Ndegwa v Muthut & another (Civil Appeal E042 of 2023)
[2024] KEELC 6431 (KLR) (16 September 2024) (Judgment)

Neutral citation: [2024] KEELC 6431 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

CIVIL APPEAL E042 OF 2023

JO MBOYA, J

SEPTEMBER 16, 2024

BETWEEN

JACKSON KAMAU NDEGWA ..... APPLICANT

AND

SUSAN MUTHUT ..... 1ST RESPONDENT

SAMUEL KARANJA ..... 2ND RESPONDENT

(An appeal from judgment delivered on 28"h September 2023 by Hon. H.K. Korir (Chairman Rent Restriction) In NAIROBI RRT CASE No. 669 of 2022)

JUDGMENT

Introduction And Background:

1. The Appellant herein filed a suit before the Rent Restriction Tribunal vide Plaint dated the 22nd June 2022 and in respect of which the Appellant [who was the Plaintiff] sought for the following reliefs [verbatim]:

    a. This Notice of Motion Application be certified as urgent.

    b. The court do issue an order to have my power resituated forthwith.

    c. The Honourable court do issue orders to have toilet/sewage repaired forthwith.

    d. The court do issue preservatory orders until this matter is heard and determined.

    e. The court do issue a Permanent restraining orders.

    f. The court issued orders on damages.

    g. The court condemns the landlord with costs of the suit

2. Upon being served with the Appellant's Plaint, [whose details have been highlighted in the preceding paragraph] the Respondents herein filed a statement of defence and counterclaim.

3. The Counter-claim on behalf of the Respondent sought for the following reliefs;

    a. The Plaintiff's suit be dismissed with costs.

    b. An order to the Plaintiff to deliver vacant possession of the suit premises.

    c. Such other or further orders as the Tribunal may deem fit and just to grant.

4. Suffice it to state that the dispute beforehand was thereafter canvassed before the tribunal culminating into the delivery of the judgment rendered on the 28th September 2023. For good measure, the chairperson of the tribunal found and held that the Appellant herein had not proved his claim to the requisite standard and thereafter proceeded to and dismissed the Appellant's claim.

5. On the other hand, the chairperson of the tribunal found and held that the 1st Respondent had duly proved and established the claims at the foot of the counterclaim. In this regard, the chairperson of the tribunal proceeded to and directed that the Appellant vacate the demised premises and hand over vacant possession within 30 days from the date of delivery of the judgment.

6. Furthermore, the tribunal found and held that same [Tribunal] was not seized of the jurisdiction to grant damages which had been sought for by the Appellant. In this regard, it was directed that the Appellant shall be at liberty to pursue the question of damages before the conventional court.

7. Following the delivery of the judgment rendered on the 28th September 2023, the Appellant herein felt aggrieved and proceeded to file a Notice of appeal as well as memorandum of appeal. The memorandum of appeal is dated the 4th October 2023 and same has highlighted numerous grounds of appeal.

8. For brevity, the grounds of appeal which are prolix in nature and quite curious are reproduced as hereunder;

    i. The chairman H. K. Korir has erred in law and facts by holding that, the landlady did not commit a crime by disconnecting a Prepaid Power from the meter box in order to enforce a backdoor eviction.

    ii. The chairman H. K. Korir has erred in law and facts by holding that, the landlady did not commit a crime by breaking the Gate next to my bedroom in order to enforce a backdoor eviction.

    iii. The chairman H. K. Korir has erred in law and facts by issuing me with an ILLEGAL one-month NOTICE to vacate the suite premises contrary to the law.

    iv. The Chairman H. K. Korir misdirected himself and misapplied his judicial powers and discretion by ignoring that, the landlady admitted in her pleadings as well as the testimonies that, she was constantly repairing my power because it was premised on a faulty line.

    v. The Chairman H. K. Korir misdirected himself and misapplied his judicial powers and discretion by holding that, the receipts adduced in court for the Electrical & Electronics Gadgets destroyed by the Faulty Power are not proof of damages-he would have rather a whole pickup of damaged items brought to court.

