Barasa & another v Ngige (Civil Appeal E008 of 2021)
[2023] KEELC 16304 (KLR) (2 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16304 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

CIVIL APPEAL E008 OF 2021

JA MOGENI, J

MARCH 2, 2023

BETWEEN

CHRISTOPHER WERE BARASA ..... 1ST APPELLANT

BEATRICE MUTHONI ..... 2ND APPELLANT

AND

JOSEPH NDICHU NGIGE ..... RESPONDENT

JUDGMENT

1. The Appellant herein filed a Notice of Motion dated September 17, 2021 seeking to lodge an appeal arising from the Determination made by the Chairman of the Business Premises Rent Tribunal (the Tribunal), Hon Mbichi Mboroki, on December 24, 2020, in a reference lodged in the Tribunal by the Respondent. The reference was provoked by the Landlord's quest to recover arrears of rent of plot No 2104 situated at Gitathuru Mathare, Kosovo. At all material times, the respondent was the appellant's landlord in the said premises. The respondent instructed auctioneers to levy distress after the appellants stopped paying rent as at February 22, 2018 the outstanding rent was Kesh 525,000.

2. The appellants who were the tenants though they admitted that the Respondent was their Land Lord they introduced the school as the one who was the tenant despite the institution not being a party to the suit. In summary, their case was that they requested the Land Lord to carry out renovations and he stated that he did not have money to undertake the renovations. That the Respondent/Landlord later denied having given the authorization following which the Appellants stopped paying rent having subtracted the monies used for renovation from the rent they should have paid.

3. The Respondent/Landlord then instructed auctioneers to levy distress and then he later filed the Reference before the Tribunal. The Appellants stated that they later discovered that the plot where the Land Lord put up his structures belonged to the Tenant/Appellant and Land Lord's plot was 2102 and not 2104 which they allege belonged to the Appellants.

4. Upon evaluating the evidence presented to the Tribunal, the Tribunal found that the Landlord/ Respondent did not lease the premises to the school but to the Tenants/Appellants in their personal capacity. That the tenants/appellants did not file any complaint in respect of the repairs to be tribunal. That the Tenants/Appellants are not entitled to withhold rent from the Land Lord. The Tribunal further found that it had no jurisdiction to hear and determine ownership of disputes on land and therefore the ownership of Plot 2102 and 2104 should be filed in the appropriate forum. Consequently, the Tribunal allowed the Landlord to levy distress and recover all outstanding arrears of rent from May 2015 till the date of the delivery of the ruling.

Grounds of Appeal

5. Aggrieved by the Tribunal's findings and decision, the appellant brought this appeal and sought the setting aside of the Tribunal's findings and orders by filing 9 grounds some which included:

    i. The learned Honorable Business Premises Rent Tribunal erred in Law by entertaining the said purported Reference and/or failing to disqualify itself from hearing and/or adjudicating on he said purported Reference hitherto filed before it notwithstanding its apparent and/or clear lack of jurisdiction inter-alia:

        a. by overlooking or failing to find that the central issue in the said purported Reference was whether or not the Honorable Tribunal was competent to hear and adjudicate on, the purported Reference within the provisions of the *Landlord and Tenant (Shops, Hotels, Catering Establishments) Act*, (Chapter 301 of the Laws of Kenya).

        b. Failing to find that the alleged suit premises was not "controlled tenancy" within the meaning of Section 2 (i) of *Landlord Tenant (Shops, Hotels and Catering Establishments) Act* (Chapter 301 of the Laws of Kenya)

    ii. That in any event and without prejudice to the aforesaid ground, the Honorable Business Premises Rent Tribunal erred in law and in fact by failing to find that the central issue between the said parties was ownership in deciding:

        a. Who "the landlord" , if any, was and who "the tenant" if any was

        b. Which was the relevant premises, if any

        c. Whether or not the contended "premises" namely the school premises were on Plot No 2104 or on Plot 2102

        d. Who was the registered owner of the Plot on which the school premises is situate. Among others

        e. in the alternative, if the said school premises was the premises in question legally on the said school plot or was it there with the consent or without the consent of the true owner.

        f. In the circumstances, was any "rent" demanded or "paid" legal or was it a case of wrongful dealings in land, land grabbing and greed for ill-gotten gains. In summary, did the Respondent come to the Tribunal with clean hands.

