Munga t/a Unisex Aero Salon v Convest Holdings Limited (Environment and Land Appeal E094 of 2021) [2022] KEELC 15543 (KLR) (20 December 2022) (Judgment)

Neutral citation: [2022] KEELC 15543 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND APPEAL E094 OF 2021

JO MBOYA, J

DECEMBER 20, 2022

BETWEEN

AGNES NYAMBURA MUNGA T/A UNISEX AERO SALON .... APPELLANT

AND

CONVEST HOLDINGS LIMITED .... RESPONDENT

(Business Premises Rent Tribunal.)

JUDGMENT

INTRODUCTION & BACKGROUND

1. The Respondent herein, who appears to be the registered Proprietor and owner of L R No 18505, I R No 112112, otherwise known as Aviation House, Located at Wilson Airport, within the City of Nairobi, proceeded to and issued a Notice to terminate tenancy against the Appellant herein.

2. Suffice it to point out that the Respondent contended that the Appellant was a tenant within the suit property, but had defaulted in payment of rents over a long period of time. For clarity, the Respondent indicated that the Appellant was in rent arrears since the year 2009.

3. Premised on the foregoing, the Respondent served the Appellant with a Notice to terminate tenancy dated May 8, 2019 and in respect of which the Respondent sought to terminate the tenancy and to recover vacant possession over and in respect of the named premises.

4. Following the issuance and service of the impugned Notice to terminate tenancy, the Appellant herein was obliged to and indeed filed a Reference dated June 10, 2019. For completeness, the Appellant contested and disputed the Notice to terminate tenancy, which was issued and served by the Respondent.

5. Subsequently, the dispute between the Appellant and the Respondent was prosecuted before the Business Premises Rent Tribunal, culminating into the delivery of the Ruling rendered on July 30, 2021.

6. It is important to note and underscore that vide the Ruling rendered on July 30, 2021, the Chair Person of the Business Premises Rent Tribunal held, *inter-alia* that the tenancy notice dated May 8, 2019 was valid and enforceable. Consequently, the chair person proceeded to and effectively endorsed the Notice to terminate tenancy.

7. It is common ground that upon the delivery of the impugned Ruling, the Appellant felt aggrieved and dissatisfied. In this regard, the Appellant proceeded to and filed the instant appeal.

8. Vide the Memorandum of Appeal dated December 9, 2021 (which was filed after leave to appeal out of time was obtained), the Appellant has enlisted various Grounds of Appeal.

9. For convenience, the grounds of appeal are as hereunder;

    i. That, the Learned trial Tribunal Vice Chair erred in law by giving validity to the Landlord's Notice to terminate or alter terms of Tenancy addressed to Agnes Nyambura Munga T/A Unisex Aero Salon dated May 8, 2019 when the same offends the mandatory provisions of Order 9 Rule 2 (c) of the *Civil Procedure Rules*.

    ii. That, the Learned trial Tribunal Vice Chair erred in law by apportioning himself jurisdiction on the basis of a perceived and erroneous supposition of admission by the Applicant rather than apportionment of jurisdiction on the basis of express statutory provisions of the law.

    iii. That, the Learned trial Tribunal Vice chair erred in law and in fact by disregarding and refusing to hear and determine the Applicant's Notice of Preliminary Objection dated January 15, 2020 and filed in court on January 15, 2020 on a preliminary basis.

    iv. That, the Learned trial Tribunal Vice Chair erred in law and in fact by disregarding and refusing to consider the Applicant's Notice of Preliminary Objection dated January 15, 2020 and filed in court on January 15, 2020; Applicant's Written Submissions dated March 25, 2021 and filed in court on March 25, 2021 as well as the Applicant's pleadings generally as filed before the Tribunal.

    v. That, the Learned trial Tribunal Vice Chair person erred in law by relying on the Respondent's legally and fatally defective Replying Affidavit as sworn by Haren Patel dated March 12, 2020 and filed in court on March 5, 2021 in arriving at his decision dated July 30, 2021 contrary to Order 9 Rule 2 (c) of the Civil Procedure Rules.

