Waigwa v Waithaka (Environment and Land Appeal 12 of 2020)
[2022] KEELC 13345 (KLR) (29 September 2022) (Judgment)

Neutral citation: [2022] KEELC 13345 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU

ENVIRONMENT AND LAND APPEAL 12 OF 2020

YM ANGIMA, J

SEPTEMBER 29, 2022

BETWEEN

DAVID MAINA WAIGWA ..... APPELLANT

AND

ELISHIBA MWERU WAITHAKA ..... RESPONDENT

(An appeal against the ruling and order of Hon S.N Mwangi (SRM) dated 25.06.2020 in Nyahururu CM ELC No 22 of 2020)

JUDGMENT

A. Introduction and Background

1. This is an appeal against the ruling and order of Hon S.N Mwangi (SRM) dated June 25, 2020 in Nyahururu CM ELC No 22 of 2020 – David Maina v Elishiba Mweru Waithaka. By the said ruling, the trial court upheld the respondent's notice of preliminary objection dated April 27, 2020 and struck out the appellant's suit with costs to the respondent.

2. The material on record shows that *vide* a plaint dated April 14, 2020 the appellant sued the respondent seeking the following reliefs against him:

    a. A declaration that there is and/or was a controlled tenancy between the plaintiff and the defendant over and in respect of block 6/423 along Kenyatta avenue Nyahururu town (Nyandarua house) and hence the eviction mounted by and/or on behalf of the defendant on the April 10, 2020, were illegal, null and void.

    b. A mandatory injunction directed against the defendant, either by herself, agents and/or servants and compelling them to reinstate and/or restore the plaintiff to the demised premises situated on block 6/423 along Kenyatta avenue Nyahururu town (Nyandarua house).

c. A permanent injunction, restraining the defendants, either by themselves, agents, servants and/or employees, from further interfering with, evicting, sub-leasing out to third party and/or otherwise interfering with plaintiff's possession, occupation and use of the demised premises, situate on block 6/423 along Kenyatta avenue Nyahururu town (Nyandarua house), without due regard to the law or at all.

d. General damages for trespass, mental torture, harassment and humiliation.

e. Interest at court rates on (d) herein.

f. Costs of this suit be borne by the defendant and any such further and/or other relief as the honourable court may deem fit and expedient so to grant.

3. The appellant pleaded that at all material times he was a sub-tenant of the respondent at block 6/423 (Nyandarua house) in Nyahururu town which premises the respondent had leased from the owner, Ngummo (K) Limited in 2009. It was further pleaded that *vide* a letter or notice dated March 23, 2020 the respondent asked the appellant to vacate the demised premises. It was the appellant's case that he opposed the demand by filing a BPRT reference No 62 of 2020 before the Business Premises Rent Tribunal (the tribunal) to have the notice nullified.

4. The appellant further pleaded that upon filing the said reference he obtained interim orders restraining the respondent from evicting him pending the hearing and determination thereof. It was the appellant's further pleading that upon application by the respondent the tribunal stayed the interim orders in his favour and as a result the respondent forcibly and illegally evicted him from the demised premises on April 10, 2020. The appellant pleaded that his stock-in-trade was destroyed in the course of the said eviction in consequence whereof he suffered loss and damage hence the suit.

5. The respondent filed a statement of defence dated April 27, 2020 denying liability for the appellant's claim and putting him to strict proof thereof. He pleaded that he was the sole tenant of the demised premises by virtue of lease executed between Ngummo (K) Ltd and himself. He denied ever sub-letting the same to the appellant and stated that the appellant was merely his employee.

6. The respondent further pleaded that the appellant had deceived the tribunal into granting him restraining orders and that the appellant was lawfully evicted from the demised premises upon the interim orders being vacated or stayed. It was the respondent's case that since the appellant alleged the existence of a tenancy or sub-tenancy between the parties then the tribunal was the right forum for adjudication of the dispute.

7. The respondent further pleaded in his defence that the trial court had no jurisdiction to entertain the suit; that the appellant had no locus standi to file suit; and that the suit was *res judicata* on account of the pendency of a reference before the tribunal. The respondent consequently prayed for dismissal or striking out of the suit with costs.

8. Simultaneously with the filing of the defence, the respondent filed a notice of preliminary objection dated April 27, 2020 challenging the jurisdiction of the trial court to entertain the suit and contending that the tribunal was the proper forum for adjudication. The respondent also contended that the appellant had no *locus standi* to file the suit since he was not privy to the tenancy agreement between Ngummo (K) Ltd and himself. Finally, the respondent contended that the suit was res judicata and the same ought to be struck out.

