



Musingi v Damisha Building Contractors Ltd (Environment and Land Appeal 2 of 2022) [2024] KEELC 5280 (KLR) (10 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5280 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL 2 OF 2022**

**A NYUKURI, J
JULY 10, 2024**

BETWEEN

JOHN MUSINGI APPELLANT

AND

DAMISHA BUILDING CONTRACTORS LTD RESPONDENT

(Being an appeal from the Orders of Honourable Gakuhi Chege (Mr.) Vice Chairperson on 19th August 2022)

JUDGMENT

Introduction

1. This appeal was instituted by John Musingi challenging the orders of Honourable Gakuhi Chege, the vice chairperson of the Business Premises Rent Tribunal at Nairobi in BPRT Case No. 769 of 2020 delivered on 19th August 2022.
2. In the Memorandum of Appeal dated 10th February 2023, the appellant raised the following five grounds of appeal;
 - a. That the learned Vice Chairperson erred in law and in fact in making an order in favour of the landlord/respondent in total disregard of the evidence and testimony adduced in the tribunal thereby arriving at a wrong conclusion.
 - b. That the learned Vice Chairperson erred in law and in fact by failing to consider the pleadings, evidence, submissions and proceedings in entirety on issues on validity of tenancy as well as statutory obligations of a landlord and thereby arriving at a wrong conclusion.
 - c. That the learned vice chairperson erred in law and in fact by mis-directing himself and acting on a wrong principle of law in making an order in favour of the landlord/respondent on the ground that the landlord/respondent had not been duly paid the rent.



- d. That the learned vice chairperson erred in law and in fact in failing to consider that the premises is situated on a road reserve and as such the landlord/respondent had no right and/or entitlement to the purported rent let alone the said business premises.
 - e. That the learned vice chairperson mis-appreciated the pleadings by the parties and evidence before him and reached a wrong conclusion.
3. Subsequently, the appellant sought the following orders;
- a. That this appeal be allowed and the learned vice chairperson's order be set aside and quashed and be substituted with this Honourable Court's orders.
 - b. That this Honourable Court do adjudicate and determine the issue of validity of tenancy in light of the evidence on record.
 - c. That the costs of this appeal and proceedings be provided for.
4. The appeal was canvassed by way of written submissions. On record are submissions filed by the appellant on 22nd February 2023 and those filed by the respondent on 22nd May 2023.

Appellant's submissions

5. Counsel for the appellant argued that the appeal raised four issues namely;
- a. Is there a valid tenancy agreement in relation to the premises herein?
 - b. Has the purported landlord/respondent herein contributed in any way to the development of the premises?
 - c. Is the premises situated on private or public land; to wit; a road reserve?
 - d. In the foregoing is the purported landlord/respondent entitled to levy any distress for rent against the appellant.
6. On whether there was a valid tenancy agreement regarding the suit premises, counsel submitted that there does not exist a valid tenancy agreement between the appellant and the respondent as tenancy agreement presented by the landlord relates to a residential premises and not a business premises which is contrary to statutory requirements which invalidated the said agreement. Counsel argued that when the former owner of the premises a Dr. Sylvester Kyengo Malei disposed of the property, the sale agreement did not envisage the existence of a landlord as the appellant put up his own developments on the premises.
7. Further, counsel contended that the appellant demonstrated before the Tribunal that the landlord did not put up any development on the suit premises and that therefore requiring the appellant to pay rent was extortion.
8. On the ownership of the suit premises, counsel submitted that the map produced by the landlord shows that the premises are on a road reserve. Reliance was placed on Section 26 of the [Land Registration Act](#) for the proposition that the suit property belonged to KENHA and therefore could not be owned by the respondent. The court was further referred to the cases of [Republic v. Minister for Transport & Communication & 5 Others Ex parte Waa Ship Garbage Collector & 15 Others](#) (Mombasa HCMCA No. 617 of 2003 [2006] 1 KLR and [Chemud Investments Limited v. Attorney General & Others](#) Nairobi Petition No. 94 of 2005 for the proposition that title can only be protected in law if it is lawfully acquired.



9. On whether the landlord is entitled to levy distress, counsel argued that there being no landlord-tenant relationship and the suit premises being on a road reserve, the landlord's distress for rent is an illegality.

Respondent's submissions

10. Counsel for the respondent adopted the issues raised by the appellant and submitted on the first issue that there was a valid tenancy agreement in relation to the suit premises. Counsel submitted that the parties signed the tenancy agreement dated 17th March 2022 which had clear terms on rent payment whereof the landlord kept a rent book as per the provisions of the *landlord and tenant (Shops, Hotels and Catering Establishments) Act* Cap 301. Counsel argued that the tenant habitually breached the agreement which led to the landlord levying distress on 31st October 2021. Reliance was placed on the definition of "tenancy" in the aforesaid *Act*.
11. On the question of the landlord's contribution to development of the suit premises, counsel argued that the contractual obligations of the landlord under Clause 7 of the duly executed agreement entitled the landlord to enter and inspect the premises; and on the other hand, Clause 12 thereof placed on the tenant the duty to maintain cleanliness, security light and address any damages that may occur.
12. Regarding the appellant's argument that the premises are on a road reserve, counsel submitted that the suit property belongs to the respondent landlord and not KeNHA (Kenya National Highways Authority). Counsel argued that the issues regarding a road reserve are new issues meant to derail the court from determining the real issues which is the tenant's obligation to pay rent.
13. On the landlord's entitlement to levy distress, counsel argued that on 19th August 2022, when the appellant was informed of his obligation to pay rent arrears of Kshs. 1,200,000/-, his counsel sought 30 days to settle the matter out of court. Counsel argued that the appellant has been filing various applications and appeals to circumvent his obligation to pay rent and that therefore the Tribunal acted fairly in making its orders. Reliance was placed on Section 3 of the *Distress for Rent Act* and the cases of *Joseph Nthumbi Kamrishi v. Asha Akumu Juma* Embu HCCA No. 7A of 2016, for the argument that no permission from the Tribunal is needed for a landlord to levy distress when there is default on the part of the tenant. Further, counsel pointed out that the order appealed from was not part of the record of appeal.

Analysis and determination

14. I have considered the Memorandum of Appeal, the record of appeal and submissions made by both parties. It is clear that in this appeal, the appellant challenges the decision of the Business Premises Rent Tribunal in BPRT Case Number 769 of 2020 delivered on 19th August 2020. From the record, the order of 19th August 2020 is not included in the record of appeal. Even the proceedings filed are between 16th December 2020 to 19th August 2022, and there are no proceedings for the alleged date of delivery of the order appealed against. That being the position, this court does not know the Tribunal's findings and the basis thereof, and therefore, this court has no decision before it to consider for purposes of exercising its appellate jurisdiction.
15. In the premises, I find and hold that this appeal is fatally defective for failure to file the order appealed against and the same is hereby struck out with costs to the respondent.
16. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 10TH DAY OF JULY 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM



A. NYUKURI

JUDGE

In the presence of;

No appearance for the appellant

No appearance for the respondent

Court assistant – Josephine