    vi. That, the Learned trial Tribunal Vice Chair erred in law by relying on the Respondent's Written Submissions dated April 13, 2021 and filed at the Tribunal on a date uncertain in arriving at his decision dated July 30, 2021 when the same was drawn in furtherance of a legally and fatally defective Replying Affidavit thereby being legally and fatally defective thereby incompetently on record.

    vii. That, the Learned trial Tribunal Vice Chair erred in law and in fact by arriving at a conclusion that the legally and fatally defective Replying Affidavit as sworn by Haren Patel dated March 12, 2020 and filed in court on March 5, 2021 was filed in response to the Applicant's Notice of Motion Application dated August 14, 2019 and filed in court on August 15, 2019 when the same was filed in reply to the Applicant's Notice of Motion Application dated January 15, 2020 and filed in court on January 15, 2020.

viii. That, the Learned trial Tribunal Vice Chair erred in law and in fact by failing to appreciate the factual accounts in Tribunal Cause No 544 of 2019 as elucidated by parties through their respective pleadings as supported by the Tribunal Proceedings of various dates.

ix. That, the Learned trial Tribunal Vice Chair erred in law and in fact by arriving at the Ruling dated July 30,2021 based on conjecture rather than the pleadings as filed by parties, proceedings before the Tribunal as weighed against Statutory provisions of the law as buttressed by relevant authorities thereto.

x. That, the learned trial Tribunal Vice Chair erred in law by shifting the Burden of Proof to the Applicant contrary to Sections 107,108 and 109 of the *Evidence Act* when it is the Respondent that instituted the suit before the Tribunal via Landlords Notice to Terminate or Alter terms of tenancy addressed to Agnes Nyambura Munga T/A Unisex Aero Salon dated May 8, 2019.

10. The subject Appeal came up for direction on October 6, 2022, whereupon directions were duly issued. For clarity, it was directed that the Appeal be canvassed and be disposed of by way of written submissions.

11. Pursuant to and in line with the foregoing directions, it is imperative to point out that the Appellant proceeded to and duly filed written submissions dated October 26, 2022, while on the other hand the Respondent filed written submissions dated November 4, 2022.

12. For completeness, the two sets of written submissions formed part and parcel of the record of the Honourable court. Consequently, same shall be taken into account whilst crafting the Judgment herein.

Submissions By The Parties:

Appellant's Submissions:

13. Vide Written submissions dated October 26, 2022, counsel for the Appellant has isolated, highlighted and amplified three pertinent issues for consideration and determination.

14. Firstly, counsel for the Appellant has submitted that the Notice to terminate tenancy dated May 8, 2019 and which was issued by and on behalf of the Respondent, was illegal, invalid and void for all intents and purposes.

15. Further, counsel has added that the impugned Notice to terminate tenancy did not stipulate or expressly contain the date when same was to take effect. For clarity, counsel pointed out that the date when the impugned Notice was to take effect was left blank.

16. Pursuant to the foregoing, counsel invited the Honourable court to take cognizance of the provisions of Section 4(2) and (4) of the *Landlord & Tenants (Shops, Hotels and Catering Establishment) Act*, Chapter 301 Laws of Kenya, which underscores that a valid Notice to terminate tenancy must give unto the tenant a duration of two months from the date of issuance and service thereof.

17. Secondly, counsel for the Appellant has further submitted that the impugned Notice to terminate tenancy was similarly invalid because same was neither executed nor authorized by the purported Landlord/Respondent.

18. In this respect, counsel for the Appellant has contended that the Respondent/Landlord being a limited liability company, can only act through her authorized officers/agents and not otherwise.

19. Nevertheless, counsel has submitted that in respect of the subject matter the Notice to terminate tenancy bears a signature, but which signature does not relate to any known person or at all.