6. That in the further alternative and without prejudice to the aforesaid grounds, the Honourable Tribunal erred in law and in fact by holding as he did that the alleged "suit premises" was on Plot No 2104 notwithstanding and in total disregard of the following unchallenged evidence before it namely: -

a. The uncontested testimony of Mr Patrick Mwangi, the Deputy County Commissioner, Mathare Sub County which made it clear, *inter alia*, that the school in question namely Genesis Joy Project Institute has at all times operated on Plot No. 2102 and not 2104 and that said school is the registered owner of the suit Plot 2102 and lastly that the two said Plots namely Plot No. 2102 and 2104 are distinct and separate and without any overlap one to the other.

b. Mr. Cyrus Mwangi Ithagi, the Chairman of Mathare Squatters Resettlement Scheme, where the school is situate, confirmed the same.

c. Both witnesses and the Respondent himself confirmed that the said school premises is a permanent structure, and not a moveable chattel, which can be relocated at the will of the alleged "Landlord" /Respondent.

7. That in the further alternative and without prejudice to the above set out grounds the Honourable Tribunal erred in law and in fact in putting undue weight to the purported payment of alleged "rent" up-to 2015 by one of the Appellants notwithstanding the clear evidence before the Tribunal pointing to, *inter alia*:

a. Illegal or criminal entry by the Respondent upon the school's said Plot No 2102 and thereon putting up illegal structures.

b. Misrepresentation or fraudulent representation and/or concealment of material particulars of the purported transaction and in particular of the Respondents none-disclosure of the true legal owner of the Plot No. 2102 on which the said school premises was constructed nor whether or not he obtained prior consent from the said school and/or Government and/or Mathare Squatters Resettlement Scheme Community before purporting to squat thereon.

c. Proceeds of crime in purporting to levy illegal "rent" from an ill-gotten gain thereby failing to refer the matters to the relevant authorities and/or a competent Court with jurisdiction to handle such matters.

8. That in the further alternative and without prejudice to the aforesaid grounds, the Honorable Tribunal erred in law and in fact by purporting to draw a line between ownership of the alleged landed plots and the alleged "premises" by on one hand conceding its lack of jurisdiction on the issue of ownership and yet by same pen proceeding to purportedly "award" alleged "rent" against a school which:

i. in any case was not party to the purported Reference

ii. but which is the registered owner of plot No 2102 on which the school is situate and

iii. which said school has never "rented" nor occupied any portion of plot No. 2104 in respect of which the Respondent is adamant as being the suit "premises"

iv. while the said "suit premises" on Plot No. 2104 is rented and occupied by residential tenants.

a) That in the further alternative and without prejudice to the aforesaid grounds, the Honorable Tribunal erred in fact and in law by making a Ruling/Order/Determination with a double edged sword by giving it the alternative interpretation that the order relates to Plot No. 2104 as the suit premises in which event, the Honorable Tribunal appears to have completely ignore the undisputed evidence before it.

That the tenancy premises on Plot No. 2104 is residential in which case by execution, the purported order would be usurping the authority and/or jurisdiction of the Rent Restriction Tribunal without notice nor hearing the residential sitting tenants, thereon.

b. Any execution of the purported order against the school Plot No. 2102 would be contrary to the Order as Plot No. 2102 was not before the Tribunal and the Respondent denied any knowledge nor interest in it.

c. In the further lop sided ruling, the Honorable Tribunal dismissed the Appellant's Counter-Claim or refund of reconstruction costs in the sum of Kesh 363,520/= which remains outstanding to the Appellant's who were in fact not the alleged "Tenants" leave alone the refund or restitution of all monies illegally received under the fraudulent scheme of the Respondents.