vi. The Chairman H. K. Korir misdirected himself and misapplied his judicial powers and discretion by ignoring that, the landlady disregarded his orders to repair the sewer passing through the House, the Gate and supply of water.

vii. The Chairman H. K. Korir misdirected himself and misapplied his judicial powers and discretion by ignoring the Law and giving the Landlady Court AUDIENCE Despite her Disobeying the Court & Court orders.

viii. The chairman has erred in law and facts by holding that, it was in order for the landlady to continue billing & receiving payments for water Not Supplied.

ix. The Chairman H. K. Korir misdirected himself and misapplied his judicial Threat of My life by the Landlady's Husband arguing that the charges &conviction are yet to take place.

x. The chairman has erred in law and in fact by holding that, i should pay for the costs of the Landlady's ignorance of the Law & shameless illegal backdoot Evicton.

xi. The Charman H K. Korit misdirected himself and misapplied his judicial powers and discretion by ignoring uphold that, the landlady authorized and supposed her husband to break the Gate next to my bedroom to expose me to her hired killer goons

9. The Appel beforehand came up for directions on the 19th June 2024 whereupon the advocates for the parties confirmed that the record of appeal had been duly filed and served. Furthermore, the parties intimated to the court that the record of appeal was complete and hence the appeal was ready for hearing.

10. Arising from the foregoing, the court proceeded to and issued directions pertaining to the hearing and disposal of the appeal. In particular, the court directed that the appeal be canvassed and disposed of by way of written submissions, to be filed and exchanged within circumscribed timeline.

11. Pursuant to the directions of the court, the parties herein proceeded to and filed their respective submissions. For good measure, the Appellant filed two[2] sets of written submissions, resting with the one dated the 18th June 2024. On the other hand, the Respondent filed written submissions dated the 18th June 2024. However, the Respondent's submissions are curiously [sic] stated to be the Claimant submissions.

12. Be that as it may, the submissions, [whose details have been highlighted in the preceding paragraph] forms part of the record of the court.

Parties'submissions:

a. Appellant's Submissions:

13. The Appellant herein filed two [2] sets of written submissions and in respect of which same [Appellant] has raised a plethora of issues. However, the key issues that are discernible from the Appellant's submissions can be summarized into four subheadings, namely, that the honourable tribunal erred in law in dismissing the Appellant's claim, the Tribunal erred in finding and holding that the Appellant had not proved the claim for damages, the Tribunal erred in granting audience to the Respondent who was guilty of contempt and finally that the tribunal erred in allowing the counterclaim and directing same [Appellant] to vacate the premises within 30 days.

14. In respect of the first sub-heading, the Appellant herein has submitted that same placed before the tribunal plausible and cogent evidence to demonstrate that the Respondent herein had interfered with

his [Appellant's] right to peaceful occupation and possession of the demised premises. In particular the Appellant contended that same placed before the Tribunal evidence that the Respondent had disconnected the electricity meter albeit without lawful cause and/or basis.

15. Furthermore, it was the submissions by the Appellant that the Respondents and in particular the 1st respondent, had failed and/or refused to facilitate the repairs of the sewage system affecting the Appellant's house. In this regard, the Appellant contended that the failure to repair the toilet and sewage system was a calculated, nay, deliberate move to force the Appellant out of the demised premises.

16. Despite the foregoing evidence, the Appellant contended that the chairperson of the tribunal still proceeded to and contended that the Appellant had not established and/or proved his claim pertaining to the threatened illegal eviction as against the Respondent.

17. The second sub-heading relates to the finding by the tribunal that the Appellant had not placed credible evidence to show and/or demonstrate that same [Appellant] owned the various items which had been contended to have been damaged as a result of heavy power surge. In any event, the Appellant has also contended that the tribunal ignored the various receipts which were tendered and or produced by the Appellant.

18. Furthermore, the Appellant has contended that the tribunal seems to be suggesting that the Appellant herein ought to have brought before the tribunal a pick-up full of the items that were damaged by the power upsurge, to prove the damages.