20. On the other hand, learned counsel has also contended that no evidence was attached to the Notice to terminate tenancy, to show that the owner/bearer of the impugned signature on the notice to terminate tenancy, was indeed authorized by the Respondent to execute the impugned Notice.

21. In the premises, it has been submitted that in the absence of credible evidence to confirm and authenticate that the owner of the impugned signature was duly authorized, then it is evident that the Notice to terminate tenancy was executed in contravention of the provisions of Order 9 Rule (2) (c) of the Civil Procedure Rules, 2010.

22. In support of the contention that the Notice to terminate tenancy was executed in contravention of the provisions of Order 9 Rule (2) (c) of the Civil Procedure Rules, 2010, counsel of the Appellant cited and relied on inter-alia, the case of *East African Portland Cement Ltd v The Capital markets Authority & 4 Others* (2014)eKLR, *Bugerere Coffee Growers Ltd versus Sebaduka & Others* (1970)EA 147 and Foss versus Harbottle 1843 AC, to vindicate that where any legal document is signed by an unauthorized person then such a document is invalid.

23. Thirdly, learned counsel for the Appellant has submitted that the Notice to terminate tenancy contended that the impugned rent arrears had been owing due and payable w.e.f 2009. In this regard, counsel pointed out that the claim seeking to recover such rents was therefore statute barred.

24. On the other hand, counsel also submitted that to the extent that the rents which were alluded to and which founded the basis of the Notice to terminate tenancy were statute barred, then the impugned notice was itself null and void.

25. To vindicate the foregoing submissions, learned counsel for the Appellant has invoked and relied on the provisions of Sections 4 and 8 of the *Distress for Rent Act*, Chapter 293 Laws of Kenya, as well as the holding in the case of *C. Y. O Owayo versus George Hannington Zephania Aduda T/a Aduda Auctioneers & Another* (2007)eKLR.

26. In view of the foregoing, counsel for the Appellant has therefore invited the Honourable court to find and hold that the ruling and decision of the Business Premises Rent Tribunal was unlawful and illegal and thus ought to be set aside, rescinded and/or quashed.

27. In a nutshell, the Appellant has implored the Honourable court to find merit in the appeal and to allow same.

Respondent's Submissions:

28. The Respondent filed written submissions dated November 4, 2022 and in respect of which same has similarly identified, isolated and highlighted three issues for due consideration.

29. The first issue that has been raised and canvased by the Respondent touches on and concerns the validity of the notice to terminate tenancy.

30. According to the Respondent the impugned Notice to terminate tenancy, duly complied with and adhered to the provisions of Section 4 of the Landlord and Tenants (Shops, Hotels and Catering establishment) Act, Chapter 301 Laws of Kenya.

31. In this regard, learned counsel for the Respondent submitted that the impugned Notice was clearly dated and same gave the Appellant more than adequate timeline to vacate and hand over vacant possession in respect of the suit property.

32. In any event, counsel for the Respondent further added that the issue that the date when the notice was to take effect was not stated/stipulated in the said notice, was neither raised nor addressed before the Business Premises Rent Tribunal.

33. In this regard, counsel has therefore submitted that to the extent that the issue of lack of date was neither raised nor canvassed before the Business Premises Rent Tribunal, the same could not therefore be ventilated and canvased before this honourable court.

34. To this end, learned counsel for the Respondent cited and quoted the decision in the case of *Independent Electoral and Boundaries Commission versus Stephen Mutinda Mule & Others* (2014)eKLR, where the Honourable Court of Appeal underscored and reiterated that Parties are bound by their Pleadings.

35. Secondly, learned counsel for the Respondent submitted that the impugned Notice to terminate tenancy was duly and lawfully executed by a Director of the Respondent Company. In this regard, counsel for the Respondent has stated that the impugned Notice was executed by Mr. Haren Patel, who is a director of the Respondent company.

36. In view of the foregoing, counsel added that the named director therefore had all the authority and mandate to execute the Notice to terminate tenancy for and on behalf of the Respondent.

