REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC APPEAL CASE NO 43 OF 2016

JOHAKIM ABAYO...APPELLANT

VERSUS

MOKUA DAMACLINE NYAMOITA........RESPONDENT

***(Being an Appeal from the Ruling and Order of Hon M S B W Mathenge, Vice Chairperson, Rent Restriction Tribunal, delivered on the 18th day March 2016 at the Rent Restriction Tribunal – Nairobi, Rent Restriction Case No 713 of 2015*)**

JUDGMENT

Background

1. On 9/9/2015, **Mokua Damacline Nyamoita, (the respondent)** initiated a suit in the Rent Restriction Tribunal (hereinafter referred to as **the Tribunal**) through a plaint dated 9/9/2015 seeking the following verbatim orders:

a) Refund of Kshs 23,500/= (20,000/= being rent, 2,500/=

b) electricity and Kshs 1000/= water).

c) Refund Kshs 10,000/= because I entered the premises on 17/6/2015 but paid full amount

d) Costs of the suit

e) OCS Langata Police Station to enforce

2. The respondent averred in the plaint that she was a tenant of the appellant paying a monthly rent of Ksh 20,000 until 5/9/2015 when the premises were inspected and handed over to the appellant's wife. It was the case of the respondent that upon vacating the premises, the appellant failed to refund to her the above monies, hence the initiation of the suit to recover the monies.

3. In answer to the suit, the appellant filed a defence and a counterclaim, both dated 9/10/2015. He contested the plaintiff's claim and prayed for the following verbatim orders by way of counter-claim:

a) That the tenant's suit be dismissed with costs.

b) That judgment be entered for the landlord for the said sum of Kshs 61,550/=

c) Costs of the counter-claim

d) Interest thereon at court rate from the date of filing of this defence and counter-claim until payment in full.

4. Prior to filing the defence and the counter-claim, on 8/10/2016, the appellant filed a notice of preliminary objection dated 8/10/2015 seeking an order striking out the respondent's suit on the following verbatim grounds:

a) The honourable Tribunal has no jurisdiction over the case by reason of the facts apparent on the face of the plaint by the Tenant.

> ***b) The case should accordingly be struck out with costs to the Landlord.***

5. The preliminary objection was canvassed before the Tribunal, and in a ruling rendered on 26/2/2016, the Tribunal held that: (i) notwithstanding the fact that the agreed rent during the subsistence of the tenancy was Kshs 20,000 per month, the Tribunal had jurisdiction to adjudicate the dispute because the standard rent had not been established; (ii) that notwithstanding the fact that there was no subsisting tenancy relationship at the time the suit was filed in the Tribunal, the Tribunal had jurisdiction to adjudicate the dispute. Aggrieved by the two findings, the appellant brought this appeal.

Grounds of Appeal

6. The appeal was anchored on the following five verbatim grounds:

> ***1) That the Learned Vice-Chairperson erred in law and fact in not upholding the preliminary objection dated 8th October 2015 raised by the appellant to the case.***
>
> ***2) That the Learned Vice-Chairperson erred in law in failing to reach a finding that the Tribunal had jurisdiction (sic) over the case in the circumstances given the averments contained pleadings (sic) filed by the parties.***
>
> ***3) That the Learned Vice-Chairperson misdirected herself in law by failing to follow binding decisions of the High Court of Kenya on similar issues arising from the Preliminary Objection and raised by the Appellant to the Tribunal's jurisdiction.***
>
> ***4) That the Learned Vice-Chairperson erred in law in implying jurisdiction of the Tribunal from the provisions of the Rent Restrictions Act, Chapter 296 of the Laws of Kenya***
>
> ***5) That the Learned Vice-Chairperson misdirected herself and erred in law by finding that it had jurisdiction over the case where the rent payable is way beyond the standard rent of Kshs 2,500 before and without determining the standard rent, the sine quo none of its jurisdiction.***

Appellant's Submissions

7. The appeal was canvassed through written submissions dated 13/1/2020, filed by M/s Ochieng' Ochieng' Advocates. On the first ground of appeal, counsel submitted that **Section 2** of the **Rent Restriction Act Cap 296 (**hereinafter referred to as **"the Act")** limited the Tribunal's jurisdiction to tenancy disputes where monthly rent did not exceeed Kshs 2,500. Relying on the decision in **Republic v Chairman Rent Restriction Tribunal Ex-parte Ezekiel Machogu,** counsel argued that because the agreed rent was more than Kshs 2,500, the Tribunal had no jurisdiction to entertain the dispute.

