8(2) of the Act confers a right of appeal to the intended Appellant, such right of appeal, is clarified and/or qualified by Rule 2 of the Rules made pursuant to the Act, which stipulates the time line within which an appeal ought to be filed.

36. For the avoidance of doubt, an appeal arising out of and pursuant to the provisions of Section 8(2) of the Rent Restriction Act ought to be filed within 15 days from the date of the impugned ruling or decision.

37. In respect of the subject matter, the Ruling that is appealed against was rendered on **the 21<sup>st</sup> September 2016**, in terms of the duly certified copy thereof, contained at pages 83 to 84 of the Record of appeal.

38. On the other hand, counsel for the appellant also wrote and addressed two (2) sets of letters to the tribunal, namely the letters dated 10<sup>th</sup> October 2016 and 26<sup>th</sup> July 2017, respectively, in which counsel for the Appellant recognized that the impugned ruling was indeed rendered on the 21<sup>st</sup> September 2016.

39. Based on the foregoing, it was incumbent upon the Appellant to file the Memorandum of Appeal within 15 days *w.e.f* 21<sup>st</sup> September 2016. For clarity, the timeline for filing the Record of appeal lapsed on or about the 6<sup>th</sup> October 2016 and not otherwise.

40. Notwithstanding the foregoing, the Memorandum of Appeal herein was filed and/or lodged on the 12<sup>th</sup> October 2016. Clearly, the Appeal was filed out of time *albeit* without leave of the court or at all.

41. In the premises, it is evident and/or apparent that the subject appeal was filed out of time and same is therefore a nullity *ab initio*.

42. In support of the foregoing observation, it is important to take cognizance of the decision of the Supreme Court in the case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR**, where the honourable court stated as hereunder;

**“What we hear the applicant telling the Court is that he is acknowledging having filed a ‘document’ he calls ‘an appeal’ out of time without leave of the Court. Pursuant to rule 33(1) of the Court’s Rules, it is mandatory that an appeal can only be filed within 30 days of filing the notice of appeal. Under rule 53 of the Court’s Rules, this Court can indeed extend time.**

**However, it cannot be gainsaid that where the law provides for the time within which something ought to be done, if that time lapses, one need to first seek extension of that time before he can proceed to do that which the law requires.**

**By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such ‘an appeal’, is tantamount to moving the Court to remedy an illegality. This, the Court cannot do.**

**To file an appeal out of time and seek the Court to extend time is presumptive and in-appropriate. No appeal can be filed out of time without leave of the Court”.**

43. The Appellant herein was obliged to comply with the law and in the event time for filing the appeal had lapsed, the appellant had the liberty to file an Application to seek for and obtain Leave to file the Appeal out of time. For clarity, the Appellant did not file any such application and consequently the appeal that was ultimately filed was caught up by the law.

44. The auxiliary question that arises is; whether the court has jurisdiction to entertain an appeal that has been filed outside the stipulated timeline.

45. In my humble view, the court has no such jurisdiction. Suffices it to note, that jurisdiction is conferred either by the Constitution or by Statute and a court of law is enjoined to comply with the constitution and statute donating such jurisdiction. Absent such jurisdiction, the Court is enjoined to down his/ her tools.

46. In support of the foregoing solemn statement of the law, it is imperative to restate the holding in the **Esther Gachambi Mwangi v Samuel Mwangi Mbiriri [2013] eKLR**, where the honourable stated as hereunder;

**As was stated in the Owners of the Motor Vessel “Lillian S” v. Caltex Oil (Kenya) Ltd 1989 KLR 1, jurisdiction is everything. Without it, a court has no power to take one more step. In the Matter of Advisory Opinions of the Supreme Court under Article 163(3) of the Constitution, Constitutional Application No. 2 of 2011; the Supreme Court noted that The Lillian ‘S’ case [1989] KLR 1] establishes that “jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity...”**

**A court of law or any Tribunal must down tools in respect of the matter before it the moment it is without jurisdiction. Applying this principle, jurisdiction wa S everything to the Mathioya Divisional Land Appeals Tribunal; if the Tribunal had no jurisdiction as a result of the Limitation of Actions Act, then it had to down its tools. Likewise, if the Mathioya Divisional Land Appeals Tribunal had no jurisdiction, its proceedings and award was a nullity and any appellate proceedings thereon is also a nullity.**

47. Be that as it may, it is worthy to note that the issue that the appeal herein was filed out of time was neither raised nor addressed by either of the advocates. Somehow, the advocates appeared not to be aware of the operative provisions of the Rent Tribunal Act and thus the failure or neglect, to address same.

48. Nevertheless, I beg to point out that the Jurisdiction is conferred by the constitution and statute and not by acquiescence, consent and/or silence. However, I may add that jurisdiction cannot also be conferred by ignorance of the applicable or operative provisions of the Law.

49. In support of the preceding observation, I share in the sentiments of Hon. Justice R. E Aburili, Judge vide the decision in the case of **Francis Ndahebwa Twala v Ben Ng’anyi (2018) eKLR**, where the court observed as hereunder;

**“Accordingly, I come to the conclusion that I have no jurisdiction to hear and determine this appeal. I down my tools and proceed to strike out the appeal herein for being fatally incompetent, with an order that each party shall bear their own costs of this appeal. This order on costs is informed by the fact that this important point that has led to the striking out of the appeal and which ought to have been canvassed by the parties was never mentioned by either of the parties’ Advocates yet it is a jurisdictional issue and as jurisdiction cannot be conferred on the court by the parties’ silence or ignorance, this court was duty bound to determine it.”**

50. Based on the foregoing observation, it is apparent that the appeal herein was filed outside the Statutory timelines and hence same is a nullity ab initio.