37. Lastly, counsel for the Respondent has submitted that the issue of Section 8 of the *Limitation of Actions Act* Chapter 22 Laws of Kenya, which stipulates the duration for which rent arrears can be recovered, does not bar or prohibit the termination of tenancy on the basis of extended delay/default to pay rents.

38. In any event, counsel has further added that the issuance and service of the Notice to terminate tenancy did not by itself constitute an action in the manner prescribed vide Section 8 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya.

39. Other than the foregoing, counsel for the Respondent has added that upon the delivery of the ruling and decision of the Business Premises Rent Tribunal, the Appellant herein was duly and lawfully evicted from the suit property.

40. Consequently, it has been submitted that upon the eviction of the Appellant from the suit property, the instant appeal has been rendered moot and academic. In this regard, counsel for the Respondent has contended that the entire Appeal has therefore been overtaken by events.

Issues For Determination:

41. Having reviewed the Memorandum of Appeal, the entire record of appeal, as well as the impugned Ruling which was delivered by the Business Premises Tribunal; and having duly considered the written submissions filed by the respective Parties, the following issues are material and thus worthy of determination;

    i. Whether the Notice to Terminate Tenancy dated and issued on May 8, 2019 was lawful, legitimate and valid in accordance with the Provisions of Section 4(2) and (4) of The Landlord and Tenants (Shops, Hotels and Catering Establishment) Act, Chapter 301 Laws of Kenya.

    ii. Whether the Impugned Notice to Terminate tenancy was duly and lawfully executed by a person duly authorized by the Respondent.

    iii. Whether the Impugned Notice to Terminate Tenancy was barred by the Provisions of Section 8 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya.

Analysis And Determination

Whether the Notice to Terminate Tenancy dated and issued on May 8, 2019 was lawful, legitimate and valid in accordance with the provisions of Section 4(2) and (4) of The Landlord and Tenants (Shops, Hotels and Catering Establishment) Act, Chapter 301 Laws of Kenya.

42. It is common ground that any landlord, the Respondent not excepted, who is keen to terminate a controlled tenancy, must issue and serve upon the tenant a valid Notice to terminate the tenancy in question.

43. In this regard, if the Respondent was keen and desirous to terminate (sic) the tenancy between herself and the Appellant, then it behooved the Respondent to duly comply with and adhere to the provisions of Section 4(2), (3), (4) and (5) of the Landlord and Tenants (Shops, Hotels and Catering Establishment) Act, Chapter 301 Laws of Kenya.

44. To be able to understand and appreciate the import and tenor of the provisions of Section 4(2), (3), (4) and(5) of the said Act, it is appropriate to reproduce same.

45. In this respect, the provisions are reproduced as hereunder;

4. Termination of, and alteration of terms and conditions in, controlled tenancy

(1) Notwithstanding the provisions of any other written law or anything contained in the terms and conditions of a controlled tenancy, no such tenancy shall terminate or be terminated, and no term or condition in, or right or service enjoyed by the tenant of, any such tenancy shall be altered, otherwise than in accordance with the following provisions of this Act.

(2) A landlord who wishes to terminate a controlled tenancy, or to alter, to the detriment of the tenant, any term or condition in, or right or service enjoyed by the tenant under, such a tenancy, shall give notice in that behalf to the tenant in the prescribed form.

(3) A tenant who wishes to obtain a reassessment of the rent of a controlled tenancy or the alteration of any term or condition in, or of any right or service enjoyed by him under, such a tenancy, shall give notice in that behalf to the landlord in the prescribed form.

(4) No tenancy notice shall take effect until such date, not being less than two months after the receipt thereof by the receiving party, as shall be specified therein:

Provided that—

(i) where notice is given of the termination of a controlled tenancy, the date of termination shall not be earlier than the earliest date on which, but for the provisions of this Act, the tenancy would have, or could have been, terminated;

(ii) where the terms and conditions of a controlled tenancy provide for a period of notice exceeding two months, that period shall be substituted for the said period of two months after the receipt of the tenancy notice;

(iii) the parties to the tenancy may agree in writing to any lesser period of notice.