19. The third sub-heading relates to the complaint by the Appellant that the tribunal proceeded to and granted audience to the Respondent, even though the Respondents were guilty of contempt for disregarding lawful orders that were issued by the tribunal. In this respect, the Appellant contended that the tribunal ought and should have denied the Respondents audience.

20. The last sub-heading relates to the complaint pertaining to the findings of the tribunal that the Respondents had duly proved the counterclaim and was thus entitled to recover vacant possession. In particular, the Appellant contends that the chairperson of the tribunal erred in granting him [Appellant] 30 days to vacate the demised premises, which order the Appellant contends to be erroneous and legally untenable.

21. Arising from the foregoing, the Appellant herein has therefore implored the court to find and hold that the decision of the tribunal is replete with errors and thus same ought to be set aside and/or varied. In short, the Appellant invites the court to find and hold that the appeal beforehand is meritorious.

b. Respondents' submissions:

22. The Respondents filed written submissions dated the 18th June 2024. However, the said submissions are titled as [sic] the Claimants' submissions. Furthermore, at the tail end of the submissions same are signed off on behalf of [sic] the Respondents.

23. Notwithstanding the contradictory and confusing title given the submissions, it suffices to point out that the Respondents herein have highlighted two [2] salient issues in opposition to the appeal.

24. Firstly, the Respondents have contended that the Appellant herein failed to place before the tribunal plausible and cogent evidence to prove his claim. In this regard, it has been posited that the tribunal was therefore right in finding and holding that the Appellant had not proved his case.

25. Secondly, the Respondents have contended that the tribunal correctly found and held that the Appellant was troublesome and a nuisance and thus the order directing vacation and handing over of vacant possession of the demised premises was lawful, legitimate and legally tenable.

26. Further and at any rate, the Respondents have posited that the tribunal considered all the evidence and issues that had been placed before same and thereafter arrived at the correct decision. In this regard, the court has been invited to find and hold that the decision of the tribunal is legally sound and ought to be sustained.

27. In a nutshell, the Respondents have implored the court to find and hold that the Appeal is devoid of merits and thus ought to be dismissed with costs.

Issues For Determination:

28. Having reviewed the pleadings and the evidence that was tendered before the tribunal and having reviewed the judgment rendered by the tribunal and upon consideration of the written submissions filed on behalf of the parties, the following issues do crystalize and are thus worthy of determination;

    i. Whether the tribunal was seized of the requisite jurisdiction to entertain and adjudicate upon the dispute that was placed before it.

    ii. Whether the tribunal erred in dismissing the Appellant's claim for damages.

    iii. Whether the tribunal erred in directing the Appellant to hand over vacant possession of the demised premises within 30 days of the delivery of the Judgment.

Analysis And Determination:

Issue Number1;

Whether the tribunal was seized of the requisite jurisdiction to entertain and adjudicate upon the dispute that was placed before it.

29. The Rent Restriction Tribunal is created and established by the provisions of *Rent Restriction Act* Chapter 296 Laws of Kenya. Furthermore, the powers and/or mandate of the tribunal are also highlighted under the said Act.

30. In particular, the jurisdiction of the Tribunal is provided for in terms of Section 5[1] of the *Rent restriction Act*, which stipulates as hereunder;

    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.

31. Though the Rent Restriction Tribunal has jurisdiction to entertain and handle disputes pertaining to what has been highlighted under Section 5 of the Act [Supra] it is critical to underscore that before the tribunal assumes jurisdiction and proceeds to hand down any decision, it behooves the tribunal to discern whether the dwelling house, which is the subject of the proceedings, falls within her jurisdiction, or otherwise.

32. To this end, the provisions of Section 2 of the Act are paramount.

33. Same stipulate and provides as hereunder;

1. This Act shall apply to all dwelling-houses, other than –

a. excepted dwelling-houses;

b. dwelling-house let on service tenancies;

c. dwelling-houses which have a standard rent not exceeding two thousand five hundred shillings per month, furnished or unfurnished.