9. The material on record shows that the said preliminary objection was canvassed through written submissions before the trial court. Vide a ruling dated June 25, 2020 the trial court upheld the respondent's preliminary objection and struck out the appellant's suit with costs. The trial court held,

inter alia, that the appellant had no *locus standi* file suit; that the proper forum for adjudication was the tribunal; and that the suit was *res sub judice* in view of the pendency of a reference before the tribunal between the same parties over the same matter.

B. The Grounds of Appeal

10. Aggrieved by the said ruling, the appellant filed a memorandum of appeal dated July 27, 2020 raising the following 15 grounds of appeal:

    i. That the learned magistrate erred in law and fact in failing to appreciate that though the dispute before had its historical background in a tenancy transaction, the substantial cause of action before the honourable court was one of illegal and/or unlawful eviction of the appellant by or on behalf of the respondent.

    ii. That the learned magistrate erred in law or in fact in failing to appreciate that a substantial claim of illegal and unlawful eviction fairly and squarely lies within the jurisdiction of the Environment and Land Court.

    iii. That the learned magistrate erred in law and in fact by failing to appreciate that the background of the matter before her being in tenancy and the substantial claim being one of unlawful and/or illegal eviction, presented a scenario of a mixed grill case.

    iv. That as a result of the foregoing the learned magistrate erred in law and in fact by taking a selective approach in deciding the question of jurisdiction and leaving the appellant expected to have split his claim among the various courts while in search of justice.

    v. That the learned magistrate erred in law and in fact in failing to appreciate that failure to adjudicate upon consequential or factual questions which on the face of it appears to be within the exclusive jurisdiction of another court would unreasonably emasculate and whittle down the inherent power of a court of law to do justice without undue regard to technicalities.

    vi. That the learned magistrate erred in law and in fact by failing to appreciate that the Business Premises Rent Tribunal has no jurisdiction to issue an injunction or similar remedy against the landlord.

    vii. That the learned magistrate erred in fact and in finding that the matter before her was solely for recovery of possession by a tenant thereby ignoring other prayers sought by the appellant that were within her jurisdiction to hear and determine.

    viii. That the learned magistrate erred in law and in fact by failing to appreciate that the Business Premises Rent Tribunal has no jurisdiction to issue an order for general damages for trespass, mental torture, harassment and humiliation as had been sought by the appellant.

    ix. That the learned magistrate erred in law and in fact by holding that the appellant lacked the requisite *locus standi* to bring the action before her simply because he was not part of the lease agreement between the respondent and Ngummo (K) Ltd even when it was not in dispute that it is the respondent that had been in occupation of the subject premises for 10 years and the court having found as much.

    x. That the learned magistrate erred in law and in fact in deciding that the appellant was not privy to the tenancy agreement between the respondent and the said Ngummo (K) Ltd yet she had decided that she had no jurisdiction to her and determine the matter before her.

xi. That the learned magistrate erred in law and in fact by failing to appreciate that it is trite law that unless a tenant consents or agrees to give up possession, the landlord has to obtain an order of a competent court or a statutory tribunal for possession which was not the case in the matter before her.

xii. That the learned magistrate erred in law and in fact by failing to appreciate that incase of eviction of a tenant without a lawful order of court, such a tenant's recourse would be before the court for remedies allied to illegal and/or unlawful eviction.

xiii. That the learned magistrate erred in law and in fact in finding that the matter before her was subjudice even when the matter before the honourable tribunal was as a result of a distinct set of facts from the matter before her and that the remedies sought in the two distinct matters are also distinct.

xiv. That the learned magistrate erred in law and in fact by failing to appreciate that the remedy of striking out pleadings is to be used sparingly and only in the cases where the plaint is incontestably bad.

xv. That the learned magistrate erred in law and in fact by failing to uphold the provisions of the *Constitution* of Kenya, 2010.

C. Directions on Submissions

11. When the appeal was listed for directions it was directed that the same shall be canvassed through written submissions. The parties were granted timelines within which to file and exchange their respective submissions. The record shows that the appellant filed his submissions on March 23, 2022 but the respondent's submissions were not on record by the time of preparation of the judgment.

D. The Issues for Determination

12. Although the appellant raised 15 grounds in his memorandum of appeal the court is of the opinion that the appeal may be effectively determined by resolution of the following three (3) key issues:

    (a) whether or not the trial court erred in law in holding that the appellant had no *locus standi* to file the suit.

    (b) Whether or not the trial court erred in law in holding that the suit was sub-judice and an abuse of the court process.

    (c) whether or not the trial court erred in law in holding that it had no jurisdiction to entertain the suit.