8. On the second ground of appeal, counsel cited the decision in **Owners of Motor Vessel "Lillian "S" v Caltex Oi (Kenya) [1989] KLR** 1 and argued that the pleadings had established that the agreed monthly rent was Kshs 20,000 and that the tenancy had ceased as at the time of filing the suit, hence the Tribunal had no jurisdiction to entertain the dispute.

9. On the third ground of appeal, counsel faulted the Tribunal for ignoring a line of binding decisions of superior courts to the effect that where the agreed rent between a landlord and a tenant was above Kshs 2,500, the Tribunal had no jurisdiction to entertain the dispute. Lastly, counsel submitted that in the absence of standard rent, the Tribunal could only infer the applicable rent from the agreement between the parties.

Respondent's Submissions

10. The respondent filed written submissions dated 30/11/2020 through M/s Jude & Sheila Associates. Counsel for the respondent submitted that the Tribunal had jurisdiction to deal with all disputes involving landlords and tenants of residential premises, including disputes relating to deposit. Counsel added that the Act only referred to "Standard Rent" not exceeding Kshs 2,500 and because standard rent had not been established in the dispute before the Tribunal, the Tribunal had jurisdiction to entertain the dispute. Counsel contended that it was the duty of the appellant to move the Tribunal to assess the standard rent if he wished to challenge the Tribunal's jurisdiction.

11. Citing the decision in **Republic v Ambrose Odwaya O Onyango & another** ***exparte*** **Ceasar Ngige Wanjao (2014) eKLR,** counsel argued that for the Tribunal to make a decision on whether it had jurisdiction or not, it had to make a determination on the standard rent. Counsel contended that without a determination on the standard rent, the Tribunal had jurisdiction to entertain the dispute. Relying on the High Court decision in **Republic v Rent Restriction Tribunal ex-parte Mayfair Bakeries Limited & another [1982] eKLR,** counsel submitted that the Tribunal had jurisdiction to entertain tenancy disputes notwithstanding the fact that the tenancy had ceased to subsist**.** Counsel urged the court to dismiss the appeal.

Analysis and Determination

12. I have examined the entire record of the Tribunal. I have also considered the grounds set out in the Memorandum of Appeal, the parties' respective submissions, the relevant legal frameworks, and the prevailing jurisprudence on the key questions falling for determination in this appeal. Although the appellant itemized five grounds of appeal, only two key questions fall for determination in this appeal. The first question is whether the Tribunal erred in holding that it had jurisdiction to entertain a claim for refund of monies by a former landlord to a former tenant after the tenancy relationship had ceased to subsist. The second question is whether the Tribunal erred in holding that it had jurisdiction to entertain a similar claim in similar circumstances in a context where the agreed rent during the subsistence of the tenancy was Kshs 20,000 per month. The two questions revolve around the question of jurisdiction of a court or a tribunal to adjudicate a dispute. I will

make sequential pronouncements on the two questions in the above order. Before I make my pronouncements, I will outline the relevant legal frameworks and jurisprudence on the subject of jurisdiction in the context of this appeal.

13. The powers of the Tribunal are set out in paragraph 5(1) of the Act which

provides thus:

> ***"5. (1) The tribunal shall have power to do all things it is required or empowered to do by or under the provisions of this Act, and in particular shall have power –***
>
> ***a) to assess the standard rent of any premises either on the application of any person interested or of its own motion;***
>
> ***b) to fix in the case of any premises, at its discretion and in accordance with the requirements of justice, the date from which the standard rent is payable;***
>
> ***c) to apportion –***
>
> ***i. payment of the rent of premises among tenants sharing the occupation thereof;***
>
> ***ii. the rent payable in respect of different premises included in one composite tenancy;***
>
> ***d) where the rent chargeable in respect of any premises includes a payment for water, light, conservancy, sweeper, watchman, or other service charge in addition to the standard rent, to fix the amount of such payment or service charge;***
>
> ***e) where any premises are occupied by tenants who enjoy***
>
> ***services in common, such as water, light, conservancy, sweeper or watchman, to apportion such charges to each of the tenants;***
>
> ***f) subject to the provisions of section 14, to make either or both of the following orders –***
>
> ***(i) an order for the recovery of possession of premises whether in the occupation of a tenant or of any other person; and***
>
> ***(ii) an order for the recovery of arrears of rent, mesne profits and service charges;***
>
> ***g) for the purpose of enabling additional buildings to be erected, to make orders permitting landlords (subject to the provisions of any written law) to excise vacant land out of premises where such a course is, in the opinion of the tribunal, desirable in the public interest;***
>
> ***h) where the landlord fails to carry out any repairs for which he is liable, to order the landlord to carry out such repairs within such time as the tribunal may stipulate, and, if the landlord fails to comply with the order, and upon application by notice of motion by the tenant, to authorize the tenant to execute the repairs and to deduct the cost thereof front the rent;***
>
> ***i) to permit the levy of distress for rent;***
>
> ***j) to impose conditions in any order made by the tribunal under the provisions of this section;***
>
> ***k) on the application by a tenant by notice of motion, to reduce the standard or recoverable rent of premises where the tribunal is satisfied that the landlord has failed to carry out such repairs to, or maintenance of, the premises as he has a duty to carry out either by agreement or under this Act;***
>
> ***l) to order a refund of any sum paid by a tenant on account of rent, being a sum irrecoverable by the landlord under this Act: Provided that no application may be made under this paragraph after a period of two years from the date of payment of the sum sought to be refunded, or, in the case of more than one payment, from the date of last payment;***
>
> ***m) at any time, of its own motion, or for good cause shown on an application by any landlord or tenant, to reopen any proceedings in which it has given any decision, determined any question, or made any order, and to revoke, vary or amend such decision, determination or order, other than an order for the recovery of possession of premises or for the ejectment of a tenant therefrom which has been executed: Provided that –***
>
> ***i. nothing in this paragraph shall prejudice or affect the right of any person under section 8 to appeal from any such decision, determination or order, or from the revocation, variation or amendment of any such decision, determination or order;***
>
> ***ii. the powers conferred on the tribunal by this paragraph shall not be exercised in respect of any decision, determination or order while an appeal therefrom is pending or in a manner inconsistent with or repugnant to the decision of the appellate***

tribunal on such an appeal.

> ***n) at any time, of its own motion, or for good cause shown on an application by any landlord or tenant, adjourn an application, or stay or suspend execution of any order of the tribunal, or postpone the date of possession, for such period or periods and subject to such conditions with regard to payment by the tenant of arrears of rent or otherwise as the tribunal thinks fit.***

14. The object of the Act is set out in the Permeable to the Act which provides thus:

> ***"An Act of Parliament to make provisions for restricting the increase of rent, the right to possession and the exaction of premiums, and for fixing standard rents, in relation to dwelling-houses, and for other purposes incidental to or connected with the relationship of landlord and tenant of a dwelling-house***

15. Kenya's superior courts have settled the principle of law applicable to questions of jurisdiction of courts and tribunals. The Court of Appeal in **Owners of Motor Vessel "Lillian "S" v Caltex Oil (Kenya) Ltd (1989) eKLR** summed up the principle in the following words:

> ***"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for continuation of proceedings pending other evidence. A court of law downs tools in respect of a matter before it the moment it holds the opinion that it is without jurisdiction"***

16. The Supreme Court of Kenya echoed this principle in **Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others [2012] eKLR** in the following words:

> "(***68) A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."***

17. The first question falling for determination in this appeal is whether the Tribunal erred in holding that it had jurisdiction to entertain a claim for refund of monies by a former landlord to a former tenant in a suit filed after cessation of tenancy. There was no dispute to the fact that at the time of initiating the suit in the Tribunal, the respondent was no longer a tenant of the appellant. Indeed, the respondent was categorical that the premises were inspected and handed to the appellant's wife on 5/9/2015. The appellant took the material suit to the Tribunal on 9/9/2015. It is therefore clear that there was no tenancy relationship between the two parties.