2. Where a dwelling-house is let on a composite tenancy each dwelling-house in the composite tenancy shall be treated for the purposes of this Act as though it were let on a separate tenancy.

34. Having highlighted the foregoing, it is now appropriate to revert to the subject matter and to discern whether the tribunal was possessed/seized of the requisite jurisdiction to entertain and adjudicate upon the dispute that was placed before same by the parties.

35. To start with, the Plaintiff intimated at the foot of paragraph 3 of the Plaint that the monthly rent in respect of the demised premises was Kes.15, 000/= only inclusive of security. For good measure, it suffices to reproduce verbatim the contents of paragraph 3 of the Plaint.

36. Same states as hereunder;

3. That I pay a monthly rent of Kes.15, 000/= that include security, water is paid separately.

37. Other than the contents of paragraph 3 of the Plaint, which has been reproduced in the preceding paragraph, the Respondents filed a statement of defence and counterclaim and at the foot of paragraph *4*, same [Respondents] reiterated that the monthly rent is Kes.15, 000/= only.

38. From the pleadings that were filed before the tribunal, there is no gainsaying that the monthly rents in respect of the demised premises was Kes.15, 000/= only per month. Certainly, the said monthly rent exceeded the prescribed rent which falls within the jurisdiction of the tribunal. [See Section 2 of the *Rent Restriction Act*].

39. The chairperson of the tribunal appears to have had an inkling that the dispute did not fall within his jurisdiction. However, the chairperson of the tribunal proceeded to and stated that because the jurisdiction of the tribunal was not contested by the parties, then it is assumed that the parties acquiesced to and acknowledged the jurisdiction of the tribunal.

40. In the chairpersons own words, same stated as hereunder;

> " I have given full consideration to both parties pleadings together with the authority cited. Before I go into the merits of the suit, I wish to state that since the jurisdiction of this tribunal was not contested by the parties herein, the same is considered in the affirmative"

41. What I hear the chairperson of the tribunal to be saying is that because neither of the parties contested the jurisdiction of the tribunal, then it suffices that the tribunal was seized of jurisdiction. For good measure, the chairperson of the tribunal thereafter proceeded to and entertained the dispute on the basis that his [Tribunal's] jurisdiction had not been contested.

42. To my mind, the manner in which the chairperson of the tribunal addressed the question of jurisdiction is erroneous and incorrect. Instructively, it was the duty of the chairperson of the tribunal to interrogate and address the question of jurisdiction, whether same was raised by the parties or otherwise.

43. At any rate, there is no gainsaying that the parties cannot confer jurisdiction on a court or tribunal by way of acquiescence, consent or waiver. Pertinently, where a court or tribunal is divested of jurisdiction, the fact that the issue of jurisdiction has not been challenged does not operate to confer jurisdiction. Simply put, jurisdiction cannot be acquired by default.

44. Additionally, a court or tribunal cannot adopt a casual and perfunctory approach in interrogating the question of jurisdiction. Indeed, it is saddening that the chairperson of the tribunal proceeded to and assumed jurisdiction, merely because none of the parties before him contested his jurisdiction. Such a procedure is laced and replete with inherent danger and therefore ought to be eschewed at all cost.

45. Suffice it to point out that jurisdiction is everything and where a court is not seized of jurisdiction, it behoove the court to down its tools. In any event, where a court that is divested of jurisdiction entertains proceedings and renders a decision in such a matter, the entirety of the proceedings and the decision if any, are null ab initio.

46. To this end, it is instructive to reference the holding of the Supreme Court [the apex Court] in the case of *In the Matter of the Interim Independent Electoral Commission (Applicant)* (Constitutional Application 2 of 2011) [2011] KESC 1 (KLR) (20 December 2011) (Ruling), where the court stated as hereunder;

> 29. Assumption of jurisdiction by Courts in Kenya is a subject regulated by *the Constitution*, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in *Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited* [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step."
>
> 30. The Lillian 'S' case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or

interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity.