9. Notwithstanding the discovery of the said fraudulent misrepresentation and/or criminal concealment on the part of the Respondent on the alleged "tenancy" scheme on or about February 4, 2019 while the said Reference was still pending before the Honorable Tribunal as summarized in the said Ruling at page 3 and 4 thereof:

i. the Honorable Tribunal had the courage this time to rule rightfully or wrongly that it did not have jurisdiction:

a. to deal with the issue of ownership of either of or both Plots Nos 2012 and 2104.

b. neither did it have jurisdiction to decide or make a ruling on whether the alleged squatted school structure/block or building was on Plot No. 2102 or Plot No. 2104.

The Honorable Tribunal having disqualified itself as stated above, it had the unmerited temerity to proceed and purportedly rule on the alleged issues of alleged "rent arrears" and alleged "levy of distress" of the illegal structures or squatted school structure/building: -

a. without first determining whether or not there was any legal "tenancy" in the first place if so whether or not the alleged legal "tenancy" was a "controlled tenancy" as defined under Section 2(i) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, Chapter 301 of the Laws Kenya.

b. without first considering whether or not the issue of trespassing and/or squatting on a public or school land or any land which did not belong to the Respondent constituted criminal trespass and illegal construction which should have been referred to a competent Court with jurisdiction before such alleged "tenancy", if any, was blessed or purportedly legalized.

c) without first considering whether or not an alleged "tenancy" based on fraudulent misrepresentation or concealment was/is null and void or whether or not any alleged "rent" or "rent arrears" are/is recoverable or irrecoverable in Law.

d) Without first considering and establishing that the Respondents concealed from the Honourable Tribunal the material fact that premises on his said Plot No. 2104 were residential flats and not the alleged squatted school block and that any tenancy disputes arising on the said suit plot should have been taken to the Rent Restriction Tribunal and that the Respondent had no locus standi with regard to any squatted building or structure or alleged "premises" on the said school's landed Plot No. 2102.

10. That if the Honourable Tribunal had fully and/or adequately considered the material points of law and fact or matters hereinbefore set out, it would most certainly have dismissed the Reference and the Notice of Motion or alternatively would have referred the matters purportedly raised therein to more competent Courts with jurisdictions rather than appear to aid and abet criminal acts and/or omission disclosed in the said Proceedings.

11. That lastly, the said Honourable Tribunal's Order/ Ruling/ Determination is unconstitutional and illegal and an act in vanity and any purported attempt at executing it would result in chaos and illegalities with untold inequitable and criminal consequences against innocent school children among others.

The above said points are grounded on the following unchallenged evidence before the Tribunal *inter alia*:-

a.

(i) The unchallenged evidence of Patrick Mwangi, the Deputy County Commissioner, Mathare Sub- County (a Senior Civil Servant of the National Government of Kenya) adduced before the Tribunal and documents produced including his letter dated February 4, 2019 confirming the following factual and legal position of the disputing parties namely; the Appellants and the said school on one hand the Respondents on the other part as follows *inter alia*:

> "This is to confirm that the above referred to Plot No. 2102 Gitathuru which is in Mathare Squatters Resettlement Scheme belongs to and is occupied by Genesis Joy Project Institute registered with the Ministry of Education as PRlS/30601l4.
>
> This office also confirms that the certificate of Plot ownership held by Genesis Joy Project Institute is genuine according to records held in this office.
>
> This is to confirm further that the said Genesis Joy Project Institute is and has at all material times been situate and operated from the said Plot No. 2102 and NOT Plot No. 2104 as previously erroneously thought or alleged.

(ii) The unchallenged evidence of Cyrus Mwangi Ithangi, the Chairman of Mathare Squatters Resettlement Scheme who produced a witness statement filed with the Tribunal on March 15, 2019 and thereafter adduced undisputed evidence before the Honourable Tribunal confirming both the factual and legal position between the disputing parties namely the Appellant and the said school on one hand and the Respondent on the other hand as follows *inter alia*:-

> " According to our records, Plots No 2102 and 2104 were respectively allocated to Genesis Joy Project Institute and Joseph Ndichu Ngige.
>
> As per our records, there is no overlap of Plot No. 2102 and 2104. Besides, on the ground, Plot No. 2102 is presently and for a long time been occupied by the school of Genesis Joy Project Institute under Reference PRlS/30601l4.
>
> The said Plot No. 2104 has been having rental flats with residential tenants while Plot No. 2102 has at all material times been having school blocks built thei-eon with a running school.
>
> The two plots, therefore, are distinctively different and apart."