(5) A tenancy notice shall not be effective for any of the purposes of this Act unless it specifies the grounds upon which the requesting party seeks the termination, alteration or reassessment concerned and requires the receiving party to notify the requesting

party in writing, within one month after the date of receipt of the notice, whether or not he agrees to comply with the notice.

46. Fromthe foregoing provisions, whose details have been cited in the preceding paragraphs, it is apparent and evident that a valid notice to terminate tenancy must not only stipulate the grounds upon which the intended termination is anchored, but same must also provide the tenant with a duration of not less than two (2) Months from the date of service.

47. On the other hand, there is also no gainsaying that the duration of the notice is stipulated and underscored to be not less than two months. In this regard, the duration alluded to relates to two (2) Calendar Months and not otherwise.

48. For coherence, the two (2) months are not to be reckoned and computed on the basis of days. For clarity, if a particular Notice is issued within a named month, then the named month would be excluded in the computation of the two months calendar Notice.

49. For the avoidance of doubt, where as in the instant case, the Notice is dated May 8, 2019, then it is evident that the entire of May, 2019, shall be excluded in the computation and reckoning of the two months stipulated and envisaged vide Section 4(4) of the Landlord and Tenants (Shops, Hotels and Catering Establishment) Act, Chapter 301 Laws of Kenya.

50. Having made the foregoing observation, it is now appropriate to return home and to deal with the validity of the impugned Notice to terminate tenancy which was issued by the Respondent.

51. As pertains to the impugned Notice, there is no gainsaying that same did not stipulate or underline the date when the impugned notice was to take effect. For clarity, the date when same was to take effect was left blank.

52. In the absence of a clear stipulation or mention of the date/time when the impugned Notice was to take effect, there is no gainsaying that the impugned notice did not therefore comply with or adhere to the mandatory provisions of Section 4(4) of the Landlord and Tenants (Shops, Hotels and Catering Establishment) Act, Chapter 301 Laws of Kenya.

53. In my humble, albeit considered view, the provisions of Section 4(4) of the Landlord and Tenants (Shops, Hotels and Catering Establishment) Act, Chapter 301 Laws of Kenya are mandatory and peremptory. Consequently, it is therefore incumbent and obligatory upon any landlord to comply with and adhere to same.

54. Additionally, where there is failure or neglect to comply with the terms of Section 4(4) of the Landlord and Tenants (Shops, Hotels and Catering Establishment) Act, Chapter 301 Laws of Kenya, such failure goes to the root of the Notice and thus affects the validity thereof.

55. In this case, the impugned Notice did not name or stipulate the due date when same was to take effect. Consequently, it is evident that the impugned Notice was therefore invalid, illegal and void.

56. To the extent that the impugned Notice to terminate tenancy was invalid, illegal and void, it therefore follows that no legitimate or lawful proceedings, let alone Court orders, could arise or be anchored there from.

57. Differently, where an act, in this case the impugned notice, is void then such an act is incapable of being validated by any subsequent action, activity, or appearance whatsoever.

58. In any event, participation in a proceeding borne out of a void and illegal act, cannot by itself validate what was otherwise anullity *ab-initio*.

59. To buttress the foregoing statement of the Law, it is appropriate to take cognizance of and to reiterate the holding of the Court of Appeal in the case of *Commissioner Of Lands & Another Versus Coastal Acquaculture Limited* [1997] eKLR, where the court stated and observed as hereunder;