In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by *the Constitution*.

47. The question of jurisdiction was also highlighted by the Supreme Court in the case *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 other*s [2012] eKLR, where the court stated and held as hereunder;

> 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.
>
> We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission* (Applicant), Constitutional Application Number 2 of 2011.
>
> Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

48. Quite clearly, a court/tribunal is obligated to interrogate its jurisdiction to entertain any matter/ proceedings before it. Indeed, it is the obligation of the court to discern jurisdiction and such an obligation cannot be left to the parties.

49. Furthermore, the legal position that parties cannot acquiesce or consent to jurisdiction was highlighted by the Court of Appeal in the case of *Kenya Ports Authority v Modern Holdings [E.A] Limited* [2017] eKLR, where the court stated and held thus;

> Generally speaking and on the authority of the Supreme Court decision in *Samuel Kamau Macharia & Another V Kenya Commercial Bank Limited & 2 Others*, a court can only exercise that jurisdiction that has been donated to it by either *the Constitution* or legislation or both. Therefore it cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. Jurisdiction is in the end everything since it goes to the very heart of a dispute. Without it, the court cannot entertain any proceedings and must down its tools. See The *Owners of the Motor Vessel Lilian 'S' v. Caltex Kenya Limited* (1989) KLR 1.
>
> This Court in *Adero & Another V Ulinzi Sacco Society Limited* [2002] 1 KLR 577, quite sufficiently summarised the law on jurisdiction as follows;
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> 1. .....
>
> 2. The jurisdiction either exists or does not ab initio and the non constitution of the forum created by statute to adjudicate on specified disputes could not of itself have the effect of conferring jurisdiction on another forum which otherwise lacked jurisdiction.

3. Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction. [Emphasis supplied].

4. Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.

5. Where a cause is filed in court without jurisdiction, there is no power on that court to transfer it to a court of competent jurisdiction.

6. .....

50. The court ventured forward and stated as hereunder;

> We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage of the proceedings and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised:
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> "....at any time, in any manner, even for the first time on appeal, or even viva voce and indeed, even by the Court itself
>
> - provided only that where the Court raises it suo motu, parties are to be accorded an opportunity to be heard."

51. Flowing from the foregoing, there is no gainsaying that it was the chairperson of the tribunal who was charged with the obligation of discerning whether same is seized with the jurisdiction to entertain and adjudicate upon the matter. Such obligation was to be undertaken by the tribunal whether or not the question was raised by the parties or otherwise.

52. Further and at any rate, it cannot be contended that merely because the parties did not challenge or question the jurisdiction of the tribunal, then such failure ipso facto bestows jurisdiction on the tribunal. In my humble view, such kind of reasoning is not only skewed, but similarly, absurd.

53. Before departing from the question of jurisdiction, it suffices to take cognizance of the holding of the Court of Appeal in the case of *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service* [2019] eKLR, where the court stated and observed as hereunder;

1. At the heart of this appeal is the issue of jurisdiction. It is a truism jurisdiction is everything and is what gives a court or a tribunal the power, authority and legitimacy to entertain any matter before it. What is jurisdiction?

2. In common English parlance, 'Jurisdiction' denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae. It is for this reason that this Court has to deal with this appeal first as the result directly impacts Civil Appeal No.6 of 2018 which is related to this one. We shall advert to this issue later. In the meantime, it is important to put this appeal in context.

54. Without belabouring the point, it is crystal clear that where a court/tribunal entertains proceedings for which same is divested of jurisdiction, both the proceedings and the decision, if any, made are void ab initio.

55. Owing to the foregoing, my answer to issue number one [1] is to the effect that the tribunal [Rent Restriction Tribunal] was divested of jurisdiction to entertain and adjudicate upon the dispute pertaining the dwelling house whose monthly rent was kes.15, 000/=. For good measure, the monthly rents at the foot of the demised premises fell outside the jurisdiction of the tribunal.

Issue Number2:

Whether the tribunal erred in dismissing the Appellant's claim for damages.

