



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL CASE 49 OF 2009

SUPERIOR PRODCUTS AFRICA LTD.....PLAINTIFF/APPLICANT

VERSUS

TSALWA SAMUEL T/A TSALWA PLAZA (2002).....DEFENDANT/RESPONDENT

J U D G M E N T

The plaintiff has filed a suit in which it seeks the following reliefs:

- i) Special damages;
- ii) General and exemplary damages;
- iii) A permanent injunction to restrain the defendant from evicting it from the suit property, L.R. NO. 1664/27, BUTERE;**
- iv) Costs of the suit; and
- v) Interest on the damages.

It is common ground that the plaintiff is the tenant on the suit property, and that the defendant is the landlord. It is the plaintiff's case that it has at all material times, complied with all the terms and conditions of the Lease Agreement which governs the tenancy relationship between the two parties herein. Notwithstanding compliance with the terms and conditions of the Lease Agreement, the plaintiff complains that the defendant has threatened to evict it, unlawfully.

As a part of that unlawful exercise, the defendant is alleged to have

removed the plaintiff's goods from the shop which the plaintiff runs on the premises of the suit property.

It is the said actions which prompted the plaintiff to first seek the

intervention of the Officer-in Charge of the Butere Police station. The said police officer later sought the advice of the OCPD.

According to the plaintiff, the OCPD and the DCIO Butere, then ordered

the defendant to return to the shop, all the goods which the defendant had removed therefrom.

Although the defendant complied with the order issued by the police

officers, he is said to have threatened to ensure that the plaintiff was removed from the suit property. Being apprehensive of the threatened action, the plaintiff filed a civil suit at the Senior Resident Magistrate's Court, Butere, with a view to safeguarding its rights under the lease Agreement.

It is common ground that the suit which was filed before the Senior Resident Magistrate's Court, Butere, was struck out by the said court. The order to strike out the suit was founded upon the said court's opinion, that it lacked jurisdiction to hear and determine the case.

The learned magistrate made a finding that the matter was within the

jurisdiction of the Business Premises Rent Tribunal.

Following the striking out of the suit, the plaintiff filed the present suit. In

part response to the application for interlocutory reliefs herein, the defendant filed a Notice of Preliminary Objection. I have referred to the preliminary objection as being only a part of the response because the defendant has also filed a defence to the suit, and a replying affidavit in answer to the interlocutory application.

This ruling is on the preliminary objection.

Mr. Sichangi, the learned advocate for the defendant, submitted that the

dispute herein ought to be determined by the Business Premises Rent Tribunal. In the circumstances, he believes that this court lacks the jurisdiction to hear and determine the suit.

His submissions are informed by the fact that the Lease Agreement governing the tenancy between the parties herein was for a period of two (2) years. By virtue of the said duration, the tenancy was one that was a “controlled tenancy”, pursuant to the provisions of **section 2** of the **Landlord and Tenant (Shop, Hotels and Catering Establishments) Act, Cap 301** of the Laws of Kenya.

As the defendant’s objection was upheld by the Senior Resident

Magistrate’s Court, Butere, the defendant reiterated that this court too, lacks jurisdiction.

In support of his submissions, the defendant relied on two decisions

of the Court of Appeal. The said decisions are;

i) JITENDRA MATHURDAS KANABAR & 2 OTHERS VS FISH AND MEAT LIMITED, MSA CIVIL APPEAL NO. 267 OF 1996;
and

ii) EVANSON GITAU V R & K INVESTMENTS LTD, CIVIL APPEAL NO. 182 OF 1998

It was the defendant’s position that in those two appeals it was held that the High Court has no jurisdiction over controlled tenancies, in the first instance.

Indeed, the defendant believes that even if the plaintiff was seeking an injunction, it should first have filed a reference before the Business Premises Rent Tribunal. Having done so, the application for an injunction would then not be in a vacuum, said the defendant. I was told that just because the plaintiff’s claim sought certain reliefs, that fact cannot confer jurisdiction on the High Court.

In answer to the preliminary objection, Mr. Okoth the learned advocate who held brief for Mr. L.G. Menezes submitted that this court ought to ignore such submissions as were made by the defendant, to the extent that such submissions were on issues of fact. He reminded this court that preliminary objections had to be limited to issues of law only.

When the court drew the attention of Mr. Okoth to the fact that the only issues about which the defendant had made reference, were those that were not disputed, the plaintiff abandoned that line of submissions.

The plaintiff then submitted that the Business Premises Rent Tribunals only dealt with issues of tenancy disputes, arising in business premises.

In the plaintiff’ view, the claim herein did not fall within the jurisdiction of the Tribunal because the said Tribunal lacked jurisdiction to grant such remedies as special damages, general damages or exemplary damages.