E. Analysis and Determination

(a)Whether or not the trial court erred in law in holding that the plaintiff had no locus standi to file suit

13. The court has considered the material and submissions on record on this issue. The appellant submitted that the trial court erred in holding that the appellant had no *locus standi* to file suit because he was not privy to the tenancy agreement for the demised premises between Ngummo (K) Ltd and the respondent. The appellant submitted that it was evident from the material on record that he had been in occupation for more than 10 years by the time of filing suit.

14. It is evident from the material on record that the respondent had pleaded in his defence that the appellant was not his tenant or sub-tenant but merely an employee. The court is of the opinion that the question of the existence or non-existence of a tenancy relationship, whether controlled or not, was a matter squarely for determination by the tribunal in the reference which was pending determination. Once the trial court came to the conclusion that it had no jurisdiction to entertain the suit, then it was required to down its tools and let the tribunal deal with all questions in dispute between the parties. It was not open to the trial court to make any determination on the rest of the issues especially on whether or not the appellant was privy to the tenancy agreement between the respondent and the owner of the demised premises. The court, therefore, agrees with the appellant's contention that the trial court erred in its determination on the issue of *locus standi*.

(b) Whether or not the trial court erred in law in holding that the suit was sub judice and otherwise an abuse of the court process

15. The court has considered the material and submissions on record on this issue. Although the respondent had argued before the trial court that the appellant's suit was *res judicata* the trial court rightly found that the suit was not res judicata since the reference before the tribunal was still pending determination. Instead, the trial court found that the parties and issues before the tribunal were substantially the same as those before the court. The court also correctly identified the central issue in both fora as being the question of the existence of a controlled tenancy between the parties.

16. It is evident from the material on record that the appellant had initially chosen his forum as the tribunal where he filed a reference against the respondent on the basis that there existed a controlled between the parties. The appellant also sought and obtained interim orders stopping his eviction from the demised premises. It is not clear why he did not seek an order for reinstatement before the tribunal when he considered that he had been wrongfully evicted during the pendency of the reference. The court is of the opinion that the trial court was right in holding that the filing of a new suit over substantially the same dispute was an abuse of the court process.

(c) Whether or not the trial court erred in law in holding that it had no jurisdiction to entertain the suit

17. Whereas the appellant contended that the trial court had jurisdiction to entertain the suit, the respondent contended that the dispute fell squarely within the province of the tribunal. The appellant faulted the trial court for holding that the dispute fell within the jurisdiction of the tribunal. It was the appellant's submission that the tribunal had limited jurisdiction to determine only the first prayer in the plaint and that it had no jurisdiction to grant an interim injunction, order reinstatement or award damages.

18. The appellant further submitted that the claim before the trial court was a mixed grill case which should have been entertained by the trial court since some of the reliefs sought fell within the jurisdiction of the tribunal whereas others fell without. The appellant cited the case of *Suzanne Achieng Butler & 4 others v Redhill Heights Investments Ltd & another* [2016] eKLR in support of the submission that a mixed grill case should be admitted by the court where it is filed in the first instance.

19. The appellant also cited the case of *Republic v Business Premises Rent Tribunal & another ex parte Davies Motor Corporation Limited* [2013] eKLR, *Moses N Gitonga & another v George Gatheca Kinyanjui & another* [20014] eKLR and *Republic v Business Premises Rent Tribunal & another ex parte Albert Kigera Karume* [2015] eKLR in support of the submission that the tribunal had no jurisdiction

to grant an interim injunction hence an aggrieved tenant can only seek such a remedy from a court of law. In the case of *Moses N Gitonga & another* (supra) it was held, *inter alia*, that:

> " It therefore follows that the plaintiff could not have obtained the orders sought in this case in cases pending in the BPRT since the BPRT has no jurisdiction to grant reliefs of injunction. Precedent shows that the right forum to seek orders of injunction in the High Court even if there is a case pending in the BPRT. This was the holding in the case of *S.N t/a Baby Steps Kindergarten v Hasham Lalji Properties Ltd & another* [2008] eKLR where Nambuye J (as she the was) held that the High Court has jurisdiction to entertain an application for injunction even if the dispute arises from tenant landlord relationship governed by the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* – cap 301."