> "I had when dealing earlier with the issue whether Mr. Mwaniki and his colleagues had jurisdiction to undertake the Inquiry, concluded that in view of Mr. Mwaniki's answer to the pertinent question put to him by Mr. Ghalia, whereby, he had asserted that the Inquiry was being undertaken by the Commissioner, he Mr. Mwaniki had denied that he and his colleagues had any jurisdiction to undertake the Inquiry. As is apparent on the face of the record, Mr. Mwaniki and Co. had acted ultra vires which is a matter which could not be condoned or corrected merely because the respondent had taken part in the Inquiry for four days before successfully seeking leave to apply for an order of prohibition in respect of the Inquiry and a stay of its proceedings.
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> With regard to the scope of the lack of jurisdiction of a tribunal which Mr. Mwaniki's Inquiry was, and which under the circumstances, applies to it, and which may give rise to an order of prohibition, de Smith's (ibid., p.396) under the heading "Lack of Jurisdiction", correctly summarized the position as follows and which Ringera, J. adopted:
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> "Jurisdiction may be lacking if the tribunal is improperly constituted; or if essential preliminary requirements have been disregarded; or if the proceedings are otherwise improperly instituted; or if the tribunal is incompetent to adjudicate in respect of the parties, the subject matter or the locality in question; or if the tribunal, although having jurisdiction in the first place, proceeds to entertain matters or make orders beyond its competence.".

60. Other than the foregoing decision, the legal implication of an act which is void ab initio was also calibrated upon and addressed in the case of Macfoy versus. *United Africa Co. Ltd* [1961] 3 All E.R. 1169, where Lord Denning while delivering the opinion of the Privy Council at page 1172 (1) stated and observed as hereunder;

61. For clarity, the revered Judge said;

> "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so.
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> And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

62. Based on the foregoing, I come to the considered view that the impugned Notice to terminate tenancy, which did not contain the requisite date when same was to take effect was a nullity ab initio.

63. Similarly, I find and hold that the impugned Notice to terminate tenancy was therefore illegal, unlawful and thus unenforceable, either in the manner alluded to in the impugned ruling or at all.

64. In a nutshell, the entire proceedings and the consequential orders made by the Business Premises Rent Tribunal were a nullity and of no legal consequence.

Whether the Impugned Notice to Terminate Tenancy was duly and lawfully executed by a person duly authorized by the Respondent.

65. It is apparent and evident that the impugned Notice to terminate tenancy bore a signature, but which had no corresponding name affixed against same.

66. On the other hand, it also evident that the portfolio or capacity of the person who executed the Notice to terminate tenancy, was also not disclosed nor provided for on the face of the Notice to terminate tenancy.

67. On the other hand, it is also common ground that other than the Notice to terminate tenancy which bore the signature of unnamed person, no authority to execute the Notice to terminate and nor resolution of the company, were attached or endorsed to the impugned notice.

68. In the absence of the name and portfolio of the person who affixed the signature on the notice to terminate tenancy, it is ex-facie, impossible to discern whether the executor of the impugned Notice was indeed a Director and was authorized by the Respondent company.

69. Similarly, it is important to observe and state that a Limited Liability company, the Respondent not excepted, can only act through authorized persons/agents and not otherwise.

70. Consequently, where any document and in this case a critical document like notice to terminate tenancy is said to have been authorized by the company, then it behooves the person executing the impugned pleading/document to exhibit the requisite authorization/resolution of the Company.

71. In the absence of such authorization or resolution by the company, then it means that the impugned act has neither been authorized nor sanctioned by the company. For clarity, the Burden of proving authorization lies on the shoulders of the one who asserts.

72. To underscore the importance of authorization and resolution of the company prior to commencement or lodgment of legal proceedings, it is essential to take cognizance of the Provisions of Order 9 Rule 2 (c) of the Civil Procedure Rules, 2010.

73. For convenience, the said provisions are reproduced as hereunder;

    2. Recognized agents [Order 9, rule 2.]

    The recognized agents of parties by whom such appearances, applications and acts may be made or done are—

    (a) subject to approval by the court in any particular suit persons holding powers of attorney or an affidavit sworn by the party authorizing them to make such appearances and applications and do such acts on behalf of parties;

    (b) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorized to make and do such appearances, applications and acts;

    (c) in respect of a corporation, an officer of the corporation duly authorized under the corporate seal.

74. Notwithstanding the provisions which have been cited and alluded to in the preceding paragraph, it is also important to point out that the importance of the requisite authorization/resolution of the company has hitherto been dealt with and addressed in various decisions.