(iii) The Certificate of Ownership referred to in the Statement of Patrick Mwangi was produced before the Tribunal and it indeed certified that the said school was and is the registered owner of Plot No. 2102 in the following terms:-

> "This is to certify that Genesis Joy Project Institute holder of ID No. PRlS/3060/14 is the registered owner of Plot No. 2102, Mathare Squatters Resettlement Scheme, Nairobi, Kenya.

The said Certificate which has been certified authentic was issued by Mathare Squatters Resettlement Scheme.

b) At the end of the purported Reference Proceedings: -

i) there was no evidence adduced to challenge the legality of the said certificate of ownership nor any explanation given to show how Plot No. 2102 allegedly became Plot No. 2104, the latter being the subject of the purported reference before the Honourable Tribunal.

ii) On the contrary, there was sufficient evidence before the Tribunal pointing at irregularities, illegalities and possible frauds in the Respondent's ownership claim, alleged right to possession of the school plot and/or alleged construction without authority or consent of the Government of Kenya, the local county nor the community of Mathare Squatters Resettlement Scheme nor the said school.

iii) There was sufficient evidence of misrepresentation whether fraudulent or not both on the issues of trespass or wrongful entry into the said school plot and wrongful or fraudulent illegal construction on the school plot and/or obtaining by false pretenses.

iv) There was also enough evidence of concealment, fraudulent or innocent by referring to the said school plot No. 2102 as allegedly belonging to the Respondent.

v) There was also enough evidence that, by his said misrepresentation and/or concealment, the Respondent duped all and sundry to believe that:- .

a. the said school Plot No. 2102 allegedly belonged to the Respondent.

b. the alleged construction of a school block was allegedly legal and on his alleged Plot.

c. that he was legally entitled to alleged rent from the alleged "premises" which was allegedly "controlled premises".

d. that he was allegedly entitled to receive purported "rent" and to allegedly "levy distress" when the truth of the matter was that he was engaged in illegalities and frauds for which he should have faced justice elsewhere.

REASONS WHEREFORE the Appellants pray: -

a. That this Appeal be allowed and the Order/Ruling and/or Determination by the Honourable Business Premises Rent Tribunal be set aside and/or dismissed with costs to the Appellants.

b. That this Honourable Court be pleased to allow costs of this Appeal and the costs of the Tribunal to be paid to the Appellants by the Respondent.

c. Such other or further Orders as this Honorable Court may deem fit to grant.

Submissions

12. The appeal was canvassed through written submissions. The Counsel for the Appellants made his submissions by focusing on the grounds of appeal. He referred to the following cases *Samson Oloolmailai & 2 Others v Leo Investment Limited* [2022] eKLR, *Melo Twenty-Seven Holdings Ltd v Micheal Jefwa Tinga & Another* [2020] eKLR. The Appellant argued that BPRT failed to address the main issue about ownership of Plots 2102 and 2104. He alleged fraud on the part of the Respondent.

13. He also referred to the case of *Mariam Fadhili v Samson Maricho Otweyo & 3 Others* [2016] eKLR, and submitted that the Honorable Tribunal's erred in its Order/Determination by failing to address the issue of the structures on the land that also belong to the owner and the land itself. This is espoused in the principle that he quoted, cujus est solem ejus et uspue ad coelum et ad inferos which loosely translates to the fact that ownership of land is not divorced from the structures that are on the land or any attachments they all accrue to the owner.

14. In the submissions the Appellants also referred to the case of *Choitram & Others v Mystay Model Hair Saloon* (1972) EA 525 where Madan J (as he then was) upheld Lord Denning's decision in *Barnard v. National Dock Labur Board*. I am however not persuaded that the decision is relevant here nor does it add persuasive value at all since in this case there were no orders from the tribunal meaning there was nothing to enforce. In the instant case, the Honorable Tribunal pronounced itself on the issue of accrued rent and allowed the Landlord to levy distress.