18. My reading of the object clause (preamble) of the Act is that the Act was enacted to provide a legal framework for restricting the increase of rent, the right to possession, and the exaction of premiums and for fixing standard rents in relation to dwelling houses, and for other purposes incidental to or connected with the relationship of landlord and tenant of a dwelling house. It is apparent from the Act that the statute was enacted to regulate subsisting tenancy relationships relating to dwelling houses of a particular category. If Parliament wanted to confer upon the Tribunal jurisdiction to deal with post-tenancy disputes, it could have done so. The Act which donates jurisdiction to the Tribunal does not confer upon it jurisdiction to adjudicate post-tenancy disputes. It therefore follows that where a landlord and tenant relationship (tenancy) has ceased to exist, the Tribunal has no jurisdiction to entertain post-tenancy disputes relating to the non-subsisting tenancies. The adjudicatory bodies with authority to deal with post-tenancy disputes are civil courts, not the Rent Restriction Tribunal. It is therefore my finding that the Tribunal erred in holding that it had jurisdiction to entertain a post-tenancy suit by a former tenant for recovery of money from a former landlord.

19. The second question is whether the Tribunal erred in holding that it had jurisdiction to entertain a similar claim in similar circumstances in the context where the agreed rent during the subsistence of the tenancy was Kshs 20,000/- per month. In holding that it had jurisdiction, the Tribunal purported to rely on the judgment of Odinga J in **Republic v Ambrose Odwaya Onyango & Another Exparte Ceasar Ngige Wanjau [2014] eKLR** in which the Learned Judge stated as follows:

> ***"In the particular circumstances of this case, for the 2nd Respondent to make a decision on whether or not it had jurisdiction to entertain the dispute before it, it had to make a determination on the standard rent. Without that determination, it cannot be said with certainty that the 2nd respondent lacked jurisdiction to entertain the matter"***

20. It does emerge from the reasoning of the Tribunal that it misinterpreted the above High Court decision to assume jurisdiction in all residential tenancy disputes regardless of the agreed or prevailing rent between the parties. Reliance on the above High Court decision in the circumstances of this appeal was misplaced. I say so for a number of reasons. First, there was no subsisting tenancy relationship between the parties to the suit. Secondly, the Tribunal was not seized of any application for assessment of rent. Thirdly, the pleadings before the Tribunal were clear that the parties had mutually agreed on rent of Kshs 20,000 during the subsistence of the tenancy and there was no dispute about that. Fourthly, in its disposal orders, the Tribunal did not deem it necessary to assess standard rent to ascertain it had jurisdiction. In the circumstances, there was no legal basis for the Tribunal to assume jurisdiction in the dispute.

21. This court has in the past pronounced itself on how the Tribunal should proceed whenever it is faced with a dispute where the agreed or prevailing monthly rent is more than Kshs 2,500. [see **Republic v Chairman Rent Restriction Tribunal; Samuel Joel Kibe & another (interested parties) Exparte Charles Macharia Mugo [2019] eKLR.** For the umpteenth time, it is emphasized that the first business of the Tribunal in such circumstances is to assess standard rent with a view to establishing whether it has jurisdiction or not. Unless and until standard rent is ascertained, the Tribunal has no jurisdiction to entertain or issue orders in a dispute where the agreed or prevailing rent is more than Ksh 2,500 per month. It is not lost to this court that it is with this in mind that Parliament, through the Act, gave the Tribunal powers to assess rent on its own motion or upon application whenever it is seized of a dispute. The Tribunal assumes adjudicatory jurisdiction in such circumstances only when it has ascertained that the standard rent falls within the limits set by the statute. It ought to be

understood that the Constitution has established other relevant adjudicatory bodies where tenancy disputes involving higher monthly rents are to be adjudicated.

22. Arising from the foregoing, I find that the Tribunal erred in holding that it had jurisdiction to entertain the claim in the suit before it in a context where the parties had agreed on a monthly rent of Kshs 20,000 during the subsistence of the tenancy.

23. The totality of the above findings is that this appeal has succeeded and both the suit and the counter-claim in **Rent Restriction Tribunal Case No 713 of 2015 - Nairobi** are struck out for want of jurisdiction on part of the Tribunal. Because both parties misapprehended the law and lodged parallel claims in the Tribunal, there will be no award of costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9TH DAY OF FEBRUARY 2021.

B M EBOSO

JUDGE

In the Presence of:-

Ms Orengo for the Appellant

June Nafula - Court Clerk