75. Without belaboring the point, it is important to take cognizance of the holding in the case of *East African Portland Cement Ltd versus The Capital Markets Authority & 4 Others* (2014)eKLR, where the Honourable Court stated and observed as hereunder;

> 32. That being the case, what does the law provide with regard to suits filed without the authority of the company?
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> 33. In Affordable Homes Africa Limited vs Ian Henderson & 2 Others HCCC No 524 of 2004, Njagi J observed that as an artificial body, a company can take decisions only through the agency of its organs, the Board of Directors and the shareholders; and that where a company's powers of management are, by the articles, vested in the Board of Directors, the general meeting cannot interfere in the exercise of those powers (see the decision of the Court in Automatic Self-Cleansing Filter Syndicate v. Cuninghame [1906] Ch.34, CA.); that it was therefore necessary to examine a particular company's articles of association to ascertain wherein lies the power to manage the company's affairs, for therein also lies the power to sanction the commencement of court actions in the name of the company. The Court (Njagi J) observed that it was common ground that there was no authority from the Board Directors to institute the suit, and consequently, he held as follows:
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> > "The upshot of these considerations is that in the absence of a board resolution sanctioning the commencement of this action by the company, the company is not before the court at all. For that reason, the preliminary objection succeeds and the action must be struck out with costs, such costs to be borne by the advocates for the plaintiff."
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> 34. I believe a similar situation obtains in the present suit. Article 92 of the company's Memorandum and Articles of Association (annexure KT3 annexed to the undated affidavit of Mr. John Maonga filed in Court on 24th December 2014) provides that the business of the company shall be managed by the Directors who may do on behalf of the company all such acts and exercise all such powers as may be exercised by the company. As already stated, Article 110 of the company's Articles provides for the passing of resolutions of directors in writing, such resolutions to be as effective as those passed at meetings of the Board of Directors. As has also been found, the resolution purportedly authorising the present petition was not passed in accordance with Article 110. Consequently, there was no resolution for the filing of this matter.
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> 35. In Bugerere Coffee Growers Ltd vs Sebaduka & Another (supra), it was held, in dismissing the suit, that when companies authorise the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or Board of Directors' meeting and recorded in the minutes, but no resolution had been passed authorising the proceedings in the case. The Court held further that where an advocate has brought legal proceedings without authority of the purported plaintiff the advocate becomes personally liable to the defendants for the costs of the action.

36. In the present case, as I have already found, there is a resolution which does not accord with the provisions of the company's Memorandum and Articles of Association. The resolution annexed to the affidavit of Mark Ole Karbolo has not been approved by a minimum of the directors of the company as required under Article 110 of the company's Memorandum and Articles of Association; further, the persons who have sworn the affidavits in support of the petition do not have the authorisation to do so, either from the Articles of Association, or from a resolution of the Board. In the circumstances, the company is not present before the Court, and this petition is therefore a nullity. The 2nd respondent's grounds of preliminary objection succeed, and the petition is hereby struck out.

76. Duly guided by the holding in the fore cited decision, which reiterates the rule in Foss versus Harbottle case, I come to the conclusion that the Notice to terminate tenancy dated mAY 8, 2019, was originated, issued and lodged by a stranger albeit without the requisite authorization by the Respondent.

77. In view of the foregoing, I have no hesitation in finding and holding that even on the basis of execution of the impugned notice to terminate tenancy, same was also invalid and of no legal effect.

Whether the Impugned Notice to Terminate Tenancy was barred by the provisions of Section 8 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya.

78. As pertains to the grounds or reasons upon which the Respondents sought to terminate the tenancy, it is apparent and evident that the Respondent contended that the Appellant was in rent arrears from the year 2009.

79. To be able to appreciate and contextualize the circumstances upon which the impugned notice to terminate tenancy was issued, it is appropriate to reproduce the aspect pertaining to the Grounds for Termination.