## **ISSUE NUMBER 2**

### **Whether the suit premises were exempted and thus fell outside the jurisdiction of the tribunal.**

51. The Appellant herein had contended that the tribunal dealt with an issue that was outside her jurisdiction and in this regard, the appellant’s counsel contended that the suit premises being institutional houses, same were exempt from Jurisdiction of the Tribunal.

52. Whereas the Rent Restriction Act applies to the designated dwelling houses, however, same does not apply to dwelling houses which are exempted by the Minister/Cabinet secretary for Land, Housing and Urban Development. *See Section 2 of the Rent Restriction Act, Chapter 296, Laws of Kenya.*

53. However, for a dwelling house to be deemed as exempted, the Party claiming the exemption must tender and/or avail the relevant gazette notice published by the Minister/Cabinet secretary.

54. As concerns the subject matter, it is worthy to note that no evidence was tendered by either of the parties and in this regard, no gazette notice was therefore produced. For clarity, the matter before the Tribunal was dealt with in an ad-hoc manner, thereby allowing no formal hearing, in the manner known to Law.

55. If the Appellant herein had intended to persuade the tribunal that the suit premises were exempted from the jurisdiction of the tribunal, it was incumbent upon the appellant to avail and/ or supply such Evidence.

56. Sadly, the Appellant did not discharge the Burden placed on her shoulders. Consequently, the Appellant cannot therefore be heard to submit that the institutional houses were exempted and therefore outside the jurisdiction of the tribunal.

57. Suffice it to say, that the Appellant ought to have tendered such Evidence before the tribunal and having not done so, the *lacuna* and/or *vacuum* resulting from non-provision of Evidence, cannot now be plugged by submissions.

58. I must point out that submissions cannot take the place of Evidence and a Party who has not tendered evidence, falls short of the statutory obligation placed on same. *See Sections 107 and 108 of the evidence Act Chapter 80 Laws of Kenya.*

59. Nevertheless, if there was need for any case law, the observations by the Court of Appeal in the case of **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR**, would suffice. For clarity, the Court of Appeal observed as hereunder;

**“Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.”**

### **ISSUE NUMBER 3**

**Whether the tribunal acted in accordance with the law in disregarding the valuation report filed by own valuer and in lieu thereof adopting the one filed by the Respondents:**

60. The Appellant also complained that the Tribunal erred in disregarding the valuation report filed by the tribunal’s own Valuer and instead adopting and relying on the valuation report filed by the Respondents valuer.

61. Before evaluating the complaint by the appellant herein, it is worthy to recall that indeed the Tribunal ordered and/or directed own valuer to value the suit premises and render a valuation report.

62. It is also common ground that pursuant to the order by the tribunal, indeed a valuation report was filed. However, upon the filing of the said valuation report, the parties herein disagreed with the contents thereof and therefore sought leave to file Independent valuation Reports.

63. Pursuant to the Request and/or Application by the parties, liberty was granted to same to engage independent valuers, value the suit premises and file independent valuation Reports. Suffice it to note, both the Respondents and the Appellant filed their independent valuation reports.

64. Owing to the foregoing, the tribunal was therefore possessed of three separate and distinct valuation Reports, one by own valuer, the other one by the Appellant and the third one by the Respondents.

65. Based on the foregoing, the question that arises is which of the three Reports would the tribunal go by and what would be the appropriate mechanism for handling the Reports, given that the contents thereof, were in conflict.

66. Suffice it to say, that a court confronted with such kind of scenario, ought and should direct that the makers of the said valuation Reports to attend court/tribunal for purposes of Cross Examination.

67. However, in the instant case, the tribunal proceeded to disregard two of the valuation reports, including the one by the Tribunal’s own valuer and in lieu thereof, adopted and relied upon the one filed by the Respondents.

68. In my humble view, the approach adopted by the tribunal was unorthodox and quiet unconventional. No wonder, a complaint has been ventilated that the tribunal was biased, in her assessment of the evidence, as well as in the ultimate decision that was arrived at.

69. By ignoring and/or disregarding the valuation Report filed by the tribunal own valuer, the Tribunal was undermining its own operations and circumventing the provisions of Section 5(2) of the Rent Restriction Act.

70. Be that as it may, on this ground alone, I would have been constrained to allow the Appeal and set aside and/or vary the Ruling and the Decision of the tribunal.

### **FINAL DISPOSITION:**

71. Having reviewed the issues for determination, it is now timely and/or expedient to render a conclusion as pertains to the subject Appeal.

72. Suffice it to say, that the Appeal herein was filed and/or lodged outside the period prescribed and/or stipulated pursuant to the provisions of Section 8(2) of the Rent Restriction Act, as read together with Rule 2 of the Rent Restriction (Appeals) Rules. Consequently, the appeal is a nullity.

73. Based on the foregoing, the Appeal herein be and is hereby struck out.

74. I must point out, that the issue pertaining to the incompetence of the Appeal was neither raised nor taken by either of the counsel. Consequently, neither Party is entitled to Costs.

75. In the premises, Each Party shall bear own cost of the Appeal.

76. It is so Ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10<sup>TH</sup> DAY OF FEBRUARY, 2022**

**HON. JUSTICE OGUTTU MBOYA**

**JUDGE**

In the Presence of;

**June Nafula Court Assistant**

Mr. Wandaka for the Appellant

Mr. Amadi for the Respondents.