15. In his summation it was counsel's contention that the Tribunal completely erred by failing to address the issue of ownership of the suit property. It was counsel's further contention that the Landlord was fraudulently enriching himself from a suit property that belonged to the Appellants and further that by sitting over this matter the Honorable Tribunal failed to recognize that the issues fell outside the purview of its mandate and therefore the Tribunal did not have jurisdiction to entertain the reference. Counsel for the appellant urged the court to allow the appeal and set aside the impugned orders of the Tribunal.

16. The Respondent did not file any submissions to the Appeal.

Analysis & Determination

17. I have submissions made, considered the tenor and import of the reference giving rise to this appeal, perused the entire record of the Tribunal, the grounds of appeal, and the parties' respective submissions. I have also considered the relevant legal framework and jurisprudence on the key issues in the appeal.

18. The reference was filed in opposition to the respondent's statutory power to levy distress for rent that has accrued for 35 months. Upon hearing the reference and evaluating the parties' evidence and the law, the Tribunal found in favor of the Landlord/Respondent's Reference and allowed him to levy distress for the outstanding arrears of rent from May 2015 at a monthly rate of Ksh. 15,000 upto the date of the delivery of the ruling. The appeal challenges that Ruling.

19. This9being a first appeal, the court is required to re-evaluate the evidence tendered and make its own findings and conclusions. Exercise of that appellate jurisdiction is guided by well-established principles. The appellate court will ordinarily not interfere with the trial court's findings of fact unless it is demonstrated that the findings are based on no evidence or on a misapprehension of evidence or the trial court acted on wrong principles in reaching the findings. This was enunciated in the case of *Ephantus Mwangi & Another vs. Duncan Mwangi Wambugu* (1982) IKAR 278.

20. The appellants set out nine grounds of appeal in the memorandum of appeal dated February 12, 2021. In their subsequent written submissions before this court, the appellants argued that the "real issue" falling for determination in this appeal were issues of ownership of land and not the one that the Tribunal dealt with. That the issue touching on ownership of land was central to the Reference and the Tribunal did not have jurisdiction to determine this matter. That by dealing with the issue of rent the Tribunal side-stepped the real issues. (see page 4 of the written submissions of the Appellants).

21. Taking into account the nine grounds of appeal set out in the memorandum of appeal, I am of the view that I need to address only one issue in order to determine this appeal. The issue is whether Tribunal's erred in failing to find that it had no jurisdiction to determine the reference. The second issue is whether the Tribunal erred by failing to find that there was no controlled tenancy arrangement.

22. The first issue is whether the Tribunal erred in failing to find that its jurisdiction was ousted by the issue of ownership. The appellant's contention is that there was no landlord/tenancy relationship between them and the Respondent. It is the appellant's contention that the Respondent wanted to benefit fraudulently from the suit property belonging to the Appellants by constructing on the suit property. Further that at the time of filing the Reference the Appellants did not know that the suit property on plot 2102 belonged to them but this became clear at the hearing the Reference, hence it ousted the jurisdiction of the Tribunal.

23. I do not share the Appellants' view and I disagree with it. The reference giving rise to this appeal was lodged by the Respondent on September 28, 2015. Though the appellants had denied the tribunal's jurisdiction in their response at the hearing of the suit they did not pursue the same at the commencement of the hearing of the suit at the tribunal hence an assumption that they had submitted themselves to the tribunal's jurisdiction. A court cannot abrogate itself with jurisdiction save as given by either the *constitution* or by legislation. Any proceedings taken by a court without the necessary jurisdiction is a nullity.

24. In the "Lillian S" Case *Owners of Motor Vessels "Lilian S" - vs- Caltex Oil (K) Ltd* (1989 KLR, it is established that jurisdiction flows from the law, and no court can arrogate its jurisdiction save as donated by the *constitution*, legislation or statutes.

25. The jurisdiction of the Business Premises Rent Tribunal is governed by the Landlord and Tenant Shops Hotels and Catering Establishments Act Cap 301. The preamble to the Act states that:

> "It is an Act of Parliament to make provisions with respect to certain premises for the protection of tenants of such premises form eviction or from exploitation and for matters connected therewith and incidental thereto."