80. For convenience same is reproduced as hereunder;

3. The Grounds on which we seek termination/alteration are:

1. That you have continued to Default in the payment of rent since the year 2009 which arrears' stands at Kshs 3.682.000/= as at April.2019

81. From the foregoing ground, it is evident that the basis of the intended termination was premised on accrual of rent arrears with effect from the year 2009.

82. Clearly, by the time the Notice to terminate tenancy was executed and issued, a substantial segment of the rent arrears which was being claimed by the Respondent had accrued and accumulated for more than a duration of six years.

83. Nevertheless, the Respondent herein still issued and served a composite and inseverable Notice to terminate premised on a ground alluding to rent arrears, most of which were indeed more than six years old.

84. To this end, the question that does arise is whether or not the impugned Notice to terminate tenancy was barred by the provision of Section 8 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya.

85. In this respect, it is appropriate to reproduce the contents of Section 8 of the *Limitation of Actions Act*. For ease of reference, same are reproduced as hereunder;

8. Actions to recover rent:

> An action may not be brought, and distress may not be made, to recover arrears of rent, or damages in respect thereof, after the end of six years from the date on which the arrears became due.

86. My understanding of the foregoing provisions is to the effect that no action can be commenced and originated with a view to recovering rent arrears, which have been outstanding and unpaid for more than a duration of six years.

87. Despite the import and tenor of the forecited provisions of the law, the Respondent herein still proceeded to or purported to proceed to terminate the impugned tenancy on the basis of grounds which were *ex-facie* barred by the *Limitation of Actions Act*, Chapter 22 Laws of Kenya.

88. It may be argued and contended that the notice to terminate tenancy is not by itself an action to recover the impugned rent arrears, but the point is that the ground to be agitated and relied upon in prosecuting the impugned Notice to terminate tenancy, is itself barred under the law.

89. On the other hand, it may also be argued that a segment of (sic) the rent arrears were not more than six years old, but yet again, it must be recalled that the impugned Notice was one composite and inseverable legal instrument/document.

90. In the premises, there was no way that the tribunal could split or separate a legal instrument, which is otherwise inseparable and thereafter seek to (sic) prosecute one segment thereof.

91. In my humble view, the impugned Notice to terminate tenancy would either, succeed as a whole or fall wholesomely.

92. Based on the foregoing, I come to the conclusion that the impugned Notice to terminate tenancy which sought to terminate the tenancy on the basis of (sic) rent arrears which were more than six years old was barred by the *Limitation of Actions Act*, Chapter 22, Laws of Kenya.

93. In a nutshell, it is my finding and holding that the impugned ground upon which the intended termination was anchored, was similarly untenable.

Final Disposition:

94. Having calibrated upon the various issues which were highlighted and amplified in the body of the Judgment, it must have become evident and apparent that the subject Appeal is meritorious.

95. Clearly, the Ruling by the chairperson of the Business Premises Rent Tribunal, which found the impugned Notice to terminate tenancy to be valid and enforceable, was inimical to the express provisions of Section 4(2) and (4) of the Landlord and Tenants (Shops, Hotels and Catering Establishment) Act Chapter 301 Laws of Kenya.

96. Consequently and in the premises, the Appeal herein be and is hereby allowed with costs to the Appellant.

97. For coherence, the impugned Notice to terminate tenancy dated May 8, 2019, together with the consequential proceedings founded on same be and are hereby declared a nullity.

98. On the other hand, the Appellant shall also have costs of the proceedings that were carried out and undertaken before the Business Premises Rent Tribunal.

99. Finally and for the avoidance of doubt, given that the Appellant had long been evicted from the suit property, this Honourable court is not seized of the requisite Jurisdiction to decree and order reinstatement into the premises.

100. Be that as it may, no such order was ever sought or impleaded.

101. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER 2022.

OGUTTU MBOYA

JUDGE

In the Presence of;

Benson - Court Assistant.

Ms Badia for the Appellant.

Mr Maina h/b for Oketch for the Respondent.