20. The jurisdiction of the tribunal is captured in section 12(1) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* (the L & T Act) as follows:

> " A tribunal shall, in relation to its area of jurisdiction have power to do all things required or empowered to do by or under the provisions of this Act and in addition to and without prejudice to the generality of the foregoing shall have power:-
>
> a. to determine whether or not any tenancy is a controlled tenancy;
>
> b. to determine or vary the rent to be payable in respect of any controlled tenancy, having regard to all the circumstances thereof;
>
> c. to apportion the payment of rent payable under a controlled tenancy among tenants sharing the occupation of the premises comprised in the controlled tenancy;
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> d. where the rent chargeable in respect of any controlled tenancy includes a payment by way of service charge, to fix the amount of such service charge;
>
> e. to make orders, upon such terms and conditions as it thinks fit, for the recovery of possession and for the payment of arrears of rent and mesne profits, which orders may be applicable to any person, whether or not he is a tenant, being at any material time in occupation of the premises comprised in a controlled tenancy;
>
> f. or the purpose of enabling additional buildings to be erected, to make orders permitting landlords to excise vacant land out of premises of which, but for the provisions of this Act, the landlord could have recovered possession;
>
> g. where the landlord fails to carry out any repairs for which he is liable:-
>
> i. to have the required repairs carried out at the cost of the landlord and, if the landlord fails to pay the cost of such repairs, to recover the cost thereof by requiring the tenant to pay rent to the tribunal for such period as may be required to defray the cost of such repairs, and so that the receipt of the tribunal shall be a good discharge for any rent so paid;
>
> ii. to authorize the tenant to carry out the required repairs, and to deduct the cost of such repairs from the rent payable to the landlord;

h. to permit the levy of distress for rent;

i. to vary or rescind any order made by the tribunal under the provisions of this Act;

j. to administer oaths and order discovery and production of documents in like manner as in civil proceedings before the High Court, to require any landlord or tenant to disclose any information or evidence which the tribunal considers relevant regarding rents and terms or conditions of tenancies, and to issue summons for the attendance of witnesses to give evidence or produce documents, or both, before the tribunal;

k. to award costs in respect of references made to it, which costs may be exemplary costs where the tribunal is satisfied that a reference to it is frivolous or vexatious;

l. to award compensation for any loss incurred by a tenant on termination of a controlled tenancy in respect of goodwill, and improvements carried out by the tenant with the landlord's consent;

m. to require a tenant or landlord to attend before the tribunal at a time and place specified by it, and if such tenant or landlord fails to attend, the tribunal may investigate or determine the matter before it in the absence of such tenant or landlord;

(n) to enter and inspect premises comprised in a controlled tenancy in respect of which a reference has been made to the tribunal.

21. It is curious that the appellant submitted that the tribunal had no jurisdiction to entertain the dispute with the respondent whereas he had filed a reference before the tribunal and even obtained interim restraining orders against the respondent. It is only when those interim orders were stayed or set aside that the appellant discovered that the tribunal was not the right forum for the adjudication of the dispute.

22. The court is of the opinion that whichever way one may look at the dispute between the parties, it is really a dispute about the existence or otherwise of a tenancy, or controlled tenancy, between the parties under the L & T Act. The 1st prayer sought in the appellant's plaint is a declaration that there was a 'controlled tenancy' between the parties hence his eviction from the demised premises was illegal. That is really the main issue for determination. The rest of the prayers for injunction, damages, costs and interest are dependent upon resolution of the key issue in favour of the appellant. It is conceded by the appellant in his submission that the issue of whether or not there was a controlled tenancy between the parties is a question falling within the jurisdiction of the tribunal. It is the other consequential prayers which the appellant contended fell without its jurisdiction. The court is thus of the opinion that the main question for determination before the trial court was a matter for the tribunal hence the subordinate court had no jurisdiction to try and determine the same. The mere fact that the appellant included additional or consequential prayers in his plaint could not deprive the tribunal of its jurisdiction to handle and determine the dispute.

23. The court is of the opinion that even though the court in the *Moses N Gitonga case* (supra) held that the court had jurisdiction to entertain an application for an injunction in a matter governed by the L & T Act, the court referred to was the High Court and not the subordinate court. The subordinate court cannot be equated with the High Court because the latter enjoys unlimited original jurisdiction

in civil matters under our constitutional framework. The court finds no error on the part of the trial court in holding that it had no jurisdiction to entertain the suit.

F. Conclusion and Disposal

24. Although the trial court erred in law on the issue of *locus standi*, nothing really turns on this point since the court correctly found that it had no jurisdiction to entertain the suit. If a party having locus standi filed his suit before a court without jurisdiction it would be an exercise of futility. Accordingly, the court finds no merit in the appeal and the same is hereby dismissed with costs to the respondent.

    It is so ordered.

JUDGMENT DATED AND SIGNED AT NYAHURURU THIS 29TH DAY OF SEPTEMBER, 2022 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Mr. Maina Kairu holding brief for Mr. Mathea for the Appellant

N/A for the Respondent

C/A - Carol

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Y. M. ANGIMA

JUDGE