26. While Section 12(4) of the *Landlord and Tenant (Shops, Hotels & Catering Establishments) A*ct states as follows:

> "para 12(4).
>
> In addition to any other powers specifically conferred on it by or under this Act, a Tribunal may investigate any complaint relating to a controlled tenancy made to it by the landlord or the tenant, and may make such order thereon as it deems fit."

27. In the case of *Phirajlal J Shah & Another vs Vijay Amritlal Shethia* (2018) eKLR (COA), the court stated that:

> " Our construction of the title of this Act together with the content of the preamble is that this act (in reference to landlord and tenant (shops, hotels and catering establishments Act Cap 301 laws of Kenya) deals specifically with the landlord and tenant relationships in relation to structures on the land. The mandate to resolve disputes arising from dealings in relation to such structures is exclusively vested in the BPRT in terms of section 12 of the act..."

28. In the ruling of the tribunal, the chairman did state that the issue of whether the Landlord's premises is on plot number 2104 or 2102 shall be dealt with by a competent Environment and Land Court since the Tribunal had no jurisdiction to hear and determine ownership disputes. This was rightly stated because the tribunal is the one which had the mandate to hear all disputes in respect of controlled tenancy as per the mandate given by the statute. The Tribunal Chairman was right by finding for rent owed because that is the bedrock of the jurisdiction of the Tribunal. I therefore find that the Respondent properly lodged his suit to the Tribunal as the Tribunal had jurisdiction to deal with the respondent's suit

29. The second issue is whether the Tribunal erred by failing to find that the suit premises was not a controlled tenancy.

30. Section 2 (1) of the Act provides:

> " controlled tenancy" means a tenancy of a shop, hotel or catering establishment—
>
> (a) which has not been reduced into writing; or
>
> (b) which has been reduced into writing and which —
>
> i. is for a period not exceeding five years; or
>
> ii. contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or
>
> iii. relates to premises of a class specified under subsection (2) of this section:
>
> Provided that no tenancy to which the Government, the Community or a local authority is a party, whether as landlord or as tenant, shall be a controlled tenancy;"

31. Further, Section 12 of the same Act provides as follows:

> 1. A Tribunal shall, in relation to its area of jurisdiction have power to do all things which it is required or empowered to do by or under the provisions of this Act, and in addition to and without prejudice to the generality of the foregoing shall have power—
>
> a. to determine whether or not any tenancy is a controlled tenancy;
>
> b. .....
>
> c. .....

32. In my understanding of the above sections means that a controlled tenancy is a commercial lease. The school which the Appellants said to have been running is a commercial lease. There is evidence from the record that I perused that the Appellants have paid rent to the Respondent/Landlord till May 2015.

33. The Appellants' Advocate in their letter dated 15/09/2015 to the Advocate of the Respondent stated that the suit premises are rent controlled. Further the Appellants stated that they used rent for renovations. This is testament to the fact that there was a controlled tenancy which was not reduced into writing.

34. I note that the suit before the Tribunal was about failure to pay rent which had accrued. I have perused the file from the Tribunal and found that there was a tenancy relationship between the Appellants and the Landlord which only ran into headwinds when the Appellants stopped paying the rent.

35. The Appellants have admitted that they indeed used the monies meant for rent to repair the dilapidated building and therefore chose to subtract this from the rent. This is an issue that is contested by the Landlord which was litigated upon at the Tribunal.

36. My finding on the second issue therefore is that the Tribunal did not err in failing to find that the suit premises was not a controlled tenancy because it was. How was the tribunal to ignore the rent issue when it appears to have been the core point in the Reference?

37. In conclusion therefore, I have not found any substantial ground out of the nine grounds itemized by the appellant to warrant interference with the finding of the Tribunal.

38. In light of the above findings, I hold that this appeal lacks merit and is rejected. The appeal is accordingly dismissed. The Respondent shall have costs of the appeal.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI ON THIS 2ND DAY OF MARCH, 2023.

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MOGENI J

JUDGE

In the virtual Presence of:-

Mr Njogu holding brief for Mr Oluoch for the Applicant

No appearance for the Respondent

Ms Caroline Sagina: Court Assistant

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MOGENI J

JUDGE