The plaintiff also argued that the decision by the learned Senior Resident Magistrate, Butere, was wrong, because the scope of the plaintiff’ claims went beyond the jurisdiction of the Tribunal.

Finally, the plaintiff reiterated that the High Court has original jurisdiction to entertain any matter which may be placed before it, for adjudication.

When the defendant was called upon to reply, he said that provided there was a controlled tenancy, every attempt to find a legal resolution to disputes arising therefrom, must start before the tribunal. But in the same vein, the defendant conceded that the High Court does not lack original jurisdiction. His contention, however, was that the High Court could exercise the said original jurisdiction in the appeal, if any, arising from the decision of the tribunal.

Having given consideration to the reply from the defendant, I almost made a simple conclusion to this whole issue. The simple conclusion I

wished to draw, at that stage, is that, as soon as the defendant conceded that the High Court's original jurisdiction was not ousted by the Tribunal, the defendant cannot be heard to argue that the High Court lacked jurisdiction. Secondly, the function of a court that is called upon to hear and determine an appeal is not that of an original jurisdiction. At that stage, the court would be exercising its appellate jurisdiction.

In **JITENDRA M. KANABAR & 2 OTHERS VS FISH AND MEAT LIMITED**, the superior court had held as follows;

“This was a controlled tenancy. The Notice was given under

the Act. Only the Tribunal can determine the issues at hand.

In the end I respectively (sic!) agree that this court lacks

jurisdiction to hear this suit and the application..”

On appeal, the Court of Appeal held that the landlord/tenant relationship between the appellants and the respondent had ceased. In the light of that fact, the Court of Appeal held that a controlled tenancy no longer existed, and that therefore, the Tribunal did not have jurisdiction to deal with the matter. In those circumstances, the court held that the appellants had to come to court to enforce their rights to their property.

In other words, the Court was addressing the issue as to whether the Tribunal or the High Court had jurisdiction to hear and determine disputes arising from a tenancy which was no longer controlled. The court came to the conclusion that the Tribunal had no jurisdiction. It is the High Court which had jurisdiction in such circumstances.

Meanwhile in **EVANSON GITAU V R & K. INVESTMENTS LTD** (above cited), the tenancy was for more than 5 years. The Court of Appeal upheld the decisions of the Tribunal and of the Superior Court, both of which had held that the Tribunal lacked jurisdiction to hear and determine a dispute arising from the said tenancy.

In my considered opinion, those two authorities do not advance the preliminary objection herein.

On my part, I have given careful consideration to the provisions of the **Landlord and Tenant (Shops, Hotels and Catering Establishments) Act**, but failed to find any provision which purports to limit the legal authority vested on the High Court by virtue of section 60 of the Constitution of Kenya. In the absence of any clear and unambiguous words, which would limit the jurisdiction of the High Court, so conferred, it is trite law that the said jurisdiction is unlimited, in the first instance.

Secondly, a reading of section 12 of the **Landlord and Tenant (Shops, Hotels and Catering Establishments) Act** reveals that the Tribunals are not vested with authority or jurisdiction to award special, general or exemplary damages. Given that unless jurisdiction is conferred, it cannot be presumed, I hold that the Tribunal lacks jurisdiction to grant those reliefs.

Therefore, I am unable to agree with the defendant, that the nature of reliefs claimed cannot give an indication as to the lack or otherwise of jurisdiction, by the court or tribunal from which such reliefs are sought. I say so because if the court or tribunal has no jurisdiction to grant such reliefs, it would be valueless seeking the said reliefs from such court or tribunal.

In **TIWI BEACH HOTEL LTD VS. STAMM [1991] KLR 658** the tenant filed suit in the superior court claiming that;

“she was a protected tenant under a controlled tenancy and that her tenancy could not be terminated or terms thereof altered otherwise than in accordance with the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act....”

- *per Kwach JA, at page 672*

The learned judge went on to hold as follows; at page 673;

“The tenant claimed, quite properly, in my view, statutory protection under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act and the appellant, as landlord of the

premises was therefore obliged to comply with the statutory procedure under the Act if it was its intention either to terminate the tenancy or alter its terms to the detriment of the respondent”

That decision reflects the fact that the High Court has jurisdiction to hear and determine cases arising from disputes in controlled tenancies.

Not only did the Court of Appeal not criticize the superior court for entertaining that dispute, but also Cockar Ag. JA (as he then was) held that the learned judge was quite right to grant an interim injunction in order to maintain the status quo until the final disposal of the main suit.

In the event, I overrule the preliminary objection and the costs thereof are awarded to the plaintiff.

Dated, Signed and Delivered at KAKAMEGA, this 30th day of April, 2009.

FRED A. OCHIENG

JUDGE