56. The Appellant herein also challenged the decision of the tribunal on the basis that the tribunal erred in law in failing to award unto him [Appellant] damages attendant to his properties that had been affected as a result of the power upsurge. In this regard, the Appellant contended that same had placed before the tribunal plausible and credible evidence to demonstrate that same was entitled to an award of Kes.264, 250/= only.

57. In answer to the complaint by the Appellant that same ought to have been awarded the sum of Kes.264, 250/ = only on account of damages to his properties, I propose to address the complaint on a three-pronged approach.

58. Firstly, it is common ground that whosoever wishes to lay a claim for special damages, the Appellant not excepted, is obliged to specifically plead the claim for special damages and thereafter supply the requisite particulars. For good measure, the pleading pertaining to the special damages must be contained at the foot of the statement of claim, whether same be a Plaint or Petition.

59. The Court of Appeal in the case of *Coast Bus Service Ltd –v- Sisco E Murunga Ndanyi and 2 others*: Nairobi C.A. No.192 of 1992 (U.R.) had occasion to speak to the manner of pleading of special damages.

60. For coherence, the Couirt stated and observed thus:

> " We would restate the position. Special damages must be pleaded with as much particularity as circumstances permit and, in this connection, it is not enough to simply aver in the plaint as was done in this case, that the particulars of special damages were to be supplied at the time of trial. If at the time of filing suit, the particulars of special damages were not known, then those particulars can only be suppled at the time of trial by amending the plaint to include the particulars which were previously missing.
>
> It is only when the particulars of the Special damages are pleaded in the Plaint that a claimant will be allowed to proceed to strict proof of those particulars."

61. Furthermore, the position pertaining to the manner of pleading and proving special damages was also articulated in the case of *Peter Mark Gershom Ouma v Nairobi City Council* [1976] eKLR, where the court stated as hereunder;

> " Thus for a plaintiff to succeed on a claim for special damages he must plead it with sufficient particularity and must also prove it by evidence. As to the particularity necessary for pleading and the evidence in proof of special damage the court's view is as laid down in the English leading case on pleading and proof of damage, *Ratcliffe v Evans* (1892) 2 QB 524 where Bowen L J said at pages 532, 533:"

62. Despite the established legal position, it suffices to point out that the Appellant herein did not particularly plead the claim of special damages in the body of the Plaint. Besides, the Appellant did not

seize the opportunity to amend his claim before the trial. In this regard, the claim by the Appellant as pertains to kes.264, 250/= only, was not pleaded in accordance with the law.

63. Suffice it to point out that the claim pertaining to Kes.264, 250/= only, was only introduced by the Appellant at the foot of his response to the counterclaim. However, there is no gainsaying that the claim by and on behalf of the Appellant could only be propagated on the basis of the Plaint filed, [which constitutes the Statement of claim] and not otherwise.

64. Secondly, it is also imperative to point out that it was incumbent upon the Appellant to tender and place before the court credible evidence starting with evidence pertaining to ownership of the chattels that were complained of. However, the Appellant herein neither tendered nor produced any ownership documents, let alone the warranty instruments which is ordinarily issued to any customer who purchases an electronic device.

65. Worse still, the receipts which the Appellant tendered and placed before the tribunal did not bear the Appellant's name and hence it was difficult to connect the receipts in question to the Appellant. Nevertheless, it must be underscored that the burden of proving the claim laid on the shoulders of the Appellant and not otherwise. In this regard, the Appellant was called upon to prove every aspect of his claim/ case.

66. To this end, it suffices to take reference and cognizance of the ratio decidendi in the case of *Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another* [2014] eKLR, where the court of appeal stated and held thus;

> With respect, that was entirely a wrong approach to this case and the entire practice of civil litigation. Whether or not the appellant had not denied the facts by affidavit or defence, when the 1st respondent came to court, he was bound by law and practice to lay the evidence to support existence of the facts he pleaded. That is what we understand Section 108 of the *Evidence Act* to be demanding of a party like the 1st respondent that:
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> "The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side."

67. To my mind, the Appellant herein did not discharge the burden of proof placed upon him as pertains to the claim for damages. Consequently and in this regard, the claim for damages was not awardable. [See the provisions of Sections 107.108 and 109 of the *Evidence Act*, Chapter 80, Laws of Kenya]. [See also the decision of the Court of Appeal in *Agnes Nyambura Munga versus Lita Violet Shephad* [2018] eklr]

68. Finally, it is worthy to revert back to the jurisdiction of the tribunal. In this regard, the provisions of Section 5 of the Rent Tribunal Act are pertinent. Suffice it to point out that the mandate of the tribunal is circumscribed and same does not include entertaining disputes like the one beforehand, namely, a claim for damages arising from power upsurge.

69. Quite clearly, if the Appellant had sustained any losses arising from power upsurge, in the manner adverted to in the body of the Plaint, such a claim could only be mounted and canvassed before the conventional court and not otherwise.

70. Notwithstanding the foregoing, it is also debatable as to whether a claim arising from power upsurge could be laid against the landlord/landlady, who is not chargeable with the provision of electricity.

Issue Number3.

Whether the tribunal erred in directing the Appellant to hand over vacant possession of the demised premises within 30 days of the delivery of the judgment.

71. The third aspect of the Appellant's complaints touched on the order whereby same [Appellant] was directed to vacate and hand over vacant possession of the demised premises within 30 days from the date of the judgment.

72. According to the Appellant, the order by the tribunal as pertains to vacating and handing vacant possession of the demised premises, was not based on any credible evidence or at all. Furthermore, the Appellant contended that the duration of notice was equally unreasonable and insensitive.

73. Without belabouring the point, it is important to underscore that where it becomes necessary to decree vacation and grant of vacant possession, it behooves the court and/or tribunal to issue reasonable notice to the concerned party. For good measure, what constitutes reasonable notice must take into account various/diverse circumstances and factors. [See Comment No. 4 of the Committee of Economic Social & Cultural Rights, which underpins inter-alia the necessity to issue a reasonable notice in matters pertaining to the right to housing].

74. To my mind, the duration of 30 days which was granted to the Appellant herein to vacate and hand over vacant possession of the demised premises, was grossly unreasonable and insensitive, taking into account the various factors that underpin the right to housing. [See Article 43 [1] [b] of *the Constitution*, 2010.] [See also Sessional paper No. 3 of 2016 on the National Housing Policy for Kenya].

75. Consequently and in the premises, I would have been constrained to vacate and discharge the judgment of the tribunal on the limb/aspect pertaining to the duration of notice. However, whilst dealing with issue number one, this court has since found and held that the entirety of the dispute fell outside the jurisdiction of the tribunal.

Final Disposition:

76. Flowing from the discussion [details highlighted in the body of the judgment], it is evident that the tribunal entertained and adjudicated upon the dispute that clearly fell outside the jurisdiction. In this respect, there is no gainsaying that the entire proceedings and the resultant judgment are void ab initio.

77. In the premises, the orders that commend themselves to the court are as hereunder;

    i. The Appeal be and is hereby dismissed.

    ii. The proceedings and judgment of the tribunal be and are hereby declared a nullity.

    iii. The suit by and on behalf of the Appellant before the tribunal be and is hereby struck out for want of jurisdiction.

    iv. The counterclaim by and on behalf of the Respondents before the tribunal be and is hereby struck out for want of jurisdiction.

    v. Either party shall bear own costs before the tribunal as well as the appeal.

    vi. The Parties are at liberty to discern how best to approach the court, subject to the advise of their Legal Counsel.

78. It is so ordered.

DATED, SIGNED AND DELIVERED ON THE 16TH DAY OF SEPTEMBER 2024

OGUTTU MBOYA

JUDGE.

In the presence of:

Benson – Court Assistant

Mr. Jackson Kamau Ndegwa – Appellant in person.

Ms. Ndichu h/b for Mr. Mburu Machua for the Respondents.